TITLE MATTERS AFFECTING PARTIES IN POSSESSION:
ADVERSE POSSESSION, AFTER-ACQUIRED TITLE, & THE RULE AGAINST PERPETUITIES

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There is a Dutch proverb that says "counsel before action". But then again, there's a saying that "you don't find peace until you find all the pieces." This paper is an attempt to provide the title examiner with some of the pieces to the title puzzle. Specifically, this paper will analyze and discuss three issues affecting title and the rights of parties in possession: (i) adverse possession, (ii) after acquired title and (iii) the Rule Against Perpetuities.

I. ADVERSE POSSESSION AND TITLE EXAMINATION

It is a fact that the industry and title examination have changed substantially in the past few decades. Historically, rights of parties in possession have been critically important, and, as such, title examiners "back in the day" placed a great deal of emphasis on the facts that were on the ground. Unfortunately in today's age, on the ground inspections have deteriorated to the point where it is not uncommon to see simple sworn statements that fail to provide factual information sufficient to cure title issues or fail to provide enough certainty to be used in a court of law to support testimony regarding ancient document facts. The point is not to provide lectures on how things used to be done, but to provide a context for the changes we are seeing in the industry today.

Training first as a land personnel and then practicing for years as an oil and gas attorney started off something like this:

1. Young, in-house land personnel were typically placed under the direct supervision of an experienced field landman, who would oversee the young land personnel's work. This typically included spending several years curing title in the field and included things like tracking down an elderly resident or two and investigating the historical use and possession over a day or so with such a person. Land personnel would often actually walk the land and identify some of the objects and boundaries of the land. That land person would then go back to the local motel room and type the original and two carbon copies on a portable Royal typewriter. The key was firsthand knowledge and incorporation of the objects and boundaries personally observed in preparing affidavits of use and possession.

2. After meeting the affiants and ensuring that the affidavit correctly included their knowledge, the possession statement would be sent to the examining attorney for review and on occasion he or she would send that land person back to obtain additional information and/or have the affidavit filed of record.

This is not typically seen today. Indeed, some folks may consider this to be "too involved" and may not even be required by attorneys, in-house land personnel or field land personnel who are reviewing or obtaining affidavits of possession. It is not unusual for the possession statement to be waived by some clients as a matter of business judgment.

In today's workplace, land persons and attorneys have better documentation on record as a general rule and many historical issues have been either resolved or are considered not able to be resolved absent a cause of action to clear title. However, affidavits of use and possession are important tools, and this paper will expand upon the reasons why thorough investigation and handling of a possession statement should be of importance to title attorneys and practitioners.

1. Adverse Possession.

"Adverse possession" means an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person.[1] As the court in Satterwhite v. Rosser, 61 Tex. 166 (1884) noted years ago, a party relying upon possession as its claim must:

> "…not only be actual, but also visible, continuous, notorious, distinct, hostile (i.e., adverse), and of such a character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant." (citing therein to Sparrow v. Hovey, 44 Mich., 63; Soule v. Barlow, 49 Vt., 329; 2 Smith's Leading Cases, 561 et seq.; Word v. Drouthett, 44 Tex., 373).

In other words, common law says that you are charged with knowledge of the rights of the parties in possession of the lands examined.

As such, a basic requirement in any title examination should be that the client obtains an affidavit of possession. An examiner who is reviewing record title from sovereignty of the soil to current date needs to provide enough information and comments in his or her opinion to assist the land personnel in obtaining this affidavit of possession.

While the purpose of this section of the paper is to relate adverse possession to title examination, the short amount of time for presentation means that our examination of the doctrine's background is necessarily limited. We note two primary sources of information which are helpful for the practitioner in analyzing case law and history of the doctrine: (i) Lange and Leopold, Land Titles and Title Examination § 996 (2nd Edition 2001), and (ii) a 1996 paper prepared for the Advanced Oil, Gas & Mineral Law Course, State Bar of Texas, Adverse Possession In Texas by Terry N. McClure. In structuring the content of the requirement to obtain an affidavit of use and possession, an examiner may also find Chapter XIII of the Title Examination Standards, including Standard 13.10 - Affidavit Defined, Standard 13.20 - Reliance Upon Affidavits, and Standard 13.30 - Affidavits of Non-Production, to be helpful sources of information.

[1] V.T.C.A., Civil Practice & Remedies Code § 16.021.

Additionally, we note that the Texas Civil Practice and Remedies Code, Chapter 16 contains the following information related to the timing and manner by which a person claiming adverse possession must comport:

Sec. 16.024. Adverse Possession: Three-Year Limitations Period. A person must bring suit to recover real property held by another in peaceable and adverse possession under title or color of title not later than three years after the day the cause of action accrues. Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 16.025. Adverse Possession: Five-Year Limitations Period. (a) A person must bring suit not later than five years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who: (1) cultivates, uses, or enjoys the property; (2) pays applicable taxes on the property; and (3) claims the property under a duly registered deed. Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 16.026. Adverse Possession: 10-Year Limitations Period.

(a) A person must bring suit not later than 10 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property.
(b) Without a title instrument, peaceable and adverse possession is limited in this section to 160 acres, including improvements, unless the number of acres actually enclosed exceeds 160. If the number of enclosed acres exceeds 160 acres, peaceable and adverse possession extends to the real property actually enclosed.
(c) Peaceable possession of real property held under a duly registered deed or other memorandum of title that fixes the boundaries of the possessor's claim extends to the boundaries specified in the instrument. Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1989, 71st Leg., ch. 764, Sec. 1, eff. Sept. 1, 1989.

Sec. 16.027. Adverse Possession: 25-Year Limitations Period Notwithstanding Disability. A person, regardless of whether the person is or has been under a legal disability, must bring suit not later than 25 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property. Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

2. Identifying Issues in Record Title.

There are several areas where a title examiner will encounter issues related to adverse possession. Below are some typical issues encountered by title examiners.

a. Historical Change in Metes and Bounds Descriptions.

In examining a tract from sovereignty of the soil to current date, some examiners may fall into the trap of relying upon acreage recitations in following the particular tract without paying close attention to metes and bounds descriptions. Paying close attention to metes and bounds descriptions is critical because you may very well find that the metes and bounds description of one tract simply does not match up with prior or subsequent tract descriptions.

Frequently an examiner will find that there are gaps and overlaps which exist between the different descriptions and that resurveys of the land may show that what is on the ground differs from what is in record title. An examiner should plot each metes and bounds description and compare said description to the others in the record title to identify gaps or overlaps in areas covered by the historical metes and bounds descriptions. Modern technology programs such as Deed Plotter are readily available for this purpose, and many landmen/abstractors will also plot these out for examiners upon request.

In order to adversely possess the land you have to know the exact area that is being adversely possessed. If minerals are severed from the surface estate, and adverse possession commences after that date of severance, it is axiomatic that the party can only adversely possess what it is able to show it actually possessed in a visible, continuous, notorious, distinct, and hostile manner. As such, it is critical to know "what" was being possessed and "where". Further, plotting each tract by Deed Plotter or otherwise is beneficial because it often will reveal exactly where adverse possession can cure certain title issues and may play into horizontal drilling programs as well. As reflected in Browning Oil Co., Inc. v. Luecke, 38 S.W.3d 625 (Tex.App.–Austin, 2000), horizontal wells have expanded the need to cure these issues since the land within a gap or overlap can become part of a well, i.e. a "drillsite tract". This in turn may affect pooling provisions, which are often based upon allocation of surface acreage to the overall unit. If a land person or practitioner has not properly planimetered (or apportioned) the correct acreage but has instead relied upon an "office survey", the downstream effects can be substantial. In sum, it pays to follow the proper metes and bounds description.

b. Adverse Possession of Minerals.

As referenced above, adverse possession of the surface will not result in adverse possession of minerals that were severed prior to the period that the adverse possession time period commenced. As Lange and Leopold note in their treatise, Land Titles and Title Examination § 993 (2nd Edition 2001):

> …If there has been a *prior* severance of the surface and minerals, possession of the surface alone will not extend to the minerals, and rights to oil and gas so severed cannot be barred or acquired by adverse possession of the surface alone,

> unless the claimant's possession interferes with the rights of the owner with respect to such severed oil and gas, such as by drilling and producing, and taking possession of such minerals.

It is a corollary that if a portion of the mineral estate is severed prior to the commencement of the adverse possession but a remaining portion is not severed, the adverse possessor who successfully acquires title to the surface will also acquire the unsevered portion of the minerals.[2]

c. Adverse Possession in Cotenancy, Landlord-Tenant, & Grantor-Grantee Situations.

Another adverse possession-related issue facing practitioners has to do with cotenants. Under the laws of cotenancy, any "cotenant has a right to be in the possession of property in which he owns an interest…."[3] Therefore, with respect to adverse possession, if the acts of the respective "cotenants and their predecessors in title are susceptible of explanation consistent with the existence of the common title then such acts cannot…give constructive notice to the cotenants out of possession" of such adverse possession.[4] For example, if each of two cotenants has the right to use and be in the possession of the entirety of the property, but one of the cotenants suddenly disappears from record title, is adverse possession available?

The answer is yes, but in order to assert adverse possession against cotenants, "…the cotenants' possession, coupled with prior existing circumstances, must have been of such unequivocal notoriety as to presumably convey to tenants or their predecessors notice of the adverse claim."[5] Court holdings reflect that the adverse possession against a cotenant is possible, but that repudiation over a long period is required. As Lange and Leopold note:

> …in certain situations, the courts of this State have held that acts normally consistent with the cotenancy relationship, if continued for extremely long periods of time by the cotenant in possession, and coupled with non-claimer on the part of the cotenant out of possession, may constitute some evidence of repudiation of the cotenancy relationship and notice thereof. As seen from the cases cited, these periods, both favorable and unfavorable, are 34 years (long enough); 16 years, not long enough; 13 years, 7 months, not long enough; and 27 years, long enough.[6]

Repudiation is an issue not only amongst cotenants, but also between landlord and tenant, and grantor and grantee. If the adverse claimant is a cotenant, landlord or tenant, or a grantor or

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[2] Dixon v. Henderson, 267 S.W.2d 869 (Tex. Civ. App.-Texarkana 1954, no writ).
[3] Lange and Leopold Land Titles and Title Examination § 996 (2nd Edition 2001).
[4] Id.
[5] Id.
[6] Id.

grantee, and the adverse party has not given actual notice of repudiation of the title to the other respective cotenant, landlord or tenant, or the grantor or grantee, as the case may be, Texas courts have held that constructive notice may not be sufficient where shorter periods of time are involved.

Repudiation is often a fact intensive analysis and timing is a key component. In Tex-Wis Co. v. Johnson, 534 S.W.2d 895 (Tex. 1976), the Texas Supreme Court confirmed repudiation without actual notice when they held that, after 53 years of possession by a Mortgagor through a tenancy which ended in 1964, the possession was sufficient to repudiate the Mortgagee's title when the Mortgagee did not take actual possession. The Court went on to note:

> Actual notice of the repudiation …is not required under certain circumstances….notice may be constructive …….to the co-tenant or owner when the adverse occupancy and claim of title to the property is so long continued, open, notorious, exclusive and inconsistent with the existing title of others. It is held that repudiation may be shown circumstances… [that a jury] …may infer from such facts from long continued possession…under claim of ownership and the non assertion of claim by the owners… [that the adverse claimant has repudiated the owner's claim].[7]

d. Distinguishing Coholders From Cotenants.

Another adverse possession-related issue facing practitioners has to do with the distinction of cotenants from coholders. As reflected above, under the laws of cotenancy, any cotenant has a right to be in the possession of property in which he owns an interest, and the repudiation must be of such length and nature that it is evidence of repudiation. However, please note that a distinction in Texas case law is made between adverse possession against "cotenants" versus adverse possession against "coholders".

With respect to cotenants, a cotenant is entitled to possession of the property, and such possession is not adverse to other cotenants absent evidence of repudiation, notice or ouster. However, in a situation where a cotenant sells ***all*** of the property to a third party who is not another cotenant, then that third party may be classified as a *coholder* of the title rather than as a *cotenant* with the non-assigning other cotenants.

Citing therein Page v. Pan American Petroleum Corporation, 327 S.W.2d 469, writ refused, n.r.e. (Civ.App.1959), Lange and Leopold note:

> In those instances where a cotenant sells all of the property to a stranger or one

[7] Id.

who is not one of the other cotenants, such grantee is not a cotenant but a coholder of the title. If such coholder then claims under such deed and goes into possession of the property and otherwise performs the acts necessary to acquire title by adverse possession, except for repudiation of title to other cotenants, it is held…that such parties (the other cotenants and the grantee of the conveying cotenant) were not cotenants but at the most joint owners, and that such joint owner **does not have the burden placed on cotenants to bring a repudiation of the cotenancy home to the cotenant in order to claim title by limitation**. A number of cases are cited by the court in support of its holding. Parr v. Ratisseau, 236 S.W.2d 503, n.r.e. (Civ.App.1951); Jones v. Siler, 129, 129 Tex. 18, 100 S.W.2d 352, 353, (1937); Martinez v. Bruni, 235 S.W. 549 (Com.App.1922); Republic Production Co. v. Lee, 132 Tex. 254, 121 S.W.2d 973 (1939); Bradshaw v. Holmes, 246 S.W.2d 296, n.r.e. (Civ.App.1952).[8] (emphasis added)

By way of our previous example, each of two cotenants has the right to use and be in the possession of the entirety of the property, but one of the cotenants suddenly disappears from record title. If the remaining cotenant then purports to sell all of the property to a third party, the practitioner may find that Page v. Pan American Petroleum Corporation greatly assists the adverse possession issue.

3. Adverse Possession Requirement.

In addition to the specific issues noted above, most title examiners encounter a more common issue, which is an unexplained gap between parties that appear to be strangers in the chain of title. Often, the title examiner may find that the materials under examination do not explain who these parties were or how they claimed their title, if any.

There is the possibility that an examiner could require an investigation into the gap and/or that the gap could be explained by changes in names by marriage, heirship, or otherwise. However, the gap may not be explained by such investigation, or, more likely, the gap happened such a long time ago that resolution of the issue by investigation becomes impractical. The practical solution then becomes obtaining affidavits of possession covering the time periods related to the gaps to determine if possession can be proved to satisfy the requirements of statute and case law.

Consider the following example of a requirement for an affidavit of use and possession:

REQUIREMENT:

The land under examination should be investigated and two or more affidavits

[8] Lange and Leopold Land Titles and Title Examination § 997 (2nd Edition 2001).

secured from disinterested parties showing the use, occupancy and possession of said land for a period of twenty-five years or more, together with specific facts as to improvements, location of all fences surrounding the property and the period of time they have been on said property. The land under examination should also be definitely located on the ground by actual survey, and a plat of such survey should be furnished showing fence lines, roads, natural objects and boundaries.

The underlined areas in the above requirement are those items commonly considered by the courts in deciding whether or not the affiant had actual, personal, and credible knowledge of facts which would establish possession sufficient to meet the statutory requirements. As mentioned previously, having firsthand knowledge, i.e. walking the property, is helpful in analyzing what should be included in the relevant affidavits. Given that it is unlikely for a title examiner to be walking property lines nowadays, it is beneficial to add deed references and additional information to the respective requirement whenever practical. Such information may include specific gaps in time and/or deed references for the legal descriptions both immediately before and after the gap. More often than not, it will be a landman who is helping to cure title issues, and the additional information you supply to him may help to provide you with a quality affidavit.

Some additional tips to consider when encountering adverse possession and providing an adequate requirement that will in turn solicit a legally adequate affidavit:

(i) Actual, specific and credible knowledge is key. The person with specific knowledge should be a disinterested party with no stake in the adverse possession. An interested party may be used if he or she has actual knowledge, but the built in potential for bias makes this a less than ideal choice. It is sometimes helpful to envision a particular affiant on the witness stand in a trespass to try title suit. Would that person be seen as biased?

(ii) When looking at the use, occupancy and possession of said land, your affiant needs to have personal knowledge of the history of the property and how it was used. This may seem obvious, but this should also include information as to *how* that person is familiar with the land, for *how long* that person was familiar with the land, and in *what capacity*.

(iii) In terms of the affidavit's substance and specific facts as to improvements, location of all fences surrounding the property and the period of time they have been on said property, the credibility of the affiant should be reinforced by the affiant's actual knowledge of the fences and/or buildings, any improvements thereto, what the property was used for (e.g. agricultural or grazing if applicable) and when said facts occurred. Remember that the affidavit should be limited to what the affiant knows. Phrases such as "to the best of my belief" or "the best of my recollection" should be avoided if possible.

(iv) [A] plat of such survey should be furnished showing fence lines, roads, natural objects and boundaries, but it should not be regurgitation of a surveyor's plat. Remember that the affidavit is based upon an affiant's personal knowledge. Unless the parties are lucky enough to have an affiant that was also a surveyor, this should be avoided.

4. Other Issues.

In addition to the matters noted above, there are other issues which sometimes get short shrift in terms of examining adverse possession matters. One of these issues deals with taxation. In some situations, an examiner is not provided with tax certificates in his materials examined, and an examiner may be inclined to include a requirement such as:

> We have not reviewed tax certificates reflecting that taxes due and owing on the lands examined have been paid.
>
> **REQUIREMENT:**
>
> You should obtain tax certificates indicating that taxes due and owing from all taxing authorities have been paid.

The need for adequate tax certificates extends beyond the possibility that the minerals, if not severed from the surface, could be subject to foreclosure for nonpayment of delinquent taxes. Use of tax certificates also needs to be considered in the context of adverse possession. Section 16.029, Evidence of Title to Land by Limitations, of the Texas Civil Practice and Remedies Code, holds that:

> In a suit involving title to real property that is not claimed by this state, it is prima facie evidence that the title to the property has passed from the person holding apparent record title to an opposing party if it is shown that: (1) for one or more years during the 25 years preceding the filing of the suit the person holding apparent record title to the property did not exercise dominion over or pay taxes on the property; and (2) during that period the opposing parties and those whose estate they own have openly exercised dominion over and have asserted a claim to the land and have paid taxes on it annually before becoming delinquent for as long as 25 years. (emphasis added).

Accordingly, knowledge of taxation over the prior twenty five years is beneficial in establishing adverse possession.

Another issue where adverse possession may be affected is in the area of unreleased oil and gas leases. An examiner may find numerous oil and gas leases in his or her materials examined for which there is no attending release, and an examiner may be inclined to include a requirement such as:

> "The materials examined reflect that there are oil and gas leases other than the Subject Leases which pertain to the subject property and which are beyond their respective primary terms. We have been furnished with no data evidencing whether said leases have been perpetuated according to their terms or are currently in force and effect.
>
> **REQUIREMENT:**
>
> You should investigate and determine to your satisfaction that the referenced oil and gas leases have expired under their respective terms, or, alternately, you should obtain a release thereof and place same of record."

The potential overlap between unreleased leases and adverse possession is more practical than theoretical. Often times, a practitioner will see that affidavits of non production in lieu of releases are combined *with* affidavits of possession for convenience.

While affidavits of non-production are sometimes combined with affidavits of possession, it is important to note that the two affidavits may cover different lands as well as different purposes. Often, a practitioner may see oil and gas leases covering lands other than the lands being examined in the title opinion, where lands not even adjacent to the lands examined can be included in said lease and maintain the lease well beyond its primary term. If the affidavit of possession is limited only to the lands being examined, there is the possibility that the affiant might not have personal knowledge of the other lands included in the lease or whether same might be keeping the lease in effect.

For this reason, a simple requirement that the unreleased leases be investigated to determine whether or not they are held by production or alternately that they be released of record should be considered. To borrow a cliché, it is advisable not to mix your apples and your oranges when it comes to affidavits of non-production and affidavits of possession.

II. AFTER ACQUIRED TITLE ISSUES

1. The Doctrine.

An often overlooked puzzle piece facing title examiners is the concept of after acquired title. The doctrine of after acquired title holds that if a grantor purports to convey ownership of real property to which he does not have legal title at the time of the conveyance, but the grantor later

acquires that title, it automatically vests in the grantee. The concept is simple enough: the doctrine does not allow a party the benefit of selling all of the property when that party does not own it all, and then saying "gotcha" when he receives the remainder of that interest. The remainder of that interest will go to the grantee, except in certain situations as discussed herein.

Under the doctrine of after acquired title, when someone conveys land by warranty of title or in a way as to be estopped from disputing the title of his grantee, title which the grantor subsequently acquires to that land will pass "eo instante" to his warrantee, binding both the warrantor and subsequent purchasers from either party.[9] Possibly the most well known case dealing with this issue is Duhig v. Peavy-Moore Lumber Co., in which the Texas Supreme Court held:

> It is the general rule, supported by many authorities, that a deed purporting to convey a fee simple or a less definite estate in land and containing covenants of general warranty will estop the grantor from asserting an after acquired title or interest in land, or the estate which the deed purports to convey, as against the grantee and those claiming under him.[10]

After acquired title is binding not only on the original grantor and its successors-in-interest, but is also binding on subsequent purchasers from the original grantor who acquired the interest with actual or constructive notice of the prior conveyance.[11] A subsequent purchaser under the original grantor, who may not have actual notice of what the grantor represented that he was conveying, is nevertheless placed on constructive notice by the recordation of the original conveyance instrument in the official public records of the county where the property is located.[12] In such an event, that purchaser cannot claim to be an innocent purchaser entitled to recover such additional interest.[13] Any practitioner that examines title can see the inherent dangers that this may cause.

2. *Bases Used by Courts in Applying the Doctrine.*

More often than not, Texas courts have been less than clear on the rationale used for applying the doctrine of after acquired title. However, certain learned commentators have noted that the doctrine of after acquired title has been applied in numerous Texas cases under one of at least three major prongs.[14] The three general prongs where the courts have applied after acquired

[9] Hardy v. Bennefield, 368 S.W.3d 643 (Tex.App. – Tyler 2012, no pet.).
[10] Duhig v. Peavy-Moore Lumber Co., 135 Tex. 503, 144 S.W.2d 878, 880 (1940).
[11] Caswell v. Llano Oil Co., 36 S.W.2d 208, 211 (1931), citing Leonard v. Benford Lumber Co., 110 Tex. 83, 216 S.W. 382 (1919); Robinson v. Douthit, 64 Tex. 101 (1885); Davis v. Field, 222 S.W.2d 697, 699 (Tex.Civ.App. - Fort Worth, 1949 writ ref'd. n.r.e.).
[12] Jones v. P.A.W.N. Enterprises, 988 S.W.2d 812, 819 (Tex.App. – Amarillo 1999, pet. denied).
[13] Caswell, 36 S.W.2d at 211.
[14] Richard W. Hemingway, *After Acquired Title in Texas,* 20 S.W. L.J. (No. 1), 117 (1966).

title doctrine are:

A. “Warranty Cases”, being those particular cases where the court applied after acquired title on a covenant of warranty in a particular deed to prevent a "circuitry of action on the covenant";

B. “Estoppel Cases”, being those particular cases where the court applied after acquired title on the basis of estopping a grantor from denying the title he purported to convey to the grantee; and,

C. “Estoppel/Warranty Cases”, being those particular cases where the court applied after acquired title on the basis of estopping a grantor from denying the title he purported to convey to the grantee on the basis of a warranty contained in the conveyance.

Certain courts have combined elements of warranty and estoppel as a basis for applying after acquired title. However, in quite a few other cases, the basis of the court's decision is simply not determinable.[15] Notwithstanding the lack of a determined rationale, one should note that Texas courts have consistently permitted the application of the after acquired title rule to pass title to real property by estoppel and that Texas courts have not limited damages to a breach of warranty action.[16]

Consequently, in Texas today, the application of the after acquired title doctrine does not depend solely on the breach of an obligation created by a title warranty. Rather, the presence of a warranty goes to the nature of the grantor's *manifested intent*, indicating whether or not he purported to convey the land described and describing the estate of land he actually intended to convey.[17] The courts look to the equitable principles of "good faith, right conscience, fair dealing and sound justice" in deciding to apply the after acquired title rule.[18]

3. Conveyance Instruments that an Examiner is Likely to Encounter.

In addition to being applied in the general circumstances above, it is noted that after acquired title doctrine is also applicable to instruments other than standard conveyance deeds.

a. Deeds of Trusts and Liens.

Texas courts have clarified that the after acquired title doctrine also applies to deeds of

[15] See Hemingway, *supra* at 99-101 for an extensive recitation of Texas caselaw.
[16] Hemingway, *supra* at 117.
[17] Lindsay v. Freeman, 18 S.W. 727, 729 (Tex. 1892); Blanton v. Bruce, 688 S.W.2d 908, 911 (Tex.Civ.App. - Eastland 1985, writ ref'd n.r.e.); Hemingway, *supra* at 118.
[18] Lindsey, 18 S.W. at 730.

trust.[19] The rationale behind the courts' decisions is that mortgages and deeds of trust generally contain covenants that warrant title to the encumbered property. The courts have found that the mortgagor, having made such covenants, will not be allowed to assert title to after acquired property that was the subject of his covenant.[20] When a deed of trust or mortgage encumbers a conveyed interest and the lien holder subsequently forecloses on his lien, the question arises as to whether the foreclosure affects the application of the after acquired title doctrine. Texas courts have held that the after acquired title doctrine still applies despite the foreclosure.[21] It is noted that Texas courts have applied after acquired title to lien issues regardless of whether the interest in question was a fee interest granted on a deed or was a fee simple determinable granted under an oil and gas lease.[22]

The doctrine has also been applied to other types of liens, such as a mechanic's and materialman's lien.[23] A Texas appellate court has found the holder of materialman's lien could foreclose on after acquired property because the owner recited in the lien document that he and his wife were the owners of the property on which the lien was granted.[24] With respect to application of after acquired title to liens, the following examples are noted:

Example 1: The Burns Case.

> A father conveyed property to his daughter in 1942 by general warranty deed. At the time that the father conveyed the property to his daughter there existed a judgment lien encumbering one-half of the property. The lien holder foreclosed the lien and a third party purchased the encumbered one-half interest at a foreclosure sale in May 1945. In August 1945, the father purchased the foreclosed property from the third party purchaser. The court held that neither the foreclosure nor the third party's subsequent purchase of the property at the foreclosure sale divested the daughter of her right to the after acquired property or prevented the application of the after acquired title rule. Title passed to the daughter the moment the father acquired the property from the third party.[25]

[19] Shield v. Donald, 253 S.W.2d 710, 712 (Tex Civ.App. - Fort Worth 1952, writ ref'd. n.r.e.); Galloway v. Moeser, 82 S.W. 2d 1067, 1069 (Tex.Civ.App. - Eastland 1935, no writ); Logue v. Atkeson, 80 S.W. 137, 140 (Tex. Civ. App. 1904, writ denied).
[20] Shield, 253 S.W.2d at 712.
[21] Burns v. Goodrich, 392 S.W.2d 689, 693 (Tex. 1965); Cherry v. Farmers Royalty Holding Co., 138 Tex. 576, 160 S.W.2d 908, 911 (1942).
[22] Caswell, 36 S.W.2d at 211-212.
[23] Land Title Bank & Trust Co. v. Witherspoon, 126 S.W.2d 71, 73 (Tex.Civ.App. 1939).
[24] Id.
[25] Burns, 392 S.W.2d at 693.

Example 2. The Caswell Case, and the oil and gas shell game.

A landowner executed an oil and gas lease covering property that was subject to a deed of trust lien. The lien holder foreclosed the deed of trust lien and conveyed title to a third party, whereupon the lease was "cancelled and terminated." The third party conveyed the property to the original landowner who executed an oil and gas lease to the second lessee. In the suit between the two lessees, the court held that by virtue of the general warranty clause in the first lease, the after acquired title doctrine applied and, upon the original landowner's acquisition of the property, the first lessee acquired its leasehold interest and it was again valid.[26]

It is because of this concept that deeds of trust in Texas usually include an express after acquired property clause stating that the deed of trust lien attaches to all after acquired property of the grantor so long as the lien is still in effect. Without a provision expressly conveying any after acquired title to the mortgagee until the debt is paid off, the mortgagee's lien will attach only to the property specifically described in the deed of trust.

b. Oil & Gas Leases and Limitations.

In contrast to foreclosure of a lessor's title discussed in the Caswell case in example 2, above, Texas courts have declined to apply the Duhig rule, which is based on the after acquired title doctrine, to oil, gas and mineral leases where the lessor acquired an additional interest after execution of the lease.[27]

Example. The McMahon Case.

The court noted that in many instances an oil and gas lease purports to cover the entire mineral estate, even though the parties know that the lessor only owns an undivided interest in the land, in order to make certain that no fractional mineral interest is left outstanding in the lessor.

The court reasoned that if the lease contains the standard provisions, the lessee is protected against overpayment of royalties by the inclusion of a proportionate reduction clause in the lease, thus application of the Duhig doctrine is unnecessary.

The clause does not, however, operate to reduce the estate that the lessor

[26] Caswell, 36 S.W.2d at 211-212.
[27] McMahon v. Christmann, 157 Tex. 403, 303 S.W.2d 341 (1957).

purports to convey, which application of the rule in Duhig could do. The application of the Duhig doctrine could prevent the landowner from asserting his royalty, allow the lessee who drafted the lease to take the lessor's entire mineral estate without having to pay royalties to the lessor, and permit the lessee to recover damages from the lessor for breach of warranty.

In the event that a lessor acquires an additional interest after execution of the lease, rather than rely upon after acquired title, it is instead advisable to make a requirement, wherein the client acquires from the lessor a ratification of the original oil and gas lease that includes present words of grant for any additional acquired mineral interest that were acquired subsequent to the execution and delivery of the lease.

c. Public Lands.

With respect to public lands, Texas courts have declined to apply the after acquired title doctrine to attempted conveyances of public land by private individuals. The courts consider such conveyances to be in derogation of public rights and void as against public policy. As such, title to any after acquired interest in the land will be void.[28] The courts have also applied this limitation to a sovereign in the circumstance where the sovereign conveyed to a private individual public land that later became the subject of a boundary dispute between sovereign states.[29]

Example. The Jones v. P.A.W.N. Enterprises Case.

Oklahoma, under its authority and laws, patented certain lands to a private person, who conveyed one-half of the minerals to a predecessor in interest to P.A.W.N Enterprises. A subsequent boundary dispute occurred between the States of Texas and Oklahoma, and in the settlement thereof, title to the land became vested in Texas. Texas then patented the land, under its authority and laws, to the heirs of the original Oklahoma grantee, who conveyed the property to Jones.

Thereafter, P.A.W.N. claimed the one-half mineral interest under the Oklahoma conveyance based on the after acquired title doctrine, stating that when the heirs of the original Oklahoma grantee acquired a patent from the State of Texas, title to the one-half mineral interest went immediately to P.A.W.N. The court noted that in instances of boundary disputes, unlike instances of ceded or conquered territory, the sovereign originally creating title, i.e. the State of Oklahoma in this case, was not in rightful possession of the land. Accordingly, the exercise by the

[28] Lamb v. James, 87 Tex. 485, 29 S.W. 647, 649 (1895).
[29] Jones v. P.A.W.N. Enterprises, 988 S.W.2d 812 (Tex.App. - Amarillo 1999, pet. denied).

State of Oklahoma of its governmental powers in patenting such public lands was done without vested authority. Because the State of Oklahoma never had title to the land, its patenting of the land to the private persons and all subsequent conveyances of interests in the land, including the one-half mineral interest, were invalid and the doctrine of after acquired title was not applicable.

d. Title Acquired in Trust.

Texas courts have declined altogether to apply the doctrine of after acquired title to estates acquired and held in trust for another party.[30] The rationale is that the doctrine of after acquired title cannot not be used to benefit a grantee whose grantor is holding the interest in trust for a third party, because the grantee is not entitled to claim greater rights than his grantor under such subsequent title.[31] While the grantor holding in trust may have legal title to the property, he has no beneficial rights in such land.[32] Consequently, he has nothing to convey to his grantee.[33] The same is true where legal title is held by virtue of a fraud and a constructive trust is imposed in equity.[34]

Example. The Newton v. Easterwood Case.

A sheriff's sale was the result of fraudulent litigation begun and prosecuted for the purpose of unjustly depriving an infant ward of the title to his land. The court found the purchasers at the foreclosure sale, who had been involved in the fraud, did not acquire legal or equitable title by their purchase at the sale, or, if they did acquire legal title, they held the title in trust only for the benefit of the victim of their fraud.

The court made no distinction between a trust held actively or constructively when it stated that estoppel will not operate to transfer title to a party who is holding property in his own name for the benefit of another.

e. Quitclaims and Limitations.

Texas courts have also limited their application of the after acquired title rule to conveyance instruments that convey a specific interest in the land itself and not just the grantor's title to the land,

[30] MacDonald v. Sanders, 207 S.W.2d 155, 158 (Tex Civ.App. - Texarkana 1947, writ ref'd n.r.e.); Newton v. Easterwood, 154 S.W. 646, 650 (Tex.Civ.App. - Texarkana 1913, writ ref'd).
[31] MacDonald, 207 S.W.2d at 158.
[32] Id.
[33] Id.
[34] Newton, 154 S.W. at 650.

whatever it may be at the time of the conveyance.[35] A quitclaim, by definition, is a deed of conveyance intending to pass any title, interest or claim of the grantor, but not professing that such title is valid.[36] As a result, the courts will not apply the doctrine where a quitclaim deed is involved.[37]

In past Texas court cases, this limitation would apply to a conveyance where a grantor conveyed all of its "right, title, and interest" in a described property because the courts viewed such language as constituting a mere quitclaim.[38] The courts also held that the purchaser of the grantor's "right, title, and claim" to land was not an "innocent purchaser."[39] Accordingly, unless the document or other evidence reflected an intent to convey the land itself, or contained recitals specifying a quantum of interest, the grantor only conveyed whatever interest he actually had at the time of the conveyance.[40] The result of these past cases was that any subsequently acquired interest did not contradict a quitclaim deed and the after acquired title doctrine would not apply.[41] This limitation controlled even if the deed contained a warranty because the rationale was that the warranty would not enlarge the intended grant.[42]

But what really defines a quitclaim? Both past and recent cases indicate that what constitutes a quitclaim could be less straightforward than what a practitioner might initially suspect. A problem arises when the conveyance instrument contains a description of land and it is not clear if the language is merely describing the source of the title conveyed or if it is describing the actual interest being conveyed. This may happen when a draftsman attempts to clarify a property description by referencing a prior deed and the prior deed limits the interest conveyed. The question then becomes whether the reference to the prior deed is for the purpose of giving the source of title (i.e. description) or if it is for the purpose of limiting the interest conveyed (i.e., the grant). Some courts have interpreted such clauses as not restricting the granting clause and applying the after acquired title doctrine so that the deed estops the grantor from claiming after acquired title,[43] whereas other courts have interpreted such a clause to describe the interest being actually conveyed and therefore not applying after acquired title.[44]

In recent cases dealing with the determination of whether an instrument is a quitclaim or not, the courts have looked to the parties' intent as it appears from the language of said instrument.[45] What is important and controlling is not whether the grantor actually owned the title to the land

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[35] Clark v. Gauntt, 138 Tex. 558, 161 S.W.2d 270, 273 (1942).
[36] Rogers v. Ricane Enterprises, Inc., 884 S.W.2d 763, 769 (Tex.1994).
[37] Halbert v. Green, 156 Tex. 223, 293 S.W.2d 848, 851 (1956).
[38] Daugherty v. Yates, 35 S. W. 937 (Tex.Civ.App. – 1896, no writ).
[39] Marshburn v. Stewart, 295 S. W. 679 (Tex.Civ.App. – Beaumont 1927, writ dism'd w.o.j.).
[40] Clark, 161 S.W.2d at 273.
[41] Id.
[42] Wilson v. Wilson, 118 S.W.2d 403, 405 (Tex.Civ.App. - Beaumont 1938, no writ).
[43] Duhig, 144 S.W. at 879-880; Rettig v. Houston West End Realty Co., 254 S.W. 765, 768 (1923).
[44] Wilson, 118 S.W.2d at 405. See Hemingway, *supra* 119-123 for a thorough discussion of drafting issues.
[45] Enerlex, Inc. v. Amerada Hess, Inc., 302 S. W. 3d 351 (Tex.App. – Eastland 2009, motion granted, rehearing overruled).

conveyed, but whether the deed purported to convey the property.[46]

Example. The Enerlex Case.

> In Enerlex, Inc. v. Amerada Hess, Inc., the deed contained a general warranty, but was nevertheless determined to be a quitclaim. Specifically, in the deed in question, the grantor conveyed to Enerlex:
>
> > [A]ll right, title and interest in and to all of the Oil, Gas, and any other classification of valuable substance, including any mineral leasehold and royalty interests, including any future or reversionary interest, in and under and that may be produced from the following described lands situated in Gaines County, State of Texas, to wit: WTTR Survey, Block G, Sections 160–230 inclusive.
> >
> > …It is the intent of Grantor to convey all interest in the said county whether or not the sections or surveys are specifically described herein…
> >
> > ….Grantor does hereby warrant said title to Grantee it's [sic] heirs, successors, personal representatives, administrators, executors, and assigns forever and does hereby agree to defend all and singular the said property unto the said Grantee herein it's [sic] heirs, successors, personal representatives, administrators, executors, and assigns against every person whomsoever claiming or to claim the same or any part thereof.[47]
>
> The court held that the grantor did not warrant or represent that she actually owned any mineral interest. Even though the deed contained a general warranty and did not contain any "as is" or "without warranty" language, the deed when viewed in its entirety was determined to be a quitclaim deed rather than a warranty deed.

Phrased another way, in Enerlex the deed did not purport to convey any specific title but broadly conveyed all of the grantor's interest. This should be of particular concern for a practitioner when he or she is drafting a deed or reviewing same in a title examination.

4. Effects on Notice and Purchasers.

As referenced above, it is important to note that after recording, the doctrine of after acquired title is also binding on subsequent purchasers from the original grantor who acquired the

[46] Enerlex, 302 S.W.3d at 355 citing Am. Republics Corp. v. Houston Oil Co. of Texas, 173 F.2d 728, 734 (5th Cir.1949); Cook v. Smith, 174 S.W. 1094, 1096 (1915).
[47] Enerlex, 302 S.W.3d at 354.

interest with actual or constructive notice of the prior conveyance.[48] A subsequent purchaser under the original grantor, who may not have actual notice of what the grantor represented that he was conveying, is nevertheless placed on constructive notice by the recordation of the original conveyance instrument in the official public records of the county where the property is located.[49] In such an event, that purchaser cannot claim to be an innocent purchaser entitled to recover such additional interest.[50]

Before discussing the effects of after acquired title doctrine upon subsequent purchasers and notice provisions, however, one must first understand who qualifies as a subsequent purchaser, what protections are afforded a subsequent purchaser, and what duty a party has to search the records.

a. Subsequent Purchaser.

A subsequent purchaser means a purchaser who is subsequent in the chain of title of the grantee of the recorded deed, rather than one who is simply subsequent in time after the deed is recorded.[51] Texas courts have stated that the object of the recording statutes is to give notice to a grantee who would have reason to search for conveyances prior to his own, but not to give notice of conveyances out of his grantor after the grantee's purchase.[52] Such subsequent conveyances would be outside of the chain of title under which the first grantee purchased.[53] Everyone who derives title from the first grantee can insist on the same principles with respect to himself.[54] Phrased another way, a purchaser is charged with knowledge of the provisions and contents of recorded instruments as well as notice of the terms of deed which form an essential link in their chain of ownership.[55]

b. Protections.

The recording statutes, which are located in the Texas Property Code, §§ 12 and 13, et seq., protect a subsequent purchaser who acquires property for valuable consideration and without notice of a prior document or circumstance affecting his title. Specifically, Section 13.001(a) of the Texas Property Code, known as the Texas recording statute, is often referred to as a notice statute. To get protection under the recording statute, a purchaser must "acquire the property in good faith, for value and without notice of any third-party claim or interest".[56] An unrecorded conveyance of an interest in real property is void as to a subsequent purchaser who buys the property for valuable consideration and without notice; thereby making the converse true - the unrecorded instrument

[48] Caswell, 36 S.W.2d at 211, citing Leonard v. Benford Lumber Co., 110 Tex. 83, 216 S.W. 382 (1919); Robinson v. Douthit, 64 Tex. 101 (1885); Davis v. Field, 222 S.W.2d 697, 699 (Tex.Civ.App. -- Fort Worth 1949, writ ref'd. n.r.e.)
[49] Jones, 988 S.W.2d at 812.
[50] Caswell, 36 S.W.2d at 211.
[51] White v. McGregor, 92 Tex. 556, 50 S.W. 564, 565-566 (1899); Houston Oil Co. v. Kimball, 103 Tex. 94, 122 S.W. 533, 540 (1909).
[52] Houston Oil, 122 S.W. at 540.
[53] Id.
[54] White, 50 S.W. at 566.
[55] City of Edinburg v. A.P.I. Pipe and Supply, LLC, 328 S. W. 3d 82 (Tex.App. – Corpus Christi 2010, pet. granted).
[56] Hue Nguyen v. Chapa, 305 S. W. 3d 316, 323 (Tex.App. – Houston [14th Dist.] 2009, pet. denied).

will be binding on a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument.[57] It is a conclusive presumption of law that the proper and legal recording of a deed in the county where the land lies is constructive notice of the recorded deed's existence.[58]

For purposes of this paper, the authors have assumed that the subsequent purchaser has paid valuable consideration and will deal only with the notice portion of the statute as it relates to after acquired title. The relevant portion of the current statutes is Section 13.001, which provides that a conveyance of real property "is void as 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." [59] Thus, a prior purchaser can protect himself from a subsequent purchaser who is without notice of the prior purchaser's rights only by recording his prior conveyance before the subsequent purchaser purchases the property. A recording of the prior deed after the subsequent purchaser has completed his purchase will not affect the subsequent purchaser's protection under the recording statutes, even if the recording of the prior deed is prior to the recording of the subsequent purchaser's deed. The subsequent purchaser's protection exists even if he never records his own deed.[60]

c. Duty to Search.

To get protection under Section 13.001(a) of the Texas Property Code, a purchaser must "acquire the property in good faith, for value and without notice of any third-party claim or interest".[61] The notice of third party claim or interest may be actual notice or may be constructive notice. So while it is a general rule that an unrecorded interest in real property is binding on those who have actual knowledge of the interest,[62] constructive notice is also sufficient. The presence of properly recorded documents in the record provides constructive notice to a subsequent purchaser of all documents in his chain of title that have been "acknowledged, sworn to, or proved and filed for record as required by law."[63] Further, a person may be charged with constructive notice for purposes of bona fide purchaser status for a deed outside his chain of title if the facts within the chain of title would place a reasonably prudent person on notice.[64] When a purchaser does not examine the deed records or make inquiries, he will be charged with notice of what would have been reasonably discovered.[65]

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[57] Id.
[58] Jones v. Clem, 2012 WL 1069168 (Tex.App. – Eastland 2012, no pet.) (mem. op.) citing White v. McGregor, 50 S. W. 564 (1899).
[59] Tex. Prop.Code Ann. § 13.001 (Vernon 2004).
[60] White, 50 S.W. at 565-566; Houston Oil, 122 S.W. at 540.
[61] Hue Nguyen, 305 S. W. 3d at 316.
[62] Tex. Prop.Code Ann. § 13.001(b) (Vernon 2004).
[63] Id.
[64] Aston Meadows, Ltd. v. Devon Energy Production Co., LP, 359 S. W. 3d 856 (Tex.App. – Fort Worth 2012, pet. denied).
[65] Hamrick v. Ward, 359 S. W. 3d 770 (Tex.App. – Houston [14th Dist.] 2011, pet. filed), Fletcher v. Minton, 217 S. W. 3d 755 (Tex.App. – Dallas 2007, no pet.).

(i) Early Texas Cases.

The question arises regarding the duty a subsequent purchaser has to search the records and the time period within which he or she is required to search. Early Texas courts established that to qualify as a subsequent purchaser, the purchaser had a duty to search the records and the period of the required search was from the date of the conveyance instrument into a grantor rather than from the date of the recording of the conveyance.[66] As a result, the duty of a subsequent purchaser originally was to look back to the date of each conveyance in his chain of title and run the name of each grantor backward and forward. This duty required an exhaustive search because each name had to be run back to the Patent and forward to the present. The recordation date of the conveyance instrument did not matter for purposes of running the title into a purchaser's grantor, so long as the recordation date was prior to the date of a grantor's conveyance to his grantee.[67]

These early cases also established the subsequent purchaser in situations where both senior and junior chains of title for a property existed. This junior/senior chain situation occurs when a common grantor creates two chains of title. The second or junior chain holder is, by necessity, the subsequent purchaser, because the senior chain holder, based on the date of his conveyance document is the first in the title chain.[68] As the subsequent purchaser, the junior chain holder will be the party protected by the recording statutes, but he will also have constructive notice of all recorded documents in his chain of title, which, as the junior chain, includes documents in the senior chain. The same is not true of the senior chain holder. The early cases established that the senior claim holder is not required to take constructive notice of the recorded documents in the junior chain. Consequently, anyone claiming under the senior chain holder will have the same position as the senior chain holder, will be considered prior to anyone in the junior chain, and, in relation to the junior chain holder, cannot be the subsequent purchaser. Because the senior chain holder and those claiming under him are not subsequent purchasers, the recording statutes will not protect them.

The rationale for the junior/senior chain relationship and who is the subsequent purchaser is that after the second deed from the common grantor is recorded, the second deed does not give notice to the first purchaser because he already owns the land. The courts do not require the first purchaser to continuously search the records to see if his grantor created a second chain of title or something has happened that affects his interests. Neither do the courts require those who hold under the first purchaser to look for subsequent deeds for the reason that such deeds are out of the chain of title under which they purchased.[69] For our purposes of analyzing after acquired title, we will use this limited explanation. However, for complete analysis and reference to supporting citations we would refer you to Lange and Leopold, *supra* at §884.

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[66] White, 50 S.W. at 565-566; Houston Oil, 122 S.W. at 540.
[67] White, 50 S.W. at 565-566.
[68] White, 50 S.W. at 565-566; Houston Oil, 122 S.W. at 540.
[69] White, 50 S.W. at 565-566; Houston Oil, 122 S.W. at 540.

(ii) Breen Exception.

In the Breen v. Morehead case, the Court created an exception or limitation to the subsequent purchaser and constructive notice rules by instead limiting the period of time required to be searched by a subsequent purchaser to the period coming forward from the date title vests in each grantor in his chain of title to the present.[70] As a result, the subsequent purchaser no longer had to look for conveyances out of his grantor that were made before the date of the deed that vested in the grantor title to the interest being conveyed to the grantee. Once the subsequent purchaser locates his grantor's vesting deed, he does not need to inquire further back.[71] Further, a purchaser of property is not charged with notice of deeds on the same property which are recorded outside of his chain of title.[72]

The extent to which the documents that are referenced in recorded conveyances puts a subsequent purchaser on notice has also been well defined in the Westland Oil Development Corp. v. Gulf Oil Corp case.[73] In Westland, the court stated that a subsequent purchaser is bound by recitals referenced in any instrument in the chain of title under which he claims. The court held that a 1968 conveyance, which referred to a 1966 letter agreement that provided for Westland to receive an overriding royalty and a working interest, was binding on the grantee in the conveyance.

III. THE RULE AGAINST PERPETUITIES

1. The Nature of the Rule.

Simply stated, the Rule Against Perpetuities (the "Rule") is a constitutional mandate that no interest within its scope is good unless it must vest, if at all, not later than twenty-one years after some life in being at the time of the creation of the interest, plus the normal period of gestation.[74] However, determining if the Rule applies to an estate or interest and, if it does apply, if the determination whether the instrument creating the estate of interest violates the Rule is often less than simple.

a. What is a perpetuity?

Texas common law defines a perpetuity as a limitation on the alienability of property that causes the property subject to the limitation to be out of free trade and commerce for the period of

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[70] Breen v. Morehead, 104 Tex. 254, 136 S.W. 1047, 1048-1049 (1911); Williams v. Cook, 282 S.W. 574, 575 (1926); Hemingway, *supra* at 131-133.
[71] Breen, 136 S.W. at 1048.
[72] Hahn v. Love, 2012 WL 2153675 (Tex.App. – Houston [1st Dist.] 2012, no pet. h.). For a more detailed example following the application of Breen and subsequent purchasers, please see the predecessor to this article in the Rocky Mountain Mineral Law Foundation Journal. Donald G. Sinex and Susan A. Stanton, *After Acquired Title Revisited*, Rocky Mountain Mineral Law Foundation Journal, Mar/Apr 2005, at 429-442.
[73] Westland Oil Development Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 908 (Tex. 1982).
[74] Brooker v. Brooker, 130 Tex. 27, 106 S.W.2d, 247, 254 (1937); Clarke v. Clarke, 121 Tex. 165, 46 S.W.2d 658, 661 (Comm'n App. 1932, opinion answering certified questions adopted)

the perpetuity.[75] The period that creates a perpetuity is a period of time greater than a life or lives in being at the creation of the interest, plus twenty-one years thereafter, plus the normal period of gestation.[76] If the vesting of an estate or interest does not depend upon a life in being, the limit of time against a perpetuity is simply twenty one years.[77] Although the Texas Constitution prohibits perpetuities and monopolies, neither the constitution nor Texas statutes define the term "perpetuities". This absence leaves the common law definition as the law of the State on the issue.[78]

b. Background and Policy Considerations.

The Texas Constitution prohibits perpetuities and monopolies stating they are "contrary to the genius of free government and should never be allowed . . . ." [79] The framers of the Texas Constitution believed in an unrestrained power to convey or transfer property. This belief had its origins in English common law, which held it was a public evil to permit limitations on the marketability of property over long periods of time. The Rule Against Perpetuities was developed to shorten the period that the unrestrained power to convey could be limited. The period beyond which a restriction of the power of alienation would not be valid was eventually decided to be twenty-one years after some life or lives in being at the creation of the interest, plus the gestation normal period.[80]

Texas courts fully support the framers' belief. They note that the Rule Against Perpetuities expresses one of the basic principles of our system of government and was founded on public policy intended to prevent the undue hampering of the power to alienate estates.[81] They consider the Rule to constitute "a peremptory command of constitutional law that must be relentlessly enforced" and, if by any possible contingency a devise or grant violates the Rule, the transfer cannot stand and must be held void.[82] Texas courts also consider the Rule to be a rule of property and not merely a rule of construction, however, they note that the courts must ordinarily interpret a written instrument to be able to apply the Rule. [83]

c. Texas Savings Statute and the Doctrine of Cy Pres.

Despite judicial statements that the Rule Against Perpetuities is one of "high public policy" to be relentlessly enforced, Texas courts prefer a construction that will render a contract or a

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[75] 34 Tex. Jur. 3d Estates §55 et. seq. (WL database 2013). *See also,* C. Stephens Saunders and Nicole B. Erickson, *The Rule Against Perpetuities*, Tex. State Bar 18th Advanced Real Estate Drafting Course, Chapter 10 (2007) [Hereinafter "Saunders and Erickson"].

[76] Brooker v. Brooker, 106 S.W.2d at 254.

[77] Henderson v. Moore, 144 Tex. 398, 190 S.W.2d 800, 801 (1945).

[78] Tex. Const. Ann., Art. I, §26 (Vernon 2007); Hunt v. Carroll, 157 S.W.2d 429, 436 (Tex. Civ. App. – Beaumont 1946), writ dism'd, Carroll v. Hunt, 140 Tex. 424, 168 S.W.2d 238 (Comm'n App. 1943, opinion adopted).

[79] Tex. Const. Ann., Art. I, §26 (Vernon 2007 and Supp. 2012).

[80] *Id.*; See also, Saunders and Erickson, *supra* note 75, at 3-4.

[81] Kelly v. Womack, 261 S.W.2d 599, 601 (Tex. Civ. App. – El Paso 1951), judgment rev'd on other grounds, 153 Tex. 371, 268 S.W.2d 903 (1954).

[82] Brooker v. Brooker, 106 S.W.2d at 254;

[83] Brooker v. Brooker, 106 S.W.2d at 254; Bagby v Bredthauer, 627 S.W.2d 190, 194 (Tex. App. – Austin 1981, no writ).

testamentary disposition enforceable rather than invalid, even when the Rule Against Perpetuities is involved.[84] For example, where an ambiguity exists and an instrument is capable of two constructions, Texas courts generally choose the construction that upholds the instrument.[85] The courts' preference is based, at least in part, on the "cardinal principal that the intention of the grantor shall govern" and the assumption that the grantor intends to create a valid instrument rather an illegal one.[86] If doubt exists as to the grantor's intent, the courts will generally hold the interest to be vested. If the meaning in an instrument is clear and holds no ambiguity, the courts will give effect to the meaning, even if by doing so the decision renders the transfer void as a violation of the Rule.[87]

The penalty for violating the Rule Against Perpetuities is severe. If the instrument violates the Rule, the courts will find the provision creating an interest to be invalid and the property transfer it contemplates to be void.[88] Because a violation of the Rule produces such results, in addition to relying on judicial relief, states have taken legislative action to lesson or remove the effect of a harsh application of the Rule.[89] Some states have abolished the Rule altogether, whereas others use the "wait and see" test. Texas chose to reform the Rule using the *cy pres* doctrine and the legislature passed a "savings" statute found in Section 5.043 of the Texas Property Code.[90] The *cy pres* doctrine allows courts to reform the conveyance of an interest that violates the Rule by giving effect to the ascertainable general intent of, and any specific directives given by, the creator of the interest. The statute directs the courts to validate an interest to the fullest extent consistent with the creator's intent and within the limits of the Rule Against Perpetuities. The statute also directs the courts to enforce the provisions of an instrument that do not violate the Rule and reform or construe the provisions that violate or may violate the Rule.

The savings statute provides that the reformation section applies to both legal and equitable interests (including non-charitable trusts and gifts), transferred by an inter vivos instrument or a will that takes effect after September 1, 1969, and to an appointment made on or after that date regardless of when the power was executed.[91] The language of the statute does not limit the application of the *cy pres* doctrine to trusts and gifts; however, most Texas cases discussing the doctrine are concerned with that area of the law and charitable trusts in particular.[92] We found no cases applying specifically the *cy pres* doctrine to oil and gas leases or other instruments transferring (or potentially transferring) interests in mineral and leasehold estates.

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[84] Mattern v Herzog, 367 S.W.2d 312, 314 (Tex. 1963); Kelly v. Womack, 268 SW2 at 906.
[85] *Mattern v. Herzog, 367* S.W.2d t 314-315.
[86] *Id*.
[87] Brooker v. Brooker, 106 S.W.2d at 254; Hunt v. Carroll, 157 S.W.2d at 437.
[88] Brooker v. Brooker, 106 S.W.2d at 254.
[89] Saunders and Erickson, *supra* note 75, at 4-7.
[90] Tex. Prop. Code Ann., §5.043 (Vernon 2004 and Supp. 2012).
[91] *Id*. at §5.043(d).
[92] *See*, Paper authored by Lisa Bagley Brown and Derek M. Harkrider, *Top Leasing and Other Perpetuities Issues in Texas and Louisiana*, Houston Bar Association Oil, Gas & Mineral Law Section (1996) [Hereinafter "Brown and Harkrider"].

Example. The Hamman v. Bright & Co. Case.

> The appellate court was presented with two top oil and gas leases that violated the Rule Against Perpetuities and an appellant arguing that the cy pres doctrine or a perpetuities savings clause should be used to save the top leases. The court declined to address the cy pres or savings clause argument because it had not been presented to the trial court. Even had the court allowed the argument, Section 5.043 of the Texas Property Code would not have applied because both top leases were executed in November 1952 and the statutory savings clause only applies to inter vivos instruments that take effect on or after September 1, 1969.

Despite the lack of cases directly on point as to the *cy pres* doctrine in the area of oil and gas law, the only stated limitation to the interests covered by Section 5.043 of the Texas Property Code is the requirement that they be conveyed by an inter vivos instrument or will that takes effect on or after September 1, 1969. The reference to non-charitable gifts and trusts appears to be an example of certain interests the statute covers, rather than a limitation to coverage. The application of the *cy pres* doctrine fits well with the preferences to validate, rather than invalidate, instruments which Texas courts have shown. As the cases indicate,[93] however, the general intent of the creator of the interest must be clear enough for the court to ascertain its meaning before a court might choose to use the statutory savings clause in Section 5.043 to reform oil and gas instruments. As the court in Hamman v. Bright & Co. states, the specific language in an instrument is outcome determinative.[94]

d. Other Features of the Rule.

(i) What Does Vesting Mean?

Texas cases define the term "vest" to mean an "immediate, fixed right of present or future enjoyment" and the right includes a present and legal right to alienate property.[95] An estate becomes vested when there is a person in being who has an immediate right to possess the land or interest when the intermediate or precedent estate ceases. An estate or interest is contingent while the person to whom the interest or estate is to vest, or the event or condition that triggers vesting of the interest or estate, remains uncertain.

Texas courts favor a construction that allows vesting at the earliest time to lessen the opportunity for the Rule Against Perpetuities to invalidate the estate or interest.[96] When it is not clear if a condition is precedent or subsequent, the courts tend to find it is a condition subsequent,

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[93] Bowers v. Taylor, 263 S.W.3d 260, 266 (Tex. App. – Houston [1st Dist.] 2007); Hamman v. Bright & Co., 924 S.W. 2d at 172.
[94] Hamman v. Bright & Co., 924 S.W. 2d at 172.
[95] Hunt v. Carroll, 157 S.W.2d at 436.
[96] Hunt v. Carroll, 157 S.W.2d at 437.

which again favors the earliest vesting of estates or interest.[97] Similarly, the courts will not construe an interest as contingent when it can reasonably be constructed as vested.[98]

Because the Rule applies only to the vesting of an interest or estate, not its duration, the Rule does not care how long the interest or the estate may last or when it may end.[99] Rather, the Rule is only concerned with how long the interest or estate takes to vest.

(ii) Measuring Lives.

When the vesting of an estate or interest does not depend upon a life in being, so-called a "measuring life", then the limit of time against perpetuities is simply twenty one years from the effective date of the instrument creating the estate or interest.[100] If the vesting of an estate or interest depends on a measuring life, the measuring life must be living at the time the interest or estate is created.[101] This requirement exists because the applicability of the Rule depends on the possibility, not the actuality, that the interest may not vest within the perpetuities period. If any possible contingency means the estate or interest may not vest within the permissible period, the Rule is violated. [102] The fact that the estate or interest could have vested in the required time is not sufficient. The "possibility" parameter means an instrument creating the interest or estate where the vesting may not occur until the death of an unborn child will violate the Rule because the child may live for more than twenty-one years plus the period of gestation after the instrument becomes effective.

(iii) When Does the Perpetuities Period Begin to Run?

As discussed previously, to avoid violating the Rule Against Perpetuities, the interest or estate must vest within twenty-one years after some life in being at the creation of the interest or estate, plus a normal gestation period. The circumstances existing when the instrument becomes operative may determine whether a condition or limitation violates the Rule.[103] Consequently, a critical element in applying the Rule is to determine when the instrument creating the interest or estate becomes operative for purposes of the Rule Against Perpetuities. For a will, the operative date is the date of the testator's death, because beneficial title vests on that date, even if full possession and enjoyment of the property is postponed to a date beyond the perpetuities period.[104] For a trust, the operative date is generally the date of the trust's creation as provided in the trust

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[97] *Id.*

[98] *Id.*

[99] Luecke v. Wallace, 951 S.W.2d at 274; Hunt v. Carroll, 157 S.W.2d at 436.

[100] Henderson v. Moore, 189 S.W.2d at 62. *See* Stephanie E. Donaho, *The Rule Against Perpetuities - A Practical Perspective,* State Bar of Texas 33rd Annual Advanced Estate Planning & Probate Course, Ch. 9-2 (2007) [Hereinafter "Donaho"].

[101] Clarke v. Clarke , 46 S.W.2d at 661.

[102] Brooker v. Brooker, 106 S.W.2d at 254; Herzog v. Mattern, 359 S.W.2d 86, 89 (Tex. Civ. App – Texarkana 1962), judgment aff''d, Mattern v. Hertzog, 367 S.W.2d 312 ,315 (Tex. 1963); Henderson v. Moore, 189 S.W.2d at 62.

[103] Conquistador Petroleum, Inc. v. Chatham, 899 S.W.2d 439, 442 (Tex. App. – Eastland 1995, writ denied); Schmidt v. Schmidt, 261 W.2d 892, 899 (Tex. Civ. App. – Galveston 1953, writ ref'd).

[104] Singer v. Singer, 150 Tex. 115, 237 S.W.2d 600, 605 (1951); Henderson v. Moore, 190 S.W.2d at 801.

instrument.[105] For a deed, most courts reviewing a deed or lease find the operative date is the execution date of the instrument.[106] We note, however, the court in Clark v. Clark held that an instrument that created a trust, but in which the trustor also did "hereby grant, bargain sell and convey" certain land to the trustee for the benefit of the trustor's children, took effect on the delivery date of the trust instrument.[107]

(iv) What Instruments Are Within the Rule's Reach?

The Rule Against Perpetuities applies only to instruments that create an interest, estate or right in real property,[108] given that the Rule's purpose is to shorten the period for limitations on alienation of interests and estates in real property. The Rule applies not only to wills and deeds, but also applies to contracts giving rise to an interest in real property.[109]

The Rule only applies where a restraint upon alienation of title exists. If the interest can be freely devised and completely alienated, it has not been taken out of commerce from the perspective of the Rule and is therefore not subject to it.[110]

Example 1. The Schmidt v. Schmidt Case.

A trust deed conveyed legal title to the trustee for a term of 25 years with the grantors retaining beneficial title. The court determined the beneficial title to the property was not contingent and, although the instrument indicated no intention by the grantors to divest themselves of their beneficial title, such title could be freely devised, alienated or inherited by their heirs, subject only to the trust they had created. The court concluded there was no restraint upon alienation of the beneficial title and the Rule did not apply.

Example 2. The Henderson v. Moore Case.

Court found that there was no trust and that the will provided that the property"

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[105] *See* Donaho, *supra* note 101, at 9-1.

[106] Peveto v. Starkey, 654 S.W.2d 770, 772 (Tex. 1982); Schmidt v. Schmidt, 261 S.W.2d at 897; Garza v. Sun Oil.. Co., 727 S.W.2d 115, 116-117 (Tex. App. – San Antonio 1987, no writ).0oi

[107] 46 S.W.2d at 661. *See also,* 34 Tex. Jur. 3d Estates §56 (WL Database 2013) and Saunders and Erickson, *supra* note 75 at 1.

[108] Kelly v. Womack, 261 S.W.2d at 601; Courseview, Inc. v. Phillips Petroleum Co., 258 S.W.2d 391, 393 (Tex. Civ. App. – Galveston 1953, writ ref'd n.r.e.), *rev'd and remanded on other grounds,* 298 S.W. 2d 890 (Tex. Civ. App. – Galveston 1957) , *modified,* 158 Tex. 397, 312 S.W.2d 197 (1958)

[109] Coffield v Sorrells, 183 S.W.2d 223, 225-226 (Tex. Civ. App. – Fort Worth 1944), judgment aff'd, Sorrells v. Coffield, 144 Tex. 31, 187 S.W.2d 980 (1954); Burch v. B. N. Nabors Excavating & Demolition, 447 S.W.2d 240, 243-244 (Tex. Civ. App. – Fort Worth, writ ref'd n.r.e., 1969).

[110] Schmidt v. Schmidt, 261 S.W.2d at 897.

be kept intact" by the executor for 25 years and eventually vest in the persons "then entitled thereto".[111] The court found that the testator's clear intent was that the property would not vest in the devisees until 25 years after his death and that the will was invalid for violating the Rule. The court declined to support the argument that the title had vested in the devisees with only possession being postponed for 25 years.

The Rule only applies to the vesting of a present right to a property interest or estate, including executory rights and contingent remainders.[112] Consequently, the Rule does not apply to a present or immediate interest, whether alienable or not, because the interest is already vested or will be immediately.[113] The Rule does not apply to a future interest which vests at its creation. In that regard, Texas courts have found the Rule does not apply to vested reversions, possibilities of reverter and remainders.[114] Also, a possibility of reverter that follows a reservation or exception by a grantor in the same instrument may not violate the Rule.[115]

Example. The Bagby v. Bredthauer Case.

The original grantor selling his land reserved a 1/16th royalty interest in the minerals for a term of 15 years and so long thereafter as production continued in paying quantities. In the same instrument, the grantor reserved to grantee all reversionary right, title and interest in and to the grantor's term royalty interest and provided the interest would vest in the grantee immediately without the need for any further conveyance. The court considered the grantee's interest to be a possibility of reverter and found no basis for distinguishing between a possibility of reverter created in the grantor by a term royalty grant and a possibility of reverter created in the grantee following a reservation of a term interest by a grantor.

Whether the Rule Against Perpetuities applies to a term royalty or mineral interest retained by a grantor appears to depend on how the court characterizes the future interest the grantor receives. Historically, courts have considered the interest the grantee receives when the grantor retains a term mineral or royalty interest to be an executory interest.[116] They subjected such interest to the Rule Against Perpetuities and held it invalid if any possibility existed that the executory

111 190 S.W.2d at 801.
112 Luecke v. Wallace, 951, S.W.2d, 267, 274 (Tex. App. – Austin, 1997, reh'g overruled).
113 Kelly v. Womack, 268 S.W.2d at 905.
114 Bagby v. Bredthauer, 627 S.W.2d at 194.
115 *Id.* at 194-195.
116 *See* Earnest E. Smith and Jacqueline Lang Weaver, *Texas Law of Oil & Gas*, §2.5(b), 2-72 and 2-73 (LexisNexis Matthew Bender 2012 [Hereinafter Smith and Weaver].

interest would not vest within the perpetuities period.[117] In Bagby v. Bredthauer and Walker v. Foss, the courts rejected the traditional approach and characterized the future interest created by the grantor's reservation of a defeasible term interest as a possibility of reverter, instead of a springing executory interest.[118] The Walker v. Bredthauer court stated the Bagby court had done so to "sidestep the effect of the rule against perpetuities."[119] The two courts noted that a more prudent way to retain a defeasible term interest and avoid the perpetuities problem is to execute two instruments. In one instrument, the grantor would convey all of his rights in the land to the grantee and in the other instrument, the grantee would reconvey a term interest to the original grantor. However, given that a single instrument was in dispute, the two courts adopted a "regrant" fiction that both transactions had occurred in a single instrument. Smith and Weaver comment that having a single instrument conveyance accommodate two transactions is very common and many jurisdictions are reluctant to invalidate the instrument based on the Rule Against Perpetuities.[120]

An interest carved out of the possibility of reverter may be valid, unless the vesting of the interest is contingent upon an event that will not occur within the perpetuities period.[121] In Hamman v. Bright & Co., the landowners executed a deed after entering into a number of oil and gas leases. In the deed, they reserved one-half of all royalties accruing under the leases and a 1/16 non-participating royalty if and when the leases terminated, forfeited or expired. The court relied on Jupiter Oil Co. v. Snow[122] and held the non-participating royalty was a vested interest because the lessor carved it out of the possibility of reverter which the lessor presently retained as a result of executing the oil and gas leases. As such, the Rule Against Perpetuities did not apply. Smith and Weaver note that the value of the Hamman v. Bright & Co. case as precedent has been somewhat weakened because the Texas Supreme Court vacated the appellate court's ruling without reference to the merits and remanded the case to the trial court for an entry of judgment per the parties' settlement agreement.[123]

The Rule does not require the vesting of actual possession of the interest or estate for an instrument to be valid.

Example. The Luecke v. Wallace Case.

In Luecke v. Wallace, a future interest that did not violate the Rule Against Perpetuities was a reservation by the grantor of an undivided one-half non-participating royalty in and to any oil, gas and other mineral royalties reserved by

[117] Peveto v. Starkey, 545 S.W.2d at 772.
[118] Walker v. Foss, 930 S.W.2d 701, 705-706 (Tex. App. – San Antonio 1996); Bagby v. Bredthauer, 627 S.W.2d at 195-196.
[119] Walker v. Foss, 930 S.W.2d at 705.
[120] Smith and Weaver, *supra* note 117, §2.5(b) at 2-73.
[121] Hamman v. Bright & Co., 924 S.W.2d 175.
[122] 819 S.W.2d 466, 468 (Tex. 1991).
[123] Smith and Weaver, *supra* note 117, §3.9(E) at 3-78.

the grantee and his heirs and assigns "*at any time in the future and which may be payable to Grantee, his heirs and assigns under any future lease of the property*."[124] The court noted that by definition a royalty interest is an interest in a share of future product or profit from an oil and gas lease, but neither the existence of the lease nor production from the property are necessary for the royalty interest to vest at the time the grantor makes a reservation.[125] All that is necessary is for the royalty owner to have a present right to a share of production, which the reservation creates.

In addition, the Luecke v, Wallace case illustrates that the Rule deals with the vesting of title to an interest or estate and not to the vesting of the receipt of its profits.[126] As noted above, the receipt of the proceeds from production was not necessary for the royalty interest to vest at the time the grantor made the royalty reservation.

Finally, it is noted that the Rule does not apply to mortgages by either statute or common law as the mortgage contains no alienation of title or any restrain upon alienation of title.[127]

2. *Application of the Rule to Oil and Gas Interests.*

a. Oil and Gas Leases.

As a general rule, the common oil and gas lease is not subject to the Rule Against Perpetuities because it conveys or retains presently vested interests that are inheritable and freely assignable.[128] The Texas courts find the effect of an oil and gas lease is to convey a presently vested fee simple determinable estate in the minerals in and under the land to the grantee and to the grantor the possibility of reacquiring the absolute fee simple in the minerals (known as a possibility of reverter) upon the contingencies stipulated in the lease.[129] They view both interests as vesting on the date of the lease, although the grantor's possibility of reverter does not become a present possessory interest until the lease terminates or expires.[130]

The court in Jupiter Oil Co. v. Snow noted the distinction between a reversion, where the grantor conveyed something less than the full fee simple, and a possibility of reverter, where the grant is *of* the full fee simple. [131] The court found the grantor's interest in a typical oil and gas lease was a possibility of reverter, not a reversion. The courts also find the possibility of reverter is like

[124] Luecke v. Wallace, 951 S.W.2d at 272.
[125] *Id.* at 274.
[126] *Id.*
[127] Norriss v. Patterson, 261 S.W.2d 758, 763 (Tex. Civ. App. – Fort Worth 953, writ ref'd n.r.e.)
[128] Rosson v. Bennett, 294 S.W. 660, 662 (Tex. Civ. App. – Waco 1927).
[129] Jupiter Oil Co. v Snow, 819 S.W.2d 466, 468 (Tex. 1992); Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290, 295 (1923); Hamman v. Bright & Co., 924 SW.2d at 171.
[130] Jupiter Oil Co. v Snow, 819 S.W.2d at 468.
[131] 819 S.W.2d at 468, footnote 2.

the fee simple determinable, an inheritable and freely assignable interest. Because the common oil and gas lease satisfies the immediate vesting and free alienability requirements of the Rule Against Perpetuities, Texas courts generally do not apply the Rule to these leases.[132]

b. Top Leases.

(i) The Rule Applies.

The general proposition that the Rule Against Perpetuities does not apply to oil and gas leases is not necessarily true with respect to top leases. Top leases are vulnerable to the Rule's reach and the outcome is related more to the instrument's specific language, than to the circumstances surrounding them.[133] A top lease is an oil and gas lease covering a mineral interest that is already subject to a valid, existing prior lease (referred to as a "bottom lease"). The top lease can only be created if a bottom lease exists and does not become effective until the bottom lease expires or terminates. A top lease is not a "renewal lease" where the existing lessee enters into a second lease with the mineral owner while the bottom lease is still in effect, typically to extend the time to drill.

The Rule Against Perpetuities creates major legal considerations for drafters of top leases as noted in the Peveto v. Starkey case, which shows how the Rule can invalidate a top lease. Although the instrument in the Peveto case is a top royalty deed, the court's reasoning in that case applies to top leases as the Hamman v. Bright & Co. case also illustrates.[134]

Example. The Peveto v. Starkey Case.

> The existing landowner, Jones, conveyed an undivided three-fourths term royalty to Peveto in a 1960 deed (bottom deed) for a primary term of fifteen years and as long thereafter as there was oil, gas and mineral production in paying quantities. Thirteen years later, Jones conveyed to Starkey a top royalty deed for a primary term of ten years and as long thereafter as there was oil, gas and mineral production in paying quantities. The top deed was to become "effective only upon" the expiration of the existing term royalty. The bottom deed to Peveto conveyed a fee simple determinable interest which vested when the parties executed the bottom deed. As to the top deed, the court found the phrase "effective only upon" created in Starkey a springing executory interest, which might not vest within the permitted perpetuities period if the bottom deed did not expire or terminate within that same period. By tying the vesting of the royalty interest in the top deed to the expiration of the bottom deed, the parties created a real possibility that production might maintain the bottom lease indefinitely. As

[132] Rosson v. Bennett, 294 S.W. at 662.
[133] Hamman v. Bright & Co., 924 S.W.2d at 172. *See generally*, Smith and Weaver, supra note 117, at §4.2(C) and Brown and Harkrider, *supra* note 92, at 1-12.
[134] 924 S.W.2d at 172-173.

noted earlier, the Rule operates on the basis of possibilities, not probabilities, and the possibility that production will keep a bottom deed or lease in effect always exists.

The court in Bowers v. Taylor[135] distinguished the ruling in Peveto v. Starkey. In the former case, Taylor's predecessors in interest leased their interest to Bower's predecessor in interest in 1919 for as long as there was production in paying quantities and reserved a one-eighth royalty. In 1927, Taylor's predecessors entered into an agreement with Bower's predecessor conveying to him a present portion of their reserved royalty and a future one-third fee interest in the mineral estate itself if the lease was forfeited. The court noted that Bower's predecessor was both the lessee under the 1919 oil and gas lease and the grantee under the 1927 deed. The court determined these facts placed the case on a different basis than Peveto v. Starkey and it would construe the 1919 lease and the 1927 deed together. Taylor's predecessors as lessors in the 1919 lease retained a possibility of reverter in the lands the lease covered. If Taylor's predecessors, as grantors under the 1927 deed, conveyed a one-third portion of their possibility of reverter, then the Rule Against Perpetuities does not apply because the Rule does not apply to possibilities of reverter. The court reviewed the 1927 deed for any "intent" language and found that the intent reflected in the deed was to "transfer to Maars McLean [Bower's predecessor] a one-third (1/3) interest in the minerals, rights and royalty". The deed made no mention of a future contingency and the habendum clause contained no mention of any delay or contingency. The court also noted that express language was absent from the Peveto instruments. Construing the 1927 deed as a whole, the court concluded that the 1927 deed made a present conveyance of the grantor's interest in the 1919 lease, that the grantor's interest was a possibility of reverter, and that the Rule Against Perpetuities did not apply to such an interest.

In Hamman v. Bright & Co., after concluding that all parties agreed the top leases and a deed that included royalty reservations were unambiguous, the court stated its duty was to ascertain the intent of the parties as expressed in the documents.[136] The Hammans argued the top leases vested the possibilities of reverter to John Hamman, Jr. and, therefore, were not subject to the Rule Against Perpetuities. Upon a review of the intent language in the top leases, the court concluded the language subjected the top leases to the Rule. The granting clause in the top leases stated that the "rights, interest, estate, privileges and royalties, as fixed thereby, of said Lessor shall remain vested in and held and possess by said Lessor, free of all claims and demands whatsoever by said John Hamman, Jr. [lessee]".[137] The court concluded the express language of the top leases showed the lessors, who owned possibilities of reverter in the bottom leases at the time they executed the top leases, did not make and did not intend to make a present conveyance of their interests. Instead, the top leases conveyed springing executory interests that would vest in the grantee only upon the termination of the bottom leases. Because production could hold the bottom leases for an indeterminate amount of time, the interests conveyed in the top leases had the possibility of vesting outside the perpetuities period provided by the Rule. The court held interests were void as a matter

[135] 236 S.W.3d at 265-266.
[136] Hamman v. Bright & Co., 924 S.W.2d at 172.
[137] *Id.*

of law under the express language of the top leases.[138]

(ii) Avoiding the Rule's Reaches.

The cases discussed above illustrate that it is the possibility of indefinite duration of the bottom leases that usually causes the standard top lease to violate the Rule Against Perpetuities. The Hamman v. Bright & Co. case suggests that ratification of the top leases after the bottom leases expire may not cure a perpetuities problem.[139] In Hamman, the parties to the top leases (or their successors in interest) executed ratification agreements as to the top leases after the bottom leases had expired. They argued that with the expiration of the bottom leases, the perpetuities issues no longer existed, the Rule no longer applied, and the ratifications were valid and removed any invalidity as to the top leases. The court acknowledged the emergence of competing lines of authority with respect to ratification of a void instrument, but stated it had not found any case that addressed ratification of instruments found to be void *ab initio* for violating the Rule. The Court looked to the constitutional mandate in the Texas Constitution regarding perpetuities and concluded that an agreement made in violation of the constitution or statute is illegal, absolutely void and not subject to ratification. As noted earlier, Smith and Weaver believe the value of the precedent of Hamman v. Bright & Co. has been somewhat weakened by the Texas Supreme Court's action to vacate the appellate court's ruling without reference to the merits,[140] which makes the effectiveness of ratifying a top lease after the bottom lease expires in order to deal with a perpetuities issue unclear.

Reforming a top lease using the statutory savings clause is an option, but as discussed above, the general intent of the creator of the interest must be clear enough for the court to ascertain its meaning before a court might choose to use the statutory savings clause in Section 5.043 to reform an oil and gas instrument. Further, the Hamman v. Bright case raises the question whether a court would use Section 5.043 to reform an instrument that it finds to be void *ab initio* for violating the Rule, particularly when the courts view the Rule as a constitutional mandate.

The better practice is to carefully draft top leases to avoid a perpetuities problem in the first place, rather than trying to reform a top lease that contains such a perpetuities problem. Smith and Weaver suggest that practitioners are using two principal techniques to avoid the harsh results of violating the Rule Against Perpetuities.[141] One method is a provision that the top lease will vest, if at all, within a specified period. This drafting method was litigated in Conquistador Petroleum Inc. v. Chatham and found acceptable.[142] Near the end of the lease term, the lessor gave her lessee the option to renew the lease upon the expiration of the primary term of the lease. She gave a second option to another company, now Conquistador Petroleum Inc., which provided if the lessee did not exercise its option to renew the lease within ten days from the "expiration of the current lease", the

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138 *Id.* at 173.
139 *Id.* at 173-174.
140 Smith and Weaver, *supra* note 117, §3.9(E) at 3-78.
141 *Id.* §4.2(C) at 4-23.
142 899 S.W.2d at 441.

other company would have five days to exercise its option to lease the land. The court first found the phrase "expiration date of the current lease" referred to the expiration date of the primary term of the lease, not the secondary term of a lease held by production. The court then noted that the provision set a definite day by which the lessee's option to renew must be exercised. The deadline, in turn, established a date by which Conquistador's option to lease the property would vest, if at all, and that date would be within the perpetuities period prescribed by the Rule. Smith and Weaver's example for a provision in a top lease to avoid violating the Rule is for the top lease to become effective upon the termination of the existing lease "provided that if such existing oil and gas lease has not expired prior to one year after its primary term, this lease shall automatically terminate."[143] Another suggested provision is to have the top lease become effective immediately upon the termination of the present lease "but no longer than twenty-one years from this date [top lease date], otherwise this lease shall be null and void."[144]

The other method Smith and Weaver suggest is to carve the top lease out of the lessor's reversionary interest in the premises, subject to the existing lease.[145] This method delays the top lessee's possessory rights from vesting until the bottom lease terminates or expires, but the top lessee's reversionary interests vest immediately. The grantors in the Bowers v. Taylor case used this method to convey a present portion of a reserved royalty and a future one-third fee interest in the mineral estate.[146] The conveyance avoided the Rule Against Perpetuities because the court determined the one-third interest in fee title was an interest out of the lessor's presently vested possibility of reverter and the Rule did not apply to possibilities of reverter. Drafters using this method are cautioned that the grant of the possibility of reverter should be set out plainly in the text of the top lease, so the intent of the parties is clearly expressed within the document. The court in Hamman v. Bright Oil Co. applied the four corners rule to its review and that court and the court in Bowers v. Taylor further confined their inquiry to the intent of the parties as expressed in the language of the instrument creating the interest.[147]

c. Areas of Mutual Interest.

(i) What is an AMI?

The Texas Supreme Court has defined an area of mutual interest ("AMI") as an agreement "in which the parties attempt to describe a geographic area within which they agree to share certain additional leases acquired by any of them in the future."[148] An AMI clause generally provides that all parties to the agreement have a mutual interest in a certain geographic area and, if any party to the agreement acquires an oil and gas interest within the AMI, then that party must give notice of the acquisition and its terms to all other parties who then have an option to participate in the

143 Smith and Weaver, *supra* note 117, §4.2(C) at 4-23.
144 Brown and Harkrider, *supra* note 92 at 8.
145 Smith and Weaver, *supra* note 117, §4.2(C) at 4-23, 4-24.
146 Bowers v. Taylor, 263 S.W3d at 264-265.
147 *Id*. at 266; Hamman v. Bright & Co., 924 S.W.2d at 172.
148 Westland Oil Development Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 905 (Tex. 1982).

acquisition.[149] An AMI can cover all types of oil and gas interests acquired within the AMI, including assignments of leases among the AMI participants; however, the interest to be acquired will be limited to the interests described in the AMI clause.[150] The parties may create the AMI in a separate agreement, although it is more frequently found as a provision in a broader agreement, such as a farmout, operating or participation agreement. An AMI requires no standard language, structure or application; however, to avoid a Rule Against Perpetuities issue the clause or agreement must be carefully drafted.[151]

(ii) The Rule Does Not Apply…Maybe.

Courseview, Inc. v. Philips Petroleum Co. provides precedent that Texas courts may avoid applying the Rule to AMI's by viewing the right to receive interests in newly acquired acreage within the AMI as something other than a right in real property. [152] In the Courseview case, the contract in question provided that if either party purchased royalty, mineral interests or fee title within the AMI specified in the contract, the other parties must be notified and given an opportunity to purchase a specified fractional interest therein from the acquiring party. The court held the contract on its face "appears to create no rights in any real property at all, but simply gives the grantee therein a property right contingent upon the purchase of royalty, mineral interests or fee titles" in the AMI, and the Rule Against Perpetuities did not apply.[153] Based on this view, the AMI provision is a contractual obligation, personal to the party subject to it, and not a presently vested property right. The contract approach seems somewhat at odds with the Texas Supreme Court's view in Westland Oil Development Co., v. Gulf Oil Corp. that an AMI provision was a covenant running with the land that burdened the promisor's estate, rather than a personal covenant that did not bind assignees.[154]

Smith and Weaver question whether the court's reasoning in Courseview, Inc. v. Philips Petroleum Co. would apply to all AMI clauses. They argue that an AMI clause allowing an unlimited amount of time for a newly acquired interest in an AMI to vest would appear to be counter to the Rule.[155] Other commentators have raised similar concerns as to AMI clauses with unlimited time periods and suggest that relying solely on the Courseview case may not be entirely safe.[156] One example given where an AMI might violate the Rule Against Perpetuities is when the term of the AMI runs with the production phase of the operations, rather than the exploration phase. Typically, a term running with the exploration phase would vest interests within the perpetuities

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[149] North Central Oil Corp. v. Louisiana Land and Exploration Co., 22 S.W.3d 572, 576-577 (Tex. App. – Houston [1st Dist.] 2000, pet. den'd). *See* Smith and Weaver, *supra* note 117, §16.4(A) at 16-18; Rick Strange, *Areas of Mutual Interest*, Tex. State Bar 21st Annual Advanced Oil, Gas & Energy Law Course, Chapter 19 (2003) [Hereinafter "Strange"]; Scott Lansdown, *Recent Challenges to Area of Mutual Interest Agreements*, 28th Annual Ernest F. Smith Oil, Gas & Mineral Law Institute (2002) [Hereinafter "Lansdown"]

[150] Courseview, Inc. v. Phillips Petroleum Co., 312 S.W.2d at 202 and 208.

[151] Strange, *supra* note 150 at 19-1; Smith and Weaver, *supra* note 117, §16.4(A) at 16-19.

[152] 258 S.W.2d at 393.

[153] *Id.*

[154] 637 S.W.2d at 913.

[155] *Supra* note 44, §16.4(A) at 21.

[156] Strange, *supra* note 150 at 19-4-5; Lansdown, *supra* note 150 at 6.

period, because often the parties do not wish to bind themselves to share acquired interests beyond that phase and provide such in the AMI clause. On the other hand, if the AMI clause provides for the AMI term to be the same as the term of the operating agreement the parties will use once production is obtained, the interest may not vest within the time required to avoid a perpetuities claim because the possibility exists that production will continue beyond the perpetuities period.

Several commentators discuss whether a Texas court might hold an AMI clause to be an exception to the Rule Against Perpetuities provided in the Restatement of Properties, which allows options to extend leases and not violate the Rule.[157] The commentators state if the AMI is viewed as implicitly limited to the duration of the existing oil and gas leases, the AMI clause would not violate the Rule.[158] However, the commentators do not speculate whether Texas courts would adopt this approach. We note that should the courts use this approach, the Conquistador Petroleum, Inc., v. Chatham case discussed in the top lease section of this paper would seem to indicate that the AMI would need to end with the expiration of the primary term of the relevant existing lease to avoid violating the Rule.[159]

Given the concern of commentators cited in this section that AMI clauses providing for a long or unlimited vesting period appear questionable under the Rule, the better practice is to draft the AMI provision to avoid a Rule Against Perpetuities issue altogether. The most certain method is to clearly limit the term of the AMI to a fixed number of years after a date certain that is within the perpetuities period. If the beginning and end of the AMI term is less certain by desire or necessity, one commentator suggests including in the AMI provision a savings clause that (i) states the parties do not intend there to be any violation of the Rule and (ii) if such violation occurs, it is the wish of the parties that the court reform such provision in a way to approximate most closely the intent of the parties within the limits permissible under the Rule.[160]

d. Preferential Purchase Rights and Options.

(i) Preferential Purchase Rights.

Whereas an AMI clause relates to the acquisition of property, a preferential right to purchase creates an obligation on a seller to give the right holder notice of a proposed sale and the opportunity to exercise the right to purchase. The preferential right to purchase is sometimes referred to as a "preferential purchase right", "right of first refusal", "first privilege to purchase" or "preemptive right" and does not have a particular legal meaning.[161] Consequently, the courts seek to ascertain the objective intent as expressed or apparent in the language of the preferential purchase

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[157] Lansdown, *supra* note 150 at 6-7. *See also*, John S. Lowe, *Analyzing Oil and Gas Farmout Agreement*, 41 S.W. L. J. No. 3, 759, 845 (1987).
[158] Lansdown, *supra* note 150 at 6-7.
[159] 899 S.W.2d at 442-443.
[160] Lansdown, *supra* note 150 at 7, footnote 29.
[161] Draper v. Goodman, 400 S.W.2d 545, 547 (Tex. 1966). *See generally*, Hunter H. White, *Preferential Purchase Rights, Area of Mutual Interest Provisions and Maintenance of Uniform Interest Provisions,* Texas State Bar 14th Annual Oil, Gas & Mineral Law Course, Section K (1996).

right provision, not the subjective intent of the parties, and analyze the provision or agreement on a case by case basis. [162]

Texas courts distinguish a preferential purchase right from a standard option. Whether a Texas court determines a right is a preferential right or an option appears to influence whether a court applies the Rule against Perpetuities.[163] The courts describe an option as giving the optionee the right to compel a sale of property, generally at a stipulated price. The preferential purchase right, on the other hand, does not give the optionee any right to compel or prevent a sale and is only a right to be offered the property at a fixed price or at a price offered by a bona fide purchaser, if and when the owner decides to sell. As such, the preferential purchase right holder must remain passive unless and until the owner receives a bona fide offer and decides to sell on the terms of the offer. Texas courts are less inclined to apply the Rule Against Perpetuities to a preferential purchase right than an option, because the preferential purchase right holder's inability to compel or prevent a sale prevents or lessens the holder's ability to unreasonably restrain alienability.

Preferential purchase rights appear in a variety of oil and gas documents, including deeds reserving or conveying minerals, oil and gas leases, and farmout, participation and operating agreements. Texas courts have generally upheld preferential purchase rights as to interests in oil and gas against a claim that the right violates the Rules Against Perpetuities. For example, Texas courts have upheld a preferential right to purchase minerals.[164]

Example. The Forderhause v. Cherokee Water Co. Case.

The appellate court in Forderhause v. Cherokee Water Co. discusses that there are two views in the United States as to the applicability of the Rule Against Perpetuities to a preferential purchase right.[165] One view is that the right, if unlimited in time, violates the Rule and will not be enforced. The other view is that the Rule is designed to prevent unreasonable restraints on alienation of property. If the preferential right does not operate to restrain alienation, but only states who will have the first right to acquire the property when and if the seller decides to sell it, the Rule does not apply. The Forderhouse appellate court stated this latter view appeared to be the rule in Texas and that it would follow the rule in that case. In the deed presented to the court, the grantor conveyed the surface of the land to the grantee, reserving the minerals and giving the grantee a "first option or preferential right" to purchase the minerals, exercisable within five days after notice, should the mineral owners ever desire and agree to sell them. The

[162] Cherokee Water Co. v. Forderhause, 641 S.W.2d, 522, 524-525 (Tex. 1982)
[163] Forderhause v. Cherokee Water Co., 623 S.W.2d 435, 438 (Tex. App. – Texarkana 1981), rev'd on other grounds, Cherokee Water Co. v. Forderhause, 641 S.W. 522 (Tex. 1981).
[164] Cherokee Water Co. v. Forderhause, 641 S.W. at 526; Perritt Co. v. K. Mitchell, 663 S.W.2d 696, 698-69 (Tex. App. – Fort Worth, 1984, writ ref'd n.r.e.).
[165] Forderhause v. Cherokee Water Co., 623 S.W.2d at 438-439.

court held the preferential right to purchase did not violate the Rule. The court reasoned that the purchase right did not place an unreasonable restraint on alienation because it contained no absolute option unlimited in time, and the grantee could not force or prevent a sale or fix a price for the sale. In these circumstances, the court found the restraint on alienation of the property was not enough to violate the Rule. The Texas Supreme Court agreed with the reasoning of the appellate court.[166]

Texas courts have upheld a preferential right giving the lessee the right to purchase royalty at a bona fide price when offered for sale by the lessor, even when the right extended to the heirs, personal representatives, successors and assigns and continued for so long as oil or gas "is or could be produced" from the land.[167] The court in Weber v. Texaco found the right was not an "exclusive option" to the lessee to buy at a fixed price which allowed the lessee to exercise the right at a remote time beyond the perpetuity period and thereby unreasonably forestalling alienation. The court determined the right was "no more than a continuing and preferred right to buy the lessor's royalty rights at market price whenever the lessor desires to sell". The lessee's sole right was to accept or reject the offer when the lessor was ready to sell.[168] The Weber case illustrates how the court's view of the nature of a right, i.e. option to purchase versus a preferential purchase right, affects the court's decision.

Where a preferential purchase right is not for a fixed price or percentage of a price offered by a third party, Texas courts have held the right is not a restraint on alienation and the Rule Against Perpetuities does not apply.[169] Where the preferential purchase right provides the holder with the right to purchase at the same price on the same terms as those a third party is offering, the courts have upheld such rights.[170] In the Cherokee Water Co. and the Perritt v. K. Mitchell cases, the preferential right was for the purchase of minerals. In the Sibley v. Hill case the preferential right was for the purchase of oil and gas leases created by an operating agreement provision. The preferential purchase right in all three cases was a "same price, same terms" right which the court considered a major factor when deciding the preferential purchase rights were not a restraint on alienation and would not violate the Rule.

If a preferential purchase right meets the parameters for a valid preferential right to purchase set forth in the Texas cases, the right should not violate the Rule Against Perpetuities. Drafters, however, should take care to draft the right as a preferential purchase right, not an option, to clearly state the parties' intent within the instrument creating the right, and to avoid limiting the right to a specific fixed price and fixed terms, rather than the same price and terms of a third party

166 Cherokee Water Co. v. Forderhouse, 641 S.W. 2d at 526.
167 Weber v. Texaco, 83 F2d 807, 808 (5th Cir. 1936)
168 *Id.* at 808.
169 Cherokee Water Co. v. Forderhouse, 641 S.W.2d at 524; Perritt v. K. Mitchell, 663 S.W.2d at 698-699; Sibley v. Hill, 331 S.W.2d 227, 228-229(Tex. Civ. App. – El Paso, 1960).
170 Fordhauser v. Cherokee Water Co., 623 S.W.2d at 438-439.

offer.

(ii) Options to Purchase.

As discussed above, a right that Texas courts view as an option is vulnerable to a court finding that it violates the Rule Against Perpetuities as a restraint on alienation. The difficulty for a practitioner may be in knowing whether the court will view the drafted purchase right as an option or as a preferential purchase right. Courts do not require the wording of the right to include the term "option". For example, one court found the provision in a will that stated "our son Chris Mattern shall have the right to purchase from each of the other children their interest in said real estate" to be an option, not a preferential purchase right.[171] As with the preferential purchase right, courts try to ascertain the parties' intent from the language of the particular provision or instrument and make their analysis on a case by case basis. The "requirements" for a valid preferential purchase right discussed above have application to our discussion of options.

As noted previously, the option holder has a right to compel or prevent a sale of the encumbered property and it is this feature of an option that can produce a restraint on alienation if a possibility exists that the optionee will not exercise the option within the perpetuities period. Once courts determine that the right is an option, the time allowed for its exercise becomes critical. If the time to exercise the option is unlimited, the option will violate the Rule Against Perpetuities.[172] If the option is personal to the optionee, it will expire upon the optionee's death and present no issue regarding the perpetuities period.[173] If the option is binding on the heirs and assigns of either optionee or optionor, the option may not expire with the lifetime of a life in being when the option was created and the right to the interest may not vest within the required period.[174]

As with other types of rights to real property interests, courts look to the parties' intent. If the wording of the option does not "compel" a construction that the parties intended the time element to be unlimited, the courts will not construe an option to run for an unlimited time and thereby destroy the option's validity.[175] In Mattern v. Herzog, the Texas Supreme Court went so far as to imply a reasonable option exercise period when the option does not expressly state a time limit.[176] However, the dissent in Mattern v. Herzog argued against applying the reasonableness rule to "escape" the Rule and stated the test is whether, at the instant the right is created, a possibility exists that the interest might not vest within a life in being plus twenty-one years and the gestation period.[177] Also, a cited reference in the majority opinion suggested that the Rule Against Perpetuities is "ill adapted to fixing a limitation of reasonableness for an option in so far as commercial transactions are concerned…."[178]

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171 Mattern v. Herzog, 367 S.W.2d at 315-316.
172 *Id*. at 318.
173 *Id*. at 315-316.
174 Garza v. Sun Oil co., 727 S.W.2d at 116-117; Maupin v. Dunn, 678 S.W.2d 180, 183 Tex. App. – Waco, 1984).
175 Mattern v. Herzog, 367 S.W.2d at 319.
176 *Id.*
177 *Id*. at 321-322.
178 *Id*. at 320.

The Mattern v. Herzog holding notwithstanding, the safer approach is to avoid drafting an option with an unlimited or lengthy option exercise period and to not rely solely on the court's willingness to apply the reasonableness rule to save the option from the Rule. Tying the option exercise period to a specific date or the occurrence of a specific event within the perpetuities period, such as the expiration of the primary term of an oil and gas lease, has been held to not violate the Rule.[179] Finally, as suggested previously in this paper, drafters should clearly state that the intent of the parties is to limit the option to be within the perpetuities period and to not violate the Rule.

e. Other Interests.

The Rule Against Perpetuities can be applied to many types of property interests. Drafters of all types of oil and gas instruments involving rights in real property should give careful consideration to the Rule. By way of example, in Phillips Petroleum Co. v. Lovell, the interest at issue was a pipeline right-of-way grant providing that if at any time or times any pipeline or pipelines were laid, the grantee was to pay to the grantor a fee per rod for each separate line laid.[180] The court concluded that Phillips obtained a perpetual easement to lay multiple pipelines, but disagreed with the grantor that the easement right violated the Rule Against Perpetuities. The court held that the rights to construct "separate lines so laid" conveyed a present grant of an expandable easement for the construction and operation of pipelines at any time or times and the provision for payment in the future for subsequent lines did not violate the Rule. This line of reasoning is similar to that the courts have used with respect to royalties or other profits that will not be paid until a future date. The Phillips Petroleum Co. court distinguished the grant from an option to acquire future additional servitudes which might not vest within the perpetuities period by characterizing the grant as a present grant of an expandable easement.

3. Drafting Considerations.

Most violations of the Rule Against Perpetuities can be avoided by careful drafting of the instrument creating the interest. Drafting suggestions for consideration include: limiting the vesting period to a specific date or a specific event which will occur within the perpetuities period; stating the intent of the parties clearly within the instrument itself; including a savings clause stating that the parties do not intend to violate the Rule; and asking for a reformation of the Rule should they inadvertently violate same. Since Texas courts and the legislature at this time do not appear to be inclined to do away with the Rule, the application of the Rule remains a key consideration when drafting valid grants of interests in oil and gas properties in Texas.

IV. CONCLUSION.

This paper was intended to provide a brief analysis of current issues involving (i) adverse possession, (ii) after acquired title and (iii) the Rule Against Perpetuities. Despite the length of this

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[179] Conquistador Petroleum, Inc. V. Chatham, 899 S.W.2d at 442-443.
[180] 392 S.W.2d 748, 751 (Tex. Civ. App. – Amarillo 1965, writ ref'd n.r.e.)

article, our research on these three matters indicates that the above is only a cursory review of some of the issues that are present in each of the three doctrines. It is our hope that this review of the history and current holdings of the three doctrines will assist you in proactively drafting around the limitations and issues noted herein. In sum, we hope that this paper helps you, the title examiner, with putting together some of the pieces to the title puzzle.