

Petroleum Land Titles: Title Examination & Title Opinions

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This Article represents a broad overview of the process of examining title and rendering legal opinions on title in the context of oil and gas property development. However, it is not intended to be a comprehensive treatise which answers all questions that might be encountered in the title [*1009] examination process.

This Article is directed not only to examining attorneys who render title opinions, but also to petroleum landmen who assist attorneys in the title examination process and to land managers of oil and gas exploration companies who review title opinions and make business decisions based on those opinions. n1 Each of these three groups of professionals plays a vital role in the title examination process, and each can perform that role better if he or she understands the roles played by the others.

II. Fundamental Concepts

At the most basic level, the Anglo-American system of land ownership and title transfer rests on two ancient institutions:

1.

The Statute of Frauds, which requires land ownership to be evidenced by written instrument; n2 and

2.

The Recording System, which says that even transactions evidenced by written instruments may be voidable unless notice of such transactions is given by recording the instruments. n3

The recording requirement protects persons purchasing interests in real estate without knowledge of unrecorded claims ("bona fide purchasers for value"), even though the unrecorded transactions are valid and binding between the parties to the transaction. n4 Similarly, the timely recording of a deed protects a purchaser against claims to the land by others who are charged with knowledge of the public record. n5 Thus, a written instrument evidences ownership or title, and the recording system preserves evidence of that ownership.

Before consummating a transaction and paying for property, a buyer [*1010] justifiably wants more than a deed from the seller. The buyer wants assurance that the seller really owns the interest that the seller purports to convey, that the interest is not encumbered, that by virtue of the conveyance the buyer will

succeed to the seller's ownership, and that the buyer can later sell the property. n6 A title examination will provide this information. Consequently, a party desiring to buy real property, make a loan secured by real property, or develop minerals on real property, will likely insist on examining the record prior to entering into the transaction. Obviously, few persons entering into real property transactions have the time, training, or capability to personally examine the public record to determine whether they are getting what they bargained for: "good" or "marketable" title.

Therefore, the professionals who examine the title record and render title opinions provide the essential link between the public record and potential buyers, sellers, lenders, lessors, lessees, purchasers of oil and gas production, and other interested parties. The means by which title attorneys, usually assisted by landmen, abstractors, and other professionals, provide this essential link in the context of petroleum land titles is the central question explored in this Article.

A. Recording Statutes

All states have recording statutes that prescribe what instruments may and must be recorded, where they should be recorded, and the protection afforded by recording them. n7 The wording, nature, effect, and details of the statutes vary, but all embody essentially the same principle. Failure to record an instrument does not affect the instrument's validity as between the parties to the transaction, but such failure will cut off rights of the grantee against subsequent bona fide purchasers for value. Courts have consistently stated the rule with respect to recordation as follows: "[a] conveyance is valid, and passes the title without registration, except as to [*1011] subsequent purchasers, for a valuable consideration paid, and without notice, and creditors; and as respects them it has no effect." n8

Under most recording statutes, conveyances and other instruments affecting title to real property are filed with the county clerk of the county where the land is situated. The county clerk places a copy of the instrument in the public record and returns the original instrument to the property owner. In most cases, parties to real estate transactions rely on the public records for proof of title rather than on the original instruments maintained by the respective owners. n9

B. Surface Titles - Title Insurance

Generally, with respect to real estate transactions, title insurance companies provide the essential link between the public record and the parties to the transaction. A title insurance policy is essentially an indemnity contract in which the title insurance company agrees to indemnify the purchaser of real property for any loss or damage resulting from title defects existing at the date of the policy, except for title defects expressly excluded under the policy terms. n10 Most title insurance policies measure "loss" by the consideration that the buyer paid for the property.

The insurer writes a title insurance policy only after its employees or agents conduct a search of title to the insured property. In general, title insurance companies maintain their own private tract indices and records, called "plants," covering all real estate in the county or counties in which they operate. The title company constantly updates these plants from the public record.

Typically, when a title company receives an order for title insurance on a specified tract of land, company employees or agents conduct an examination of title to that tract using the company's title plant. Based on that examination, the title insurance company decides whether to issue a policy insuring title and what exceptions, if any, that policy will contain. [*1012] In effect, a title insurance policy is an opinion on title backed by an indemnity contract. n11

When title insurance is used, "insurability" rather than "marketable title" becomes the test of a title's acceptability. Insurability is the insurance company's willingness to insure title. Because the insurer typically accepts a degree of business risk when it issues title insurance, insurability is a broader and more flexible standard than marketable title. For example, a title insurance company will typically insure title to property if, in the insurer's opinion, the property title is sufficiently free of defects to justify issuing a policy indemnifying the insured against loss arising from potential title defects, even though the title does not meet the legal standard of "marketability." n12

C. Petroleum Land Titles - Overview

Generally, title insurance is not available to insure interests acquired in oil and gas. n13 Thus, the essential link between the public record and persons desiring to acquire and develop oil and gas properties, explore for oil and gas, and market oil and gas production is provided through the process of title examination and opinion - the process examined in this Article.

In a typical oil and gas transaction, an oil and gas exploration company [*1013] leases lands geologically identified as "prospects." n14 The basic rights acquired by a lessee under an oil and gas lease include the right to enter upon the land, to explore for oil and gas, to drill wells, and to produce and market oil and gas. n15 Before expending large amounts of money to acquire leases, and certainly before drilling a well on the prospect, the operator will want assurance that the person from whom it is acquiring the lease has the power and authority to grant the lessee those rights. n16 Similarly, when and if production is obtained, the production purchaser will require assurances as to the identity and title of the persons entitled to receive proceeds from the sale of production. n17 As more fully discussed below, these assurances are provided at several stages of the development process through title examination and title opinions.

D. Definitions

The following terms used in this Article have the meanings set forth below.

1. Title and Examination of Title

"Title" is defined as a bundle of rights which constitute the ownership of property. n18 "Title" is also used to designate the means by which a property owner may evidence his or her ownership. In other words, title may relate either to ownership itself or to the acts, instruments, or records [*1014] which prove ownership. When this Article speaks of "examining title" or "rendering an opinion on title," it speaks of title in the evidentiary sense rather than the pure ownership sense. "Examination of title" thus refers to examining evidence to prove title to real property.

2. Stand-up & Sit-down Examinations.

The two methods most often employed in examining petroleum land titles are (a) "examinations from abstract" or "sit-down" examinations and (b) "direct examinations of the county records" or "stand-up" examinations. Such title searches have been described as follows:

Mineral title opinions are based on either "stand-up" or "sit-down" searches. In a stand-up search, the examining attorney searches the official records of the county recorder's office and other county offices where the subject land is located. In a sit-down search, the attorney examines a verbatim abstract furnished by an abstract company. A verbatim abstract contains copies of all instruments affecting title to the

property, copies of judgments rendered against persons in the chain of title, and statements concerning payment of taxes. n19

3. Title Opinions

A title opinion consists of an attorney's conclusions concerning the ownership of a tract of land and the minerals underlying that land, based upon the attorney's examination of title. Title opinions are usually in letter form. Although they are expressed as statements of opinion with reservations, qualifications, and exceptions, n20 title opinions can expose the title attorney to malpractice liability for material errors and omissions. n21 [*1015]

III. The Examination Process - Persons Involved and Respective Responsibilities

The examination of petroleum land titles requires discipline, attention to detail, knowledge in several areas of the law, and an aptitude for gathering evidence. Further, examining the record, preparing a title opinion, and deciding whether to accept title requires business judgment and teamwork on the part of three professionals, all with different roles, who are usually involved in the process: the landman, the title attorney, and the company manager.

Landmen perform a number of key functions in the examination process. In stand-up examinations the landman typically conducts a search of the indices, establishes a chain of title based on his search, and prepares a run sheet reflecting the instruments in the chain of title. n22 Although the landman's duties are generally less extensive in examinations from abstracts, he typically performs a number of valuable services in this sit-down examination as well. n23 In connection with either type of examination, the landman operates as a trained investigator and may be called on to close holes in the chain of title, develop additional facts, and cure title defects. n24

The title attorney examines the instruments in the chain of title and prepares a title opinion which sets forth the surface and mineral ownership. n25 The title opinion also notes any deficiencies in title and contains information as to the curative measures necessary to bring title up to the desired standard. n26

In this Article, "company management" refers to the land department of the oil and gas company that desires to develop property for oil and gas or to market production (or more specifically, the individual in that land department responsible for the prospect to which the title opinion relates). Company management determines what title risks are acceptable. Typically, the attorney will apply a "marketable title" n27 standard in examining title and preparing his opinion. Often, however, company management will accept a title which is less than "marketable" if the [*1016] business risk in accepting such title appears reasonable. n28

The respective functions of the three professionals involved in the process of examining petroleum land titles frequently overlap. For example, the examining attorney should point out defects in title and let company management decide on whether to waive such defects. However, the attorney should not operate in a vacuum by raising problems of little practical significance. Although company management may consult with the examining attorney prior to deciding what business risk to accept relative to a particular title, the ultimate decision rests solely with company management. A working knowledge of the law is extremely helpful to the landman, but he should not take it upon himself to waive a defect simply because he thinks the attorney is wrong on the law. On the other hand, the landman may recommend waiving a defect based on facts known to him but not known to the attorney. Furthermore, the attorney's title opinion

should not contain requirements couched in terms such as "satisfy yourself" when a legal determination is involved; however, such a requirement is proper as to factual matters such as a missing delay rental receipt.

Countless additional examples could be cited to illustrate the interdependence and overlap in the respective functions performed by the examining attorney, the landman, and company management. Thus, each of the three professionals should be aware of her own role as well as the role of the others in the overall process of examining petroleum land titles.

IV. Applicable Standards in Examining and Approving Titles

A. Marketable Title - The Standard Applied in Examining Titles

Long ago, the law established an objective standard called "marketable title," against which a title would be measured for purposes of title examination. Title approval requires a different standard. A marketable title is free from reasonable doubt such that a prudent person, with knowledge of all salient facts and circumstances and their legal significance, would be willing to accept it. n29 All title opinions in Texas [*1017] must be rendered based on marketable title. n30 To be marketable, a title need not be absolutely free from every technical and possible suspicion. The mere possibility of a defect which, according to ordinary experience, has no probable basis does not show an unmarketable title. n31

Generally, title will not be considered marketable if:

1.

a reasonable chance exists that a third party could challenge the validity of title against the record owner; n32

2.

parol evidence is necessary to remove doubt as to the validity and sufficiency of the owner's title; n33

3.

the title rests on a presumption of fact that would probably become a fact issue to be decided by a jury in the event of a suit; n34 or

4.

the record discloses outstanding interests claimed by third parties that could reasonably subject the property owner to litigation or compel the owner to resort to parol evidence [*1018] to defend his title against outstanding claims. n35

In addition, to meet the standard of marketability, title must be unencumbered. Thus, prior oil and gas leases and mortgages should be released, taxes should be paid, and judgments should be satisfied. Where prior leases, liens, or encumbrances have not been released, marketable title must be established by producing clear, readily accessible evidence of non-production of prior oil and gas leases that have expired, or similar evidence of payment of unreleased liens or encumbrances.

B. Business Risk - The Standard Applied to Approving Titles

In practice, with respect to petroleum land titles, marketable title merely establishes the basis for rendering title opinions, not the type of title which must exist before accepting a lease or drilling a well. Customarily, an oil company will accept a title that is a reasonable "business risk" even though that title fails to meet the marketability standard. This does not mean a title will be accepted when serious doubts exist as to its validity. Acceptable business risk does mean that leases will be acquired and wells will be drilled on property when gaps in record title are bridged by apparently reliable affidavits of adverse possession, or proof of death or heirship, even though a remote legal possibility still exists that title could be attacked. n36

The degree of risk considered acceptable varies with the examination's purpose and the company management's business judgment. Obviously, an acceptable risk when one is "checkerboarding" leases for a bonus of ten dollars per acre may not be acceptable when the decision involves drilling a test well costing over a million dollars. n37 Company attitudes concerning acceptable risks vary with the management's differing analyses of the likelihood of title failure balanced against the cost of curing title defects. n38

C. Interplay Between Examination and Approval of Titles

Most oil companies follow a highly practical approach in approving or [*1019] disapproving titles. The attorney prepares an opinion based on the relatively objective standard of marketability. Company management then makes the business decision whether to accept title. That decision is usually based on the more practical standard of business risk, rather than marketability. Thus, business risk is a subjective standard that may vary from case to case. n39

V. Methods of Examination, Indices, and Land Descriptions

A. Examinations from Abstract

In sit-down opinions, the examining attorney prepares a title opinion based on the attorney's examination of "abstracts of title." An abstract of title is a collection of verbatim copies of all instruments and proceedings contained in the public record which affect title to the land covered by the abstract. n40 With some variation, most abstracts consist of the following:

1.

a caption sheet or title page which identifies the abstract by number and the legal description of the land;

2.

a plat prepared by the abstractor which further identifies the land;

3.

an index which lists all of the instruments contained in the abstract;

4.

entries, which comprise the bulk of the abstract, consisting of verbatim copies (or in some cases excerpts or summaries) of each instrument affecting title to the land; and

5.

an abstractor's certificate regarding the land abstracted, the records and time period covered, and the number of [*1020] pages in the abstract. n41

1. The Abstractor's Function

While the precise methods of compiling abstracts may vary, abstract company agents or employees generally compile abstracts using private tract indices similar to the plants maintained by title insurance companies. In many counties the same company operates as both a title insurance company and an abstract company.

Abstract companies typically maintain a set of cards (or their electronic equivalent) indexed by survey. In Texas, all lands situated in a particular county are within these surveys. Surveys typically consist of sections (640 acres), leagues (4428.4 acres), labors (177.1 acres), or fractions thereof. Originally, cards referenced under a given survey name reflected all transactions pertaining to land within that survey. n42 Today, many abstract companies have replaced these card files with computer generated files that perform the same function.

From its plant and the public records, the abstractor compiles an abstract covering the specific tract under examination. The abstract should include not only all recorded conveyances, but also copies of any relevant judicial proceedings. In addition, copies of wills and related probate proceedings, proceedings to determine heirship, and proceedings relating to title passing through inheritance should be included, as should any affidavits of record such as affidavits of possession and heirship. The abstractor is not concerned with the consequences, legal interpretation, or effect of any of the instruments contained in the abstract. n43

2. Review of Abstracts

The title attorney is responsible for determining that the time period covered by the abstract has no gaps and that the abstract covers all of the land under examination. The attorney's responsibility may be complicated because several abstracts often cover the property under examination. For example, to save time or money, landmen sometimes borrow existing abstracts from landowners or prior lessees. The existing abstracts are then updated by "supplemental" abstracts, n44 and "base" abstracts n45 are ordered to [*1021] cover portions of the property for which no existing abstracts are found.

The examining attorney does not need to know the precise details of how to compile abstracts. However, the examining attorney must carefully check the abstractor's certificate to determine that the land and time period covered by the abstract are correct, complete, and adequate. He should also check to determine whether abstract entries are properly indexed and whether the abstract covers all appropriate county records. Finally, if more than one abstract covers the land being examined, the attorney must determine how the various abstracts fit together and whether in total they cover all of the land under examination.

B.

Stand-up Examinations

A "stand-up opinion" is a title opinion based on an examination of public records in the county where the land is situated. n46 The attorney may personally search the indices and records, as well as examine the instruments in the chain of title. Usually, however, the attorney delegates the task of performing the initial search of the indices and records to a landman. n47

Although procedures may vary to some degree, n48 a typical stand-up examination n49 is conducted as follows:

1.

The landman establishes a "starting point" for the examination. The starting point is a past date such as sovereignty, fifty years ago, or the closing date of a prior opinion. The examination will cover the period between [*1022] the starting point and the closing date of the opinion. The closing date is the last date covered by the records, typically a few days prior to the date of the examination.

2.

The landman then ascertains the structure of the indices in the county where he is working. If the index maintained by the county clerk is a "grantor-grantee" index, n50 the landman uses the grantee indices to trace title from the present to the starting point and uses the grantor indices to research title from the starting point to the present. n51

3.

In addition to the indices and records in the county clerk's office, the landman will search several other indices and records outside the county clerk's office which may reveal information affecting the status of title. These records include probate, county, and district court records; Uniform Commercial Code filings and the records of the tax assessor/collector.

4.

From these various indices, the landman compiles a list of the instruments that may affect title to the property. He must then go to the record books and review each instrument to determine its relevance. Some of the instruments found in the indices will be clearly irrelevant. If doubt exists as to relevance, however, the instrument should be included in the run sheet. n52

5.

The landman's next task is to list the instruments in the chain of title in a run sheet. n53 A run sheet lists the instruments in chronological order and includes the type of instrument, parties, and recording data. [*1023]

6.

At this point, the examining attorney generally assumes the task of completing the title examination. Using the run sheet as a guide, she goes to the record books and examines each instrument listed on the run sheet. Among the things the examining attorney must look for are the current ownership of the surface and minerals, gaps in the chain of title, defects in the instruments, encumbrances, and legal requirements. The examining attorney should also check the indices, particularly if gaps exist or matters look suspect. While the landman's run sheet is an extremely valuable tool that can save the attorney countless hours, the attorney should not base her conclusions on the run sheet or the apparent content of the instruments it lists. The attorney must review each of the listed instruments and base her conclusions on her own examination.

The sequence of the above steps will vary significantly from examination to examination, although the order listed above is quite typical. Many of the steps take place more or less simultaneously or in varying order as to different chronological periods in the chain of title, which may span several decades if not cen-

turies. Shortcuts, such as recital references to prior instruments, often speed up the search process. More often, though, the search reveals apparent gaps in the chain of title, apparent dead ends, or countless other problems which must be resolved.

The title examining process is one of evidence gathering and investigation. The result depends on the ingenuity, perseverance, and attention to detail exercised by the landman and the attorney involved in the stand-up examination. The result also depends on their ability to work together as a team. Like the abstractor, the landman locates all instruments and proceedings which may affect title. The abstractor places these instruments in his abstract, and the landman lists the instruments on his run sheet. The examining attorney bears sole responsibility for interpreting these instruments and determining their relevance, materiality, and legal effect.

C.

Indices

The most common type of index in most states is the grantor-grantee index, in which each instrument is indexed under the names of the grantor [*1024] and the grantee. In Texas, the legislature requires each county to maintain a grantor-grantee index. n54 Clerks periodically compile additions to the index which are set forth in supplemental indices. n55 Both the main and supplemental index books must be examined, and the instruments revealed by the index must be pulled and read to determine relevancy.

The public records in some states and counties have a tract index n56 in addition to the grantor-grantee index. When a tract index is not available in the public records, the local abstract or title insurance company may have a private tract index, which can usually be used for a fee. Tracts, of course, vary in size. Generally, a tract index that lists in one place the various instruments affecting title to a particular tract of land can be helpful, even when the tract is an entire survey and the title examiner is only interested in a small portion of the land in that survey.

Finally, the structure of both public records and indices varies from county to county. Some counties maintain one set of records and indices for all instruments, while others maintain separate sets of records such as deed records, deed of trust records, and oil and gas records. n57 [*1025]

D. Land Descriptions

The title examiner must examine the instruments in the chain of title to determine whether they contain adequate legal descriptions. Generally, a land description is legally adequate if the deed or other instrument contains sufficient information to identify the described land with reasonable certainty. n58 If the description is not legally adequate, the instrument is void under the statute of frauds. n59

Most rural land n60 in the United States is described under the "rectangular survey system" which was established in 1796 when Congress passed the National Land Act. n61 The National Land Act established a series of six square mile townships identified by township lines running east and west and range lines running north and south. Each township contained thirty-six 640 acre sections arranged in a square (i.e., 1 square mile). Each section was further subdivided into 160 acre quarter sections, each of which was further divided into forty acre quarters. n62 The most prevalent method of describing land surveyed under the rectangular survey system is by reference to its location within the system; for example: the Northwest quarter of Section 10, Township 2 North, Range 4 West of the 31st principal meridian.

Various parts of the country recognize several exceptions to the rectangular survey system. n63 The most important exception to the rectangular survey system, in the context of petroleum land titles, is found

in south and east Texas. Spanish and Mexican land grants subdivided vast portions of Texas into irregularly shaped surveys containing one or more leagues of land (4428.4 acres) or one or more [*1026] labors of land (177.1 acres). n64 The Spanish vara was the unit of linear measurement. The legislature declared that the vara was equivalent to 33 1/3 inches. n65 This system described land within these surveys by metes and bounds. n66

Metes and bounds descriptions give precise boundaries by angle, distance, and course from a fixed and ascertainable starting point which can be located on the ground - the "monument." The monument can be natural, such as a tree; artificial, such as a fence post; or a point established by reference to a recognized survey, such as "480 feet south of the northwest corner of the Jason Daniel survey." All metes and bounds descriptions must "close" so that the final point is the same as the starting point.. n67

VI. Transferring Title

A. Conveyances

The most common way to transfer land title is conveyance. n68 Deeds and assignments are the types of conveyances most often used to transfer title to interests in oil and gas. n69

A conveyance must: (1) be written, (2) name the parties - grantor and grantee, (3) contain present words of grant, (4) contain an adequate description of the property, and (5) be duly executed. n70

An effective conveyance must be delivered. n71 Delivery contemplates a present intent to transfer title. An intent to transfer title at some future date or on the happening of some future contingency, such as the grantor's death, does not satisfy the delivery requirement. n72 Usually, a title examiner [*1027] cannot tell from the record whether a deed has been properly delivered. Deeds are presumed to have been properly delivered unless the record or other evidence indicates the contrary. n73 However, a lengthy lapse in time between the date on the deed and the recording date may rebut the presumption of proper delivery, and should put the title examiner on notice of possible delivery problems. The prime example of such a lapse is the "dresser drawer deed." In this situation, a grantor executes a deed in favor of his son, but instead of recording the deed, he places it in his safe deposit box with instructions to record the deed after the grantor's death. Such a deed does not legally satisfy the delivery requirement, n74 and should generate a requirement in the title opinion. Quitclaim deeds or disclaimers of interest from all the grantor's heirs other than the grantee named in the "dresser drawer deed" are the usual methods of curing title. n75

B. Other Means of Transferring Title

In addition to conveyance, ownership of oil and gas interests may be transferred through judicial action, inheritance, and involuntary transfers.

Judicial transfers generally occur in two situations. The first situation involves the sale of property pursuant to court order, such as mortgage or tax foreclosure proceedings. The second situation involves proceedings in which a court resolves real property ownership disputes such as quiet title suits or trespass to try title suits. n76

When a property owner dies, title to the decedent's property passes to his beneficiaries, heirs, administrators, executors, or successors in interest through probate of the decedent's will or under laws of descent and distribution. Section 37 of the Texas Probate Code provides that "when a person dies leaving a lawful will, all of his estate devised or bequeathed by such will ... shall vest immediately in the devisees or legatees ... ; and all the estate of such person, not devised or bequeathed, shall vest [*1028] immediately in his heirs at law" n77 Generally, the same considerations that govern title transfers by will or intestate succession govern transfers of interests in oil and gas.

Finally, title may be transferred involuntarily through adverse possession. All states have statutes of limitations which generally provide that if one who is not the owner occupies land in an open, notorious, and adverse manner for the statutory time period, then mere occupancy of land may ripen into ownership divesting the former owner of title. n78

The legal requirements associated with such transfers are beyond the scope of this Article. However, title examination requires a broad understanding of several legal areas other than oil and gas law, including conveyancing, probate, judgments, statutes of limitations and statutes of descent and distribution.

C. Establishing a Starting Point for the Title Run

What should be the starting point for a title search? The answer usually depends on a variety of practical factors, including considerations related to time, cost, examination purpose, business risk, custom, and company policy. In some cases, the examining attorney and client may partially rely on a prior title opinion covering the land being examined.

In the preparation of the original or initial opinions, n79 the question arises whether or not the examiner should run title back to sovereignty. The time and expense of running back to sovereignty is typically weighed against the risk involved in cutting the search short. The purpose of a particular opinion may determine how far back to run a title search. For example, companies that would not consider going back to sovereignty when acquiring leases for a ten dollar per acre bonus might do so prior to [*1029] spending in excess of a million dollars to drill a well. Some states have curative statutes which decrease the risk of cutting the search short. n80

The following situation illustrates some of the practical considerations involved in deciding how far back to run a title search. In connection with a proposed loan from the Reconstruction Finance Corporation ("RFC") secured by a lien on real estate owned by his client, a New Orleans attorney prepared an extensive title opinion based on a title examination going back to 1803. The RFC hesitated to approve the loan and requested that the attorney run the title search back further than 1803. The New Orleans attorney's classic reply read as follows:

Your letter regarding titles in case No. 189156 [was] received. I note you wish titles to extend further than I have presented them. I was unaware that any educated men in the world failed to know that Louisiana was purchased by the United States from France in 1803. The land came into possession of Spain by right of discovery made in 1492 by a Spanish-Portuguese sailor named Christopher Columbus, who had been granted the privilege of seeking a new route to India by the then reigning monarch, Queen Isabella. The good Queen being a pious woman and careful about titles (almost as careful, I might say, as the RFC) took the precaution of securing the blessings of the Pope of Rome upon the voyage before she sold her jewels to help Columbus. Now, the Pope, as you know, is the emissary of Jesus Christ, who is the son of God, and God, it is commonly accepted, made the world. Therefore, I believe it is safe to presume that He also made that part of the United States called "Louisiana" - and I hope to hell you're satisfied. n81

Although title-related literature probably over-quotes the above story, the story takes on a contemporary quality by substituting acronyms - "RTC" n82 for "RFC." [*1030]

Every title must begin with a grant, such as a patent from the sovereign. In most states the original grant is a patent from the United States. The notable exceptions are the original thirteen states and Texas.

Four different sovereigns - the Spanish government, the Mexican government, the Republic of Texas, and the State of Texas - issued patents in Texas. n83 Texas entered the Union as an independent republic in 1845 and retained its public lands. Consequently, the federal government does not own land in Texas, except for "acquired lands." In other words, no part of the "federal public domain" is in Texas. n84 In most western states, such as New Mexico, the federal government still owns a large portion of the land.

A patent establishes that the sovereign has parted with legal title to the land. Since statutes of limitations do not run against the state, one cannot rely on limitation title to lands for which a valid patent was never issued. n85 Texas patents are registered in the general land office, and copies of patents should be (and usually are) recorded in the county where the land is situated. However, failure to record does not affect the patent's validity. Thus, if an examination reveals that a copy of the patent has not been recorded in the county where the land is situated, the title examiner should search the general land office records for evidence of the patent. Numerous other problems may arise concerning patents, including the procedures for granting and perfecting patents, the validity of such patents, whether the patent passed mineral rights, the Texas Relinquishment Act, n86 [*1031] and vacancies. n87 However, these matters are outside the scope of this Article. n88

D. Chain of Title

The chain of conveyances or other transfers by which title passes from the patentee to the present owner is called the "chain of title." All instruments in the chain of title from the title search starting point to the title opinion closing date should be included in the abstract or run sheet and examined by the examining attorney. Gaps or defects often exist in the early chain of title. Following a gap or irregularity, title examiners usually take some comfort if a regular chain of title ensues for the limitations period, prior to any severance of minerals. n89 In this situation, title examiners often rely on an affidavit of possession containing facts sufficient to establish limitation title. n90

VII. The Attorney's Examination

Title examiners should understand the basic distinction between the duty of the examining attorney and that of the abstractor or landman. The duties of the landman and the abstractor are to search the record and find, report, and assemble the facts. The duties of the examining attorney are to:

1. examine the instruments revealed by the abstract or the record;
2. interpret the instruments in the chain of title;
3. formulate legal and factual conclusions based on the examination; and
4. reflect these conclusions in a title opinion. [*1032]

Preceding sections of this Article focused on the practical steps involved in searching the record. This section and the following sections focus on the examination process and title opinion preparation.

The purpose of a title opinion is to advise the client of title defects and irregularities which might impair marketable title or expose the client to litigation and to suggest how those defects and irregularities may be cured. The examining attorney should strive to solve problems, not create them. The attorney's job is not to impress the client with his knowledge of obscure legal points or with his ability to uncover facts of questionable relevance. Rather, the attorney should focus on problems that might expose the client to real world risks and focus on finding solutions to those problems.

One of the examining attorney's most difficult chores in the examination process is organization. The abstract or run sheet may cover a lengthy time period and reveal countless title transfers reflected by a plethora of instruments - all of which need to be examined, sorted, and classified. The examining attorney is the master of relevancy and materiality. He must determine the importance of a particular instrument or transaction within the context of the chain of title.

The examining attorney must develop a system that reflects his title examination results as succinctly and efficiently as possible. Developing such a system avoids confusion, duplication of effort, and repeated searches through a thick abstract or set of instruments. Many examining attorneys find that making one or more graphic depictions of the chain of title is the most workable method for initially summarizing the examination results. n91 The types of diagrams and worksheets vary according to the preferences of the attorney. Each examiner should develop his or her own methodology for summarizing his search results.

The attorney should include basic information such as the grantor and grantee, recording date, and date of instrument in the diagram. In complex title situations, two or three different diagrams may be necessary. For example, one diagram may show the basic chain of title; a second may show encumbrances, mortgages, liens, and unreleased oil and gas leases; and a third may show assignments of the present oil and gas lease. In a less complex chain of title, all transactions can be combined into one [*1033] diagram. n92 Diagrams depicting the chain of title can be useful tools which, when used with the run sheet or abstract index, can ease the attorney's difficult task of systematically examining instruments in the chain of title.

VIII. Title Irregularities

Few titles are completely free from doubt. Consequently, the examination will likely reveal various types and degrees of title irregularities. This Section discusses some commonly-encountered title irregularities. However, a discussion of every type of irregularity exceeds the scope of this Article.

A. Nature of the Interest - Mineral or Royalty

A title examiner often confronts the problem of determining the legal nature of an interest - whether a particular grant or reservation in a chain of title instrument creates a mineral interest or a royalty interest. This determination is critical in establishing who must join in a lease, how production and costs of production are allocated, and who receives royalty, bonus, and delay rentals. Understanding how that determination is made goes to the heart of oil and gas jurisprudence.

The incidents of mineral ownership are well-established and consist of "development rights," "executive rights," and "rights to economic benefits under the oil and gas lease." The "development right" includes the right to explore for and develop minerals, as well as the obligation to pay any costs of exploration and development. The development right also includes the right to reasonable use of the surface estate and the right of ingress and egress. n93 Although the mineral owner can personally exercise the development right, he rarely does so because most mineral owners do not have the capital or technical knowledge to explore for oil and gas. Instead, the mineral owner usually conveys this right to an oil company through an oil and gas lease. n94 [*1034]

The "executive right" is the power to lease. n95 The "Right to Economic Benefits Under the Oil and Gas Lease" usually consists of bonus payments, delay rentals, and royalties. n96

A mineral interest encompasses some or all of the above incidents of mineral ownership. A royalty interest, on the other hand, is only one incident of mineral ownership. A royalty interest is a share of produc-

tion free of the costs of exploration and production. n97 A royalty interest does not include any right to develop the minerals, to delay rentals, or to receive bonuses. n98

Through proper draftsmanship, interests which are clearly either mineral or royalty in nature can be easily created, reserved, or conveyed. However, any attorney or landman examining petroleum land titles will likely encounter many instruments which contain an endless variety of ambiguities relating to the nature of the interest conveyed or reserved.

When an instrument in the chain of title contains ambiguous language, title examiners face problems in determining whether the conveyance creates a mineral interest or a royalty interest. n99 What specific language [*1035] determines whether a royalty or mineral interest was reserved or conveyed? The answer to this factual inquiry depends on the interpretation given to specific language in an infinite variety of combinations and circumstances. n100

The ultimate question in all cases is whether the parties intend to reserve or to convey a rock formation under the ground, or a can of oil at the surface. Some of the factors potentially influencing a court's interpretation of the parties' intent are discussed below.

Courts generally interpret "produced & saved" as royalty language while they generally interpret "in and under" as mineral language. These phrases are not universally controlling, and the ultimate determination often depends on whether the phrases are used alone or in combination with other words relating to the interest conveyed or reserved.

The label that the instrument places on the interest, either "mineral interest" or "royalty interest," is not controlling, but it may be some evidence of the parties' intent. Courts usually place little or no weight on the instrument's title. Many instruments entitled "Mineral Deed" have been held to convey royalty interests and vice versa. Thus, courts look to the instrument's substance, not the instrument's label, in determining whether a mineral or royalty interest was conveyed.

Courts usually consider whether the interest is cost-bearing and whether the instrument carries a right to lease or share in other economic benefits under the lease as controlling facts. Unfortunately, these factors are not usually clear from the instrument's language.

However, the presence of words indicating that the interest includes a right of ingress and egress or a right to drill suggests that the parties intended a mineral interest. n101 The question of whether a particular interest is a mineral or a royalty interest also arises in situations where a deed's granting clause grants minerals, but later deed language reserves or strips away most of the incidents of mineral ownership.

For example, in *Altman v. Blake*, n102 the granting clause provided:

W.R. Blake, Jr... does hereby grant ... unto W.R. Blake, Sr... an undivided one-sixteenth (1/16) interest in [*1036] and to all of the oil, gas and other minerals in and under and that may be produced ... But does not participate in any rentals or leases ... with the rights of ingress and egress at all times for the purpose of mining, drilling, exploring ... n103

The Texas Supreme Court held that the deed conveyed a 1/16 mineral interest stripped of the executive right and the right to receive delay rentals. n104 In reaching that result, the court restated the component elements of the mineral estate n105 and reaffirmed the basic proposition that such component elements can be individually severed and transferred.

The court then ruled that the development right is the linchpin of the mineral estate. Although the right to develop is the most rarely used stick in the bundle of mineral rights, it is the right that is essential in distinguishing mineral interests from royalty interests. If the interest reserved or conveyed includes a right to develop, it is a mineral interest. Even when stripped of all apparent economic value, it remains a mineral interest rather than a royalty interest. n106

B. Size of the Interest - Double Fraction Ambiguities

Title examiners may also encounter difficulty determining the size of the interest reserved or conveyed. Anytime someone who owns less than all of the minerals conveys or reserves a fractional interest, an ambiguity may exist as to whether the grant or reservation is intended to be a fraction of the whole estate or a fraction of that part of the estate owned by the grantor. This situation is called the "double fraction problem." n107

One subset of the double fraction problem may arise when O, who owns $\frac{1}{2}$ the minerals in Blackacre, conveys to E an undivided $\frac{1}{4}$ of the [*1037] oil and gas "produced and saved" from the above described land. A lease on Blackacre provides for a $\frac{1}{8}$ royalty. The question is raised: What is the size of E's royalty? Is it $\frac{1}{4}$ of the entire lease royalty or merely $\frac{1}{4}$ of O's $\frac{1}{2}$? Expressed mathematically, E's royalty could be:

$$\frac{1}{4} \text{ of } \frac{1}{8} = \frac{1}{32}; \text{ or}$$

$$\frac{1}{4} \text{ of } \frac{1}{2} \text{ of } \frac{1}{8} = \frac{1}{64}$$

Averyt v. Grande, Inc. illustrates this aspect of the double fraction problem. n108 In Averyt, the grantor, Grande, who owned the surface and $\frac{1}{2}$ the minerals in a tract of land, conveyed the property to Averyt's predecessor in title, reserving $\frac{1}{4}$ of the royalty on oil, gas, and other minerals produced from the "lands above described." The question was whether Grande reserved $\frac{1}{4}$ of the royalty attributable to the entire tract or $\frac{1}{4}$ of the royalty attributable to Grande's $\frac{1}{2}$ interest in the tract.

The court held that Grande had reserved $\frac{1}{4}$ of the royalty on the oil and gas produced from the entire tract. n109 The rule applicable to cases such as Averyt, sometimes called the "land conveyed/land described rule," has been restated as follows:

Where a fraction designated in a deed is stated to be a mineral interest [(or a royalty interest)] in land described in the deed, the fraction is to be calculated upon the entire interest... Where a fraction designated in a reservation clause is stated to be a mineral interest in land conveyed by the deed, the fraction is to be calculated upon the grantor's fractional mineral interest...." n110

Another subset of the double fraction problem may arise when inconsistent fractions appear in a conveyance. An example of this issue is found in the seminal case of Alford v. Krum. n111 The deed construed in Alford contained a "granting" clause which conveyed $\frac{1}{2}$ of $\frac{1}{8}$ of the minerals, a "subject to" clause which stated that the grantee was entitled to a $\frac{1}{16}$ royalty interest under an existing lease, and a "future lease" clause [*1038] which stated that upon expiration of the existing lease the grantee would receive a $\frac{1}{2}$ interest in the minerals. n112 The Corpus Christi Court of Appeals held that the deed conveyed a $\frac{1}{16}$ mineral interest during the pendency of the existing lease. On termination of the lease, the interest increased to a $\frac{1}{2}$ mineral interest. The Texas Supreme Court reversed, holding that the deed conveyed a $\frac{1}{16}$ mineral interest. The Court reasoned that the fraction in the granting clause would prevail as a matter of law due to the application of a canon of construction known as the "repugnant to the grant" doctrine. n113

Commentators severely criticized Alford n114 and in 1991 the Texas Supreme Court overruled Alford in Luckel v. White. n115 Luckel, like Alford, involved inconsistent fractions in the "granting," "subject to," and "future lease" clauses. n116 In overruling Alford, the court rejected the "repugnant to the grant" approach and applied a well-known rule of construction known as the "four corners rule." n117 This rule of construction seeks to give effect to all portions of the deed, not just the granting clause. The four corners rule is the canon applied today in construing inconsistent fractions.

C. Rules of Construction.

To deal effectively with mineral/royalty ambiguities, double fraction problems, and other construction problems, title examiners must understand how courts interpret ambiguities in instruments reserving or [*1039] conveying interests in oil and gas. n118 Although many judicial opinions construing deeds state that the court is trying to ascertain the parties' intent, the holdings of those opinions often do not turn on the parties' subjective or objective intent. Courts do not affirmatively seek to render decisions contrary to the parties' intent, nor are they wholly indifferent to the parties' intent. On the contrary, courts do seek to ascertain the parties' intent, but generally only to the extent that the four corners of the instrument evidence such intent. Courts rarely admit extrinsic evidence to ascertain intent. n119 In oil and gas cases, when the parties' intent is not clear from the four corners of the instrument, courts generally apply rules of construction to interpret the instrument. n120

Rules or canons of construction are not rules of law. Because the choice and use of canons of construction is discretionary with the courts, results are not always consistent. n121 Rather, canons of construction are mere statements of judicial preference used to resolve particular problems. They are based on common sense and human experience, and are designed to achieve what courts believe should be the normal result for the problem under consideration. Although the ostensible function of rules of construction is to ascertain the parties' intent, frequently the application of these rules defeats the actual intent of the parties. In reality, rules of construction are applied to resolve disputes in which the parties' intent is not clear. n122

Courts apply rules of construction to lend a degree of certainty to the law. Although certainty is both a legitimate and powerful policy goal of property law, it is not necessarily related to intent. Results often do not reflect the parties' intent, irrespective of judicial statements to the contrary. An inverse relationship usually exists between a court's [*1040] willingness to admit extrinsic or parol evidence and a court's use of canons of construction. "The more extrinsic evidence that is admitted, the less the court needs to resort to canons of construction." n123

The idea behind the popular expression, "this is tantamount to a rule of property," is that such a rule creates certainty. Once the title examiner appreciates the quest for certainty, deed construction cases and the application of rules of construction to resolve those cases become somewhat easier to understand and manage.

Numerous rules of construction exist, n124 but the following three rules are frequently found in oil and gas cases and warrant special attention:

- 1.

The "Greatest Estate" or "Greatest Interest Rule," states that courts will interpret a deed that does not specifically limit the size or nature of the interest conveyed as conveying everything the grantor owns. In other words, the grantor conveys everything he owns except that which is specifically reserved.

- 2.

The "In Sequence Rule" states that the court will interpret the language describing the grant before it will interpret the language describing the reservation. Thus, courts interpret each portion of the conveyance in sequence, without reference to other portions of the document. If the language of the granting clause conflicts with the language of the reservation clause, the granting clause generally prevails.

3.

The "Literal Meaning Rule" directs courts to give the words of a conveyance their literal meaning. The drafter is deemed to have meant exactly what he or she stated in the instrument.

Averyt v. Grande n125 illustrates the application of the "literal meaning rule." In *Averyt*, the deed literally reserved a fraction of the "land described," and the described land encompassed the entire tract, not a 1/2 interest in the tract. *Averyt* also illustrates the "in sequence rule." The [*1041] court construed the grant before it interpreted the reservation, and the court resolved conflicts in favor of the grant. n126

Altman v. Blake n127 applied the "greatest estate rule." In *Altman*, the component parts of the mineral estate, which were not specifically reserved, passed to the grantee.

Courts apply dozens of other rules of construction. Some of the commonly applied rules of construction include the following:

1.

Courts construe instruments against the party preparing the instrument. Accordingly, real estate leases are construed against the lessor, while oil and gas leases are construed against the lessee.

2.

Typewritten or handwritten provisions prevail over printed provisions.

3.

In the event of conflict between provisions, specific provisions prevail over general provisions.

4.

Through the rule of *eiusdem generis*, courts interpret general words that follow specific words as referring to the same types of items described by the specific words. n128

Although rules of construction are not rules of law, some rules of construction have become so entrenched that some courts follow them as if they were rules of law. Unfortunately, these rules occasionally are applied blindly and in lieu of rational thought.

Justice Calvert aptly described rules of construction and their place in the larger process of judicial interpretation:

Courts try to solve disputes over the meaning of contracts by giving them the meaning the parties intended them to have. This is as it should be. But what meaning the parties to a contract intended it to have is often unclear. Once a dispute arises over meaning, it can hardly be expected that the parties will agree on what meaning was [*1042] intended. It is for this reason that the courts have built up a system of rules of interpretation and construction to arrive at meaning, ignoring testimony of subjective intent. "Intention of the

parties" is often guesswork at best. Sometimes the true intention of one or even of both parties may be defeated... So, while use of rules of interpretation and construction may not always result in ascertaining the true intention of parties in using particular language ... , their use yet must be better than pure guesswork in most cases else they would never have been evolved. n129

Knowledge of the process followed by courts when interpreting conveyances helps the title examiner make determinations in his title opinion. However, no title examiner has sufficient knowledge in this area to answer all interpretation questions that might arise in the course of a title examination. Potential conveying ambiguities in the chain of title are simply too broad and too varied. Further, judicial decisions in this area are inconsistent. As Professor Kramer propounded:

The continued adherence to outdated forms as well as continued confusion as to the nature of the interests owned by the parties after an oil and gas lease has been executed have created difficult interpretational issues. These difficulties have led to a jurisprudence with little predictability and doctrinal upheaval. n130

[*1043] If an eminent legal scholar is unable to "discern the big picture or... categorize and rationalize the myriad canons of construction that have been used and abused in Texas case law," n131 it is unlikely that a title examiner, struggling to complete a title opinion under time pressure, could resolve all of the inconsistencies and uncertainties. Fortunately, the title examiner does not have to resolve all of these difficult questions with perfect certainty. If controlling precedent provides a clear solution to a particular problem, the attorney can set forth appropriate conclusions in the title opinion. Otherwise, the title attorney should not speculate on how a court may resolve a particular uncertainty. Instead, the attorney should state the problem and suggest curative steps that are necessary to insure good title regardless of how the courts interpret the conveyance. n132

D. Overconveyances and Estoppel by Deed: The Duhig Rule

All title examiners should be aware of the rule announced in *Duhig v. Peavy-Moore Lumber Co.* n133 The Duhig Rule, followed in Texas and most oil-producing states, is a rule of law rather than a rule of construction. n134 The rule rests on a of breach of warranty theory and estoppel by deed, and it applies with mathematical certainty, irrespective of actual knowledge or equities.

The Duhig Rule applies to overconveyances by general warranty deed. A clear statement of the Duhig Rule is as follows:

Where a grantor conveys an interest in the minerals and in the same instrument reserves a mineral interest, and where there is a prior interest outstanding that is not excepted from the operation of the deed, so that effect may not be given to both the interest that grantor has purported to convey and the interest grantor has attempted to reserve, [*1044] under the rule of *Duhig v. Peavey-Moore Lumber Co.*, the grantee is not limited to a suit in damages for failure of title, but the attempted reservation will fail to the extent necessary to make the grantee whole. Where complete failure of the reserved interest is insufficient to make the grantee whole, he will also have a cause of action in damages for failure of title. n135

In other words, the grantor cannot grant and reserve the same interest. If the grantor does not own a large enough interest to satisfy both the grant and the reservation, the grant will be satisfied first under the rationale of breach of warranty and estoppel by deed. The grantor will be estopped from claiming any interest until the grantee is made whole. n136

The Duhig Rule only applies to conveyances by warranty deed. Because the rationale for the Duhig Rule rests on breach of warranty, the rule clearly does not apply to conveyances through quitclaim deeds, which do not warrant anything. n137

Similarly, the Duhig Rule does not apply to oil and gas leases. In *McMahon v. Christmann*, n138 the Texas Supreme Court reasoned that since lessors frequently execute oil and gas leases purporting to cover the entire mineral interest, even though the lessors own only an undivided interest in the leased premises, applying the Duhig Rule to leases would be unfair. Accordingly, if a lessor who owns only 1/2 the minerals executes a lease purporting to cover 100 percent of the minerals, courts will not take any part of the lessor's reserved royalty under the Duhig Rule. Of course, the lessor's interest might be reduced through operation of a proportionate reduction clause in the lease. n139 [*1045]

E. Other Commonly Encountered Title Problems

Title examiners may encounter a plethora of title problems in addition to problems involving the nature and size of the interests reserved or conveyed. This Section briefly discusses some of the more commonly encountered title problems. The problems discussed in this Section represent only a small sampling of potential title problems and serve merely as examples. n140

1.

Possession

When someone other than the record owner possesses a tract of land, persons dealing with the land are charged with knowledge of possession, and they have a legal duty to determine the rights or claims of persons in possession. n141 The examining attorney normally has no knowledge of possession, and unless furnished with information of possession by the landman or client, the attorney should make a routine comment in the title opinion advising the client of its duty of inquiry.

2. Unreleased Oil and Gas Leases

The title examination may reveal prior unreleased oil and gas leases which have apparently expired but are still recorded. These unreleased leases constitute a cloud on title to the mineral estate. n142 The best method of removing this cloud on title is to secure a recordable release from the prior lessee. If a release cannot be obtained, other solutions may be available depending upon whether the unreleased lease is in its primary or secondary term. n143 The title opinion should suggest specific methods for [*1046] removing this cloud on title. n144

3. Mortgages, Deeds of Trust, and Other Liens

Mortgages, deeds of trust, and other liens against the property, including tax or judgment liens, recorded prior to the oil and gas lease, constitute clouds on title to property. n145 The title opinion should contain a requirement that the mortgage, deed of trust, or other lien be released of record or subordinated to the oil and gas lease. Few lienholders are willing to release their liens, but most are interested in the financial well-being of their debtors and the value of collateral securing payment of the loan. Since oil and gas develop-

ment may enhance the property value, and thus the mortgagee's collateral, many knowledgeable mortgagees agree to subordinate their liens to the oil and gas lease. If a release cannot be obtained, or if the mortgagee is unwilling to subordinate her lien, and no satisfactory alternative solutions can be found, the lessee may exercise business judgment and waive the title requirement. n146 The lessee is particularly likely to waive the title requirement when the outstanding indebtedness secured by the mortgage is relatively small and the lease contains a subrogation clause.

4. Heirship and Probate

The death of the record property owner may raise numerous title issues. If the record owner dies intestate, her property passes to her heirs under the laws of descent and distribution. If the record owner dies with a valid will, her property passes to the decedent's devisees pursuant to the terms of the will, provided that the will is properly probated.

Succession between the decedent and her heirs or devisees is generally [*1047] established under the probate law n147 of the state in which the property is located. The title examiner must identify the heirs or devisees and determine whether their succession was established according to applicable law. Detailed consideration of the law of wills and estates is beyond the scope of this Article. In general, intestate succession is judicially determined through various actions in probate court. n148 In some circumstances judicial action may not be necessary to determine heirship - proof of death and an affidavit of heirship may suffice as evidence of succession. n149 When property passes by will, the attorney must examine copies of the will and related probate proceedings to determine whether property title passed to the devisees named in the will, pursuant to such proceedings, and free of all liens. n150

Title examiners often face practical problems concerning succession by inheritance. For example, assume O, the record owner of property in Goliad County, dies either testate or intestate in Harris County. O's sons, A and B, live on the property and execute leases in favor of X Oil Co., but nothing recorded in Goliad County shows their succession to title. In this situation, the examining attorney routinely makes a requirement in the title opinion relating to proof of heirship. The opinion will generally require, if O died testate, that a certified copy of his will and the related probate proceedings be recorded in Goliad County. If O died intestate, a certified copy of any proceeding to determine heirship should also be filed in Goliad County. In most circumstances, if no formal proceeding to determine heirship took place, proof of death and a recordable affidavit of heirship will usually suffice. [*1048]

5. Capacity of Parties

Various questions may arise regarding the capacity of parties executing instruments in the chain of title. Instruments such as leases or deeds executed by agents, corporate officers, executors, guardians, or trustees should raise red flags for the title examiner relative to capacity issues. For example, if an agent or attorney executes a lease or deed, the title examiner will probably want to examine the power of attorney to determine whether the power of attorney gives the agent authority to execute the instrument and convey the interest. n151 Similar considerations apply to instruments executed by guardians, executors, administrators, trustees, corporate officers, and other fiduciaries or representatives. In all of these cases, the title examiner must carefully check the record, applicable statutes, and court proceedings for evidence of the representative's or fiduciary's power and authority to execute the instrument in question and bind the estate or principal. n152

6. Name Discrepancy

Sometimes the record reveals discrepancies in the spelling of a name of a given grantee and a subsequent grantor in the chain of title. The title examiner must determine whether this name discrepancy creates a material title defect. The examiner should use common sense and reason to determine which name discrepancies are worth noting. If sufficient evidence in other chain of title instruments establishes the parties' identity, then minor discrepancies can probably be ignored, absent special circumstances. If legitimate uncertainty exists regarding the identity of a person in the chain of title, an affidavit of identity should be required in the title opinion. n153

7. Spouses

Numerous title problems may arise relating to spouses, such as a [*1049] spouse's non-joinder in a deed or lease. The gravity of these problems will depend on the nature of the property, such as homestead classification; local law, such as community property classification; or various other considerations. n154 The examiner must note specific problems and should suggest solutions in the title opinion.

8. Life Tenants and Remaindermen

Leases from life tenants and remaindermen may raise problems. Subject to certain exceptions, the property interest held by life tenants and remaindermen requires joinder of both parties to grant leases. The life tenant may not commit waste on the property, and the remaindermen have no possessory rights until the death of the life tenant. In addition, special rules govern the manner in which royalty, bonus, and delay rentals are allocated among life tenants and remaindermen, and the allocation should be reflected in the title opinion. n155

9. Roads and Easements

The examiner should carefully review instruments creating roads, streets, or other strips of land to determine whether the interest granted was a fee interest or an easement. The examiner should ascertain the easement's ground location and should read the instruments creating the easement in their entirety to determine whether the easement will interfere with oil and gas operations. Conveyances by grantors who own land bounded by public highways or railroad rights-of-way may own mineral rights to the center of such roads or rights-of-way. n156

F. Handling Title Irregularities: Title Standards

Although few titles are perfect, even fewer are fatally defective. The title attorney should not lose sight of the title examination's purpose and the applicable standards. The title attorney advises the client regarding [*1050] marketability of title while exercising a high degree of judgment based on the title's vulnerability to attack. Title attorneys do not serve their client's best interest by raising objections of questionable materiality or by writing lengthy dissertations on esoteric points of law which have little practical effect. The attorney should provide the client with a title opinion that is a workable tool for rendering title acceptable. The opinion should summarize the title's current status and provide useful, relevant guidelines for dealing with title objections and making title acceptable.

In the context of this overriding objective, title attorneys routinely apply certain presumptions of fact and rules of law. For example, deeds are presumed delivered, signatures are presumed valid, and grantors are presumed competent unless the record indicates otherwise. n157 While these propositions are well-established, other propositions are weaker and may be viewed differently by different title examiners. For example, what is the impact on marketability if: (1) deeds are recorded but not acknowledged, (2) deeds

fail to disclose a grantor's marital status, (3) deeds omit a spouse's signature or (4) deeds reveal name discrepancies? The answers to these and similar questions may vary significantly among title examiners. To foster a higher degree of uniformity among title examiners and to aid title examiners in distinguishing defects that impair marketability from minor irregularities which do not affect marketability, the bar associations of at least twenty-six states have promulgated "title standards" or "uniform title examination standards," terms used synonymously in this Article. n158 A title standard is a statement, officially approved by a professional organization of lawyers, which declares [*1051] solutions to problems that regularly arise in the title examination process. n159 The State bar association is usually the approving organization. The scope and function of title standards have been described as follows: A title standard should represent the substantially unanimous opinion of bar association members experienced in conveyances. However, a title standard may cover questions upon which inexperienced conveyancers are uninformed or may cover questions with respect to which over-ambitious conveyancers may take a position contrary to that of the great majority of competent experienced conveyancers. In other words, title standards should not cover questions which are controversial among competent, experienced conveyancers. However, the standards should resolve questions that cause problems for inexperienced parties. n160

Title standards promote uniformity, establish realistic practice standards, represent the recognized practices of the organized profession, and provide useful checklists for inexperienced title examiners. n161 While the scope of title standards varies substantially from state to state, n162 they typically encompass several areas. Some commonly included areas are: (1) duration of the search; (2) effect of lapse of time on title defects; (3) presumptions of fact which title examiners ordinarily should recognize; and (4) law that applies to recurring situations. n163

Oklahoma, a leader in the adoption and application of title examination standards, recognizes two primary purposes of title standards: (1) alleviating disagreements among bar association members on matters which impact title and (2) setting forth matters which most lawyers agree on when reviewing title. The Oklahoma Bar Association adopted its first title standards in 1946. Since 1962 these title standards have been published in the Oklahoma Statutes Annotated. n164 In 1982 the Oklahoma Supreme Court endorsed the Title Examination Standards of the Oklahoma Bar Association as follows:

[*1052]

While [the Oklahoma] Title Examination Standards are not binding upon this Court, by reason of the research and careful study prior to their adoption and by reason of their general acceptance among the members of the bar of this state since their adoption, we deem such Title Examination Standards and the annotations cited in support thereof to be persuasive. n165

Texas does not currently have title standards. However, in 1990, the Real Estate, Probate, and Trust Law Section of the Texas State Bar established a Title Examination Standards Subcommittee. That subcommittee was charged with the task of drafting a set of title examination standards for Texas. The subcommittee's initial draft of Proposed Texas Title Standards is now in its final stages of revision. n166 The Proposed Texas Title Standards are generally modeled after Oklahoma's Title Standards but are much less extensive in their scope and coverage. Finalization and approval of the Proposed Texas Title Standards will be a positive step toward promoting uniformity and providing needed guidelines for Texas title examiners. n167 [*1053]

IX. Title Opinions

A title opinion reflects the results of the title examination and advises the client as to the current status of title and what is required to make title marketable. Although title opinions vary somewhat, they generally advise the client regarding ownership of the surface, mineral, and leasehold interests. In the course of setting out ownership of all interests, the opinion should address all aspects of title emanating from such ownership. n168

A. Types of Title Opinions

At several stages in the course of leasing and developing land and marketing oil and gas production, title examinations and/or title opinions may be required. The most frequent of these stages are:

1.

Lease purchase title opinions which are rendered before the lessee pays the lessor a bonus for executing an oil and gas lease.

2.

Drilling title opinions which are rendered before drilling begins.

3.

Division order title opinions which are rendered before production purchasers pay the owners of such production. n169 [*1054]

The first full title opinion rendered on a piece of property is the "original" title opinion. For example, if a full title opinion is rendered at the lease purchase stage, then that opinion will be the "original" opinion, and a subsequent opinion rendered on the same property prior to drilling will be a "supplement" to the original opinion. While practices vary, most companies rely on record checks by landmen at the leasing stage and do not secure formal title opinions at that time. Thus, the opinion prepared prior to drilling is typically the "original" opinion. If drilling results in production, a Division Order Title Opinion must be prepared to facilitate preparation of "division orders." n170 Division Order Title Opinions set forth the respective percentage ownership of all parties having interests in production from the well and the land covered by the opinion.

Original Drilling Opinions and Division Order Opinions are the two most common types of title opinions. Both Original Drilling Opinions and Division Order Opinions are frequently supplemented to reflect the status of title requirements, new information, curative matters, or changes in the size or composition of the unit. Original Drilling Opinions and Division Order Opinions differ in two fundamental ways. First, Original Drilling Opinions typically trace title back a relatively long way in time, often to sovereignty, while Division Order Opinions, covering the same land, trace title back only to the closing date of the Original Drilling Opinion or the most recent supplement. Second, Original Drilling Opinions typically cover all leased property, while Division Order Opinions cover only the property allocated to the actual spacing unit established for a particular well. n171 Skeletal forms of an Original Drilling Opinion and a Division Order Title Opinion are attached as appendices to serve as examples and facilitate the discussion of the form and content of Title Opinions. [*1055]

B. Malpractice Liability

Many people read, work with, and rely on title opinions. Consequently, material errors or omissions in a title opinion expose the title attorney to malpractice liability, as illustrated in *Gavenda v. Strata Energy, Inc.*

n172 In Gavenda, the operators, who had drilled a producing well on certain property, hired an attorney to prepare a Division Order Title Opinion. n173 Well production proceeds were paid to the operators, who distributed these proceeds to the various owners of well production, including the Gavendas, who owned a nonparticipating royalty interest. n174 The size of the Gavenda interest was later questioned. All parties to the suit signed division orders which reflected the interests set out in the Division Order Title Opinion. n175

The title attorney found a reservation of "a one-half (1/2) non-participating royalty" extremely high and concluded that the parties probably meant to reserve a one-half (1/2) royalty. n176 The attorney's Division Order Title Opinion and the division orders prepared and signed based on that opinion reflected that interpretation. n177 Payments were made pursuant to those division orders for several years. Subsequently, nonparticipating royalty owners revoked the division order and filed suit, claiming a full one-half royalty interest. n178 The court agreed with the royalty owners and rendered judgment against the operators for approximately \$ 2.4 million, the amount of the underpayment from date of first production. n179 The operators filed a malpractice cross action against the attorney who rendered the opinion. n180

C. Form and Structure of Title Opinions

Title opinions take the form of letters from the examining attorney to the operator or purchaser of production, expressing the attorney's conclusions as to the status of title. The form and structure of the title [*1056] opinion may vary significantly, depending on the opinion's purposes and the preferences of the particular attorney and client. However, basic principles relative to organization, form, and structure should be followed in preparing all opinions.

All opinions should contain essential information and be written to advise the readers of the current status of title and how to bring title to marketability status. The opinion should be well organized and limited to relevant information. The examples of original and division order opinions, attached as appendices, contain the minimal information required in a title opinion. The attachments reflect the significant differences in structure, content, and organization between original opinions and Division Order Opinions.

The heart of the original opinion is the section captioned "Title," which sets forth the attorney's conclusions as to the status of the surface title, and the minerals and leasehold interests in the property under examination as of the opinion's closing date. Ideally, every other part of the opinion should implement, explain, complement, or qualify the information contained in that section. The following sections should be included in the title opinion:

- 1.

The caption or "RE Clause" should briefly describe the property under examination with appropriate reference to the lease and land involved.

- 2.

The "Material Examined" section sets forth the examined materials on which the attorney based his opinion.

- 3.

The section captioned "Patent Information and Chain of Title" should contain a brief narrative description of the chain of title, which helps readers understand the basis for the attorney's conclusions and exceptions to title.

4.

The section captioned "Validity and Maintenance of Lease" contains the attorney's conclusions regarding the current validity of the lease and how the lease was maintained. This section typically refers to an exhibit which summarizes the principal lease terms for easy reference by the client.

5.

The sections on "Taxes" and "Easements and Rights of [*1057] Way" should contain information on the status of payment of ad valorem taxes and the existence of any easements which might affect operations on the property.

6.

In a series of numbered paragraphs under the caption "Comments and Requirements," the opinion should set forth exceptions to title and the requirements to make title marketable.

7.

Under the caption "Limitations," the attorney should note matters that the opinion does not cover.

8.

Special facts or circumstances might call for additional captions or other information.

The heart of the division order opinion is the "Division of Interest" referred to in the opinion section of the same name and set out in detail in Exhibit A. In this section, the attorney sets forth in decimal form the well production ownership among the persons owning royalty, overriding royalty, and working interests in such production. The sum of the decimals will always equal one (1). The formula used to derive the decimal interests is set out to inform the reader how the attorney reached his or her conclusions.

The other sections of the Division Order Opinion implement, explain, complement, or qualify the Division of Interest. No title history is typically necessary in a Division Order Opinion since the time period covered is usually short. A narrative description of well interest assignments may be necessary, depending on the scope and complexity of the assignments. A section detailing the current status of the comments and requirements contained in the earlier opinion is often included.

The attorney should emphasize accuracy and completeness when preparing a title opinion. Many people, such as company management, landmen, lease analysts, division order analysts, and others, including attorneys, work with the title opinion. In fact, parties often pass around and rely on title opinions well into the future. The examining attorney should strive to write and structure the opinion in a manner that makes it as readable and as easy to work with as possible, without sacrificing [*1058] accuracy. n181 In short, the examining attorney assumes a high degree of responsibility each time he signs a title opinion. He should strive to produce complete, accurate, and relevant results, while producing succinct and well-written opinions. n182

X. Curing Title Defects

Curing title defects discovered during the title examination is the final step in the process discussed in this Article. Title requirements and curative matters represent two sides of the same coin; thus, curative considerations are part and parcel of the examination process. Attorneys and landmen often work closely together in curing title defects. n183 Consequently, both the examining attorney and the landman should

understand the available curative tools. Detailed considerations regarding curative procedures - for example, the form and content of curative affidavits or procedures involved in judicial proceedings brought to cure title defects - are beyond the scope of this Article. The Article merely provides an overview of the primary procedures available to cure title defects.

Generally, the major types of curative procedures are as follow: (1) voluntary curative action, (2) compliance with curative statutes, and (3) suits to clear title. In curing a particular title problem, one should select the least expensive and time consuming alternative. These curative alternatives are not mutually exclusive, and the available procedures are often combined. n184

A. Voluntary Curative Action

Voluntary curative action consists of preparing, executing, and recording instruments that address various title problems raised in the title opinion. If the necessary parties are alive, can be located, and are cooperative, curative conveyances such as assignments, releases, quitclaim deeds, and correction deeds usually represent the surest and least [*1059] expensive method of curing many title problems. All claimants or affected parties must execute these curative conveyances. Disclaimers, stipulations of interest, and ratification are also widely used to cure title defects. All affected parties should sign both the instrument and the curative instrument, and the curative instrument should contain words of grant. n185

Various affidavit forms are frequently used to cure title irregularities. Affidavits usually will not be sufficient to render an otherwise defective title marketable. However, these affidavits often furnish evidence to satisfy business risk, which is the standard generally applied in approving title. n186 The five most common categories of curative affidavits are: affidavits of possession, affidavits of adverse possession, affidavits of non production, affidavits of death and heirship, and affidavits of identity. n187 Nothing magical exists in the fact that curative evidence is furnished in affidavit form. An affidavit's weight and usefulness depends on the detail, reliability, and factual accuracy of the affidavit information and on the affiant's knowledge of the facts. n188

B. Curative Statutes

All states have statutes which can be utilized in varying degrees to cure title defects or eliminate title requirements. Curative statutes are generally grounded on the policy against unreasonably burdening the transfer of land and the policy favoring quieting titles. Curative statutes are also a practical necessity. For example, most chains of title, in their early years, reveal apparent gaps in title, conveyancing irregularities, or defective court proceedings. From a cost effective, practical standpoint, these defects are difficult to cure absent curative statutes. n189

Although curative statutes vary from state to state, they generally fall into three categories:

(1) Statutes of limitations, which all states recognize, [*1060] although in varying forms. n190

(2) Specific curative statutes which cure specifically enumerated defects or create irrefutable presumptions. These statutes typically relate to defects such as defective acknowledgments or executions in instruments which have been recorded for a prescribed time period, name discrepancies, enumerated deficiencies in court proceedings, and presumptions that some affidavits, if recorded for a prescribed time period, are true. These types of statutes are typically narrow in scope and vary from jurisdiction to jurisdiction. n191 The examining attorney should be familiar with the specific statutes available in the jurisdiction in which he is working, the types of defects those statutes will cure and the extent of protection afforded by such statutes.

(3) In recent years several states have adopted marketable title acts which essentially seek to bar ancient defects under certain circumstances. Texas does not have a marketable title act. In general, these acts bar title defects occurring before a specified time when an instrument, under which the record owner claims title, has been recorded for a given number of years, and no claims adverse to the record holder's title have been filed during the specified time period. n192 [*1061]

These marketable title statutes typically provide that the record owner holds marketable title free of all interest or claims which depend on transactions occurring before the record owner's "root of title," as long as the "root of title" instrument has been recorded for a specified time period. n193 All of the marketable title acts contain exclusions, limitations, and exceptions which vary from state to state. For example, the acts typically exclude interests reflected in subsequent title transactions or preserved by filing statutory notices. Furthermore, various types of interests are excluded from the operation of the marketable title acts in some states.

C. Suits to Clear Title

Sometimes judicial action is the only means of curing title. Generally, judicial action should be used as a last resort due to time and expense. The most common causes of action available in Texas for establishing or curing title are (1) suits to quiet title and (2) suits in trespass to try title. n194

A suit to quiet title is a suit in which a person in possession seeks relief against persons making claims against plaintiff's title. Plaintiff must allege his right, title, and ownership with sufficient certainty to enable the court to see that the plaintiff has an ownership right that warrants judicial interference. n195 The suit to quiet title is the principal procedural vehicle for interpreting ambiguous instruments in the chain of title, removing clouds on title, and setting the record straight.

While suits to quiet title are equitable actions, trespass to try title suits are statutory. n196 Section 22.001 of the Texas Property Code provides that "[a] trespass to try title action is the method of determining title to lands, [*1062] tenements, or other real property," and that "the action of ejectment is not available in this state." n197

A plaintiff in a trespass to try title action must recover on the strength of his own title, which he can establish by proof of: (1) a regular chain of title from the sovereign, (2) superior title from a common source, (3) limitation title or (4) prior possession. The plaintiff's petition can be in statutory form. The plaintiff is not required specifically to plead his title. n198 However, by the statutory plea of "not guilty," the defendant places the question of title in issue and places the burden on the plaintiff to prove his title. n199

Judicial proceedings may be the only available course of action where adverse claimants are uncooperative and defects in title are serious. Therefore, title attorneys should be aware of the types of judicial proceedings available to clear title and should not hesitate to use those proceedings when necessary.

[SEE APPENDICES IN ORIGINAL]

Legal Topics:

For related research and practice materials, see the following legal topics:

Energy & Utilities Law
Federal Oil & Gas Leases
Title Examinations
Insurance Law
Property Insurance
Title Insurance
Real Property Law
Title Quality
Marketable Title
Abstracts

FOOTNOTES:

n1. The majority of citations are to Texas authority, although many of these citations support propositions of general application.

n2. See, e.g., Tex. Bus. & Com. Code Ann. 26.01 (Vernon 1987).

n3. See, e.g., Tex. Prop. Code Ann. 13.001(a) (Vernon Supp. 1994) ("A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law."); see also *Carroll v. Holliman*, 336 F.2d 425, 429 (5th Cir. 1964), cert. denied, 380 U.S. 907 (1965).

n4. See Tex. Prop. Code Ann. 13.001 (Vernon 1984).

n5. See *Hawley v. Bullock*, 29 Tex. 216, 222 (1867).

n6. The buyer's mortgage lender, if any, wants similar assurances.

n7. The following are the most significant Texas recording statutes:

Tex. Prop. Code Ann. 11.001(a) (Vernon 1984 & Supp. 1994) ("To be effectively recorded, an instrument ... must be recorded in the county in which a part of the property is located."); id. 12.002(a) (recording a subdivision plat or replat); id. 13.001(a) ("A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law."); id. 13.003 (Vernon 1984) ("Recording a previously recorded instrument in the proper county does not validate an invalid instrument.").

n8. See, e.g., *Hawley*, 29 Tex. at 222.

n9. See generally 3 Fred A. Lange and Aloysius A. Leopold, *Texas Practice* 251-268 (2d ed. 1992 & Supp. 1993) [hereinafter *Lange & Leopold*]. A full discussion of state recording statutes is beyond the scope of this Article. However, both title attorneys and landmen should have a good working knowledge of the recording statutes in the jurisdictions where they conduct title searches.

n10. Tex. Ins. Code Ann. art. 9.02a (Vernon Supp. 1994) ("'Title Insurance' means insuring, guaranteeing or indemnifying owners of real property or others interested therein against loss or damage suffered by reason of liens, encumbrances upon, or defects in the title to said property, and the invalidity or impairment of liens thereon").

n11. See id. See also Paul E. Basye, *Clearing Land Titles*, ch. 1(2d ed. 1970) [hereinafter *Basye*]; Jesse Dukeminier & James E. Krier, *Property* 670 (2d ed. 1988) [hereinafter *Dukeminier & Krier*] ("Title insurance is the opinion of the insurer concerning the validity of the title, backed by an agreement to make that opinion good if it should prove to be mistaken and loss results as a consequence.").

n12. See *infra* part IV for a discussion of the standards followed in examining and approving petroleum land titles, which are similar to the insurability standard that title insurance companies follow with respect to surface titles.

n13. One reason title insurance is not available in connection with oil and gas transactions is the variety of property interests that may be created in oil and gas. If mineral ownership is severed from surface ownership, two separate fee estates result - the mineral estate and the surface estate. Further, the mineral estate consists of several component parts, each of which can be separately conveyed. Finally, not only can the owner divide the mineral estate into its component parts, he can further divide it, temporarily or permanently, in all of the ways developed since the feudal beginning of modern property law. Such fractionalization regularly takes place because of the demands of oil business economics. Because the oil industry is a capital-intensive and risky business, fractionalization helps raise capital and spread the risk. See *infra* part VIII(A). See generally Bruce M. Kramer, *Conveying Mineral Interests - Mastering the Problem Areas*, 26 *Tulsa L.J.* 175 (1990). [hereinafter *Kramer, Conveying Mineral Interests*].

n14. "Prospect" is a term often employed in the oil and gas industry which may be defined in various ways depending on context. In this Article, the term is used as it relates to the future - lands having potential for producing oil and gas. In *Wurzlow v. Placid Oil*, the court defined "prospect" as follows:

In the oil and gas industry, a prospect commences with the determination of the existence of a certain geological structure conducive to the production of oil and gas underlying a certain area of land. The actual existence of such minerals must then be determined and confirmed by actual drilling and production of said minerals.

279 So. 2d 749, 754 (La. Ct. App. 1973).

n15. See, e.g., *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981); *Williamson v. Mobil Producing Texas & New Mexico, Inc.*, 737 S.W.2d 917, 921 (Tex. App. - Beaumont 1987, writ denied).

n16. See *infra* part IX(A) for a definition of an "Original Drilling Opinion" and a discussion of its use.

n17. See *infra* parts IX(A) and (B) for definitions of and further discussion pertaining to "division orders" and "division order title opinions".

n18. See generally *Luckel v. White*, 792 S.W.2d 485, 489 (Tex. App. - Houston [14th Dist.] 1990), *rev'd on other grounds*, 819 S.W.2d 459 (Tex. 1991).

n19. Eugene O. Kuntz et al., *Cases and Materials on Oil and Gas Law*, 571-72 (2d ed. 1993) [hereinafter *Kuntz*]. See *infra* part V for additional details on both "stand-up" and "sit-down" opinions.

n20. See *infra* part IX. See generally Lewis G. Mosburg, Jr., *Landman's Handbook on Petroleum Land Titles* 4.05 (1976) [hereinafter Mosburg]; Tevis Herd, *Title Opinions for Oil and Gas Purposes - Structure and Information Needed by a Client*, 33 *Inst. on Oil & Gas L. & Tax'n* 285, 298 (1982) [hereinafter Herd].

n21. See *infra* part IX(B).

n22. See *infra* part V(B).

n23. See *infra* part V(A).

n24. See *infra* part X.

n25. See *infra* part VII. The opinion should also set forth the component elements of the mineral estate.

n26. See *infra* part IX.

n27. See *infra* part IV(A) for a definition of marketable title.

n28. See *infra* part IV(B) & (C).

n29. See generally J.E. Rehler, *Proposed Title Examination Standards for Texas*, *Rev. of Oil & Gas Law VI. Oil, Gas, and Mineral Section of the Dallas Bar Ass'n* (1991) [hereinafter Rehler]. See also 16 *Okla. Stat. Ann. tit. 16*, 71 (West 1986 & Supp. 1992) (containing a similar but slightly more restrictive definition of marketable title); *First Am. Title Co. v. Prata*, 783 S.W.2d 697, 702-03 (Tex. App. - El Paso 1989, writ denied) ("Marketable title means a title free and clear from reasonable doubt as to matters of law and fact and is one not clouded by any outstanding contract, covenant, interest, lien or mortgage sufficient to form a basis of litigation.") (citations omitted); *Lieb v. Roman Devel. Co.*, 716 S.W.2d 653, 655 (Tex. App. - Corpus Christi 1986, writ ref'd n.r.e.); *Ryan Mortgage Investors v. Fleming-Wood*, 650 S.W.2d 928, 936 (Tex. App. - Fort Worth 1983, writ ref'd n.r.e.) ("'Marketable title' means a title free and clear from reasonable doubt as to matters of law and fact, such a title as a prudent man, advised of the facts and their legal significance, would willingly accept."); *Lund v. Emerson*, 204 S.W.2d 639, 641 (Tex. Civ. App. - Amarillo 1947, no writ) (finding same general definition).

n30. Proposed Texas Title Standard 2.10 provides: "All title examinations should be made on the basis of marketability of title" Rehler, *supra* note 29. See also Mosburg, *supra* note 20, 4.05.

n31. See *supra* note 29.

n32. *Texas Auto Co. v. Arbetter*, 1 S.W.2d 334, 336-37 (Tex. Civ. App. - San Antonio 1927, writ dismissed w.o.j.).

n33. Owens v. Jackson, 35 S.W.2d 186, 188 (Tex. Civ. App. - Austin 1931, writ dismiss'd); Texas Auto Co., 1 S.W.2d at 336-37.

n34. Austin v. Carter, 296 S.W. 649, 651 (Tex. Civ. App. - Eastland 1927, writ dismiss'd w.o.j.). See also Lund, 204 S.W.2d at 641; Texas Auto Co., 1 S.W.2d at 336-37.

n35. See Texas Auto Co., 1 S.W.2d at 336-37; Alling v. Vander Stucken, 194 S.W. 443, 444 (Tex. Civ. App. - San Antonio 1917, writ ref'd).

n36. Mosburg, supra note 20, 1.05.

n37. Id.

n38. Id.

n39. Id. Compare part II(D) with part IV to understand the similarity in standards and practices followed by title insurance companies with respect to general real estate titles with those followed by oil companies with respect to petroleum land titles.

n40. See Pearson v. 32 Oil Ass'n, 1 S.W.2d 860, 860 (Tex. Comm'n. App. 1928, holding approved); Lambert v. Taylor Tel. Coop., 276 S.W.2d 929, 932 (Tex. Civ. App. - Eastland 1955, no writ); see also Black's Law Dictionary 10 (6th ed. 1990).

n41. See Lange & Leopold, supra note 9, 291-299 for a general discussion of abstracts, the abstracting process, how abstracts are prepared, and what abstracts contain.

n42. See Lange & Leopold, supra note 9, 291.

n43. Id. 303.

n44. Supplemental abstracts are abstracts which cover a period of time subsequent to the date covered by a previous abstract on the same land. Id. 300.

n45. Base abstracts are abstracts which cover a period from sovereignty, or such lessor period as is deemed appropriate, to the date shown in the abstractor's certificate. Id.

n46. See supra note 19.

n47. Engaging a landman to search the indices and prepare a run sheet is usually more economical. It saves the attorney time and allows him to focus on examining the instruments listed in the run sheet. Further, good landmen usually have more skill than attorneys at working the indices and constructing run

sheets. On the other hand, although the attorney can delegate the work, he cannot delegate the responsibility. The title opinion is the attorney's opinion, and the attorney is responsible for any error that resulted because the landman omitted a key document from the run sheet.

n48. For example, local procedures and customs vary not only from state to state but also from county to county within the same state. Procedures may also vary depending on the personal preferences of the examining attorney, landman, and client oil company; time and cost factors; the structure of the indices and records in the particular county; and the purpose of the opinion.

n49. This scenario assumes that the tasks of running the records and preparing a run sheet are delegated to a landman.

n50. Grantor-grantee is the index required by statute in Texas. See *infra* note 54. Sometimes, though not usually, a "tract" index will also be maintained as part of the public record. See *infra* note 56.

n51. See *infra* part V(C). Today, in counties with computerized records, computer-generated chains of conveyances make this task significantly easier.

n52. The attorney makes the decisions regarding relevancy and materiality. Unless an instrument is clearly irrelevant, it should be included in the run sheet. The attorney can later dismiss the instrument if it turns out to be irrelevant or immaterial.

n53. An excerpt from a run sheet is attached as Appendix A.

n54.

Index to Real Property Records.

(a) The county clerk shall maintain a well-bound alphabetical index to all recorded deeds, powers of attorney, mortgages, and other instruments relating to real property. The index must state the specific location in the records at which the instruments are recorded.

(b) The index must be a cross-index that contains the names of the grantors and grantees in alphabetical order. If a deed is made by a sheriff, the index entry must contain the name of the sheriff and the defendant in execution. If a deed is made by an executor, administrator, or guardian, the index entry must contain the name of that person and the name of the person's testator, intestate, or ward. If a deed is made by an attorney, the index entry must contain the name of the attorney and the attorney's constituents. If a deed is made by a commissioner or trustee, the index entry must contain the name of the commissioner or trustee and the name of the person whose estate is conveyed.

Tex. Loc. Gov't Code Ann. 193.003 (Vernon 1988).

n55. The clerk recompiles the main indices periodically to incorporate the supplements in much the same way that publishers reprint statute books periodically to incorporate the pocket parts. Recompilation used to take place only every decade or so, but today many counties have computerized records that can be updated much more frequently.

n56. A tract index is an index compiled according to the land affected by the transactions rather than by the parties to the transaction. This index is similar to the "plants" maintained by title insurance companies.

n57. For general information regarding the structure of indices, see Basye, *supra* note 11, at 51-53.

n58. See, e.g., *Smith v. Sorelle*, 87 S.W.2d 703, 705 (1935). See also Lange & Leopold, *supra* note 9, 812.

n59. In *Greer v. Greer*, the court succinctly stated the rule as follows:

The rule was long ago announced by this court that in all instruments for the conveyance of lands the description must be so definite and certain upon the face of the instrument itself, or in some other writing referred to, that the land can be identified with reasonable certainty; otherwise, the instrument is void under the Statute of Frauds.

191 S.W.2d 848, 849 (1946).

n60. Urban land is usually identified by lot, block, and subdivision.

n61. National Land Act, ch. 29, 1 Stat. 464 (1796) (current version at 43 U.S.C. 52 (1986)).

n62. *Id.* 2. See also 43 U.S.C. 751-774 (1986).

n63. For example, the original 13 states as well as Kentucky, Tennessee, Maine, Vermont, and West Virginia were surveyed prior to adoption of the National Land Act in 1796 and thus do not use the rectangular survey system. Dukeminier & Krier, *supra* note 11, at 660.

n64. Fractions of leagues or labors were also granted in some cases.

n65. Tex. Nat. Res. Code Ann. 21.077 (Vernon 1978).

n66. Mosburg, *supra* note 20, 2.11; Lange & Leopold, *supra* note 9, 820.

n67. *Id.*

n68. A conveyance is a presently operative instrument which transfers ownership to an interest in land from the transferor to the transferee. See, e.g., *Leonard v. Benford Lumber Co.*, 216 S.W. 382, 383 (1919).

n69. The oil & gas lease is also a conveyance. See *infra* note 94.

n70. See, e.g., Tex. Prop. Code Ann. 5.021 (Vernon 1984). Some state statutes impose additional requirements such as seals, witnesses, or acknowledgements.

n71. See, e.g., *Curry v. Curry*, 270 S.W.2d 208 (1954); *Koppelman v. Koppelman*, 57 S.W. 570 (1900). See also *Lange & Leopold*, *supra* note 9, 691-693.

n72. *Agnew v. Brawner*, 553 S.W.2d 688, 689 (Tex. Civ. App. - Eastland 1977, writ ref'd n.r.e.); *Sgitcovich v. Sgitcovich*, 229 S.W.2d 183, 185 (Tex. Civ. App. - Galveston 1950, writ ref'd n.r.e.) (holding that deeds executed but never delivered by grantor were ineffective to pass any title to realty).

n73. See *infra* part VIII(F).

n74. *Ragland v. Kelner*, 221 S.W.2d 357, 359 (1949) ("The test ... is whether or not the grantor parted with all dominion and control over the instrument at the time he delivered it to the third person, with intent at the very time of its delivery that it take effect as a conveyance."); *Vannerberg v. Anderson*, 206 S.W.2d 217, 219 (1948) (holding that delivery is essential but may be presumed from recordation). See also *Lange & Leopold*, *supra*, note 9 691-693; *Mosburg*, *supra* note 20, 2.12.

n75. See *Mosburg*, *supra* note 20, 2.12. See also *infra* part X.

n76. See *infra* part X(C).

n77. Tex. Prob. Code Ann. 37 (Vernon 1980 & Supp. 1994). Texas Probate Code section 38 governs the transfer of property of persons dying intestate. *Id.* 38. A title examiner needs to be familiar with the probate code and the law of wills, intestacy, and estate administration of the state in which the property examined is located.

n78. Texas recognizes limitations periods of 3, 5, 10, and 25 years. See Tex. Civ. Prac. & Rem. Code Ann. 16.021-16.037, subch. B, Limitations of Real Property Actions (Vernon 1986 & Supp. 1994). See *id.* 16.024 (the 3 year statute); *id.* 16.025 (the 5 year statute); *id.* 16.026 (the 10 year statute); *id.* 16.027 & 16.028 (the two 25 year statutes). See also Richard W. Hemingway, *The Law of Oil and Gas* 3.4-3.5 (3d ed. 1991) (limitations title to oil and gas properties) [hereinafter *Hemingway*]; Thomas K. McElroy, *Adverse Possession of Mineral Estates*, 11 *Baylor L. Rev.* 253 (1959).

n79. See *infra* part IX(A) for definition of "original" or "initial" opinions.

n80. See, e.g., Okla. Stat. Ann. tit. 16 71-80 (West 1986) (A marketable record title might exist when a person holds under an unbroken chain of title extending back at least 30 years, and nothing appears of record which divests such person of title). Texas does not have such a statute. See *infra* part X(B).

n81. See Mosburg, *supra* note 20, app. at 150.

n82. Resolution Trust Company.

n83. All patents to Texas land emanate from Spanish or Mexican land grants or from grants by the Republic or State of Texas. See generally Lange & Leopold, *supra* note 9, 158-159.

n84. Kuntz, *supra* note 19, at 855, describes "public lands" as follows:

Federal public lands comprise ... about 30 percent of the total land area of the 50 states. Most of this acreage is classified as "public domain:" lands that have never left federal ownership ... The balance is generally classified as "acquired land:" land obtained by the federal government by purchase, condemnation, gift or exchange.

n85. Texas expressly provides that limitations provisions do not bar the rights of the state, all counties, and all school districts. Tex. Civ. Prac. & Rem. Code Ann. 16.061 (Vernon 1986 & Supp. 1994). Thus, in the event of litigation involving title, one must show that the state parted with title through an appropriate grant of patent prior to commencement of the alleged adverse possession. See, e.g., *Houston Oil Co. v. Gore*, 159 S.W. 924, 927 (Tex. Civ. App. - Galveston 1913, writ ref'd). See generally *Dallas County Levee Improvement Dist. No. 6 v. Curtis*, 287 S.W. 301 (Tex. Civ. App. - Dallas 1926, no writ).

n86. Persons examining title to Texas lands granted by patent from the State of Texas after September 1, 1919, should be aware of the Relinquishment Act of 1919. Tex. Rev. Civ. Stat. Ann. arts. 5367-5379 (Vernon 1919) (repealed but reenacted verbatim in 1977 as Tex. Nat. Res. Code Ann. 52.171-52.189 (Vernon 1977 & Supp. 1994)). The definitive article on the Texas Relinquishment Act is A.W. Walker, *The Texas Relinquishment Act*, 1 *Oil & Gas Inst.* 245 (S.W. Legal Found. - Matthew Bender 1949). See also Herd, *Title Opinions*, *supra* note 20, at 291-97; Lange & Leopold, *supra* note 9, 234.

n87. See Lange & Leopold, *supra* note 9, 233 & 236 (discussing vacancies and vacancy litigation).

n88. For general information regarding patents, see Mosburg, *supra* note 20, 2.02 & 2.04. For further general information regarding patents to Texas land, see Lange & Leopold, *supra* note 9, 155-159.

n89. See *infra* note 190. See also Lewis G. Mosburg, Jr., *Statutes of Limitation and Title Examination*, 13 *Okla. L. Rev.* 125, 166-67 (1960).

n90. See Mosburg, *supra* note 20, 5.03. See also *infra* part X(A).

n91. The attached appendix contains examples of chain of title diagrams. One diagram tracks surface ownership and mineral ownership, while the other diagram tracks leasehold ownership. For other suggested methods of tracking chains of title, see Lange & Leopold, *supra* note 9, 311-314.

n92. When the configuration of the land being examined changes (i.e., parts of the tract are sold or adjoining tracts are acquired) during the period covered by the examination, a set of plats showing these configuration changes, used in conjunction with the chain of title diagram, can be very helpful.

n93. These rights flow from the well-settled rule that when the mineral estate is severed from the surface estate, the mineral estate is dominant. The surface estate is burdened with a servitude in favor of the mineral estate. See *Texaco, Inc. v. Faris*, 413 S.W.2d 147, 149 (Tex. Civ. App. - El Paso 1967, writ ref'd n.r.e.); *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 135 (N.D. 1979).

n94. Eugene Kuntz describes the oil and gas lease as follows:

[The oil and gas lease is] both [a] conveyance and [a] contract... [A] conveyance, because it is the instrument by which the mineral owner conveys a right to an oil company to explore for and produce oil and gas... [A] contract because the oil company accepts the right to explore and produce, burdened by certain express and implied promises.

...

The key to understanding [the] oil and gas lease ... is to remember that the lease is a business transaction. A mineral owner, who generally lacks the capital or expertise to explore or develop, transfers those rights to an oil company [while reserving a royalty interest in production]... Both parties expect to make a profit from the transaction, and the lease ... sets out their bargain.

Kuntz, *supra* note 19, at 138-39.

n95. *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1936).

n96. This is the full bundle of rights that comprises "ownership" of the mineral estate. See *Altman*, 712 S.W.2d at 118; *Schlittler v. Smith*, 101 S.W.2d 543, 544 (Tex. 1937). See also Kramer, *Conveying Mineral Interests*, *supra* note 13; Mosburg, *supra* note 20, 3.01.

n97. In economic terms, a royalty interest is a form of compensation used when value is speculative. It is a hedge against uncertainty. See Hemingway, *supra* note 78, 2.5.

n98. *Id.*

n99. A preliminary, and often critical, question in the interpretation process is the question of what evidence is admissible in construing the instrument. This inquiry involves application of the parol evidence rule and is beyond the scope of this Article.. Generally, if a court finds the instrument to be ambiguous, it will consider extrinsic evidence. Conversely, if a court finds the instrument to be unambiguous, it will look only to the four corners of the instrument and use rules of construction to interpret the ambiguous language. In the overwhelming majority of cases involving interpretation of oil and gas conveyances, courts tend to find the instruments unambiguous and refuse to hear extrinsic evidence. See *infra* part VIII (C).

n100. See Hemingway, *supra* note 78, 2.7(A).

n101. Howard R. Williams & Charles J. Meyers, *Oil & Gas Law* 304 (Student Ed. 1985); Hemingway, *supra* note 78, 2.7.

n102. 712 S.W.2d 117 (Tex. 1986).

n103. *Id.* at 117-18.

n104. *Id.* at 120. Although the deed seems ambiguous, the parties stipulated that the deed was unambiguous and the court looked only to the four corners of the instrument in construing it. By applying a rule of construction called the "greatest estate rule", see *infra* part VIII(D), the court found that 1/16 of the development rights passed under the deed and therefore concluded that the grantee received a 1/16 mineral interest rather than a 1/16 royalty interest.

n105. See *supra* note 96 and accompanying text.

n106. See Altman, 712 S.W.2d at 118-19. See also Kramer, *Conveying Mineral Interests*, *supra* note 13; Luckel v. White, 819 S.W.2d 459, 463 (Tex. 1991); Day & Co., Inc. v. Texland Petroleum, Inc., 786 S.W.2d 667, 669 (Tex. 1990).

n107. See Hemingway, *supra* note 78, 2.7(G).

n108. 717 S.W.2d 891 (Tex. 1986).

n109. *Id.* at 895.

n110. See Will G. Barber, *Duhig to Date: Problems in Conveyancing of Fractional Mineral Interests*, 13 Sw. L.J. 320, 322-23 (1959).

n111. 671 S.W.2d 870 (Tex. 1984), overruled in part, Luckel v. White, 819 S.W.2d 459 (Tex. 1991).

n112. *Id.* at 871-72.

n113. Id. at 872-74.

n114. See e.g. Tevis Herd, Deed Construction and the "Repugnant to the Grant" Doctrine, 21 Tex. Tech L. Rev. 635 (1990); Robert Bledsoe & John Scott, The Ten Most Regrettable Oil and Gas Decisions Ever Issued by the Texas Supreme Court - and the "Winner" - Based on a Survey, Eighth Annual Advanced Oil, Gas and Mineral Law Course, State Bar of Texas (1990).

n115. 819 S.W.2d 459 (Tex. 1991).

n116. Id. at 460-61. The granting clause conveyed a 1/32 royalty interest, while the "subject to" and "future lease" clauses referred to 1/4 of lease royalties. At the time of the deed, the property was subject to an oil and gas lease with a 1/8 royalty. Leases in effect at the time of suit provided for 1/6 royalties. Id.

n117. Alford, Luckel, and Jupiter Oil Co. v. Snow, 819 S.W.2d 466 (Tex. 1991), a companion case to Luckel, as well as numerous other deed construction cases, are exhaustively treated in Bruce M. Kramer, The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction, 24 Tex. Tech L. Rev. 1 (1993) [hereinafter Kramer, The Sisyphean Task].

n118. See Karl Llewellyn, The Common Law Tradition, Deciding Appeals (1960); Edwin W. Patterson, The Interpretation and Construction of Contracts, 64 Colum. L. Rev. 833 (1964).

n119. Courts are reluctant to admit extrinsic evidence in cases involving interpretation of written instruments. In Texas, admissibility depends on whether the court finds the deed ambiguous or unambiguous. In an overwhelming majority of cases, courts have found the language to be unambiguous. See, e.g., Black v. Shell Oil Co., 397 S.W.2d 877, 887 (Tex. Civ. App. - Texarkana 1965, writ ref'd n.r.e.); Chandler v. Hartt, 467 S.W.2d 629, 634 (Tex. Civ. App. - Tyler 1971, writ ref'd n.r.e.).

n120. This Article only scratches the surface regarding the interpretation process and the use of rules of construction. See Kramer, The Sisyphean Task, supra note 20; Mosburg, supra note 20, 3.06.

n121. See Kramer, The Sisyphean Task, supra note 20, at 124.

n122. See 6A Richard R. Powell, The Law of Real Property P 899[3] (1994).

n123. Kramer, The Sisyphean Task, supra note 20, at 6; see supra note 119.

n124. See generally Kramer, The Sisyphean Task, supra note 20.

n125. 717 S.W.2d 891 (Tex. 1986).

n126. *Alford v. Krum* may be characterized as an extreme application of the "in sequence rule."

n127. 712 S.W.2d 117 (Tex. 1986).

n128. See Kramer, *The Sisyphean Task*, supra note 20, at 84-100, 103-05. Professor Kramer lists and attempts to define a number of additional canons of construction in his article.

n129. *Southland Royalty Co. v. Pan Am. Petroleum Corp.*, 378 S.W.2d 50, 58 (Tex. 1964) (Calvert, J., concurring).

n130. Kramer, *The Sisyphean Task*, supra note 20, at 129. Early in his article, Professor Kramer analogizes his task of rationalizing Texas jurisprudence in the area of judicial interpretation to the task of Sisyphus, a character from Homer's *Odyssey*, who was condemned in Hell to roll a large boulder to the top of a steep hill. Each time Sisyphus got the boulder to the top of the hill, it rolled over the crest and down the other side. Professor Kramer summarized the results of his attempt to "rationalize the myriad canons of construction that have been used and abused in Texas case law" as follows:

To continue the Sisyphean analogy, the boulder has been pushed to the top of the hill several times, only to become dislodged and roll back over me on its headlong journey back down the hillside. I hope, that by exposing the difficulties encountered in the jurisprudence of deed interpretation, to have others join me in the task of pushing the boulder until it comes to rest at the top of the hill.

Id. at 128, n.591.

n131. *Id.* at 128.

n132. See Mosburg, supra note 20, 3.06; supra part IV(A) & IV(B); infra part X.

n133. 135 Tex. 503, 144 S.W.2d 878 (Tex. 1940).

n134. In contrast to rules of construction, which courts may apply in their discretion, rules of law are mandatory if applicable. The court clearly intended the Duhig rule to be a rule of law. *Id.* at 880.

n135. Hemingway, supra note 78, 3.2 at 128.

n136. See *Acoma Oil Corp. v. Wilson*, 471 N.W.2d 476 (N.D. 1991). *Acoma* contains a good statement of the Duhig Rule. The *Acoma* court applied the rule even though the deed did not contain a reservation.

n137. See *Hill v. Gilliam*, 682 S.W.2d 737, 739 (Ark. 1985). In a warranty deed, the grantor warrants that he has title, while in a quitclaim deed the grantor does not warrant anything. He merely conveys whatever interest, if any, that he has. While *Duhig* does not apply to conveyances by quitclaim deed, it apparently does apply to conveyances by special warranty deed - a deed under which the grantor makes only limited warranties. See *Blanton v. Bruce*, 688 S.W.2d 908, 911-14 (Tex. Civ. App. - Eastland 1985, writ ref'd n.r.e.).

n138. 157 Tex. 403, 410, 303 S.W.2d 341, 346 (1957).

n139. See *Hemingway*, supra note 78, 7.8 at 407-08.

n140. *Lange & Leopold*, supra note 9, the four volume work frequently cited in this Article, is the most comprehensive attempt within a single work to deal with potential title problems that might arise in Texas. Even this massive treatise falls far short of answering all potential title questions arising during the course of a title examination.

n141. See, e.g., *Grossman v. Jones*, 157 S.W.2d 448, 451 (Tex. Civ. App. - San Antonio 1941, writ ref'd w.o.m.).

n142. See, e.g., *Best Inv. Co. v. Parkhill*, 429 S.W.2d 531, 534 (Tex. Civ. App. - Corpus Christi 1968, writ dismissed w.o.j.). Any deed, contract, judgment, or other instrument which purports to convey an interest in or make any charge upon land, the invalidity of which would require proof, clouds the owner's title. See also Angus E. McSwain, *Westland Oil Development Corp. v. Gulf Oil: New Uncertainties as to Scope of Title Search*, 35 *Baylor L. Rev.* 629 (1983).

n143. A primary term is "the period of time during which a lease may be kept alive by a lessee even though there is no production in paying quantities by virtue of drilling operations on the leased land or the payment of rentals," and a secondary term is the period after the primary term expires where the lease is continued by operation of the "thereafter" clause. Howard R. Williams & Charles J. Meyers, *Manual of Oil and Gas Terms Annotated* 189, 225 (1957).

n144. If the lease is in its primary term, the cloud can be removed by evidence of expiration of the lease, such as by non-production and non-payment of delay rentals. After the primary term of the unreleased lease expires, the cloud can possibly be removed through physical inspection of the property and a recordable "Affidavit of Non-Production." Someone familiar with operations on the property should execute the affidavit, and if the lease has a pooling clause, the affidavit should cover all lands which might conceivably have been pooled with lands covered by the unreleased lease. See *Mosburg*, supra note 20, 5.03 & 5.07(b).

n145. See *id.* 5.07(d).

n146. See *id.* 5.07(a).

n147. See Tex. Prob. Code Ann. 3 (Vernon 1980 & Supp. 1994). "Probate" is sometimes narrowly defined as the judicial process of proving a will. Modern usage gives the term broader meaning to include all judicial activity related to winding up a decedent's affairs, whether the decedent died testate or intestate. For example, Chapter II of the Texas Probate Code covers intestate succession. This Article uses the term "probate" in the broader sense.

n148. See, e.g., Tex. Prob. Code Ann. 48(a) (Vernon 1980) (Proceedings to Declare Heirship). If a person dies intestate, the court, pursuant to statute, may determine who the decedent's heirs are as well as their respective shares and interests under Texas law.

n149. See Tex. Prob. Code Ann. 37-38 (Vernon 1980 & Supp. 1994). See also Mosburg, *supra* note 20, 5.06(d); Lange & Leopold, *supra* note 9, 1021-1025. At the other extreme, an action to quiet title may be required to set the record straight. See *infra* note 194 and accompanying text.

n150. Numerous Probate Code provisions may impact these determinations. Thus, a title examiner must have broad knowledge of probate matters.

n151. For example, the title examiner may have to determine that the principal was alive at the time the agent executed the instrument. Notably, the power to sell does not include the power to execute oil and gas leases. See *Bean v. Bean*, 79 S.W.2d 652, 654 (Tex. Civ. App. - Texarkana 1935, writ ref'd).

n152. See *infra* part VIII(F). Title standards such as those currently in effect in Oklahoma and those proposed in Texas, as well as local statutes, establish certain presumptions regarding capacity.

n153. *Id.* The title standards referred to in note 166, *infra*, also create certain presumptions regarding identity. See also Mosburg, *supra* note 20, 5.03(d).

n154. The Title Standards referred to in note 166, *infra*, also create presumptions regarding spouses.

n155. See, e.g., *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566, 573 (8th Cir. 1924); Hemingway, *supra* note 78, 5.2 (A-D). Section 5.2(C) of Hemingway discusses the "Open Mine Doctrine," which is an exception to the general rule regarding allocation of interests between the life tenant and remaindermen.

n156. See, e.g., *Rio Bravo Oil Co. v. Weed*, 50 S.W.2d 1080, 1084 (1932), cert. denied, 288 U.S. 603 (1933); *Cox v. Campbell*, 143 S.W.2d 361, 362 (1940). See also Lange & Leopold, *supra* note 9, 371-387.

n157. Many states, including Texas, now have statutes making the public record prima facie evidence of execution and delivery. Tex. Prop. Code Ann. 5.021 (Vernon 1984). See also *Hunter v. Meshack*, 471 S.W.2d 155, 157 (Tex. Civ. App. - Tyler 1971, writ ref'd n.r.e.) (filing of deed for recordation establishes a rebuttable presumption of delivery); *Austin Lake Estates Recreation Club, Inc. v. Gilliam*, 493 S.W.2d 343, 347-48 (Tex. Civ. App. - Austin 1973, writ ref'd n.r.e.) (recording a deed results in a presumption that the grantor intended to effect a conveyance, and no further act of delivery is required); *Sorsby v. State*, 624 S.W.2d 227,

234 (Tex.Civ..App - Houston [1st Dist.] 1981, no writ) (recording a deed is prima facie evidence of grantee's acceptance). See also Mosburg, supra note 20, 5.05.

n158. Interim results of a survey dated October 19, 1989, conducted by the Joint American Bar Association/Oklahoma Bar Association/Oklahoma City University Title Examination Standards Resource Center Project, show that the following 26 states have adopted title examination standards: Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Washington, Wisconsin, and Wyoming.

n159. Lewis M. Simes & Clarence B. Taylor, *Model Title Standards*, 1 (1960) [hereinafter Simes & Taylor].

n160. *Id.* at 6.

n161. *Id.* at 3. See also Rehler, supra note 29.

n162. Compare the Proposed Texas Title Standards, infra note 166, with the Oklahoma Title Standards, infra note 164.

n163. Simes & Taylor, supra note 159, at 3-4.

n164. 16 Okla. Stat. Ann. tit. 16, ch. 1 (West 1986 & Supp. 1994). In addition to publication in the Oklahoma Statutes, the real property section of the Oklahoma Bar Association publishes the Oklahoma Title Standards annually. These standards are widely disseminated and extensively used by Oklahoma practitioners.

n165. *Knowles v. Freeman*, 649 P.2d 532, 535 (Okla. 1982).

n166. The Proposed Texas Title Standards have not been officially published. The latest draft furnished this writer was a discussion draft dated April 6, 1994. All references in this Article to the "Proposed Texas Title Standards" or to specific Texas title standards are to the standards set forth in the the April 6, 1994, discussion draft. To trace the evolution of the proposed Texas Title Standards compare the standards set forth in the discussion draft dated April 6, 1994, with those set forth in the concept draft dated March 1, 1991, appended to Rehler, Proposed Title Examination Standards for Texas, supra note 161.

n167. The following excerpts from Simes & Taylor, supra note 159, at 1-3, illustrate the desirability of title standards:

Perhaps there is no greater delusion current among inexperienced conveyancers than that land titles are either wholly good or wholly bad, and that the determination of the person who has the title is merely a

mathematical process of applying unambiguous rules of law to the abstract of the record. Yet the experienced conveyancer knows that the process of determining the marketability of a title is much more like determining whether, under all the facts, a man has a cause of action for negligence, than it is like the calculation of the amount of income tax a person owes on a given date.

No record, or abstract of the record, gives all the facts from which marketability must be determined... If the practice of conveyancers is not uniform, the tendency always is for the standards of the overmeticulous conveyancer to determine the standards of all conveyancers... Thus, uniform title standards have great remedial value because they crystallize the practices of conveyancers; and instead of being merely the recognized practices of individuals in a profession, they become also the recognized conclusions of the organized profession itself.

n168. See Herd, Title Opinions, *supra* note 20, at 298.

n169. These are title opinions of general application. There are numerous other types of title opinions which are more limited in scope and application and are beyond the scope of this Article. The most commonly encountered of these other title opinions include: (1) purchase opinions - rendered when one or more production owners sell their interests and (2) mortgage opinions - rendered when lenders loan money secured by production. Title opinions can be either broad or quite limited. See John L. Beckham & Charlotte Parker, Title Examination/Opinions, Oil, Gas and Mineral Law for Lawyers and Legal Assistants, Professional Development Program, State Bar of Texas (1990) [hereinafter Beckham]. See also Mosburg, *supra* note 20, 4.05.

n170. "Division order means an agreement signed by the payee directing the distribution of proceeds from the sale of oil, gas, casinghead gas, or other related hydrocarbons. The order directs and authorizes the payor to make payment for the products taken in accordance with the division order." Tex. Nat. Res. Code Ann. 91.401(3) (Vernon 1991) (defining "Division Order"). In other words, a division order is a special type of contract which is revocable at will by either party. As a general rule, division orders, even if erroneous, are binding on the parties until revoked or terminated. See *Exxon Corp. v. Middleton*, 613 S.W.2d 240, 250 (Tex. 1981). However, when an operator benefits from the underpayment of royalty, the underpaid owners can recover for underpayments prior to revocation. See *Gavenda v. Strata Energy, Inc.*, 705 S.W.2d 690, 691-92 (Tex. 1986). See also Hemingway, *supra* note 78, 7.5. For information relating to title attorneys' potential liability for errors or omissions in division order title opinions, see *infra* notes 172-180 and accompanying text.

n171. See appendices; Mosburg, *supra* note 20, 4.05.

n172. 705 S.W.2d 690 (Tex. 1986).

n173. *Id.* at 690-91.

n174. *Id.*

n175. *Id.*

n176. Id. The opinion erroneously concluded that the Gavendas were entitled to a 1/16 royalty interest rather than a 1/2 royalty interest.

n177. Id.

n178. Id.

n179. Id.

n180. Id. at 693.

n181. In view of the attorney's exposure to malpractice liability, the attorney should never sacrifice accuracy for readability. However, the two are not mutually exclusive, and a well-crafted title opinion can accomplish both objectives.

n182. See Mosburg, *supra* note 20, 4.05; Herd, *Title Opinions*, *supra* note 20, at 314-15; Beckham, *supra* note 169, at 20.

n183. The curative process and stand-up title examinations are the two areas which usually call for the greatest degree of teamwork and interaction between the attorney and the landman. See *supra* section V(b).

n184. See Mosburg, *supra* note 20, 5.01.

n185. See Mosburg, *supra* note 20, 5.02, including Appendix Five, Sample Curative Instruments.

n186. See *supra*, parts IV(A) & IV(B).

n187. See Mosburg, *supra* note 20, 5.03.

n188. Id. 5.03; including Appendix Five, Sample Curative Instruments, containing a number of curative affidavit forms. See also J.E. Rehler, *Improving Marketability of Real Property in Texas: Affidavits, Recitals and the Evidentiary Effect of Recording*, 49 *Tex. L. Rev.* 747, 749 (1971); Moses, *The AAPL Guide for Landmen* at 64 (Revised Ed. 1980).

n189. See Mosburg, *supra* note 20, 5.04(a).

n190. Texas has a 3 year, a 5 year, a 10 year, and two 25 year statutes of limitations. See *supra*, note 78; Harold F. Thurow, *Trespass to Try Title*, (Butterworth Legal Publishers 1988), Chs. 13-18 (discussing elements that must be pleaded and proved to obtain title under the Texas limitations statutes).

n191. See generally Mosburg, *supra* note 20, 5.04(b) Some writers have criticized marketable title acts. See, e.g., Shirley N. Jones, *Constitutional and Practical Problems in Legislation to Terminate Non-Productive Mineral Interests*, 3 *Miss. C. L. Rev.* 175, 191 (1983) (Marketable title acts do not relieve mineral interest problems. In fact, they have the potential to create additional problems.).

n192. See J.E. Rehler, *Proposed Marketable Act and Title Examination Standards for Texas*, *Advanced Oil, Gas and Minerals Course, Professional Development Program, State Bar of Texas* (September 1990). Texas does not have a marketable title act, but such an act was proposed in the early 1990s. Oklahoma, Kansas and several other states have such acts. See 16 *Okla. Stat. Ann. tit. 16*, 71-86 (West 1986); *Kan. Stat. Ann.* 58-3401 to 58-3411 (1983).

n193. The "root of title" is the conveyance or other title transaction under which the record title owner claims title. The specified time period varies from 25 to 40 years under most marketable title acts.

n194. See Lange & Leopold, *supra* note 9, 1091 (recognizing other Texas actions that may be brought to resolve title disputes including trespass, slander of title, and declaratory judgment).

n195. See *Ellison v. Butler*, 443 S.W.2d 886 (Tex. Civ. App. - Corpus Christi 1969, no writ). This court concluded that the appellants failed to prove title or show possession which made this a trespass to try title case rather than an equitable proceeding to remove a cloud from title. *Id.* at 889. See also *Bibby v. Preston*, 555 S.W.2d 898, 901 (Tex. Civ. App. - Tyler 1977, no writ) ("The primary requisite in a suit to quiet title is that the plaintiff must prove, and thereby recover on, the strength of his title and not on the weakness or invalidity of his adversary's title").

n196. *Tex. Prop. Code Ann.* 22.001 and 22.002 (Vernon 1984). Trespass to try title is a formal action which emanates from the laws of the Republic of Texas and has its origins in Spanish Law.

n197. *Id.* 22.001. See also *Hill v. Preston*, 34 S.W.2d 780, 787 (Tex. 1931) (The remedy of trespass to try title is given in all cases where right to title or interest and possession of land may be involved.); *City of El Paso v. Long*, 209 S.W.2d 950, 954 (Tex. Civ. App. - El Paso 1947, writ *ref'd n.r.e.*). See generally *Lorino v. Crawford Packing Co.*, 169 S.W.2d 235 (Tex. Civ. App. - Galveston 1943), *aff'd*, 175 S.W.2d 410 (Trespass to try title is the only formal action known to Texas civil law.).

n198. *Tex. R. Civ. P.* 783.

n199. See Lange & Leopold, *supra* note 9, 1093 and cases cited therein.