THE PRESUMED GRANT DOCTRINE

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EDUCATION

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EXPERIENCE

- Successfully handled dozens of appeals and original proceedings in Texas state and federal courts, including matters in the Supreme Court of Texas, the Texas courts of appeals, the United States Court of Appeals for the Fifth Circuit, and the United States Supreme Court.
- Previously served as Assistant Solicitor General for the State of Texas, where experience included successful defense of Texas A&M University in federal and state appeals related to tragic bonfire collapse, the State of Texas in a constitutional challenge to the Texas Civil Commitment of Sexually Violent Predators Act, and a court of appeals sued by a sitting appellate justice.
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RECOGNITIONS & CERTIFICATIONS

- Board certified in Civil Appellate Law by the Texas Board of Legal Specialization.
- Ranked by Chambers & Partners in USA – Nationwide Oil & Gas Litigation.
- Named "Super Lawyer" in Texas appellate law from 2014-25 and, before that, ten times named "Rising Star" in Texas appellate law by Texas Super Lawyers as published in *Texas Monthly* magazine.
- Recognized on list of "Top Attorneys" in appellate law by *Austin Monthly*, "Best Lawyers in America" by Best Lawyers, and "Top Ranked Lawyers in America" by *American Lawyer*.
- Named one of top 25 "Legal Leaders" in Texas under the age of 40 by *Texas Lawyer* in 2013.
- Member of Texas Bar College and Fellow of Texas Bar Foundation
- Rated AV Preeminent with High Ethical Standing by Martindale-Hubbell.
- 2010 Finalist for Austin Under 40's Young Professional of the Year award
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EDUCATION

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Carnegie Mellon University, Pittsburgh, PA
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EXPERIENCE

Hunton Andrews Kurth LLP, Austin, TX
Associate, October 2025 – Present
- Successfully handled appeals and original proceedings in Texas state and federal courts, including filing a petition for writ of mandamus in the Court of Appeals for the Fourteenth District of Texas at Houston, as well as briefing in the Supreme Court of Texas and other courts of appeals.

Davis, Gerald & Cremer, Austin, TX
Trial and Appellate Associate, September 2023 – September 2025
- Successfully handled a variety of appeals in Texas courts, including briefing in the Supreme Court of Texas, the Texas courts of appeals, the United States Court of Appeals for the Fifth Circuit and an oral argument in the Eastland Court of Appeals.
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Supreme Court of Texas, Austin, TX
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TABLE OF CONTENTS

THE PRESUMED GRANT DOCTRINE

I. INTRODUCTION

In 2023, the Texas Supreme Court issued arguably the most consequential mineral-title opinion in decades: *Van Dyke v. Navigator*, 668 S.W.3d 353 (Tex. 2023). At this point, the Texas legal world (and especially the mineral-title arena) is well-aware of the opinion's creation of a new deed-construction rule—that in mineral conveyances that describe the interest conveyed or reserved in a double fraction *and* one of those fractions is 1/8, a rebuttable presumption arises that the 1/8 fraction represents all of the mineral interest, not just 1/8th. *Id.* at 364.

But what has gone less noticed in some circles is the second part of the opinion—nearly as groundbreaking as the first. In what appears to be *dicta*, the Court also held that it would have reached the same conclusion under the "presumed grant" doctrine—a factual presumption that, under certain circumstances, ownership of a property interest may be demonstrated by circumstantial evidence rather than record title. *Id.* at 366-68. Even less noticed is what the Court stated in a footnote: when the presumed-grant doctrine applies, a court may "*dispense with the deed-construction analysis*." *Id.* at 368 n.11 (emphasis added).

To shed light on the Court's discussion of the presumed-grant doctrine in *Van Dyke*, this paper takes a deep dive into the doctrine under Texas law. Section II briefly revisits the Court's *Van Dyke* opinion. Section III presents a historical analysis of the development of the presumed-grant doctrine in Texas. Section IV highlights and analyzes key presumed-grant cases in the last two centuries. And Section V discusses salient issues in the doctrine that will need further development in the upcoming years.

II. *VAN DYKE V. NAVIGATOR GROUP*

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

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

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

A. What Meaning Means

The Court began by emphasizing that words in an instrument must be given their original meaning—*i.e.*, the meaning they had at the time of the instrument's execution. *Id.* at 359-60. "The test is what the text reasonably meant to an ordinary speaker of the language who would have understood the original text in its context." *Id.* at 360. Pointing to the United States Supreme Court's decision in *New Prime Inc. v. Oliveira*, 586 U.S. 105 (2019), the Court emphasized that to determine what the words meant at the time of their execution, courts undertake "careful analysis of [the words'] public meaning at the time" of their use—examining "contemporary legal and lay dictionaries, judicial decisions," statutes, "and the like." *Van Dyke*, 668 S.W.3d at 360.

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

B. Estate Misconception and the Legacy of the 1/8th Royalty

Turning to the meaning of the deed's disputed text—"one-half of one-eighth of all minerals"—the Court began with the premise "that, at the time the parties executed this deed, '1/8' was widely used as a term of art to refer to the total mineral estate." *Id.* at 362. The Court emphasized that "it is *that* fraction—not 1/3, 2/7, 6/241, or any other—that is so repeatedly deployed." *Id.* Then, pointing to *Hysaw*, the Court said that "two related circumstances … explain

why 1/8" in instruments containing double fractions "did not typically bear its arithmetical meaning: the historical use of 1/8 as the standard royalty and the estate-misconception theory." *Van Dyke*, 668 S.W.3d at 362 (citing *Hysaw v. Dawkins*, 483 S.W.3d 1, 8 (Tex. 2016)). "[T]hese historical features," said the Court, "confirmed that 1/8 was a widely used term of art." *Id.*

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

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

C. The New Rebuttable Presumption

Relying on the two presumed-mistake doctrines (and without identifying contemporary sources), the Court formally adopted a new framework for construing mineral deeds that include double fractions:

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

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

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

Id. at 364-65.

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

D. Presumed Grant

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

"The presumed-grant doctrine, 'also referred to as title by circumstantial evidence, has been described as a common law form of adverse possession.'" *Id.* at 366 (quoting *Fair v. Arp Club Lake, Inc.*, 437 S.W.3d 619, 626 (Tex. App.—Tyler 2014, no pet.)). The doctrine has three required elements:

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

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

Applying those elements to the facts of the case, the Court held that "the parties' history of repeatedly acting in reliance on each having a 1/2 mineral interest conclusively satisfies the presumed-grant doctrine's requirements"—thereby confirming title to 1/2 of the ranch's minerals in the grantors' successors. *Id.* at 366-67. The Court specifically pointed to the "ninety-year history [that] includes conveyances, leases, ratifications, division orders, contracts, probate inventories, and a myriad of other recorded instruments that provided notice." *Id.* at 367. Thus, "[t]here was a long and asserted open claim—for nearly a century, *both* parties acted in accordance with *each* side owning a 1/2 interest." *Id.* "Accordingly," said the Court, "if the presumed-grant doctrine were in fact necessary, we would find that the [grantors' successors] have conclusively established it." *Id.* at 368.

Because the result of the case was the same under either the Court's new rebuttable-presumption deed construction or under the revived presumed-grant doctrine, the case did not present an opportunity to discover what happens when the two theories reach differing results. But thankfully for the bar, the Court seemingly provided that answer in footnote 11:

> When historical records are sufficiently clear to implicate the presumed-grant doctrine's demanding requirements, the result could cut either way—in favor of or contrary to the party invoking the double-fraction presumption. *Either* side, therefore, could find the doctrine to be important. In cases where the presumed-grant doctrine is clearly implicated, a court could dispense with the deed-construction analysis.

Id. n.11. In other words, it appears to be the case that when the presumed-grant doctrine applies, its application trumps—and leaves no need for analyzing—the plain language of the deed itself. *See id.*

III. THE HISTORY OF THE "PRESUMED GRANT" DOCTRINE

Although immensely consequential, the Texas Supreme Court's discussion of the presumed-grant doctrine is brief. This paper therefore provides a review of the doctrine's history and development in an attempt to aid litigants and counsel seeking to apply *Van Dyke*'s *dicta* to resolve future disputes.

The presumed-grant doctrine—also referred to as the lost grant theory, title by circumstantial evidence, or proof of title by circumstances—can most easily be understood as a rule of evidence that presumes a conveyance based on circumstances. *See* Jerome J. Curtis, Jr., *Reviving the Lost Grant*, 23 REAL PROP. PROB. & TR. J. 535, 535 (1988) ("In effect, the lost grant theory supplies a rule of evidence that can bolster, or indeed establish, the claims of trespassers."); *Fair*, 437 S.W.3d at 626 (describing the doctrine by the terms "presumed lost deed or grant" and "title by circumstantial evidence"); *Magee*, 221 S.W. at 256-57 ("the rule . . . permits the inference that an apparent owner has parted with his title from evidence, first, of a long-asserted and open claim, adverse to that of the apparent owner; second, of nonclaim by the apparent owner; and third, of acquiescence by the apparent owner in the adverse claim").[1]

[1] *See also, e.g. Fowler v. Tex. Expl. Co.*, 290 S.W. 818, 823 (Tex. App.—Galveston 1926, writ ref'd) ("The law further is that where the fact or deed, as the case may be, which is sought to be presumed, lies back thirty or more years, and the parties claiming the presumption, or those whose estate they have, or both combined, have during such period openly and notoriously, and with the acquiescence of their adversaries, claimed and exercised acts of ownership over the land in question, such as might

It has been conceived of as a common-law form of adverse possession, allowing a party to establish title by circumstantial evidence. *Fair*, 437 S.W.3d at 626; *Conley v. Comstock Oil & Gas, LP*, 356 S.W.3d 755, 765 (Tex. App.—Beaumont 2011, no pet.); *San Miguel v. PlainsCapital Bank*, No. 04-18-00450-CV, 2019 WL 2996975, at *5 (Tex. App.—San Antonio July 10, 2019, no pet.) (mem. op).

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

A. Early Background

The presumed-grant doctrine has its roots in English law. 23 REAL PROP. PROB. & TR. J. at 537. The doctrine evolved to meet a specific legal problem: how to square Western understandings regarding permanent ownership and ancestral inheritance with the realities of a system dependent on fragile paper and the ability to read the words written on it. The first formulation attempted to designate a time of "legal memory." *Id.* Enjoyment since the year 1189 was considered conclusive evidence that the right claimed had been conferred. *Id.* This iteration was imperfect. Time passed, increasing the span since that designated year and necessitating the rise of other, less functional, presumptions to smooth the rule's application. *Id.* The doctrine subsequently evolved again to resolve those issues, leading to the earliest form of the presumed-grant doctrine as we would recognize it today: the notion that "long enjoyment of [a] right raises a presumption that the claimant had been granted the right." *Id.*

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

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

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

Id. at 545; *see also Baldwin v. Goldfrank*, 31 S.W. 1064, 1066 (1895) ("[L]ong and continuous acts of ownership, acquiesced in knowingly by those who hold an apparently adverse title, lead to the conclusion that the persons so exercising such acts have acquired the title."). Second, while the doctrine was sometimes called the lost-grant doctrine, it was not necessary for a jury to decide that an executed deed had, in fact, actually existed. *Fletcher*, 120 U.S. at 555 ("If the execution of a deed was established, nothing further would be required than proof of its contents; there would

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reasonably be expected from owners thereof, and the circumstances in evidence, taken in their entirety, are consistent with the presumption sought to be indulged, and it is more reasonably probable that the facts sought to be presumed existed than that they did not, then the jury are at liberty to presume them and find accordingly.") (quoting *Frugia v. Trueheart*, 48 Tex. Civ. App. 513, 527 (Tex. Civ. App. 1907, writ ref'd)).

[2] Once the rule was applied to land-ownership disputes, scholars also originally contemplated a difference between recognizing grants between private individuals and presumption of grants from the crown. *See Watkins,* 26 Tex. at 694 ("Grants from the crown may be presumed, but where such a presumption has been made, it has been under particular circumstances, and after a much longer period of time than has been deemed sufficient for raising the presumption of a grant from private individuals.").

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

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

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

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

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

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

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

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

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

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

As was frequently emphasized, the doctrine was a deeply factual inquiry. *See e.g.*, *Taylor*, 26 Tex. at 696, 698. The relevant facts all ultimately lead to the same question: did the apparent owner acquiesce to the competing claim? This primary question also aligns with the theoretical justification for the rule: "owners of property, especially if it be valuable and available, do not often allow it to remain in the quiet and unquestioned enjoyment of others." *Fuller*, 120 U.S. at 545. Thus, if there are open acts of ownership by a different party and the apparent owner does and says nothing, the law presumes that the other party lawfully received the right to the possession and use of the property. Otherwise, common sense indicates the apparent owner would object.

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

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

Relatedly, courts consider whether a grantor or later descendants appeared to have knowledge of the claimant's competing claim. *See Love v. Eastham*, 154 S.W.2d 623, 625 (1941). For example, in *Love*, all the open acts of ownership took place after the apparent owners moved to another part of the state. *Id.* Thus, the record failed to establish presumptive grant because acquiescence could not be established if knowledge of the presumptive grantees' claims of ownership could not be attributed to the prior owner. *Id.; see also Grayson v. Lofland*, 52 S.W. 121, 123 (Tex. Civ. App. 1899, writ ref'd) (crediting evidence that the original grantor had recognized claimant's interest during his lifetime); *Sydnor v. Tex. Sav. & Real Est. Inv. Ass'n*, 94 S.W. 451, 454 (Tex. Civ. App. 1906, writ ref'd) (crediting evidence that predecessor had not listed the property on an inventory of his father's estate); *Jeffus*, 484 S.W.2d at 954 ("[W]here the ostensible owner resides in the immediate vicinity of a tract of land over which another party is exercising open and notorious dominion and control, knowledge of such dominion and control may be thereby imputed to the owner.") (quoting *Love*, 154 S.W.2d at 625)).

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

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

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

> The doctrine of the presumption of the execution of a deed, or more properly the proof of its execution, by circumstances when no better evidence is obtainable is well established, and especially so by the decisions in this state, and the disposition has been to extend rather than to limit it.… The destruction of the records in so many of the counties of this state, coupled with the carelessness, well nigh universal at an earlier period of our history, on the part of the people in keeping the original deeds after they had been recorded, and the disposition now so prevalent to uncover, by reason of carefully prepared abstracts of title, the absence of such written muniments of title as are necessary to make a complete chain, require, in our opinion, a liberal application of this rule for the protection of titles long relied upon in good faith, the evidence of which has been lost through carelessness or accident, the destruction of records, and the death of all persons originally connected therewith, or likely to know anything about the facts.

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

IV. KEY "PRESUMED GRANT" CASES BEFORE *VAN DYKE*

Sometimes the best way to develop a fuller understanding of a doctrine is to review the facts and holdings of the key cases in the doctrine's development. This section therefore highlights pivotal decisions in the presumed-grant doctrine's development with the goal of helping inform the way that parties litigate presumed-grant cases in the future.

A. *Taylor v. Watkins*, 26 Tex. 688 (1863)

A very early exposition of the presumed-grant doctrine is contained in *Taylor v. Watkins*, 26 Tex. 688 (1863). The case involved a dispute over ownership of land, and the plaintiff mostly relied on proof of *possession*—not perfect record title—to advance her claim. *Id.* at 690. The opinion presents a bit of a treatise on presumed-grant law in Texas and beyond, *see id.* at 692-700, and ultimately concluded that the issue is a fact question for the jury, *id.* at 698-99.

After opining about presumptions of proof generally, the Court focused on the presumed-grant doctrine:

> When we come to inquire into the general principles upon which presumptions of grants are resorted to by courts of justice, we are told that they are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title and the public policy of supporting long and uninterrupted possessions. They are said to be founded upon the consideration that the facts are such as could not according to the ordinary course of human affairs occur, unless there was a transmutation of title to or an admission of an existing adverse title in the party in possession.

Id. at 692-93 (citation omitted).

The Court also indicated that the question is largely one for the jury to decide and that the presumption may be rebutted:

> [T]he question whether a grant will be presumed or not is a question for the jury; in other words, … the court ought always leave it to the jury to presume a grant or not, according to the evidence and the circumstances of the case; that the presumption of a grant does arise from long and uninterrupted possession, where the possession is consistent with the presumption, and that the jury may properly be told thus much as matter of law; but that the presumption is one which may always be repelled by proof.

Id. at 698-99. The Court also indicated that the amount of time that must pass is not "a definite period of time," but rather a question for the jury looking "upon all the circumstances taken together." *Id.* at 695-96 (citation omitted).

As an historical aside, one of the categories of presumed grant that the Court pointed to was the presumption of a grant of manumission. *See id.* at 693. Specifically, the Court pointed to a Maryland case holding that a grant of manumission could be presumed in the presence of evidence that a person's ancestors had been living free for more than 30 years. *Id.* at 694 (citation omitted).

B. *Fletcher v. Fuller*, 120 U.S. 534 (1887)

In *Fletcher v. Fuller*, the United States Supreme Court reviewed a presumed-grant jury instruction in a dispute over an interest in 14 acres of land in Lincoln, Rhode Island. 120 U.S. 534, 544-45 (1887).

As in many presumed-grant cases, the case presented a battle between one party in possession of the land but without perfect record title and another party with arguably perfect record title but without possession of the property. The plaintiff acquired, by power of attorney, all the rights to the property that had passed—by the will of Abigail Fuller—118 years earlier. *Id.* at 541-42. The defendants traced their title by deeds back to Jeremiah Richardson, a grandson of Abigail Fuller whose father preceded Abigail in death. *Id.* at 542. For at least 77 years (from 1805 to the time of trial), the land was assessed to and taxes were paid by persons in the defendants' chain of title. *Id.* at 544. When the defendants found the plaintiff upon the land in October 1874, they "on that day and year, with force and arms, entered thereon, and ejected him therefrom." *Id.* at 537.

The trial court presented the jury with this presumed-grant question:

> [I]f you find that you can presume a grant, if you find from the testimony that there was a lost deed which passed from Abigail Fuller to Jeremiah Richardson … so that Jeremiah had a good title to [convey], that makes the title of the defendants complete. But … if the evidence in favor of the presumption is overcome by the evidence against such a grant, … you will not presume one.

Id. at 544-45. The defendants also requested a jury instruction—described below—along with the charge, which was denied by the trial court:

> The presumption [the jurors] were authorized to make of a lost deed was not necessarily restricted to what may fairly be supposed to have occurred, but rather to what may have occurred and seems requisite to quiet title in the possessor.

Id. at 545. The issue was whether the trial court erred by failing to provide the additional instruction—and the United States Supreme Court answered that question "yes": "For the refusal of the court below to give the instruction requested, the case must go back for a new trial." *Id.* at 550.

In resolving the jury-charge question, the opinion provides a comprehensive analysis of the presumed-grant doctrine, its purpose, and its application. First, the Court explained that the doctrine exists "for the purpose of quieting the possession" of property, recognizing that title is "often … imperfect," and in many cases unavailable, when from the length of time it has become impossible to discover in whom the legal estate … is already vested." *Id.* at 545-46 (citations omitted). The Court further explained that—in many instances—title passed "orally" (and therefore without written record), title passed without a written instrument intended to follow a condition, or title passed by written instruments that "may have been mislaid or lost." *Id.* at 545-546. Because "[t]he owners of property … do not often allow it to remain in the quiet and unquestioned enjoyment of others," *id.* at 545:

> [t]he law, in tenderness to the infirmities of human nature, steps in, and by reasonable presumptions that acts to protect one's rights which might have been done, and in the ordinary course of things generally would be done, have been done, … affords the necessary protection against possible failure to obtain or preserve the proper muniments of title, and avoids the necessity of relying upon the fallible memory of witnesses, when time may have dimmed their recollection of past transactions, and thus gives peace and quiet to long and uninterrupted possessions.

Id. at 546.

"When," the Court explained, "possession and use are long continued, they create a presumption of lawful origin; that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property." *Id.* at 545. This "rule of presumption … is one of policy, as well as of convenience, and necessary for the peace and security of society." *Id.* at 546.

Finally, the Court emphasized that the jury need not conclude that a conveyance *actually* occurred, but rather that it *might* have occurred and that its occurrence "would be a solution of the difficulties arising from its non-execution." *Id.* at 547.

C. *Baldwin v. Goldfrank*, 31 S.W. 1064 (Tex. 1895)

The Texas Supreme Court took another opportunity to refine the presumed-grant doctrine in *Baldwin v. Goldfrank*, 31 S.W. 1064 (Tex. 1895). In *Baldwin*, the plaintiff sough to recover an interest in "28 leagues and 10 labors of land originally granted by the king of Spain." *Id.* at 1065. Because the plaintiff's claim relied partially on the existence of a lost deed in the chain of title, the Court expounded upon the presumed-grant doctrine.

Notably, the Court wrote that the doctrine's purpose was *not* to quiet title, but instead to recognize that ownership has been conveyed under circumstances beyond record title:

> The rule that a deed or a power may be presumed after a long lapse of time is not an arbitrary one. It does not rest upon any consideration of public policy with reference to quieting titles to property. It has its just foundation in the principle that long and continuous acts of ownership, acquiesced in knowingly by those who hold an apparently adverse title, lead to the conclusion that the persons so exercising such acts have acquired the title.

Id. at 1066.

The Court also explained the role of possession in the presumed-grant doctrine:

> Since possession is the most indubitable act of ownership which can be exercised by a claimant of land, it would seem that in a country where there are no unoccupied lands it is reasonable to hold that, without such proof of possession, the presumption will not be allowed. In a country, however, where much of its lands are unoccupied, a different rule should prevail; and therefore it has been held in this state, as in many others, that possession is not indispensably requisite to the presumption.

Id. (citation omitted). In lands where possession would not be typical, then, courts might look to "other acts showing a continuous claim to the land." *Id.*

But the Court was unwilling to recognize that a grant could be presumed to support ownership by a party that itself did not make a public claim to the land for more than two decades. *Id.* "In the present case, there was no evidence as to any claim to the land whatever, by the grantee in the deed in question, for more than 24 years." *Id.* The Court explained:

> The presumption of a grant or of a power from claim of ownership upon the one side, and an acquiescence upon the other, rests rather upon the acquiescence of the latter than upon the claim of the former. Without proof of some unequivocal acts of ownership, long-continued, and brought home to the adverse party, acquiescence in the claim cannot be established.

Id.

D. *Frugia v. Trueheart*, 106 S.W. 736 (Tex. Civ. App. 1907, writ ref'd)

Frugia v. Trueheart, 106 S.W. 736 (Tex. Civ. App. 1907, writ ref'd) is one of several prototypical presumed-grant cases in which the party in possession for decades doesn't have perfect record title, the official deed records were destroyed (there, in a courthouse fire), and the existence of a lost deed fills in the gap in record title for the party in possession. *Id.* at 737-41.

In *Frugia*, the land was granted to Joseph Young in 1835 by the State of Coahuila and Texas. *Id.* at 737. The appellants traced their title to Young, while the appellees traced their title to deeds allegedly executed by Young. *Id.* One of those deeds was introduced into evidence and the jury was instructed to find for the defendants thereon. *Id.* But the other deed was lost and "[t]he records of the county were destroyed by fire in December, 1874." *Id.* Even so, its existence was noted in an abstract of title prepared by the county clerk before the fire occurred. *Id.* at 737-38. Moreover, the appellants' heirs did not claim the land "for over 60 years." *Id.* at 737.

The Court of Civil Appeals held that the evidence of presumed grant was *conclusive*:

> We are of the opinion that from the evidence in the record no other verdict could have been properly rendered than one for [appellees]. The evidence overwhelmingly establishes that Joseph Young did in fact execute the two deeds conveying the entire league in 1835. The evidence of the Cameron abstract, which was not impeached or contradicted, corroborated in the minutest particular by the recitals in the Kessler deed of 1875, and by the original deed found in the custody of Miss Helen Hardin, the long-continued claim of ownership and title by the appellees, and their vendees, the open, public, and notorious character of this claim as shown by the partition proceedings in 1896, and … the utter failure of Joseph Young in his lifetime (and he lived for many years in the neighborhood of the land), and of his heirs after him, who also lived near the land, to assert their claim, … all lead irresistibly to the conclusion that the deeds from Young were executed and recorded as claimed, and that the belated claim of his heirs was born of the destruction of the records of Liberty county, and with them, it was supposed, the evidence of the execution of those deeds. The Cameron abstract, uncontradicted and unimpeached as it was, established beyond dispute the execution of the deeds.

Id. at 741.

E. *Pratt v. Townsend*, 125 S.W. 111 (Tex. Civ. App. 1910, no writ)

Another early prototypical presumed-grant case is *Pratt v. Townsend*, 125 S.W. 111 (Tex. Civ. App. 1910, no writ). Although the records of the county were destroyed in a courthouse fire in 1875, the court held that other evidence was more than sufficient to put the presumed-grant issue to the jury. *Id.* at 113. Specifically, the court pointed to (1) recitations in other deeds that acknowledged a prior conveyance of the land; (2) an "openly asserted claim of title by persons holding under the [presumed] conveyance"; (3) the "payment of taxes and other acts of possession" of the parties holding under the presumed deed; and (4) the "entire absence of such claim, payment of taxes, etc., by the holders of the adversary title for nearly 50 years." *Id.*

The court reasoned that the presumed-grant doctrine is available to demonstrate proof of the execution of a deed "by circumstances when no better evidence is obtainable." *Id.* at 114. And the court summarized the need for the doctrine:

> The destruction of the records in so many of the counties of this state, coupled with the carelessness, well nigh universal at an earlier period of our history, on the part of the people in keeping the original deeds after they had been recorded, and the disposition now so prevalent to uncover … the absence of such written muniments of title as are necessary to make a complete chain, require, in our opinion, a liberal application of this rule for the protection of titles long relied upon in good faith, the evidence of which has been lost through carelessness or accident, the destruction of records, and the death of all persons originally connected therewith, or likely to know anything about the facts. And especially is this true when such claim of title is accompanied by an entire absence of any assertion or claim of right or title inconsistent with the claim under the deed so sought to be established.

Id. at 115.

F. *Magee v. Paul*, 221 S.W. 254 (Tex. 1920)

Magee v. Paul, 221 S.W. 254 (Tex. 1920) is arguably Texas's most important presumed-grant case not named *Van Dyke*.

Magee was a dispute over 640 acres of land in Lubbock County, Texas. 221 S.W. at 255. The land was patented by the State to John Gibson in 1882. *Id.* Gibson died in 1887, and the appellant traced his title from Gibson's heirs. *Id.* The appellees, on the other hand, traced their title from Steven Albert, who assigned the interest in 1879. *Id.* at 256. There was no deed in the record conveying the interest from Gibson to Albert, however, and the evidence was in conflict as to whether Gibson's heirs had acquiesced "in the claim to the 640 acres under Stephen Albert." *Id.*

The opinion largely focused on the admissibility of indirect and circumstantial evidence of a conveyance from Gibson to Albert, including (1) an affidavit from Albert indicating that he placed the deed to him (from Gibson) in a package and delivered it into the possession of a private courier; (2) an affidavit of a private courier stating that "he was attacked by armed and masked men" who stole the package; and (3) a certified copy of a published notice of missing instruments linked to Gibson from the time of lost package. *Id.* The Court held that the exhibits and recitals therein were "admissible as tending to establish the sale recited." *Id.* at 257.

In holding that the instruments were admissible, the Court pointed to the presumed-grant doctrine as a mechanism for establishing title despite the missing record link between Gibson and Albert. The Court began by noting that "[t]he appellees were entitled to recover only in the event that they established an ancient transfer, or chain of ancient transfers, … from John H. Gibson to Stephen Albert." *Id.* at 256. And the Court explained that evidence of such transfers need not be actual conveyances, but could be circumstantial evidence of such conveyances *if* the elements of the presumed-grant doctrine are met:

> Since it is not consistent with human experience for one really owning property of value to assert no claim thereto, but to acquiesce for a long period of time in an unfounded, hostile claim, the rule is sound which permits the inference that an apparent owner has parted with his title from evidence, first, of a long-asserted and open claim, adverse to that of the apparent owner; second, of nonclaim by the apparent owner; and third, of acquiescence by the apparent owner in the adverse claim.

Id. at 256-57. The Court further explained that this presumption was necessary as a matter of public policy:

> This rule is essential to the ascertainment of the very truth of ancient transactions. Without it, numberless valid land titles could not be upheld. Its application becomes more and more important with the passing years, as it becomes more and more difficult to get living witnesses to that which long ago transpired.

Id. at 257.

Last, the Court weighed in on the burden and standard of proof:

> [I]t was incumbent on the plaintiffs, in this action of trespass to try title, to establish the missing links in the chain of title, under which they claimed the 640 acres of land, by the preponderance of the evidence, before they were entitled to recover.

Id. at 258.

G. *Fowler v. Tex. Expl. Co.*, 290 S.W. 818 (Tex. App.—Galveston 1926, writ ref'd)

Fowler v. Texas Exploration Co., 290 S.W. 818 (Tex. App.—Galveston 1926, writ ref'd) is an example of the use of the presumed-grant doctrine without destroyed or knowingly lost documents—but under circumstances when only a missing deed makes sense (and perhaps pursuant to the distribution of a bit of rough justice).

In that case, the disputed land was granted to Abraham Darst in 1831. *Id.* at 819. The same year, Abraham promised to convey the land to Henry Austin as soon as such sale was allowed. *Id.* Abraham Darst died in 1834 or 1835, leaving behind family members including his daughter Rosetta Darst. *Id.* at 819-20. Austin began paying taxes on the land in 1837 and continued to do so thereafter. *Id.* at 820.

Between 1846 and 1847, another man—Alpheus Rice—deserted his first wife and purported to marry Rosetta Darst. *Id.* at 821. There is no direct evidence of Rosetta conveying her interest in her father's land to Austin. Descendants of Alpheus and Rosetta made no claim to any interest in the land until this suit was filed. *Id.* at 823.

The trial court presumed the existence of a deed from Rosetta to Austin, *id.*, at 821, and the court of appeals affirmed under the presumed-grant doctrine, *id.* at 822-23. The court held that "[t]he acquiescence by all of the Darst family, and by Alpheus Rice and his descendants, in the claim and active assertion of ownership and the possession of the land by Austin and those holding under him, are … consistent with the findings that … Alpheus Rice and wife, Rosetta, … either by deed or otherwise, released Rosetta's apparent title." *Id.* at 823.

The court further explained:

> The salutary rule which authorizes a court or jury to find when a title has been openly and notoriously asserted for a long period of time, as against the heirs of one who held the title in his lifetime and must have known of the adverse claim and assertion of title, and such continuous adverse claim and active assertion of ownership is known and long acquiesced in by the heirs, that such title has passed by deed or otherwise from the ancestor, is a settled rule of decision of this state. The rule is generally referred to as the presumption of a deed or grant, but it seems to us it could be more accurately termed proof of title by circumstantial evidence.

Id. at 823.

H. *Duke v. Hous. Oil Co. of Tex.,* 128 S.W.2d 480 (Tex. App.—Beaumont 1939, no writ)

Duke v. Houston Oil Co. of Texas, 128 S.W.2d 480 (Tex. App.—Beaumont 1939, no writ), is another example of an appellate court holding that a "presumed grant" was conclusively established.

Duke was a dispute over ownership of 640 acres of land in Hardin County, Texas. *Id.* at 482. The land was granted to Samuel Williams in 1836 by the Republic of Texas. *Id.* Williams conveyed the land to James Henderson, who conveyed the land to George Ryan, who conveyed the land back to Henderson in 1848. *Id.* Two years later, a patent for the land was issued to Ryan, *id.*, and Henderson's heirs made no claim to the land from 1848 until they filed suit in 1937—"an absolute non-claim of some ninety years." *Id.* at 483.

The record showed that appellants—Henderson's heirs and their predecessors—had not "at any time paid any taxes" on the land. *Id.* Nor had they ever "been in possession of the land, nor made any claim thereto" since the 1840s. *Id.* On the other hand, the appellees "did not offer in evidence a transfer of the [land] by Henderson back to Ryan, and the record shows that they did not have such a transfer in their possession, and that such a transfer is not of record in either Jefferson or Hardin Counties." *Id.*

Under these facts, the court of appeals held that the trial court correctly concluded that Ryan's heirs had conclusively established title by circumstantial evidence:

> [W]e think the trial court was justified, as a matter of law, in presuming that the title transferred by George Ryan to James Henderson was transferred back to Ryan by Henderson. Every inference in the record supports that presumption, and, as we view the record, there is not a circumstance against it. Appellants offered no evidence to rebut this presumption. As a fact issue, no one could dispute the proposition that the evidence was sufficient to send it to the jury. But on the issue, as in proof of all other issues, where there is no ground upon which reasonable minds can differ, the court, as a matter of law, can draw the conclusion, and so instruct the jury.

Id. The court further explained that, in its view, the evidence "excludes every hypothesis except a transfer of the certificate by Henderson back to Ryan, and is sufficient to remove all reasonable doubts of the existence of such a

transfer." *Id.* at 486. "Our conclusion is supported by the policy of our courts to extend and not restrict the application of proof of title by circumstances, where there has been a long non-claim by the plaintiffs and an active possession and claim by the defendants." *Id.*

One interesting wrinkle of this case is that it appears that the appellees (who ultimately prevailed on a common-law presumed-grant theory) may have at trial relied on Texas's rarely litigated *statutory* presumption of title—sometimes called the "dominion" statute—that governs title disputes when the record-title owner has "not exercised dominion" over or paid taxes on the land, while the other party has paid taxes on the interest for 25 years without delinquency and has "openly exercised dominion over" the land. *See id.* at 485. The opinion implies that the statute did not apply because an exhibit in evidence revealed that for one year, Ryan's heirs paid taxes only "after they became delinquent." *Id.* at 483.

I. *Love v. Eastham*, 154 S.W.2d 623 (Tex. 1941)

In 1941, the Texas Supreme Court showed a limit to the presumed-grant doctrine—holding that it did not apply in the absence of evidence of the record-title owner's knowledge of the presumed-grant advocate's claim to the land. *Love v. Eastham*, 154 S.W.2d 623 (Tex. 1941).

In *Love*, the disputed land had been patented in 1888 to George Love, a "Methodist preacher." *Id.* at 623. At the time, George, his wife, and their family lived on the land as their homestead. *Id.* In 1889, the church assigned George to work in another county "far removed from this land," and he and his family moved together. *Id.* at 624.

The following year, Della Eastham "assumed dominion and control over this land," and such dominion and control were "open and notorious, and well and generally known in the vicinity where this land is located." *Id.* However, "[t]here is no direct evidence … showing, or tending to show, that George and Betty Love ever conveyed this land to Mrs. Della Eastham." *Id.* "No such deed has been recorded in Walker County, Texas, where this land is situated, and no such deed was offered in evidence in the trial of this case." *Id.* Moreover, "[n]o witness testified to having seen such a deed, and … Betty Love … absolutely denied that she ever saw, signed, or acknowledged such an instrument." *Id.*

The Court held that under those circumstances, Eastham's heir "failed, as a matter of law, to establish a presumptive conveyance." *Id.* at 624. The Court wrote:

> In order to establish a presumptive conveyance, there must be a long and notorious claim of ownership, nonclaim by the ostensible owner, and acquiescene on the part of the ostensible owner in the claim of the adverse party. Of course, it cannot be said that the ostensible owner has acquiesced in a claim of ownership adverse to his title, unless it can also be said that he had knowledge of such adverse claim. Such knowledge may be either actual or imputed. … [N]o knowledge on the part of George Love has been shown.

Id. at 625.

J. *Miller v. Fleming*, 233 S.W.2d 571 (Tex. 1950)

In *Miller v. Fleming*, 233 S.W.2d 571 (Tex. 1950)—a mineral-title dispute—the Texas Supreme Court largely recharacterized the presumed-grant doctrine as merely the demonstration of title by circumstantial evidence. *Id.* at 575-56.

The Court explained that in the case, it was "dealing with conveyances executed more than 50 years ago." *Id.* at 575. "It is quite obvious that by reason of the lapse of so many years the law will not exact the same particularity of proof as would be required in cases where the testimony of the particular transaction is supposed to be accessible." *Id.* As a result, the Court said, "[t]he law only demands the best proof of a transaction that it is susceptible of, and when that is produced then it becomes a question whether or not its probative force is such as to establish its existence." *Id.* And "[a] deed or other instrument may be proved by circumstances or presumptive evidence." *Id.*

The Court also emphasized that the standard is low. "Evidence need only lead to the conclusion that the grant might have been executed." *Id.* (quotation omitted). "A removal of all reasonable doubt is not essential." *Id.* (citation omitted). "Only a fair probability of the existence of such title need be proved." *Id.* (citation omitted). In summary:

> If the circumstances are consistent with the presumption that a sale or deed was made, and, in view of the circumstances, it is more reasonable to believe that such a sale or deed was made than that it was not made, the jury are at liberty to presume and find that it was made. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed and that its execution would be a solution of the difficulties arising from its nonexecution.

Id. at 575-76 (citations omitted).

K. *Adams v. Slattery*, 295 S.W.2d 859 (Tex. 1956)

Adams v. Slattery, 295 S.W.2d 859 (Tex. 1956) is a great example of what ultimately came to be a typical case in the presumed-grant arena—described in that case as a branch of demonstrating title "by circumstantial evidence." *Id.* at 868.

In *Adams*, a land certificate for the property was originally issued to the heirs of Republic of Texas colonist Conrad Eigeneaur, who was killed in 1836 at the Battle of Coleto. *Id.* at 860. The county courthouse, which kept the land records, "was destroyed by fire" in 1874. *Id.* at 861.

Tax records, however, indicate that the land was assessed to other parties as early as 1868. *Id.* In 1877, it was assessed to Thomas Slattery. *Id.* The same year, a deed indicates that the land was sold to Slattery as part of a bankruptcy. *Id.* The Slattery family paid taxes on the property for many decades. *Id.*

In 1940—a few months after the death of Slattery's widow—heirs of Conrad Eigeneaur brought suit to claim the land. *Id.* at 871. By the time the case made it to trial, "more than 70 years" had elapsed "since Thomas Slattery recorded his deed to this land." *Id.* at 872.

The Court held that the evidence raised a fact question as to the issue of "presumption of a deed" from Eigeneaur's heirs to Slattery's predecessors-in-title. *Id.* at 871. "Since the acquiescence of the Eigeneaur heirs can be shown by circumstances, and since the possession of the Slattery defendants was of the open, notorious and adverse character necessary to impute knowledge, a jury issue was raised as to such acquiescence and the instruction of the verdict for [the Eigeneaur heirs] was not justified." *Id.* The Court pointed to the assessment of taxes in Slattery and the discontinuation of assessment of taxes in the Eigeneaur heirs as evidence of acquiescence. *Id.*

The Court also emphasized that for presumed grant to apply, the "[e]vidence need only lead to the conclusion that the grant *might* have been executed." *Id.* (emphasis added) (quotation omitted). "A removal of all reasonable doubt is not essential." *Id.* (citation omitted). "Only a fair probability of the existence of such title need be proved." *Id.* In other words:

> If the circumstances are consistent with the presumption that a sale or deed was made, and, in view of the circumstances, it is more reasonable to believe that such a sale or deed was made than that it was not made, the jury are at liberty to presume and find that it was made. It is sufficient if the evidence leads to the conclusion that the conveyance *might have been executed* and that its execution would be a solution of the difficulties arising from its nonexecution.

Id. (emphasis added) (citations omitted).

L. *Page v. Pan Am. Petroleum Corp.*, 381 S.W.2d 949 (Tex. App.—Corpus Christi 1964, no writ)

Courts sometimes seem particularly inclined to rely on the presumed-grant doctrine when stale title claims are pushed under less-than-sympathetic circumstances. *Page v. Pan Am. Petroleum Corp.*, 381 S.W.2d 949 (Tex. App.—Corpus Christi 1964, no writ) is a good example.

In *Page*, the property was owned by Elizabeth Page Chase upon her death in 1829. *Id.* at 950. She died without a will and left as her sole heirs two sons—Joseph Page and Samuel Page. *Id.* In 1939, Joseph conveyed his half of the interest to John Sweeny. *Id.* But there is no record of any deed conveying Samuel's half. *Id.* Samuel was sophisticated, lived nearby, and "keenly aware of his inheritances," but "never at any time made any claim that he had inherited" the property. *Id.* at 951. Samuel was a minor when his mother died, and "[t]he court records of the guardianship proceedings … are incomplete and do not close." *Id.* at 952. Moreover, "in a storm of 1932, many of the old records, including old probate papers [from the courthouse], were blown across the prairie." *Id.*

Sweeny and his heirs occupied the property and "paid all the taxes levied against this property," while Samuel and his heirs "paid none." *Id.*

In 1957, the plaintiff—after the discovery of oil on the property—"commenced searching for the descendants of Samuel … and took assignments of part interest in their claims as part consideration for his agreement to pay all costs of this litigation" to pursue the claims of Samuel's heirs. *Id.* at 952.

Under these circumstances, the court of appeals affirmed the trial court's holding that Sweeny's heirs had proved presumed grant—by circumstantial evidence—as a matter of law:

> In the light of the circumstantial proof, we hold that the trial court did not err in presuming as a matter of law the proof of a conveyance divesting plaintiffs' predecessors in title of all right, title and interest in the lands. … We feel that the defendants, by their summary judgment evidence, have shown the entire absence of any issue of fact but that there was such a disposal of title either by Elizabeth Page Chase prior to her death … or writing not recorded or lost … or by some subsequent unrecorded conveyance … and the plaintiffs have not offered any evidence to rebut defendants' proof, or establish a fact issue as to such presumption.

Id. at 952.

M. *Jeffus v. J.B. Coon*, 484 S.W.2d 949 (Tex. App.—Tyler 1972, no writ)

Presumed-grant cases from the late 1900s are rare, but *Jeffus v. J.B. Coon*, 484 S.W.2d 949 (Tex. App.—Tyler 1972, no writ) offers another example of a prototypical presumed-grant case: long-time non-claim by the record-title owner, a gap in title, and destroyed records. *Id.* at 951-54.

The property was granted to Maria Jacinto Chamar by "the Mexican Government on July 30, 1835." *Id.* at 951. Chamar conveyed the property to William Kindman in 1857. *Id.* Although a reference in another deed is made to a conveyance of the land to Barton Clark, no deed was found conveying the land out of Kindman or into Clark. *Id.* Notably, the Houston County Courthouse was destroyed by fire in 1865, and the records destroyed by fire included the records referenced in the other deed. *Id.*

For 90 years, Clark and his heirs and successors have "paid all taxes" and possessed the land. *Id.* at 952. Appellee derived its title from Clark. *Id.* at 951. It appears that appellant was an heir to Kindman. *Id.* at 954. But "the record shows that since the deed to Kindman dated April 15, 1857, there is nothing in the record of Houston County showing that any Kindman heir ever asserted any title to the land in question, during a period of 110 years before this issue was raised." *Id.*

The court explained that in Texas, title may be proved by circumstantial evidence. *Id.* at 953. Given that the Kindman heirs made no claim for 100 years and that an appellant had lived in the area for decades and made no claim while the Clark heirs paid taxes and possessed the land, the court held that the evidence supported the trial court's presumed-grant findings. *Id.* at 954-55.

V. WHAT'S NEXT AND REMAINING QUESTIONS

Given the doctrine's decline in recent decades, the Texas Supreme Court's resurrection of the doctrine in *Van Dyke* was surprising in itself. The rise of digital title records seems to have obviated much of the doctrine's initial purpose, and it appears at odds with most modern doctrines regarding real-property records (the statute of frauds, adverse-possession statutes, etc.). Even more surprising was the doctrine's application to a deed-interpretation dispute.

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

Given the Court's explicit recognition that its presumed-grant holding wasn't necessary to its decision, the entire section of the opinion is likely *dicta*. Nevertheless, the opinion leaves questions about the future development of the doctrine.

A. Deed Interpretation or Course of Conduct?

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

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

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

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

Indeed, in the recent oral argument at the Texas Supreme Court in *Clifton v. Johnson*, No. 23-0671, the justices appeared to consider whether the Court could or should simplify some deed-construction disputes by merely looking to the course-of-conduct doctrine. Of course, Texas courts have traditionally refused to consider the parties' prior conduct as a tool to determine the meaning of an unambiguous instrument. *See Burlington*, 573 S.W.3d at 206; *E. Montgomery Cnty. Mun. Util. Dist. No. 1 v. Roman Forest Consol. Mun. Util. Dist.*, 620 S.W.2d 110, 112 (Tex. 1981) ("The conduct of the parties is ordinarily immaterial in the determining of the meaning of an unambiguous instrument. The conduct of the parties i[s] only relevant after the court has determined that the contract is ambiguous.") (citations omitted). *Sun Oil* seemed to take this analysis a step farther—indicating that the parties' conduct could "not create a

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

contract right that does not otherwise exist." 626 S.W.2d at 734; *see also Yzaguirre v. KCS Res., Inc.*, 47 S.W.3d 532, 541 (Tex. 2000) (analyzing *Sun Oil*); *de los Santos v. Coastal Oil & Gas Corp.*, No. 05-97-00029-CV, 1999 WL 619639, at *4 (Tex. App.—Dallas Aug. 17, 1999, pet. denied) (not designated for publication) (same). On the other hand, *Van Dyke* emphasized that the types of "extrinsic evidence" considered under the presumed-grant doctrine (and this would presumably also apply any new course-of-conduct theory) "is *not* probative" of the meaning of the instrument at all. 668 S.W.3d at 367 n.9.

B. Gap in Title?

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

The lower court's holding was not unreasonable given that the doctrine was ordinarily applied to patch gaps in title. *See Slattery*, 156 Tex. at 436 (gap in title caused by destruction of records in courthouse fire); *Jeffus*, 484 S.W.2d at 954 (same); *Magee*, 221 S.W. at 256 (gap due to missing records where transporter was attacked by masked men who stole land certificates). Nor was it inconsistent with at least some statements of prior caselaw. *See Seddon v. Harrison*, 367 S.W.2d 888 (Tex. App.—Houston [1st Dist.] 1963, writ ref'd n.r.e) ("In the present case there is nothing to show from whom appellants might have derived title under a lost deed or presumption of grant. There is no missing link in their chain of title…. The only defect was in the description of the property in the deed…."); *Howland*, 570 S.W.2d at 879 ("Because the gap in Howland's title occurred 96 to 129 years before this suit was brought, no direct evidence was available as to possession of the land."). In *Magee*, the Texas Supreme Court even described the doctrine as an action "to establish the missing links in the chain of title." 221 S.W. at 258. Given the historical purpose of the doctrine to quiet title in an age where records were very easily lost and reliance on human memory ineffective, relying on a gap in title might have been a useful guardrail for limiting the doctrine going forward.

Or are we misreading *Van Dyke*'s gap-in-title analysis? Here's what the opinion says about whether a gap in title is needed to trigger application of the presumed-grant doctrine:

> The court of appeals imposed an additional fourth element: a gap in the title. Satisfying the doctrine is properly difficult, but neither our precedent nor the doctrine's underlying purposes support mandating this additional test. Nonetheless, the extensive history of transactions and dealings detailed below, accompanied by the 1946 letter, provides enough evidence for the existence of such a gap even if it were needed.

Id. at 366 (citations omitted). We read that as rejecting the need to demonstrate a gap in title, but in a case that has been granted and recently argued at the Texas Supreme Court, the El Paso Court of Appeals did not. In *Johnson v. Clifton*, 719 S.W.3d 270 (Tex. App.—El Paso 2023, pet. granted), the court of appeals held that in *Van Dyke*:

> The Court left open the question of whether a fourth element was required, i.e., a 'gap in the title,' finding that even if necessary, there was a gap in the title in the deed in that case that justified the doctrine's application. Here, there is no evidence of a gap in the record….

Id. at 287. Given that the Texas Supreme Court granted the petition for review in *Johnson*, we will likely soon have an answer to whether the gap-in-title element survived *Van Dyke*.

C. Standard of Proof?

In another wrinkle of the presumed-grant doctrine, the Court may have authored an entirely different guardrail—a potentially heightened standard of proof.

Historically, courts often emphasized that the doctrine was to be given a "liberal" application. *See Fowler*, 290 S.W. at 823 ("The rule has been given the most liberal interpretation and application by our courts."); *Slattery*, 156 Tex. at 452-53 ("[Evidentiary issues] require, in our opinion, a liberal application of this rule for the protection of titles long relied upon in good faith."); *Jeffus*, 484 S.W.2d at 953 ("[T]he doctrine of the presumption of the execution of a deed … receive a Liberal application for the protection of land titles long relied on in good faith…."); *Fair*, 437 S.W.3d at 626 ("The rule has been given the most liberal interpretation and application by our courts."). In fact, the Texas Supreme Court has previously repeatedly emphasized how downright *easy* it is to trigger a fact question on the presumed-grant doctrine. *E.g.*, *Slattery*, 156 Tex. at 452; *Miller*, 233 S.W.2d at 376-77. In *Slattery*, the Court could not have been more clear that the bar is low, not high, to submit a presumed-grant charge to the jury:

> Evidence need only lead to the conclusion that the grant might have been executed. … Only a fair probability of the existence of such title need be proved. If the circumstances are consistent with the presumption that a sale or deed was made, and, in view of the circumstances, it is more reasonable to believe that such a sale or deed was made than that it was not made, the jury are at liberty to presume and find that it was made. *It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed and that its execution would be a solution of the difficulties arising from its nonexecution.*

295 S.W.2d at 45 (emphasis added) (citations omitted). Likewise, in *Miller*, the Court said that "[a] deed or other instrument may be proved by circumstances or presumptive evidence, *and the tendency of the courts is to extend rather than limit the rule*." *Id.* at 575 (emphasis added).

However, *Van Dyke* suggests that liberality may not extend to this new era of presumed grant. In discussing the rule's evidentiary burdens, the Court stated that satisfying the doctrine was "properly difficult" and "demanding." 668 S.W.3d at 366, 368 n.11. Thus, it may be that as the presumed-grant doctrine is extended outside of its historical context, the burdens of proof will be higher. The Court also said that application of the presumed-grant doctrine would "dispense with the deed-construction analysis" in a case "where the presumed-grant doctrine is *clearly* implicated." *Id.* at 368 n.11 (emphasis added). What does that mean? Does the existence of a fact question "clearly implicate" the presumed-grant doctrine sufficient to trump deed construction? Or must there be some level of proof more than the Court has ever before required to apply the doctrine now?

And what evidence may a court or jury consider in analyzing presumed grant? In *Van Dyke*, the Court relied on a "ninety-year history [that] include[d] conveyances, leases, ratifications, division orders, contracts, probate inventories, and a myriad of other recorded instruments that provided notice." 668 S.W.3d at 366-67. This is consistent with the prior reliance on conveyances as an assertion of ownership, as well as a focus on the actions of both parties' predecessors over a long period. *See, e.g.*, *Love*, 154 S.W.2d at 625; *Brewer*, 99 S.W. at 1035; *Baldwin*, 31 S.W. at 1066. Courts have also often looked to tax assessments and tax payments, *e.g.*, *Slattery*, 295 S.W.2d at 869-70; *Page*, 381 S.W.2d at 951, *Duke*, 128 S.W.2d at 483, as well as occupation and use, *e.g.*, *Page*, 381 S.W.2d at 951.

D. The Statute of Limitations and the Statute of Frauds

Another question to be answered is how other property law doctrines will interact with presumed grant. The presumed-grant doctrine has long existed alongside adverse possession and limitations statutes. Frequently, it was applied in instances where adverse-possession was not available. *See, e.g.*, *Purnell*, 339 S.W.2d at 91-92. As an evidentiary tool, it evolved with a bit more flexibility than the adverse possession statutes, even as the forms of proof applied are quite similar.[4] Courts have recognized this similarity, describing the presumed-grant doctrine as a form of "common law adverse possession." *See, e.g.*, *Van Dyke*, 668 S.W.3d at 366; *San Miguel*, 2019 WL 2996975, at *1; *Haby v. Howard*, 757 S.W.2d 34, 39 (Tex. App.—San Antonio 1988, writ denied). However, presumed grant is distinct

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

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

from adverse possession in that the courts have not established a definitive period of time needed to apply the presumed-grant doctrine. Some courts have stated the requisite period as "thirty years," *see Fowler*, 290 S.W. at 823; *Duke*, 128 S.W.2d at 484, but this time period hasn't been universally adopted. Modern cases do not appear to rely on a specific time period at all. *See Conley*, 356 S.W.3d at 765. Thus, the presumed-grant doctrine will likely be reinvigorated as an alternative to adverse possession when parties cannot meet adverse possession's statutory requirements.

On the other hand, the statute of frauds[5] may potentially work to limit new applications of the presumed-grant doctrine, as it requires conveyances of real property to be in writing and a presumed grant does not strictly comply. This issue hasn't yet been raised in the presumed-grant context. When applied to ancient documents before a certain point, the statute of frauds did not raise a concern because "[p]rior to the act of the Fourth Congress of the Republic of Texas of 1840 making sales of land void unless evidenced by an instrument in writing, lands could be sold in Texas orally, no deed of conveyance being necessary for the transfer of title from one to another." *Page*, 381 S.W.2d at 952. That the doctrine wasn't discussed in connection with this rule for conveyances after that date is interesting, but it may be that the legal mechanism of the doctrine itself (it presumes "lawful origin" when the needed facts are in place, *Fuller*, 120 U.S. 534 at 673) simply doesn't raise the issue.

VI. CONCLUSION

The Texas Supreme Court's *Van Dyke* opinion continues to be an enormously consequential mineral-title decision and—like any other seemingly earth-shaking decision—left many issues unanswered, particularly as to its secondary presumed-grant analysis. Counsel and litigants can't peek into the minds of the justices, but they can look to the historical development of the doctrine and key cases in the doctrine's evolution to shed light on how "presumed grant" may be applied in the future.

[5] A promise or agreement for the sale of an interest in real property is not enforceable unless in writing and signed by the person to be charged. TEX. BUS. & COM. CODE § 26.01. Oil-and-gas interests are real property and thus their transfer or assignment is subject to the statute of frauds. *Long Trs. v. Griffin*, 222 S.W.3d 412, 416 (Tex. 2006) (citing TEX. BUS. & COM. CODE § 26.01).