Unbundling the Executive Right: A Guide to Interpretation of the Power to Lease and Develop Oil and Gas Interests

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Unbundling the Executive Right: A Guide to Interpretation of the Power to Lease and Develop Oil and Gas Interests

For what is the land but the profits thereof?1

I. INTRODUCTION

An appropriate beginning for the discussion of the nature of the executive right is the recognition that the law of oil and gas is not a body of unitary doctrine. The executive right is recognized in oil and gas producing states, but the law of these states pertaining to the executive right has not flowed from a common source. When the young lawyer Edward Coke became one of the counsel for defendant Henry Shelley in Shelley's case in 1579, the common law of land ownership and transfer of ownership was already largely developed. A century before Shelley's case Thomas Littleton had published a systematic study of English land law, his Tenures.2 Coke himself sought to modernize Littleton.3 When the common law of England was received into newly independent states, as in New Jersey in 17764 and New York in 17775 and Texas in 1840,6 the rules of property and contract

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1. COKE UPON LITTLETON § 4b (17th ed. 1817).
2. Littleton's treatise was "the first exposition of English land law as a system based on principles instead of as a number of disconnected formulae concerning the procedure of real actions." PETUR STEIN, REGULAE IURIS 159 (1966).
3. When Coke's FIRST INSTITUTE, also known as COKE UPON LITTLETON, was produced in 1628, some 70 editions of Littleton's TENURES had been published. Michael I. Swygert & Jon W. Bruce, The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews, 36 HASTINGS L.J. 739, 743 (1985).
5. Id. at 820.
6. Texas declared its independence from Mexico in 1836, and for four years thereafter the Republic Texas retained the civil law as the rule of decision. The Constitution of the Republic of Texas provided: "The Congress shall, as early as practicable, introduce, by statute, the common law of England, with such modifications as our circumstances, in their
were a relatively cohesive body of doctrine, albeit one that had to be adapted to new economic circumstances with variations (rather small) among states. A concerted effort could be made three-quarters of a century ago to provide a Restatement of the Law of Contracts or a Restatement of the Law of Property that sought to restate a common law among all the states. But there was not the centuries-sifted body of oil and gas law in England or Pennsylvania or New York or Texas that existed for Contract or Property. The simple reason for this is that there had been no significant oil and gas development anywhere in the world prior to the latter part of the nineteenth century. The 1926 observations of Lawrence Mills and J. C. Willingham on the state of oil and gas law of the period are worth repeating today:

On account of its recent development, [the law of oil and gas] has not undergone the smelting process of the common law, which has refined and purified those branches of the substantive law that have received the consideration of Bench and Bar through the centuries. As a result, its elements are not found in the mine of adjudicated cases in a state of purity, but combined and fused with many alien principles. It is the product of case-law at its worst.

A decade later, the California court made similar comments, albeit with somewhat greater respect for the judiciary’s role. In Dabney-Johnston Oil Corp. v. Walden⁶ the court stated:

The failure of those who are dealing in oil rights to precisely describe the nature of the interests granted is due in part to the recent development of the oil industry. The law pertaining thereto is still in a formative stage. An analysis of the nature of oil interests which may be created involves an application of the common-law rules which crystallized before there were extensive dealings in subsurface fugacious substances. In the several jurisdictions in this country there is

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9. 52 P.2d 237, 244 (Cal. 1935).
a contrariety of description as to the nature of these interests, and in a single jurisdiction, as in this state, there are conflicting expressions as to the description of oil interests. ... It is not surprising, in view of the lack of a definite terminology descriptive of these interests, that those who are dealing in oil interests have difficulty in describing the interest transferred, and that ambiguous and uncertain instruments are presented to the courts for analysis.

The law of oil and gas had to develop in each producing state, looking only to English common law analogues, not to precedents in the manner we generally think of as precedent. Louisiana, as is generally the case, may be regarded as an exception because its civil law system derived from French and Spanish sources. Yet the Louisiana development paralleled that of its sister states because France and Spain also had no oil and gas background. The Louisiana courts had to make a body of oil and gas law by going beyond the civil code, effectively legislating within the gaps of the "code civil."10

If we appreciate the way in which oil and gas law has been established (largely home-grown, state-by-state, rather than imported) then we can better understand why the body of case law from various jurisdic-

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10. Colonel John H. Tucker spoke of the mineral law of Louisiana as being explicable by the aphorism "au-dela du code civil mais par le code civil" — beyond the civil code but through the civil code. He said, "Louisiana developed its mineral law quite logically by following the practice indicated, arriving at the basic decision that the sale or reservation of mineral rights by the owner of the immovable to which it applied created a real right in the nature of a predial servitude, to which the rules relating to predial servitude would be applied as near as may be." John H. Tucker, Foreword to 1 LA. CIV. CODE ANN. vii (West 1981).

Harriet S. Daggett, a noted authority on Louisiana oil and gas law, dedicated her treatise on Louisiana mineral rights to the Louisiana judiciary 1900-1939 for their role in shaping Louisiana mineral law. She observed that there was little guidance from French and Spanish sources:

The law of oil and gas is new and without precedent. ... [T]he courts of Louisiana were without aid from the legislature. They could receive little from counsel, though the members of the Louisiana Bar who are concerned in these issues have not been unmindful of the complexity of the problems. The decisions of other states were of small value because Louisiana is a civil-law state with an old civil code. The French, Spanish, and Roman sources furnished no precedents because the problem was unknown to those forefathers. The judiciary has ever been a determining factor in defining frontier interpretation of new social and economic policies. The history of legal thought cannot neglect the role of judge-made law. Louisiana jurisprudence on oil and gas is a continuing tribute to the patience, research, wisdom, and fairness of the members of the bench of the state.

tions pertaining to executive rights for oil and gas interests can appear so inconsistent and in fact contradictory. Various writers have urged breaking away from common law concepts to create new principles. The lack of anchoring concepts has in part led to the proliferation of approaches. Indeed, a close examination of the case law of a single state may reveal radical inconsistencies in doctrine from case to case. My purpose in this paper will be to examine certain topics and cases related to executive rights and then to suggest a basis for sound resolution of future cases. I have no hope that my purpose will be achieved, for I recognize that no matter what suggestion is made, a host of cases and a line of reasoning can be cited as contrary. Lawyers in litigation will have no incentive to bring consistency because, as all realists will recognize, in confusion there is opportunity. I suspect the only way out of the morass is a statutory solution, such as the proposal for a codification of oil and gas law made some years ago as a

11. Professor Kuntz suggested that the executive right could be recognized as a distinct and separately alienable incident of mineral ownership, whether or not it has an exact counterpart in feudal land law. 1 EUGENE KUNTZ, LAW OF OIL AND GAS § 15.7 (1987). As Leo Hoffman observed concerning pooling and unitization: "Considering all the relevant factors, however, the [Texas] court might have been better inspired to recognize the pooling or unitization device as something relatively new in the law which cannot be arbitrarily forced into the traditional concepts of property law." LEO HOFFMAN, VOLUNTARY POOLING AND UNITIZATION 161 (1954). Blass and Richey also observe: "Technical difficulties are often encountered in trying to fit oil and gas law into particular common law property concepts. Why not ignore both of these theories [cross-conveyance or real covenant] and simply regard this matter as sui generis?" Joel Blass & Jean R. Richey, An Analysis of the Rights and Duties of the Holder of the Executive Right, 41 Miss. L.J. 189, 217 (1970).

12. Some 40 years ago Fred Moulton made similar comments. After observing that oil and gas law was around long enough to develop some uniform principles, this was not occurring. Instead of confusion being resolved, it was being compounded in the cases. He stated:

The cause is attributable to the following: Many conveyances are drafted by real estate men and others who have no training in the field. Conveyances are drafted by lawyers who don't know the legal principles involved, and by lawyers who have not fully advised themselves by examination of abstracts or examination of title documents, of the exact interest or ownership of the grantor at the time the grant is made. Notwithstanding the fact that distinctions between minerals and royalty could have been uniformly determined by judicial decision, the courts of the oil and gas producing states lack unanimity between the various jurisdictions and even lack consistency within individual jurisdictions. It appears that the courts have too often been impelled by what they felt to be a correct economic solution to the problem immediately before them. The result has been a failure to lay down basic and uniform legal principles that will serve as definite guides. There has therefore been a contribution to, rather than a solution of, the confusion.

Fred Moulton, Avoiding and Curing Ambiguity in Mineral and Royalty Conveyances and Reservations, 3 ROCKY MTN. MIN. L. INST. 1, 3-4 (1957).
Uniform Act for consideration by the states, or perhaps the American Law Institute could develop a Restatement of Oil and Gas. The Dormant Mineral Acts are a good start. 13

Ludwig Wittgenstein said something to the effect that all philosophical problems are problems of semantics. Law is a kind of calculus of language. 14 The law pertaining to executive rights is a mess and a muddle because we lack a shared understanding of the basic terms of the calculus. Language requires rules, and rules that are not followed are not rules at all.

At this stage, the subject of oil and gas conveyancing may be an example of what the Critical Legal Studies scholars call "indeterminacy" in law. One may find cases and rationales that will support whatever interpretation one wishes to make. It must be acknowledged that the cases are a hopeless snarl that is unlikely to be disentangled. Even if the rules seem to have had a final pronouncement in one state, the next panel of judges to come along may borrow from a case from another state or may simply overrule contrary precedent.

II. WHAT THE EXECUTIVE RIGHT IS

Commentators and courts have identified as an exercise of executive right the leasing or administration of oil and gas interests in a variety of circumstances wherein another's rights in oil and gas production will be affected. A simple yet comprehensive definition of the executive right is a task that challenges the most astute of oil and gas attorneys. The essence of the executive right, which may also be thought of as the

13. One of the wisest judicial decisions in all of property law was the decision of the Louisiana Supreme Court in Frost-Johnson to treat severed mineral interests as servitudes (like common-law easements); interests that are not used for a certain period disappear. Frost-Johnson Lumber Co. v. Salling's Heirs, 91 So. 207 (La. 1922). This approach was codified in the Louisiana Mineral Code, LA. REV. STAT. ANN. §§ 31:27-70 (West 1988). Some other states have borrowed the concept in passing into law dormant mineral interest acts. Sachse & Atkinson, Reuniting Unused Mineral Interests with the Land, 44 INST. ON OIL & GAS L. & TAX'N § 2 (1993); Debra Dobray, An Explanation of Louisiana Mineral Law and the Doctrine of Liberative Prescription: Policy Considerations for Common Law Jurisdictions?, 6 J. ENERGY L. & POL'Y 153 (1985); Francis J. Lynch, Comment, Wilson v. Bishop and Texaco, Inc. v. Short: Two Inadequate Analyses of Dormant Mineral Interest Statutes, 7 S. ILL. U. L.J. 533 (1982); Cyril A. Fox, Jr., Clearing Mineral Titles by Statute After Texaco, Inc. v. Short, 3 E. MIN. L. FOUND. ch. 25 at 1 (1982); George W. Hardy III, Ancient Mineral Claims—An Obstacle to Development, 28 INST. ON OIL & GAS L. & TAX'N 137 (1977). One state has even gone so far as to specify in its constitution that mineral deeds are to be construed in a certain way to limit the continuing impacts of mineral deeds long ago separating interests from land. Ward v. Harding, 860 S.W.2d 280 (Ky. 1993), cert. denied, 510 U.S. 1177 (1994) (broad form deed does not include right to strip mine, by constitutional amendment).

executive power, is the power to grant a lease from which persons other than the lessor will enjoy royalty or other lease payments. The executive right is generally understood to include the power to grant a lease with respect to the mineral interest of another person and the executive right is a term taken to include the power to grant leases with respect to the royalty or another.\(^5\) No doubt such a right springs from the power to develop oil and gas, and the two ought to be considered as flowing from the same source and as being correlative to one another.\(^6\) It is sometimes thought appropriate to distinguish between the executive right, which may be defined as the ability or right to lease or develop the minerals that one owns oneself, and the executive power, which may be defined as the power to lease or develop the minerals owned by another. These definitions are not necessarily common usage but they may help clarify our initial concepts. But another way of viewing the subject is that there is an aspect of the mineral estate that is the right and power to develop the minerals, and this aspect of the mineral estate is the subject of conveyance in itself, as opposed to a right or power over a thing owned by another.

As we shall see, one of the most significant problems generally associated with issues involving executive rights is characterizing an interest as a mineral interest or as a royalty interest. This characterization has been most difficult for the courts. In a work published in 1954, Charles J. Meyers wrote that "In a staggering number of cases, the courts have been required to construe instruments relating to rights in oil and gas and the countless, conflicting interpretations that have been forthcoming defy reconciliation."\(^7\) He referred to this mass of cases as a "twisted skein." Forty odd years later the numbers are still more staggering, and no one has unraveled the twisted skein.

The source of the interpretive problems is the fundamental starting point that ownership of minerals or the right to produce minerals can be separated from the ownership of land. This fact creates the potential for conflict between landowner and the owner(s) of the severed right. Such severed rights are often established for speculation, and one suspects that so many cases are inconsistent because of differing judicial attitudes toward property rights that are speculative. Some courts tilt towards the property

\(^{15}\) Lochridge describes the executive right as "the exclusive right to make and execute any and all future oil and gas leases." Lloyd Lockridge, Abuse of Executive Rights, 36 Sw. Legal Fdn. Oil & Gas Inst. 2-1 at 202. (1985).

\(^{16}\) This is indicated in the broad or inclusive definition of the executive right given by Ernest Smith as "the right to make decisions affecting the exploration and development of the mineral estate." Ernest E. Smith, Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right, 64 Tex. L. Rev. 371, 372 (1985).

right aspects of severed rights in minerals and others appear to look askance at the speculative nature of such rights when weighed against the interests of the landowner. There is much solicitude for the rights of owners of non-executive interests, but concern for them may diminish if one thinks of them as absentee owners speculating on mineral development. Concern for owners of non-executive interests may increase if the non-executive is the landowner and the speculator is an absentee mineral owner.

But this is perhaps getting ahead of ourselves. Let us begin with examples so that we are on common ground as to what we are considering. The executive right or power can apply in a number of circumstances, a few of which can be illustrated by hypothetical examples or paradigm transactions. We will then examine circumstances that are not an example of the executive right.

A. Transaction 1—Fractional Mineral Interest

Bacon is the owner of a tract of land, perhaps eighty acres in size which we shall call Idyll Acres. He sells it to Coke, reserving one-half of oil, gas and minerals; it is further specified that Coke is to have the exclusive right or power to lease with respect to Bacon's one-half interest. This is a common type of transaction, and Coke would be said to have the executive right or power over Bacon's one-half mineral interest. It would be universally recognized also that Coke would have the right to grant leases or develop with regard to his own interest. The law allows Bacon to retain an interest in minerals even as he conveys his land. He has nothing to lose by reserving the interest and much to gain if the land should prove to be capable of producing oil or natural gas or other mineral that is the subject of the reservation. As the possibility of minerals may be quite speculative, Coke may be willing to buy land despite his not getting all rights that would normally accompany the land; moreover, by having the executive power over Bacon's interest, Coke will be able to control the timing and extent of development of the land. Thus, Coke will be able to raise trees or rice or cattle on the land with the assurance that Bacon cannot interfere with his use of the land by letting an oil company (or a sand and gravel company or a coal mining company) come onto the land and develop the minerals. Any development that takes place will be through Coke's control. Such an arrangement is potentially beneficial to Bacon in that the exclusive control by one party makes it somewhat more likely that a lessee will lease the property. When mineral interests are split into many fractions, leasing becomes more difficult. A fractional mineral interest may also arise if a landowner or mineral owner sells a portion of the minerals, say a 1/16th, to raise money for the seller. The purchaser of the fractional mineral interest is investing in the potential for development, not reserving an interest in the mere hope of development occurring.
Now any number of legal issues may be raised that could grow out of this apparently simple transaction.

- Is the transaction itself valid when the leasing power has been separated from the ownership of the minerals?
- Is there a problem under the Rule against Perpetuities for the executive right/power or for the severed interest?
- Are Bacon and Coke co-tenants?
- Must Coke lease or seek to lease for minerals or may he remain content to raise cattle should he so prefer?
- If Coke does lease, what are his responsibilities toward Bacon in the mix of terms that may be negotiated in an oil and gas lease?
- If Coke does lease, does he have exclusive power to enforce the obligations of the lease?
- Does Bacon get a share of bonus and delay rentals from leasing undertaken by Coke?
- If Bacon is to receive no share of bonus or delay rentals, is his fractional mineral interest no more than a royalty?
- Does Bacon retain the power to drill even if he cannot grant a lease?
- What royalty should Coke seek?
- May Bacon obtain a partition of his interest from Coke's?
- If so, in what manner may that partition be accomplished?
- Could Coke assign or otherwise convey the executive power to Bacon's interest?
- If Coke were to die, would his heirs inherit the executive power as to Bacon's interest?
- Is Bacon's interest possessory or nonpossessory? Does this matter?

Numerous other problems can arise from misinterpretation of conveyances by the courts or the ineptitude of scriveners. But a fundamental question from which many of these problems flow concerns how we conceptualize the "executive right." Is it a property right, valuable in itself? Or is it a power and duty over another's property? Can it be both? If it is both, which should we give priority—the property right (control) of the executive or the duties of the executive?

B. Transaction 2—Fraction "of royalties."

Bacon sells the eighty acre tract to Coke, reserving one-half of the royalties derived from leasing Idyll Acres and recognizing that Coke has the
exclusive power to lease the tract. This transaction differs from the first transaction in that Coke has only retained an interest to be paid from royalties from leasing. Yet it is to be observed that the quantum of royalty is not fixed or specified. While many of the issues mentioned above may still be raised, there is now a further dimension in which the person with the leasing power may be said to have a conflict with the other person. The grantor of the lease might trade off royalty for bonus, assuming that Bacon has no right to share in bonus, thereby increasing his take at the expense of the non-leasing person's share. It should be noted that what the lessor would lease is the entire mineral interest with an obligation to share the royalty with the non-leasing party.

One might inquire as to the nature of this interest in the event that there is development without leasing. One such situation would occur when there is forced pooling. When pooling occurs a share of production might be allocated to the tract, but there would be no royalty (depending on the approach of the state in which the pooling is effected). Would it be appropriate to regard Bacon as having a one-half interest in the mineral estate thus sharing in one-half of all production attributed to the tract? Likewise, if a trespasser is required to account to the true owners of production arising from the trespass, would the owner of “half the royalties” be entitled to anything in the accounting?

C. Transaction 3—Royalty per se

Bacon sells the 80 acre tract to Coke, “reserving” a one-sixteenth royalty. This transaction differs from the first in that royalty only is reserved and differs from the second in that the percentage of royalty is fixed. Bacon’s interest is properly referred to as a royalty interest, and we may call it pure royalty or royalty per se. This royalty exists apart from any lease that may be executed for the land. What is the nature of the relationship between Bacon and Coke arising from this transaction? Bacon’s interest is certainly a passive one. He cannot develop oil and gas. Is it appropriate to call it a non-executive interest or to refer to it as “non-participating

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18. See Richard C. Maxwell, Mineral or Royalty – The French Percentage, 49 SMU L. REV. 101, 109 (1996). This is sometimes called a Corpus Christi royalty, after the case of State National Bank of Corpus Christi v. Morgan, 143 S.W.2d 757 (Tex. 1940) (conveyance of “1/2 . . . of the royalty in oil, gas . . . and in all other minerals . . . produced . . . from the above described land.” Held: no right in the royalty owner to participate in oil payment of $48,000 payable out of 1/8 of 7/8 of production). See also Davis v. Hurst, 90 P.2d 1100 (Kan. 1939) (deed reserving “one-half of the oil and gas royalties.” Held: not a reservation of any share in the oil and gas in situ; grantor not entitled to share in delay rentals and bonus).

19. As will be explained, this type royalty is sometimes also known as “perpetual royalty” or “perpetual nonparticipating royalty” or “pure royalty.”
royalty”? This latter usage would suggest that it is an interest from which the power to lease has been stripped, yet in a sense the interest never had a power to lease. Only Coke has the power to lease the tract. If Coke should enter into a lease with Rex Oil Company, Coke will not negotiate with Rex over any aspect of the royalty owned by Bacon. The royalty of Bacon will not be leased to Rex by Coke; rather, Bacon has a right to a cost-free share of production from the tract however it should occur. If Coke were to try to provide in the lease that Bacon’s interest was to share in certain costs of production, he would be unable to do so. If Coke were to try to agree with the lessee that no royalty was to be paid until $1,000,000 of production was obtained, he would lack the power to do so. This is because Coke lacks power over Bacon’s interest, except in the sense that unless Coke does lease it is unlikely that there will be any production from which Bacon may share. Does Coke owe duties of leasing to Bacon? If Coke sells the land, does his successor owe a duty to Bacon to lease even without privity of contract? As before mentioned, this type of interest too can arise from a sale by a landowner or mineral owner who sells royalty to raise money. The purchaser in such circumstances has invested and has rather different expectations of the seller than in the case of a reservation of royalty. The circumstances surrounding such a transaction create a different relationship between grantor and grantee than a reservation of royalty in a sale of land.

D. Transaction 4—Term Interests

Bacon sells the eighty acre tract to Coke, reserving either a one-half mineral interest or a one-sixteenth royalty interest with Coke having the exclusive right to lease but with the further provision that the reserved interest will continue for a term of ten years and so long thereafter as oil, gas or other mineral is produced from the tract. This transaction differs from the prior three transactions in that Bacon has only a term interest. If there is no production in ten years time, then Bacon’s interest will cease to exist. Should production not occur that will continue the term interest into the secondary period, then Coke’s interest in minerals is increased or is potentially increased. Are Coke’s duties to Bacon affected by this potential for conflict between the two? Does Coke have some duty to seek to prevent the condition subsequent (or special limitation) from occurring, that is the lack of production? If so what is the standard applicable to that duty?

20. Coke will want to preclude warranty as to Bacon’s interest and to establish that Coke’s royalty from the lease will be in addition to any royalty paid to owners of other outstanding interests.
E. The Executive Right—Not!

If Bacon and Coke are co-tenants of Blackacre (whether land or the mineral estate), then either may go on the land and develop the minerals in most states. The developing party cannot be precluded from developing; there is no trespass or conversion of the minerals by the producing party. There is co-tenancy in the produced minerals and an accounting must be provided to the non-developing co-tenant. I believe that virtually all would agree that the developing party does not have an executive right or power over the non-developing party's interest. The developer may have some duties in accounting for the production, but otherwise owes no special duties. The impact on the non-developing cotenant is often as great as circumstances in which there is an executive right. Why does the law treat the relationship so differently? It might be argued that the non-developing party had the power to develop also and thus could protect himself from overreaching. But if the nondeveloping party owns a small interest, say a one-sixteenth of the minerals, his own right to develop is far overshadowed by the owners of the other fifteen-sixteenths. It might also be argued that the non-developing party can always seek partition, yet this may produce elusive benefits if the non-developing party must divest himself of his interest or perhaps be left with a nonproductive parcel.

III. THE REASONS FOR CREATING AN EXECUTIVE RIGHT OR POWER OVER ANOTHER'S INTEREST

A. Control of the Surface

As mentioned in the preliminary explanation under Transaction 1, a frequent reason for the creation of the executive right in one person is to deny the power of leasing to the other person. This ability is important for control of the use of the land by the landowner. Many states allow each co-owner or co-tenant to undertake oil and gas or other mineral development without the consent of the others. Likewise, most states allow the owner of the oil, gas or other minerals or the owner of a fractional interest in minerals to develop the minerals without the consent of the landowner. Developing parties in such a circumstance generally have the right to use so much of the

surface as is reasonably necessary. The landowner may insist on retaining or acquiring the executive right as to all the minerals so as to be able to limit through the contract of lease what use may be made of the land by the lessee. The leasing executive right owner may, for example, require that all wells or other use of the property be at least 300 feet from any residence or that the lessee provide for surface restoration and damages. The landowner may refuse to lease for say sand and gravel or coalbed methane or lignite when such development would be incompatible with peaceful residential use. An owner of say a fifty percent interest in only the minerals would have no incentive to limit where wells are drilled or what types of minerals are developed on the land.

Some writers have downplayed the significance of surface control in the creation of the executive right. Joshua M. Morse and Jaimie A. Ross assert that the parties usually create the executive right for development purposes: to improve efficiency in leasing and rely on experience of the executive right holder. They say that it is rarely created for surface protection. They do recognize that surface control can be very important for the holder of the executive right, and that this concern must be given effect in appropriate cases. The author cannot quantify the extent of concern over surface use in land transactions, but he can assert without doubt from experience in a number of instances that it is often of great importance to a purchaser of land. Certainly, however, Morse and Ross are correct when a landowner or mineral owner has sold for investment purposes fractional mineral shares or royalty. In such circumstances, the retention of the leasing and development power comes with the expectation by the investor that development will be prudently sought; otherwise, the purchaser has bought something of little worth.

B. Enjoyment of the Economic Benefits by the Executive; Enhance the Value of Executive’s Interest

A person who retains or acquires the executive right or power concerning another’s interest in minerals may do so to enjoy various


24. “Where evidence shows that the executive rights were created or acquired to prevent mineral development, courts should give effect to the intent of the parties, and executives should have no duty to lease.” Id. at 198. They would require actual proof of intent to protect the surface rather than rely on inference.
economic benefits associated with the power. Owning the executive right may entitle the holder to retain all of the bonus and delay rentals associated with the leasing of the oil, gas and other minerals. This entitlement may be the result of a default rule of law or it may arise from the contract or deed creating the executive right. Having the executive right as to all or most of the oil, gas and mineral rights may well enhance the value of the executive right owner's own fractional share of the minerals. Other things being equal, the person who can lease in one transaction all the oil and gas rights on a tract is in a better bargaining position with a potential lessee than a person who can lease only a portion of the oil and gas rights. That is, if a lessee can acquire the right to go on a tract of land from Bacon who owns one-half the minerals then Coke, who owns the other half, is generally in a poorer bargaining position when the oil company comes to negotiate with him. Rex Oil can say to Coke, "I have already obtained a lease from Bacon for a one-eighth royalty, so I will only give you a one-eighth royalty; if you decline to lease, I can still go on the land and drill." Coke's ability to obtain a higher royalty would be enhanced by having the executive right as to Bacon's half-interest.

Likewise, if Coke owns the land, the land's value is enhanced by Coke having the executive right to all of the oil and gas. This observation is an extension of the point made above concerning surface control. For example, if Bacon sells to Coke an eighty acre tract of land and retains one-half of the oil, gas and other minerals, Coke will have a difficult time subdividing the land for residential purposes if Coke does not have the executive right as to Bacon's interest. This is because Bacon's reservation will be in the chain of title to each subdivided tract, and Bacon will have the right to use so much of the subdivided land as reasonably necessary to develop the oil, gas and other minerals. Such possibility may significantly diminish the value of the land purchased by Coke. If Coke has all the powers of development, he can covenant with the purchaser of the subdivided tract not to use that tract or can convey the power of development to the owner of the subdivided tract.

C. Facilitate Leasing

In some states, the co-owners or co-tenants of mineral interests may deny to other co-owners or co-tenants the ability to develop the oil and gas under the property. Each may veto the other. Even in states in which each

25. In several states, one cotenant cannot develop without the consent of the other cotenants because of the state's adoption of a strict adherence to the common law of waste. West Virginia is one of these. Thomas Franklin McCoy, Note, Mineral Interests and the Executive Right in West Virginia, 66 W. VA. L. REV. 221 (1964). Louisiana is another. LA. REV.
co-tenant may undertake development of the oil and gas, one or more co-tenants may effectively stymie development if a lessee cannot get enough co-tenants to agree to a lease to make it worthwhile to drill; one co-tenant may hinder development by the others by insisting on preferential terms in a lease. Likewise, in some states the owners of successive interests in the minerals may effectively veto development by the others.26 Each of these situations may be avoided by establishing the executive right in one person. Such executive right holder may be one of the owners of an interest in the minerals or it may even be a third person. Thus, a wise parent knowing of potential disputes among his or her children or other heirs, yet wishing that each may enjoy the benefits of future oil and gas development, may bequeath the oil and gas to the heirs while at the same time designating a single person among them as the holder of the executive rights or powers as to all oil and gas passing to the heirs. Likewise, one co-owner or co-tenant may accede to the other owner having the exclusive right to lease because the result may be better lease terms for both owners.27

Let us recognize at this point that treating the executive right as a property interest in itself that can be separated from the ownership of the land or from the ownership of minerals can work to defeat or limit the reason for separating the power to grant leases (or develop) from the mineral interest affected thereby. That is to say, the executive right might be conveyed to a person or persons with no interest at all in the minerals or land; it too may become fragmented. Some years ago Conan Cantwell made the following remarks:

...leasing rights do not furnish a satisfactory solution to the problems created by divided mineral ownership. Leasing rights can also become divided among a number of persons, including minors, incompetents, unknown heirs, and residents of distant places.28

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27. Professor Maxwell observed some time ago that: "It is becoming increasingly common to give the power to lease to one individual where ownership of oil and gas is divided. Such an arrangement facilitates leasing at the most propitious time and quite possibly increases the price that can be obtained for a lease." Richard T. Maxwell, The Mineral-Royalty Distinction and the Expense of Production, 33 TEX. L. REV. 463, 468 (1955). The West Virginia court commented in Donahue v. Bills, 305 S.E.2d 311, 312 (W. Va. 1983), that "it is common experience that when oil and gas interests are owned by numerous persons, negotiating a lease acceptable to all owners can be a nightmare for everyone concerned."

28. Conan Cantwell, Term Royalty, 7 INST. ON OIL & GAS L. & TAX'N 339, 344 (1956).
Thus, the attorney who wishes to create an executive right for the purpose of facilitating leasing must recognize that over time the usefulness of this device may be lost through establishment of a property interest that is alienable and heritable. One should consider the possibility instead of accomplishing the same ends through a different device, such as setting up a trust or giving a limited power of attorney over minerals to an institution.

D. The Creation of Royalty

If we are to consider royalty per se as a non-executive interest, the reasons for creating this type of interest rather than some other type are numerous and largely self-evident. A person selling land has every incentive to reserve to himself or herself a cost-free share of any wealth that may come from the land. If the buyer is willing to purchase subject to such a reservation, it would be rather short-sighted not to reserve whatever one can. The reservation in such circumstances is in the nature of a hope and a speculation. The buyer of the land generally merely tolerates the reservation as being necessary to consummate the purchase. Should it be assumed that the buyer has implicitly agreed, when the seller creates from a conveyance a royalty interest, to shoulder obligations towards the royalty owner when such obligations do not coincide with the buyer's own interests? The owner of land or of a mineral estate may give a gift of royalty to a family member. Does the giving of the gift subject the giver to a series of implied duties to maximize the interests of the donee? But a royalty may also arise from a sale or other contract, as observed earlier. Thus, an investor may purchase a one-sixteenth royalty in an area that is potentially productive or an exploration company may agree to convey a (lease) royalty to a geologist for prospects which he has developed. Does not the grantor of the royalty assume implied obligations to effectuate the purposes for the grant?

IV. THE POWER OF NAMING

Where there is confusion over the nature of the executive right, it arises from the identification of the characteristics of the rights created in a mineral or royalty deed. Not the least of the problems is the conflicting

30. A discussion of names between Socrates and Hermogenes culminated in the following exchange:
   Socrates: [W]hat do we do when we name?
   Hermogenes: I cannot say.
   Socrates: Do we not give information to one another, and distinguish things according to their natures?
approaches taken to the "bundle of sticks" metaphor employed by a number of courts and writers. Let us identify some terms that are used and that pose problems.

A. Land in fee simple

Ownership of land carries with it all the rights and powers that may be imagined unless limited or prohibited by the state. The owner owns the soil, the timber, the oil and gas, the solid minerals and so forth not as a series of separate rights but because all of these are simply a part of the land. Minerals are accessory to the land, and the right or power to work them is an attribute of the ownership of the land. One may work the minerals or cut the timber not because one has acquired The Timber Cutting Estate but because such power is intrinsic to the concept and meaning of ownership of the land. The subject of a fee simple estate in Idyll Acres will be Idyll Acres. Professor Summers expressed it in this way many years ago:

A landowner may create a separate legal interest or estate in the oil and gas under his land, apart from the interest in the land itself, by a direct grant of the oil or gas, or by a grant of the land with an express reservation or exception of the oil and gas. Where the oil and gas is granted, there is no need of expressing an intention to retain the land, for the simple reason that his legal relations in respect to the oil and gas are accessory to his legal interest in the land itself. But where the landowner grants the land, and without expressing an intention to retain his legal interest in the oil and gas thereunder, that legal interest will pass with the land as accessory to it. If in the grant or reservation of a separate interest in oil and gas the grantor does not expressly grant or retain such legal relations as are necessary for the production and operation of the land for oil and gas purposes, these relations are held to be created by implication.31

B. Mineral interest

A mineral interest, as the preceding quote from Summers would indicate, may be rather like ownership of the land itself. The subject of the

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Hermogenes: Certainly we do.
Socrates: Then a name is an instrument of teaching and of distinguishing natures, as the shuttle is of distinguishing the threads of the web.
PLATO, Cratylos, in THE DIALOGUES OF PLATO, 80, 87 (Benjamin Jowett, trans., William Benton 1952).

interest is the minerals themselves (ownership theory) or the power to produce the minerals (nonownership theory). When a mineral interest is created, all of the powers and rights incidental or correlative to the minerals or the production of minerals are part of the interest itself and accompany it; they are intrinsic to the interest. There should be no need to spell out these powers and rights any more than it is necessary to state that when I convey Idyll Acres I am conveying the power to cut timber on the land or to fish upon its ponds.32

C. Royalty interest

A royalty interest is quite different from a mineral interest. It is simply a right to a share of production. The subject of the interest is the produced minerals. The property interest may exist before the minerals are produced but there can be no right in minerals themselves until they are produced. Thus if a royalty of one-eighth of the oil and gas is "reserved" in a conveyance, it is not possible to conceive of this as the grantor holding back one-eighth of the oil and gas from the conveyance.33 There is nothing to hold back because the royalty cannot attach to anything until there is production. Nevertheless, such an idea of "holding back" a share of oil and gas has taken hold in some jurisdictions. In Texas this has been referred to as the "estate misconception" by Professor Burney.34 Courts struggling with the nature of royalty have sometimes referred to it as an inchoate right in the minerals.35 It appears possible that some writers and courts have

32. This fundamental notion has been most clearly and forcefully set forth by Joseph W. Morris, Mineral Interests or Royalty Interests? Problems Created by Separation of Bonus, Delay Rental, Power to Lease and Right of Ingress and Egress, 10 INST. ON OIL & GAS L. & TAX’N 259, 265-67 (1959) [hereinafter Morris, Mineral Interests or Royalty Interests?].

33. Because of the inappropriateness of "reserving" royalty, Oklahoma courts appear to have taken an approach at one time such that virtually any reservation would be construed as a reservation of minerals (not royalty) in place, because as explained by Moulton, "in the absence of a lease, there can be no reservation of royalty for there is no royalty in existence." Fred Moulton, Avoiding and Curing Ambiguity in Mineral and Royalty Conveyances and Reservations, 3 ROCKY MTN. MIN. L. INST. 1, 7 (1957), citing Wilson v. Olsen, 30 P.2d 710 (Okla. 1934); Pease v. Dolezal, 246 P.2d 757 (Okla. 1952).


35. The right to a royalty interest in oil does not merely attach after the oil has been severed from the ground and has become personal property. It is not merely rent issuing out of the annual produce of the land. It goes further than that. The right, extending as it does to oil which is to come from particular land, extends to and is necessarily connected with the corpus of the land, and is, accordingly, a right which exists in the oil which still is in
believed that a "royalty" inheres in a mineral interest.\textsuperscript{36} Thus if a one-eighth royalty in minerals is in existence within a mineral estate or within ownership of land, then one could "reserve" half of it (i.e. a one-sixteenth royalty) when conveying the minerals or the land.\textsuperscript{37} But it is submitted that this is a false notion of the nature of ownership in land or minerals. Royalty must be created; a cost-free share of minerals does not inhere in land or minerals, though the power to create royalty may be thought of as an inherent attribute of land or mineral interest. To see this one need only look at an example of royalty that a court has recognized as independent of a lease. In Gavenda v. Strata Energy, Inc.\textsuperscript{38} the Texas Supreme Court found that the sellers of land had established "an undivided one-half (1/2) non-participating royalty of all of the oil and gas in, to and under that produced from the hereinabove described tract of land . . . ." This entitled the royalty owner to a half of all production from the land free of all costs of exploration and production. Did a right to a cost-free share of one-half of the minerals inhere in the land such that the seller could hold it back from the sale of the land? What if the instrument had provided for a "99% non-participating royalty"? It is quite marvelous to imagine the existence of such a component of the earth and that an owner of land can withhold its passage from a conveyance of the land itself.

Confusion may further arise because the term royalty can be used to identify an interest in production arising from three common sorts of transactions.

1. \textit{Royalty per se}. This type of royalty goes by different names, and I have added "per se" to "royalty" to focus better on the distinctive nature

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\item place, inchoate though it may be, follows it as it comes from the ground and still is attached after it has become personal property.
\item Morris for example, states: "a royalty interest passes as part of the mineral estate when the minerals are conveyed . . . ." Morris, \textit{Mineral Interests or Royalty Interests?}, \textit{supra} note 32, at 271. This may help explain why there is some limited authority that a cotenant (or his lessee) may develop minerals in a tract without the consent of his concurrent owners and account to them by payment of the usual royalty. Petroleum Exploration Corp. v. Hensley, 284 S.W.2d 828 (Ky. 1955); McIntosh v. Ropp, 82 A. 949 (Pa. 1912). For purposes of unitization, landowners and mineral interest owners in some states are treated as treated as owning a "working interest" and a "royalty" (typically in the amount of one-eighth of production). B. KRAMER & P. MARTIN, POOLING AND UNITIZATION, § 12.02 (1996). This, however, is a matter of statute, not common law property.
\item See Mafrige v. U.S., 893 F.Supp. 691 (S.D. Tex. 1995) (deed made "subject to . . . [a]ll of the Grantors' non-participating royalty interest in and to oil, gas and other mineral interests in and under the property described herein" was treated as reserving all royalties from future leases).
\item 705 S.W.2d 690 (Tex. 1986).
\end{itemize}
of this type interest. Its essential feature is that it exists independent of any particular lease. It may be created from a mineral interest or from the interest of a landowner. Two examples will illustrate the nature of this royalty per se. If Bacon sells Idyll Acres to Coke and reserves a one-eighth royalty this is royalty per se. If Mary Scots owns the minerals of Blackacre and bequeaths a one-sixteenth royalty to her son James this is royalty per se. When Idyll Acres or Blackacre is subsequently leased the royalty will be payable by the lessee even though the royalty was not created in the lease; the lessee must pay the royalty because the royalty per se is treated as an interest in property that burdens the land.

The origin of royalty appears to be that it was a form of rent. But with royalty per se (or non-participating royalty) one does not own the minerals or the right to produce the minerals, so the person producing the minerals who pays a royalty of this sort is not paying rent to the person who allowed the leasing. The sort of payment that royalty per se is—like rent but rent divorced from land and divorced from responsibilities of any sort—strikes one as odd on reflection. It is a sort of tax, levied by someone who once had some relationship to the land but no longer does. If we were to rename the royalty per se as a Tax Interest, would this change our view toward it? An income interest divorced from ownership and devoid of responsibilities and duties seems a most curious creation. Why it should not have been invalidated by the common law is perhaps a story in itself. To use an analogy, if Bacon is the owner of land and he leases it to Maize Company for the growing of corn, it would not seem strange to have an arrangement whereby Bacon is paid ten per cent of the corn free of cost of producing it as rent. There is even utility in allowing Bacon to sell or assign some form of interest in his rent that arises from his lease to Maize Company. But why would the law recognize the ability of Bacon to sell his land to Coke and retain a permanent interest of say ten per cent cost-free of all crops to be grown on the land or ten per cent of the rents from any structures hereafter to be placed on the land? Why should Bacon’s heirs forever be entitled to draw the profits from a tract of land when their only contribution is to have appeared in the chain of title? Why should the law recognize the power to create a profit interest that is divorced from costs? It is one thing to

39. Professor Kramer has employed the term “Stand Alone Royalty” for the same type of interest. Bruce Kramer, Royalty Interest in the United States: Not Cut From the Same Cloth, 29 TULSA L.J. 449, 450 (1994).

40. A royalty per se in minerals seems different in nature from say a book royalty or a royalty on use of a patent or trademark. These latter forms of “property” arise from statute and contract and are recognized to protect and encourage invention and creation. The English common law was hostile to claims of perpetual rights divorced from land ownership. The courts of the American states have been skeptical but more tolerant of efforts to create such rights, particularly where they are useful to the public. Easements in gross, which a
contract with another for the other to bear one's own responsibility for costs. It seems another thing to create a property interest in all income free of costs. The anomalous nature of this interest may be suggested if we might ask, when environmental cleanup is required from oil development, why should not royalty owners be required to bear a share of the costs of land rehabilitation or remediation, particularly if the lessee is long gone? Royalty owners have enjoyed the income from minerals development, why should they not pay for land restoration if the choice is from among them, the surface owner or the public? Is any interest of society served by recognition of a purely speculative interest? Recognition and protection of such non-contributing interests actually hinders development of mineral resources.

2. Lessor's royalty. The lessor's royalty is a share of production paid to or provided to the lessor as part of the consideration for the grant of a lease. It is thus rent. If Coke leases Idyll Acres to Rex Oil in exchange for a bonus of $100 per acre and a royalty of one-eighth of the production, then Coke would have a lessor's royalty. The bonus money would be a payment to Coke for the execution of the lease and the royalty would reflect the property interest of Coke that has been granted to the lessee and from which Coke will participate. While Rex Oil would have the right to produce all of the interest of Coke that has been leased, Coke still retains a property right, which we may refer to as a reversionary right upon the termination of the lease.

3. Overriding royalty. The overriding royalty is now generally used to describe a royalty created from a lease that is in favor of a person other than the lessor of the lease. Thus, for example, Rex Oil may employ Hobbes as a geologist and reward his efforts with a 1% overriding royalty on all successful prospects that he may generate. Or Rex Oil may convey its lease interest to Locke Exploration Company while reserving a one-sixteenth overriding royalty. These two examples differ from the first two types of royalty in that they terminate when the lease terminates, and the royalty per se resembles, may be important in facilitating commercial activity, especially in the area of transportation rights of way and public utilities; but reservations of mineral royalties seem to have no such significance. On the treatment of easements in gross, profits a prendre, and servitudes in American property law, see John W. Weaver, Easements are Nuisances, 25 REAL PROP. PROB. & TR. J. 103 (1990); Alan David Hegi, Note, The Easement in Gross Revisited: Transferability and Divisibility Since 1945, 39 VAND. L. REV. 109 (1986).

For doubt a clever attorney will some day attempt to tag such interest owners for some environmental costs, in which case we will immediately see a body of oil and gas attorneys devising ways for royalty owners to voluntarily divest themselves of their speculative property rights by a process of renunciation.

42. An earlier usage of the term "overriding royalty" was to describe any royalty greater than one-eighth. The evolution of the terminology is set forth in 8 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW 765-71 (1995).
holders of the royalty probably have no reversionary rights in the ordinary course of events.

D. Oil and Gas Lease

The oil and gas lease is a non-freehold interest in land. It is granted with respect to the right to produce minerals whether such right to produce is held by a landowner or a mineral interest owner. Most leases in the United States for more than a half-century have been for a specified term of ten years or less and for so long thereafter as oil or gas is produced from the property subject to the lease. The lease typically will be treated as including among its terms a special limitation providing for automatic termination or a condition subsequent or power of termination providing for forfeiture. Most leases will provide for a sum of money to be paid for execution of the lease (bonus), for rentals to be paid annually if operations for the drilling of a well are not commenced within a specified period (delay rentals) and for a royalty upon production (lessor’s royalty). The lessor’s royalty is generally regarded as rent paid for the right to produce. Because the landowner or mineral interest owner’s interest is burdened by the lease, it is common to think of that owner as having a reversionary right such that full ownership will be restored upon the termination of the lease.

E. Confusing Terminology

There are certain other terms that need to be explored. These arise in relation to mineral and royalty interests and carry implications for the executive right or power. They include “non-participating” or “non-executive” standing alone and the terms that arise using either of these two as a prefix or variations thereon: “non-participating royalty”; “participating royalty”; “non-executive mineral interest”; “non-participating mineral interest”.

A term that has fairly wide usage that may nevertheless serve to confuse us is “non-participating royalty.” The use of the word “non-participating” in describing a mineral or royalty interest is troublesome. One is never quite sure what the person using the term intends the interest not to participate in. Is the interest not participating in the costs of production? Or is it not participating in the bonus and delay rental? Or is it not participating in the granting of leases? Or is it not participating in processing and treatment of the produced hydrocarbons? If a royalty interest generally means that one simply has a cost-free share of production from a certain tract and nothing more arising from the minerals of the tract, then to add on the prefix “non-participating” does nothing to aid our understanding of the nature of the interest being identified. How did the
"non-participating" label get attached to royalty? Is it a retronym or it is muddle?

William Safire has described the process of language that produces certain new descriptions of old things; he calls them retronyms. He states: "A retronym is a noun phrase created to denote things that have been overtaken by events. Among early examples of retronyms was day baseball, created after night baseball became the norm, back when major league baseball was played at any time. Acoustic guitar was formed when most loud twanging was produced by electric guitars, and the old-fashioned guitar needed a special designation to assert its identity." Another example he cites is the hard fax: hard has a new sense of "written" or at least "on paper." Thus, a hard fax is-like hard mail—something you can hold in your hand. The retronym was needed because a plain fax is being replaced by faxes received electronically, shown on a computer screen and not printed out.

It may be doubted that "nonparticipating royalty" arose to distinguish it from "participating royalty" defined as: "A royalty interest, independent of a subsisting lease, if any, which shares in some other lease benefits than gross production, such as bonus, rental, or the right to join in the execution of leases. The term is ambiguous since it does not indicate in each particular which other lease benefit is joined to the royalty interest." If a "non-participating royalty" is a royalty that does not participate in other lease benefits, it seems to suggest that the lack of the word non-participating means that royalty ordinarily does participate in other lease benefits. A prefix to a term is generally there to change or modify the ordinary meaning of the term. Is a participating royalty intended to be simply a mineral interest or is it a royalty to which certain mineral interest attributes have been attached? But the term "participating royalty" has not flowed into common usage. This may be because if one attaches an attribute of a mineral interest to what would otherwise be a royalty, one runs the great risk that the interest will be regarded as a mineral interest and the quantum of production greatly diminished as a result of the characterization.

Nonparticipating royalty is probably not a retronym but instead a muddling of the concepts of mineral interest and royalty. It appears that many people used the words royalty and minerals interchangeably, and the term "non-participating royalty" probably came about to distinguish royalty per se (as I've identified it above) from a fractional mineral interest, which was conceived as a share of royalty that also included other attributes

44. 8 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW 781 (1995).
of a mineral interest. The source of confusion for many people is that neither a mineral interest nor a royalty per se is likely to be enjoyed by an owner of such an interest until an oil and gas company has leased the tract and production is obtained. When a lease is entered into, the mineral interest then becomes the source of a lease royalty. So, if Bacon owns a one-half mineral interest, and it is made subject to a lease that provides for a one-eighth royalty, then Bacon will have a one-sixteenth (lease) royalty; Bacon’s one-half mineral interest gives rise to a one-sixteenth (lease) royalty. If Bacon’s one-half mineral interest has had stripped from it the power to develop or to grant a lease, some people will think of Bacon’s interest as being effectively a royalty. But this confuses the matter, for the subject of Bacon’s interest is the minerals themselves (ownership state) or the right to produce the minerals (nonownership state) even though Bacon himself may not exercise the power to produce (or lease) the minerals. When Idyll Acres is leased, Bacon will be entitled to a share of the royalty created under the lease, but it will be because he owns a mineral interest. The distinction is a fundamental one, yet one that is lost on a great many people who have only casual acquaintance with oil and gas law (including judges who have infrequently adjudicated oil and gas cases). Thus, many people will confuse owning half the mineral rights or half the oil and gas rights of the land with owning half the royalties from the land. It appears that early usage often did not distinguish between royalty and mineral interest.\(^46\) In a delightful passage, the author of an ALR annotation commented on the readiness by which people came to identify royalty and mineral interests as the same thing. The annotation states:

> Since royalty is passive and burden free and the chief means by which an owner may realize on his possessions, it has not escaped action of the popular imagination. Vendors of various sorts designate their holdings as royalty. Though it is land, minerals, or mineral rights that are owned, it is royalty that is offered. The mind in contemplation of the potential enrichment adopts the terminology of realization and by a kind of poetic license or spontaneous synecdoche describes the source of wealth as the wealth itself.\(^47\)

\(^46\) The Kansas court has observed:
> As we have frequently stated the term 'royalty' is often rather loosely and inaccurately used by men in the petroleum industry, those dealing in oil and gas holdings and at times by attorneys. Some persons refer to oil and gas in place as royalty. Others refer to royalty as the landowner's share in production.


\(^47\) W.W. Allen, Annotation, What Constitutes Oil or Gas 'Royalty,' or 'Royalties,' Within Language of Conveyance, Exception, Reservation, Devise, or Assignment, 4 A.L.R.2d 492 (1949).
Indeed, it has been so seductive a concept that it has drawn some very fine oil and gas attorneys and scholars into conflating the two.\textsuperscript{48}

Nonparticipating royalty appears often to have meant what I have described above as royalty per se. Lee Jones, Jr. in a 1948 article stated:

Non-participating royalty has a well-understood meaning in the oil industry. It may be defined as an interest in the gross production of oil, gas and other minerals carved out of the mineral fee estate as a free royalty, which does not carry with it the right to participate in the execution of, the bonus payable for, or the delay rentals to accrue under, oil, gas and mineral leases executed by the owner of the mineral fee estate. The exclusive-leasing privilege remaining in the mineral fee owner is commonly referred to and known as the 'executive right.'\textsuperscript{49}

Summers in his treatise treats non-participating royalty as any "royalty interest created by grant or reservation prior to lease . . . "\textsuperscript{50} Despite the apparent usage the origin of the prefix "nonparticipating" is of some interest. I think that the origin of the term non-participating royalty may be seen in the distinction made by Conan Cantwell in a 1956 article.\textsuperscript{51} He stated the following:

\textsuperscript{48} The Manual of Terms in H. WILLIAMS \& C. MEYERS, OIL AND GAS LAW states, for example, under the heading of "Nonexecutive mineral interest" that "Other names for the same type of interest are: participating royalty and nonparticipating mineral interest." They go on to state that "the practical difference between a Nonparticipating royalty (q.v.) and a nonexecutive mineral interest is that the latter shares in bonus and delay rental as well as royalty under existing and future leases. The former shares in royalty only." Elsewhere the authors stated: "It is our contention that a nonexecutive mineral interest is nothing more than a royalty interest that also shares in bonus and rental." 1 H. WILLIAMS \& C. MEYERS, OIL AND GAS LAW § 301. Joseph Morris has similarly argued that if A conveys to B a one-half mineral interest but reserves the power to lease together with the bonuses and delay rentals, the "net effect of such a deed is simply to convey a royalty interest." Morris, Mineral Interests or Royalty Interests?, supra note 32, at 295. With the utmost respect for these writers, I would observe that while a "nonexecutive mineral interest" is effectively the same as a royalty in certain circumstances, in other important instances, it is not. In pooling, the difference can be important: the nonexecutive's interest gets certain treatment that is not based on royalty. Moreover, if there is development by a cotenant who is not the executive or if there is an accounting by a trespasser, the accounting to the nonexecutive is not to be based on royalty but on status as unleased interest. For a recent case that indicates the courts now will not treat a stripped mineral interest as a royalty, see Buffalo Ranch Co. v. Thomason, 727 S.W.2d 331 (Tex. App. 1987).

\textsuperscript{49} Jones, Non-Participating Royalty, 26 Tex. L. Rev. 569 (1948). See Stokes v. Tutvet, 328 P.2d 1096 (Mont. 1958) (relying on this definition).

\textsuperscript{50} 3A W.L. SUMMERS, OIL AND GAS § 599, at 238 (1958).

\textsuperscript{51} Conan Cantwell, Term Royalty, 7 Inst. on Oil & Gas L. & Tax'n 339, 341 (1956).
A landowner, by conveyance or reservation, may create what might be termed a pure royalty, i.e., a right to receive free of cost a fraction of the production.

Also, a landowner, before or after making a lease, may convey a fraction of the minerals and reserve the delay rentals, the right to make future leases and future bonuses arising from such leases or any one or more of these rights. When, in a conveyance of minerals all of these rights are reserved, the interest conveyed is generally referred to as a non-participating royalty.52

Thus it should be seen that non-participating royalty really signified a mineral interest that did not participate in other usual attributes of a mineral interest and was in many minds simply a royalty because benefits would only be realized from the interest when leased. The more appropriate terminology for such an interest would be "non-participating mineral interest." Dean Kuntz in fact distinguished the "non-participating mineral interest"53 from the "non-participating royalty."54 Jones in his 1948 article used the phrases "non-participating royalty" and "a mere royalty interest," but the latter term appears to be descriptive of the former and not a distinct type of interest for Jones. In a 1964 article, Jones did distinguish between a "non-participating royalty" and a "non-executive mineral interest" in a way that suggests that his earlier usage and definition of "non-participating royalty" may have been narrower than I have indicated. The 1964 essay states:

A non-executive mineral interest may, therefore, be defined as a mineral fee interest which has been stripped of only one of its many natural attributes, i.e., the power to lease; and it will be demonstrated that the creation of such a non-executive mineral interest results in or brings about a cotenancy in the mineral fee estate even in those rare instances where the mineral fee interest has also been stripped of bonuses or delay rentals, or both.55

Jones apparently believed that "non-executive mineral interest" was a possessory interest and the holder of such an interest was a cotenant with the executive and could seek partition of his interest. Jones attributed the term "Non-Executive Mineral Interest" to Charles J. Meyers as a substi-

52. Id. at 341-42.
53. 1 Eugene Kuntz, Oil and Gas § 15.3 (1987).
54. Id. § 15.4.
tute for the term, "participating royalty." Professor Norvell in his recent article distinguishes "between a non-participating fractional share royalty and a fraction of royalty . . . " that I believe signifies the distinction between a mineral interest stripped of certain features and a royalty per se.

One suspects that some usage of the term "non-participating royalty" is not as a retronym nor as a term designed to embrace both "royalty per se" and "mineral interest stripped of certain other features" but an example of lawyerly or judicial confusion. When not understanding fully a concept, there is a tendency of certain lawyers and judges to use all buzz words possible in connection with a term they desire to use. Thus we see in mineral conveyancing the repeated phrase "in and under that may be produced," combining traditional phrases used to describe cost-bearing interests (in and under—the concept of the mineral in place, realty) and cost-free interests (produced—the concept of a thing separated from the earth, an item of personalty). This confusion of concepts has caused other concepts to lose their clarity of meaning. Thus a knowledgeable and skilled oil and gas attorney may have studied the cases for years and have come to understand the fundamental concept that royalty is a share of production; he may then conclude that no one can misunderstand his meaning if he describes the interest he is creating as "one-eighth of all oil and gas produced from the land." Such an interest, he would conclude, would not share in the costs of production, because the interest is described as being one-eighth of all production, which can only be a royalty, and because all understand that a royalty is free of the costs of production. Yet, because there are cases indicating some persons use the word "produced" along with "in and under" in their conveyances, a court may conclude that the scrivener may not have meant the interest to be a cost-free royalty, and his client may end up with not one-eighth of the production but one-sixty-fourth.


58. This occurs frequently in most fields of law. We see the concept of "minimum contacts" as a standard for assertion of state jurisdiction transmogrified into a judicial inquiry of whether we have "sufficient minimum contacts." We see the notion of primary jurisdiction in administrative law turned into a new principle of "exclusive primary jurisdiction." What sometimes appears as muddle is a deliberate effort to forge new legal principles or transform old ones. A current example is the pleading of "tortious breach of contract."
F. The Bundle Metaphor

Metaphors are often helpful in legal analysis but they may also be misleading. Property rights are often spoken of as a “bundle of sticks,” and this metaphor has often been used to resolve property disputes, including controversies in oil and gas. If by “stick” one is simply identifying an attribute or quality of a thing, the metaphor may be useful. But the bundle of sticks concept may be taken as identifying a group of separate property interests that are simply aggregated as Blackacre. Thus, extended to its logical conclusion, one is taken to a concept of land tenure as a numerous group of separate estates. This is perhaps in keeping with a view of property that would suggest that just as you can create any sort of contract right you might wish, so too you may create any sort of property right that you might desire to create, so long as it does not violate some specific prohibition of law. One problem is that with a plethora of property types no one can tell what you have tried to create when you have not spelled out all the consequences you intend. The proliferation of new interests or estates has a tendency to confuse and to fragment property. There are important public policy concerns that grow out of property.

The “bundle” metaphor has been taken as a set of rules of conveyancing rather than as an aid to interpretation. It is as though the axioms or “rules” of interpretation of contracts had assumed a controlling significance: because one interprets against the drafter, the party who

59. When Benjamin Cardozo first used the bundle metaphor in connection with property, he clearly was not using it to identify an aggregation of separate estates but simply the “bundle of power and privileges to which we give the name ownership . . . .” BENJAMIN CARDozo & JAMES S. CARPENTER, FUND LECTURES, (1927), reprinted in THE PARADOXES OF LEGAL SCIENCE 129 (1928). The stick metaphor used in conveyancing is discussed at some length in Bruce M. Kramer, Conveying Mineral Interests – Mastering The Problem Areas, 26 TULSA L.J. 175 (1990).

60. See Westbrook v. Ball, 77 So. 2d 274 (Miss. 1955) of which Blass & Richey say “in this case the court recognized as a present vested interest in reality the separate estates consisting of the right to lease, the right to receive royalty, the right to receive bonuses and the right to receive delay rentals. As separate estates, they may be assigned, alienated and devised, and should pass under the laws of descent and distribution.” Blass & Richey, supra note 11, at 193.

61. Cardozo’s “bundle” metaphor was followed by the observation that “property like every other social institution has a social function to fulfill.” BENJAMIN N. CARDozo, THE PARADOXES OF LEGAL SCIENCE 129 (1928).
drafted the contract or a term of the contract must always lose when the term is called into controversy. Application of the "bundle" metaphor is perhaps assuming just such a ridiculous dimension.

The consequence of regarding each stick as a discrete interest in property is seen in application of the traditional rule that "upon conveyance of property the law implies a grant of all the incidents rightfully belonging to it at the time of conveyance and which are essential to the full and perfect enjoyment of the property." If one conceives that there are three "estates" or "interests"—land, mineral and royalty—one ascertains which has been conveyed or created, and the estate has all of the attributes that were not specifically excluded in the conveyance. If the executive right is simply an attribute of a mineral interest, once one has identified an interest as a mineral interest then it has the power to lease or develop absent a specific exclusion of the power. If, for example, we see that a person has been given an interest which has with it a share of bonus money and a share of royalty from any lease and from this we conclude that a mineral interest has been created, then we will further conclude that the person must have the executive right (or power to lease or develop), for it is an attribute of a mineral interest unless excluded. If, on the other hand, one conceives of the executive right (or bonus or delay rental etc.) as an estate or interest in itself, then one who has been conveyed the "bonus interest" and "a share of royalty interest" will not have been conveyed the "executive right interest," for the executive right is not simply an attribute of the bonus interest or estate but is an estate in itself.

The approach of some courts has been to treat a reference to one "stick" as a conveyance or reservation of that "stick." The more proper approach is to recognize that the task at hand in the cases is generally to determine whether a mineral interest or a royalty interest has been created. The appropriate treatment is to look at the attributes of the interest identified by the parties. Is there language that indicates an intent to take away a default attribute of a mineral interest? Is there language that indicates an intent merely to spell out the attributes of a royalty interest to make clear that the royalty owner has no power to control development? Once one has determined which type of interest has been created, the other attributes can be identified by the default rules.

63. Richard Maxwell has noted that: "Obviously, to an extent, this procedure is a kind of circular reasoning. An interest is mineral or royalty because of certain attributes that it has. To discover these attributes by making the distinction between mineral and royalty is a process that can turn back on itself." Richard Maxwell, A Primer of Mineral and Royalty Conveyancing, 3 UCLA L. Rev. 449, 455 (1956). As he observed, however, this was the process courts were using, and drafters of conveyances were acting further in response to this
As will be seen in the analysis of the cases that follow, the courts are tending to adopt the approach that each “stick” is a separate interest. This will inevitably have the effect of further fragmenting ownership of “interests” in a piece of land.

V. SEVEN CASES ILLUSTRATING EXECUTIVE RIGHT PROBLEMS, PARTICULARLY THE CATEGORIZATION OF MINERAL OR ROYALTY

There are a great many, perhaps hundreds, of cases that deal with the classification of an interest as being mineral interest or royalty interest. The locus of the executive right is part of the classification process, or one may be classifying the interest in order to ascertain the locus of the power to lease or develop. Certain of these cases illustrate the power of the “bundle of sticks” metaphor and the apparently increasing acceptance of the notion of a series of estates in mineral attributes. Let us examine a few of the recent cases, some prominent and some not.

A. Altman v. Blake

This case is an example in which the executive right plays a role in determining whether an interest is a mineral interest or a royalty interest and is conspicuous in its use of the 5 stick bundle approach. Here a one-sixteenth interest was created in 1938. The question before the court was whether the holders of the interest were to receive one-sixteenth of the production from a well cost-free or whether they were to receive 1/128th cost free (1/8 x 1/16 = 1/128). The granting clause of that instrument (erroneously referred to as a lease by the court) provided as follows:

W.R. Blake, Jr. ... does hereby grant, bargain, sell, convey, transfer, assign and deliver unto W.R. Blake, Sr., of Lubbock, Texas, hereinafter called Grantee (whether one or more) an undivided one-sixteenth (1/16) interest in and to all of the oil, gas and other minerals in and under and that may be produced from the following described land situated in Hockley County, State of Texas, to wit:

All of that certain tract or parcel of land being all of Labors 15 and 16, League 2, Jones County School Land, Hockley County, Texas.

But does not participate in any rentals or leases, containing 348 acres, more or less, together with the rights of ingress and

process. To shift to a bundle-of-discrete-estates approach is to ignore the manner in which earlier judicial decisions and conveyances were confected.

64. 712 S.W.2d 117 (Tex. 1986).
egress at all times for the purpose of mining, drilling, exploring, operating and developing said lands for oil, gas and other minerals, and storing, handling, transporting and marketing the same therefrom, with the right to remove from said land all of Grantee's property and improvements.

Did this create a mineral interest or a royalty? The court held, and I think correctly, that it was a mineral interest. The court felt certain that but for the clause "But does not participate in any rentals or leases", no one would dispute that the instrument conveyed only an undivided one-sixteenth interest in the mineral fee. Thus the issue was whether stripping out the executive right (or part of it) changed a mineral interest into a royalty interest. Would the grantor's denying to the grantee participation in rentals or leases effectively give to the grantee one-half of the usual royalty? From the grantee's perspective, this would be akin to the alchemist's magic of turning dross into gold. The court's reasoning process in rejecting the claim that this was a 1/16th royalty was as follows. The court identified "five essential attributes of a severed mineral estate." These were: "(1) the right to develop (the right of ingress and egress), (2) the right to lease (the executive right), (3) the right to receive bonus payments, (4) the right to receive delay rentals, (5) the right to receive royalty payments." The 1938 deed had reserved to the grantor attributes (2) and (4): the right to lease and the right to receive rentals. The court said that stripping these two attributes did not convert the mineral interest into royalty and thus apparently concluded that attributes (1), (3) and (5) went to the grantee. As to (5), the right to receive royalty payments, this meant the right to receive royalty on the 1/16th interest which could be leased by the grantor under the reserved attribute (2), thus leaving the grantee with 1/16th of 1/8th. Fine. That answered the question before the court, and fairly answered it in all likelihood. But where do we go from there? How do we apply the court's approach to the next case? We must explore the court's analysis.

One should begin by inquiring, where did the five attributes come from? Why these five and not some other five? The court does not cite a source either from case law or treatises or from industry custom and practice. The court avoids classical analysis of the nature of the rights or attributes it identifies. Are they rights in gross or rights appurtenant? We can indicate the significance of these questions by asking other questions.

Let us say that I own the minerals on Idyll Acres and I grant to Bacon the power to grant leases on Idyll Acres and I grant to Coke the right to receive royalty payments from Idyll Acres. Let's say that Bacon leases Idyll Acres to Rex Oil for $1,000 per acre and delay rentals of $100 per acre per year. Who gets these payments? Applying the Altman v. Blake analysis I think the answer is that I do—attributes or sticks (3) and (4) never left me. Let's say that Rex Oil takes that lease and goes on the land to start drilling.
When they get there, they find me on Idyll Acres drilling a well. Can they stop me? Not if "(1) the right to develop" is a separate stick from "(2) the right to lease." Surely this is a curious result. What was I receiving bonus and rental money for if not for the exclusive right to develop minerals on Idyll Acres? This hypothetical example is not so far-fetched to ask of the Altman v. Blake court, for the 1938 deed evidently reserved the exclusive leasing power in the grantor but the court read the deed as expressly conveying to the grantee "the rights of ingress and egress at all times for the purpose of mining, drilling, exploring and developing said lands." This suggests both the lessee of the grantor and the grantee personally could go on the land and drill a well. What is the executive right leasing if not attribute (1) identified by the court? Perhaps the court simply misread the awkward grammar of the scrivener; perhaps the phrase "But does not participate in any rentals or leases, containing 348 acres, more or less, together with the rights of ingress and egress" was intended to signify that the rights of ingress and egress were together with "rentals or leases" among those things in which the grantee did not participate.

The court suggests rather clearly that the grantee would have gotten a share of bonus money from a lease executed by the grantor/executive right owner. The court states: "The 1938 deed does not reserve the right to receive bonuses, and it is not necessarily included within the term 'participation.""65 Bonus money is the payment to a person who grants a lease for the execution of the lease. Royalty is a share of production itself or a payment in lieu of sharing in identifiable production. Thus I think that the lawyer drafting the 1938 did not identify bonus separately because logically it was seen as simply an extension of the power to lease. As we shall see, one line of cases takes this approach. Royalty was not identified as going to the grantee because the deed granted a mineral interest; the royalty was to be the mineral interest owner's share of his 1/16th that was being leased. So let us return to my hypothetical example. If I give to Bacon the right to grant leases, it follows that I have also given to Bacon the bonus money that flows from the grant of a lease. This is clearly the rule in Louisiana,66 but some states differ. Bonus and rental will be further discussed below. Likewise if I give to Bacon the exclusive power to lease Idyll Acres then I do not retain the power to develop the minerals myself. The leasing power and the development power are one and the same, as the Texas courts have evidently now recognized.

The process of implication goes on all the time in oil and gas law. The right to use water on Idyll Acres for oil and gas development is implied

65. Id. at 119.
66. See infra text accompanying note 147.
from the grant of the minerals. The right to go on the land for the minerals is implied from the grant of the minerals. The right to inject produced brine to dispose of it is implied from the grant of the minerals. The right to use water is not a separate right from the right to go on the land or from the right to inject brine. It would be a mistake to identify each of these as a separate right that is the subject of property treatment, i.e. as real rights or rights in gross, as opposed to simple attributes of other property interests.

We go into all of this in part because Altman v. Blake set the stage for our next case to consider. What arguably was a simple listing of "attributes" in Altman became something more solidly identified as discrete property rights in a case decided four years later.

B. Day & Co. v. Texland Petroleum

Mildred Williams Keaton and Francell Williams Young conveyed eighty acres of land plus the right to enter into oil and gas leases as to one hundred percent of the minerals to Day & Co. via warranty deed. At the same time they reserved one-half of the mineral interest to themselves. Day & Co. then conveyed the east ten acres of the tract to the Shoafs, reserving one-fourth to itself; this general warranty deed expressly referred to the prior reservation of one-half of the minerals by Keaton and Young. However, the deed made no mention of or reference to Day's executive right over Keaton and Young's one-half mineral interest. The Shoafs executed an oil and gas lease covering the east ten acres, evidently believing they had a right to enter into a lease as to their one-fourth mineral interest and as to Keaton and Young's one-half mineral interest. The lease ultimately was assigned to Texland Petroleum, Inc., which drilled and completed a producing oil well on the Shoaf's ten-acre tract.

Meanwhile, Day & Co. executed an oil and gas lease covering the same ten-acre tract; it purported to cover not only their one-fourth mineral interest but also Keaton and Young's one-half mineral interest. Which lease actually covered Keaton and Young's one-half mineral interest? Day & Co. brought suit to establish the validity of its lease as to Keaton and Young's one-half mineral interest. The Texas Supreme Court treated the severed executive right as a property interest that was conveyed by implication as a result of its failure to except the right from the granting clause of a general warranty deed. Reversing their holding in the earlier case of Pan American

68. 786 S.W.2d 667 (Tex. 1990).
Petroleum Corporation v. Cain, the court confessed error in Cain stating: "Although the executive right is similar to a power, it is not a product of contract, but rather a creature of property rights.... Even when it is severed from the other rights or attributes incident to the mineral estate, it remains an interest in property." The executive right, the court held, "is an interest in property, an incident and part of the mineral estate like the other attributes such as bonus, royalty and delay rentals." The court further spelled out its rationale as follows: "Under the approach in Cain, a severed executive right appears to be a right based in contract, in the nature of a power, the duration of which is a matter of the parties' intent. In fact, the executive right is a property interest subject to principles of property law when bundled with the other rights and attributes comprising the mineral estate." The court's footnote to this statement refers us to Altman v. Blake and further states: "Other rights and attributes of the mineral estate include the right to receive delay rentals for the deferral of commencement of drilling by the lessee, the right to receive royalty, the right to share in other benefits secured from the lessee such as shut-in royalties, minimum royalties, production payments and the like, and correlative to the executive right, the right to develop and produce minerals." Accordingly, the executive right, severed from the one-half mineral interest reserved by Keaton and Young and conveyed to Day & Co., passed under Day & Co.'s general warranty deed to the Shoafs because Day & Co. did not reserve or except such interest from the conveyance.

We might focus on how the Texland bundle differs a bit from the Altman v. Blake bundle. The court identifies these sticks as "rights and attributes"; it runs certain "other benefits" under a "such as" reference and omits "bonus" from the list; and the court identifies "the right to develop and produce minerals" as being "correlative to the executive right" rather than identifying it as a separate right.

70. 786 S.W.2d at 669.
71. 476 S.W.2d at 669.
72. 476 S.W.2d at 669.
73. Professor Masterson suggested quite some time ago that the separation of the leasing power indicates an intention that the nonexecutive party shall have no right to lease or develop:
   It is submitted that in the light of present day customs and needs, and also logically, if the right to lease is granted, this carries with it the exclusive right to develop. There would be fatal inconsistency between a right to execute oil and gas leases (granting to the lessee the exclusive right to
Altman v. Blake
(1) the right to develop (the right of ingress and egress),

(2) the right to lease (the executive right),

(3) the right to receive bonus payments,

(4) the right to receive delay rentals,

(5) the right to receive royalty payments.

Day & Co. v. Texland
(1) the executive right,

(2) the right to receive delay rentals for the deferral of commencement of drilling by the lessee,

(3) the right to receive royalty,

(4) the right to share in other benefits secured from the lessee such as shut-in royalties, minimum royalties, production payments and the like,

(5) and correlative to the executive right, the right to develop and produce minerals.

What are we to make of the differences in the lists? Is there an implication here that bonus is correlative to the executive right?

C. French v. Chevron

In 1943, George Calvert (Grantor), the owner of a 1/32 mineral interest in a 32,808.5 acre tract, deeded a fifty acre, 1/656.17 interest to Capton M. Paul (Grantee). The instrument, titled "Mineral Deed," read in part as follows:

[Paragraph I.]

That I, George Calvert, ... do grant, bargain, sell, convey, set over, assign and deliver unto Capton M. Paul, an undivided Fifty (50) acre interest, being an undivided 1/656.17th interest in and to all of the oil, gas and other minerals, in, under and that may be produced from the following described lands....

possession) being vested in one person and a right to enter and develop being vested in another.

Wilmer D. Masterson, Jr., Discussion Notes, 1 OIL & GAS REP. 960, 960 (1952).

74. 896 S.W.2d 795 (Tex. 1995).
[Paragraph II.]

It is understood and agreed that this conveyance is a royalty interest only, and that neither the Grantee, nor his heirs or assigns shall ever have any interest in the delay or other rentals or any revenues or monies received or derived from the leasing of said lands present or future or any part thereof, or the renewal or extension of any lease or leases now on said lands or any part thereof. Neither the Grantee herein nor his heirs or assigns shall ever have any control over the leasing of said lands or any part thereof or the renewal or extending of any lease thereon or for the making of any lease contract to develop or prospect the same for oil, gas or other minerals, which is hereby specifically reserved in the Grantor.

We ask the by-now familiar question: mineral or royalty? The second paragraph calls it “a royalty interest only” and then says it does not carry with it delay or other rentals nor does the grantee have any power to lease. Was the deed drafter identifying the attributes of a royalty interest so as to make it clear that it was a royalty or was the deed drafter taking a mineral interest and stripping it of the normal attributes of a mineral interest? The court said the drafter was doing the latter for it would be redundant to spell out the attributes of royalty after having used the word royalty. The court stated:

It [the second paragraph] reserves in the grantor the right to receive delay or other rentals, or any revenues from the leasing or from any renewal or extension of any lease. This reservation would be redundant and would serve no purpose whatsoever if the interests in minerals being conveyed was a 1/656.17 royalty interest, that is, 1/656.17 of all production. A grant of a royalty interest, without any further grant, does not convey an interest to the grantee in delay or other rentals, or in bonus payments, nor would it convey executive rights.

I will not attempt to repeat the fine analysis of the French decision of Professor Maxwell but will refer you to it for its insights. What I will note is the court’s return to the specific list of sticks from Altman v. Blake. And from Texland the court incorporates the interpretative rule: “[w]hen

75. The fallacy of the court here is its failure to recognize that, as discussed above, many people had used the terms “mineral interest” and “royalty” interchangeably; careful drafters would have often spelled out the attributes of the interest they were creating so as to clarify, not so as to strip away sticks from a different interest.

an undivided mineral interest is conveyed, reserved, or excepted, it is presumed that all attributes remain with the mineral interest unless a contrary intent is expressed." Most curiously, the Texas Supreme Court gives us Altman v. Blake's five sticks but then hurries on to reduce them to four by recognizing that development is correlative to leasing. In footnote 1, the court states:

The court of appeals held that the deed was silent as to the conveyance of the right to develop and therefore, that right was impliedly transferred to the grantee. This conclusion is incorrect for two reasons. First, the right to develop is a correlative right and passes with the executive rights. Day & Co. v. Texland Petroleum, [Inc.], 786 S.W.2d 667, 669 n. 1 (Tex. 1990). Second, we read the reservations clause in this conveyance as reserving the right to develop in the grantor. It states that the grantee has no control over 'the making of any lease contract to develop or prospect.' Consequently, we also conclude that the right to develop was reserved in the grantor.

Let's slightly alter the wording of the deed. Let's say it read that the grantor "does grant, bargain, sell, convey, set over, assign and deliver unto Coke, an undivided Fifty (50) acre interest, being 1 barrel out of each 656 barrels in and to all of the oil in, under and that may be produced from Idyll Acres and I intend that this conveyance is a royalty interest. By this I mean that the interest shall have none of the attributes of a mineral interest in that the grantee shall not have: 1) the right to develop, 2) the right to lease, 3) the right to receive bonus payments, 4) the right to receive delay rentals, and 5) the right to receive royalty payments from any lease granted by the grantor." Let's assume that the deed is recorded and the grantor subsequently leases the acreage to Rex Oil for a one-eighth royalty. What does the Coke interest receive? 1 barrel out of each 656 barrels has to be the answer I would think. The enumeration of the attributes of a royalty interest should not convert it into a stripped down mineral interest any more than stripping a mineral interest of certain of its attributes should convert it into a royalty. Yet perhaps that is what the French court has done.

D. Bank One Texas, National Ass'n v. Alexander

French, Altman and Day & Co. were all followed in Bank One Texas, a case concluding that a 1/16 mineral interest had been created, not a royalty. The questioned language of the deed was as follows:

77. 896 S.W.2d at 797 n.1.
78. 910 S.W.2d 530 (Tex. App. 1995).
79. Id. at 531 (bracketed numbers supplied by the court).
Grantors herein reserve for themselves, their heirs, assigns and legal representatives an undivided 1/16 interest in and to all minerals of every kind and description, including oil and gas, in, upon and under said land;

but the right to control and manage and make any and all gas and oil leases or other mineral leases upon said land is hereby granted exclusively to grantees herein, their heirs, assigns and legal representatives, and they shall be entitled to any and all cash bonus or bonuses paid on any and all oil and gas leases on said land together with all cash rentals under such leases;

but an undivided 1/16 of any and all oil and gas and other minerals developed from said land shall be owned by grantors herein, their heirs, assigns and legal representatives.

Bank One, which contended this created a royalty interest, placed heavy emphasis on the fact that "the right to control and manage and make any and all gas and oil leases or other mineral leases upon said land" (i.e. the executive or development right) was in the grantee; this, it asserted, meant that the right to develop passed by implication with the grantors' conveyance of the exclusive right to lease the property. The court acknowledged that the right to develop was a correlative of the right to lease but said that a mineral interest stripped of many of its component parts remains a mineral interest absent additional evidence showing a contrary intention. More troublesome perhaps was the use of the word "developed" in the deed: "undivided 1/16 of any and all oil and gas and other minerals developed from said land shall be owned by grantors". This seems quite close to the notion of "produced", a term generally applied to royalty. But since "developed" has more meanings than "produced and saved", it just was not close enough to work against the other factors, according to the court.

I cannot argue that Bank One is wrongly decided. I think what is more important than the court's falling back on the bundle of sticks approach is the court's use of canons of construction and its relying several times on Bruce Kramer's fine and oft-cited article on the Canons of Construction. The court indicated its process in a footnote and then demonstrated it as it worked its way through the language of the deed and the cases:

We must ascertain the intent of the parties by looking to the "four corners" of the deed. . . . Another canon of construction requires that we harmonize all provisions of the deed in

ascertaining the parties' intention, even if some appear to be in conflict. . . . We may orchestrate the 'four corners' canon with the harmonizing canon.

The court looked at the instrument as a whole and balanced the provisions said to conflict against one another. This, I would suggest, is a somewhat different process than the simpler stick analysis.

E. Temple-Inland Forest Products v. Henderson Family Partnership

The five stick approach was applied in this case with a rather unsatisfactory result. The writ of error is still pending so I'm a bit reluctant to criticize the case, yet it seems to hold particular dangers for drafters. The case involves two 1938 mineral deeds conveying forty mineral acres each. We must start with the language of the deeds:

... have granted, bargained, sold, conveyed, transferred, set over and delivered, and by these presents do grant, bargain, sell, convey, transfer, set over and deliver unto the said Grantee, an undivided fifteen-sixteenths (15/16ths) interest in, to and of all oil, gas and other minerals, whether similar or dissimilar, on, in, under and that may be produced from the following described land . . .

Pertinent provisions of these deeds regarding the reservation of interest by grantors are as follows:

In respect to the undivided one-sixteenth (1/16th) part of and interest in the oil, gas and other minerals retained and reserved by the Grantor in said land, it is understood and agreed that said one-sixteenth (1/16th) interest is and shall always be a royalty interest, and shall not be charged with any of the costs which the Grantee may incur in exploring, drilling, mining, developing and operating wells or mines for the production of oil, gas and other minerals; and, if the Grantee, or his heirs, executors, assigns or any person or concern to whom the Grantee shall give an oil and gas mining lease thereon, shall, by his or their explorations and operations, discover and produce oil, gas and other minerals, the Grantor's one-sixteenth (1/16th) royalty interest above referred to shall be delivered free of cost to the Grantor at the wells or mines or to the credit of Grantor in pipe lines or storage provided by the Grantor. It is expressly understood that the Grantee shall never be required to, under any covenant or obligation, whether express or implied, to drill or operate on

81. 911 S.W.2d 531 (Tex. App. 1995).
said lands or any part thereof for the discovery of or production of oil, and other minerals, before and after discovery, shall be solely at the Grantee's option and election, and that any wells or mines discovered or drilled by the Grantee may be abandoned or operated by him at any time at his election or discretion; provided, that before Grantor's royalty shall be calculated and determined, all oil, gas and other minerals used for light, heat and operations by the Grantee and any taxes against the production shall be first deducted.

The rights and interests herein granted, created and reserved shall extend to the respective heirs, executors, administrators, successors and assigns of the parties hereto, it being agreed that the Grantor shall not be required to join in or ratify any oil and gas mining lease which the Grantee may grant by virgue [sic] of his ownership hereunder and that Grantor shall be entitled to none of the bonus money therefor and to no part of the delay rentals paid thereunder; it being further understood that any change of ownership of the one-sixteenth (1/16th) royalty belonging to Grantor, whether effected by conveyance, will, partition or otherwise, shall entitle the respective owners only to their proportionate part of said royalty, . . . .

Although this court also spoke of harmonizing, it seems to have placed great reliance on the notion of transfers of sticks. The court listed the five attributes or sticks from Altman by way of French and proceeded to misapply them by failure to read the grammar of the conveyance. Here are the court's words:

we find the grantors (1) conveyed the right to develop; (2) conveyed the right to lease; in other words, they have conveyed their executive rights; (3) conveyed their right to bonus and conveyed their (4) right to delay rental. Under the deeds in question, the grantors gave up the right to develop, lease, receive bonus payments, and receive delay rentals. If the parties had intended the 1/16th retained interest to be a fixed royalty interest, there would have been no need to grant these attributes to the grantee. These attributes would have automatically passed without a grant of the mineral interest. Only when the parties intended that the 1/16th interest retained to be a mineral interest was it necessary to make such a grant. If the Grantors actually intended to grant 100 percent of the mineral interest and retain a 1/16th royalty, then they would have done just that: the granting clause would have granted all minerals (16/16ths), and separately reserved a 1/16th royalty.
As to the four enumerated items the deed simply does not convey those items as to the retained 1/16th. Those attributes all pass to the grantee and arise with the 15/16ths conveyed. There is no language of grant of these attributes as to the 1/16th. Rather the deed rather carefully describes the attributes of royalty, saying that the interest shall not bear expenses, that the royalty need not join in any lease, and it is not entitled to bonus or delay rental. The deed language does not purport to take away these attributes from an interest. The necessity of describing the attributes of the interest at one time arose as we have seen from the fact that "royalty" and "mineral interest" were often used interchangeably. Indeed, the deed very specifically states that the "one-sixteenth (1/16th) interest is and shall always be a royalty interest, and shall not be charged with any of the costs which the Grantee may incur in exploring, drilling, mining, developing and operating wells or mines for the production of oil, gas and other minerals" and that "one-sixteenth (1/16th) royalty interest above referred to shall be delivered free of cost to the Grantor at the wells or mines ..." Assuming that the land is leased for a 1/8th royalty, the court subjects this cost-free 1/16th to a substantial part of the costs of bringing the 1/16th to the wellhead. The court ignores the plain import of this language of a cost-free interest. We should observe also the court's last sentence from the passage quoted above. How can you grant all of something and then reserve a part of it back? If you reserve something you hold it back; you do not convey it and then convey it back to yourself! As we have seen above, many people dealing in oil and gas transactions have conceived of royalty as a thing one holds back in a conveyance, thus one would convey to the grantee a 15/16ths interest. Besides, one should look at the surrounding circumstances of the transactions. It appears that in 1938 an investor in minerals bought up the mineral rights and the sellers reserved the very common 1/16th royalty. It makes no sense for someone in circumstances like these to reserve a 1/16th mineral interest, which effectively would turn into a 1/128th royalty when leased. Why convey a large interest in minerals and retain only a small fractional interest of the same type?

Let's move away from Texas to look at a couple of other jurisdictions.


In 1944 the McLeods leased about 40 acres of land to one Frank Ryba. The following year they executed a mineral deed to C.L. Thornhill

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82. 523 So. 2d 983 (Miss. 1988).
conveying an undivided one-half (1/2) interest in the minerals. The deed to Thornhill appears on a standard “Form R-101 Mineral Right and Royalty Transfer” instrument. On the face of this deed was typed the following:

It is the intention of the grantors to convey, and they do hereby convey, twenty (20) full mineral acres of land of said tract.

Non-participating as to present or future lease rentals or bonuses.

Now we must ask what type of interest was this? We look at certain of the attributes to ascertain what type of interest it is, and once we classify the interest, we then spell out the unspecified attributes. As we shall see, the issue before the court was the determination of what kind of interest was conveyed by the instrument, for the purpose of classifying the interest so as to fix the location of the leasing power. Who had the power to lease, the landowners or the grantee of this interest?

First we may consider the heading of the conveyance: it was labeled a “Mineral Right and Royalty Transfer.” Does this suggest a royalty? Apparently the trial court thought so, for the chancellor ruled the interest was a royalty only and thus the landowners had the sole power to lease. But such a conclusion ignores the function of several printed provisions of the conveyance. Remember that the land was already under a mineral lease to Ryba. The Thornhill conveyance was expressly made subject to any and all outstanding leases but conveyed the grantee’s proportional share of royalties arising under the lease. Thus the deed conveyed both the mineral rights to twenty full mineral acres and a share of the royalty already established under the existing lease. Thus the heading of the deed is consistent with the creation of a mineral interest.

Next we should note that the deed conveys “twenty (20) full mineral acres of land of said tract”, which is the classic means of conveying a mineral interest rather than a royalty interest. The latter often has been expressed as a conveyance of royalty acres.

The third thing that we observe is that the deed specifies that the interest is “Non-participating as to present or future lease rentals or bonuses.” We might read this in three ways. a) We might say it is descriptive of the type of interest created. A royalty is a passive right that cannot lease and does not share in bonus or delay rental, ergo it follows that this signifies that a royalty interest has been created. This seems to be what the chancellor

83. I suspect that Mr. C. L. Thornhill was an investor or speculator in mineral interests. The same name appears in other litigation over purchased mineral interests. See Thornhill v. Ford, 56 So. 2d 23 (1952).

84. The fact that four years after the mineral conveyance to him, Thornhill filed an application for ad valorem tax exemption showing that he had a “1/2 Royalty” may be explained by the fact that he had received one-half of the royalty under the existing lease.
ruled.\textsuperscript{85} b) We might say that the deed created a mineral interest for roughly one-half the minerals and then stripped the interest of the right to share in delay rental and bonus money. c) Finally we might say that the deed created a mineral interest for roughly one-half the minerals and then stripped the interest of the power to lease, as is signified by specifying that the grantee is not to participate in rental or bonus money. What is the correct answer?

The Mississippi Supreme Court found that b) was correct. It essentially followed the bundle of sticks approach \textsuperscript{86} and said that the "delay rental and bonus" stick was a separate stick from the "right to grant leases" stick. The court then reasoned that all sticks not retained by the grantor went to the grantee ("under ordinary rules of construction, all that was not unequivocally and specifically reserved was conveyed by the granting clause."). Therefore, the court concluded, the grantee received the power to grant leases.

Now I have no doubt that the court was correct to conclude that the grantee had been given a mineral interest (and lease royalty under the existing lease), but I think that the court has created a most curious power in the grantee. The grantee can lease the interest he owns but does not get to keep any bonus or delay rental arising from the lease. Presumably that goes back to the grantor. Can we refer to such a grantee as having an "executive duty" as to the rental and bonus interest that is retained by the grantor? I suspect that a sounder approach for the court to have taken in trying to effectuate the likely intent and understanding of the parties was to have identified the grantors as having the executive right over Thornhill's twenty full mineral acres. Evidently what had happened here was the tract in question had been placed in a unit and the owner of the Thornhill interest was to be treated as subject to a lease granted by the McLeods' successor and thus shared in a royalty under the unit or treated as an unleased owner, which no doubt was far more advantageous. It seems to me that the bonus and rental payments are simply incidental to the power to grant leases and that the McLeod-Thornhill deed was signifying who had the power to grant leases.\textsuperscript{87}

\textsuperscript{85} This had been the approach of \textit{Harris v. Griffith}, 210 So. 2d 629 (Miss. 1968), which Thornhill distinguishes and overrules.

\textsuperscript{86} [T]he distinguishing characteristics of an interest in minerals in place are: (1) Such interest is not free of costs of discovery and production; (2) the owner has the right to do any and all acts necessary to discover and produce oil and gas; (3) the owner has the right to grant leases; and (4) the owner has the right to receive bonuses and delay rentals. 523 So. 2d at 988.

\textsuperscript{87} Compare the Oklahoma cases of \textit{Anderson v. Mayberry}, 661 P.2d 535 (Okla. Ct. App. 1983) and \textit{McVey v. Hines}, 385 P.2d 432 (Okla. 1963) discussed infra wherein the courts
G. Zemp v. Jacobs

In this Oklahoma case, land was conveyed by warranty deed reserving an interest defined as follows:

Said first party requires said second party to keep said land under Oil or gas Lease to some responsible and reliable Oil or Gas Company at all times if demand therefor, satisfactory to said first party, at expiration of any Oil or gas lease on said land. The Grantors herein specifically reserve and retain an undivided one sixteenth (1/16) of all Oil and Gas produced from said land and also reserve to themselves an undivided One Half of all Oil and Gas rentals and bonuses under any Oil and Gas lease affecting said real estate or in any future Oil and Gas Lease on the above described premises...

The grantors claimed a 1/16th royalty interest and the grantees brought suit to establish that the interest reserved was a 1/16th mineral interest. The Oklahoma court held that the interest reserved was a mineral interest:

The [grantors], having previously entered into a lease for oil and gas production, knew of the royalty available to them and chose not to reserve specifically unto themselves one half of the royalty interest. They chose instead to retain a shared executive interest via the right to participate in the leasing process. They also chose to participate equally in all bonuses and rentals and to keep for themselves one unit of every sixteen units of produced hydrocarbons. Further, while they did not specifically retain the right of access in the reservation, they also did not waive it.

equated the holding of bonus and rental as holding the executive right. This approach had been followed in Harris v. Griffith, 210 So. 2d 629 (Miss. 1968), which was overruled in Thornhill. A stinging dissent in Thornhill by Justice Dan Lee would have followed the McVey and Griffith analysis. Justice Lee contended:

An executive right unhinged from the bonus is meaningless, because by definition whoever retains the right to execute leases has the right to the resulting bonus. The bonus is nothing more, or nothing less, than consideration paid for executing a lease. Harris v. Griffith, . . . was infinitely correct, in the real world, when it held that the retention of bonuses and lease rentals justifies an implication to retain the right to execute leases. . . . It is the only implication that makes any practical sense. Otherwise, both the grantor and the grantee are left with meaningless rights.

523 So. 2d at 995.

The [grantors'] language in the reservation indicates they did not intend to give up any rights. The reservation maximized the [grantors'] control to insure receipt of an undivided 1/16 of all oil and gas produced together with income from the lease bonuses and rentals, not only from the existing lease but also for all future leases. The [grantors], being familiar with the leasing process would also have reasonably known that there would be a cost of production to produce any oil and gas and that they would be required to share in this cost pro rata with the retained interest.

Thus, while the actual hydrocarbon reservation for 'oil and gas produced from said land' would tend to indicate that a 'royalty' interest was created, this is negated by the [grantors] retention of rights in the critical factors indicative of a mineral interest: the executive right, or the right to grant leases, and the right to receive rentals and bonuses. . . . Consequently, we hold that the [grantors] created . . . a mineral interest and that the mineral interest has the right to receive 1/16 of the royalty under any lease existing on the realty.

Here the court ignored the careful draftsmanship that clearly spoke of 1/6th of all oil and gas produced. From the whole deed it seems apparent that a drafter sought to retain the equivalent of a half-interest in the minerals while making it clear that the grantee was solely responsible for leasing. The parties avoided any question about the quantum of royalty that the person granting leases would negotiate by specifying the quantum of production that the grantor would receive. That question has been prominent in some litigation over exercise of the executive right. Perhaps addition of the words "royalty" and "cost-free" would have helped the grantor here, but we have already seen in Temple-Inland how a court may simply ignore even those very plain signifiers. Just as importantly, the deed made clear that the grantees had the power and the duty to lease the tract. The grantors did not retain the executive right; rather they clearly provided a mechanism to require the holder of the executive right to exercise it, quite a different thing from retaining the executive right.

VI. NATURE AND VALIDITY OF THE EXECUTIVE RIGHT AND OF INTERESTS WITHOUT POWER TO LEASE OR DEVELOP

Writers have discussed the nature and validity of the creation of an executive right, nearly as often as the courts have.89 Over the years the

89. 1 E. Kuntz, A TREATISE ON THE LAW OF OIL AND GAS §§ 15.4 – 17.3 (1987); 3A W. Summers, THE LAW OF OIL AND GAS § 605 (1958); 2 H. Williams & C. Meyers, OIL AND GAS LAW § 323 (1995); Charles J. Meyers, The Effect of the Rule Against Perpetuities on Perpetual Non-Participating Royalty and Kindred Interests, 32 TEX. L. REV. 369 (1954); W. Hume Everett,
courts have struggled with the question of just what is the proper classification of the executive right in terms of powers under the common law.\textsuperscript{90} We have already seen how Day & Co. v. Texland has resolved this in Texas (at least for the time being); there the court concluded that the executive right is a property right in itself (or may be established as such by proper signification of intent). Other courts at other times and in other jurisdictions have indicated that the holder of the executive right is the holder of a power over the minerals of another.\textsuperscript{91} The purpose of classifying the executive right in such cases has been to determine if the power is revocable or irrevocable, whether it is heritable, and whether it violates the Rule Against Perpetuities. For example in the case of Pan American Petroleum Corp. v. Cain\textsuperscript{92} the issue before the court was whether the reserved executive right survived the death of the executive right holder. The court found the executive right to be a "power given as security" rather than a mere "naked power" or a "power coupled with an interest";\textsuperscript{93} the power was "reserved to facilitate the leasing of his interest in the minerals. It was for the protection or security of such interest that he stipulated for the power."\textsuperscript{94} The reservation was unaccompanied by words of inheritance and therefore terminated at the executive's death. The Cain court relied on the Oklahoma case of

\begin{thebibliography}{99}
\bibitem{Cruthirds} David L. Cruthirds, Comment, Power to Execute Mineral Leases Over A Severed Mineral Interest is a Real Property Interest, 32 S. TEX. L. REV. 337 (1991) goes over the common law background of various types of powers over property and discusses the pre-Day & Co. treatment of the executive right under different classifications of powers. Cruthirds goes over the analyses of the executive right as security or administrative power, power coupled with an interest, power of appointment, power held in trust, assignable personal right, unassignable personal right, and as right exercisable as the owner of the property leased. For an introduction to the topic of "powers of appointment" see R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY, ch. 33 (ab. ed. 1968). There seems to have been nothing at common law property quite like the executive right or power.
\bibitem{Royalty} If royalty is owned by the other in the property, the courts apparently have not addressed whether the person with the power to lease has a power over the royalty. See 2 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 324.2 (1995).
\bibitem{Wright} 355 S.W.2d 506 (Tex. 1962).
\bibitem{Wright2} Cases finding the executive right to a power coupled with an interest include Kilfoyle v. Wright, 300 F.2d 626 (5th Cir. 1962), Bonzo v. Nowlin, 285 S.W.2d 153 (Ky. 1955), Allison v. Smith, 278 S.W.2d 940 (Tex. Civ. App. 1955), Odstrcil v. McGlaun, 230 S.W.2d 353 (Tex. Civ. App. 1950) and Donahue v. Bills, 305 S.E.2d 311 (1983) (classifying the executive right as a power [agency] coupled with an interest). It may be noted that Allison and Odstrcil may also be cited for the proposition that creation of a non-executive mineral interest implies an agreement not to partition.
\bibitem{Wright3} 355 S.W.2d at 508.
\end{thebibliography}
Howard v. Dillard\textsuperscript{95} which had described the executive right there as a power in trust.\textsuperscript{96} When Day & Co. overruled Cain, it was in part to the effect that words of inheritance were not necessary. In cases from other jurisdictions once words of inheritance have been used, the courts have generally upheld the executive right and have treated it as irrevocable, though this must be qualified by reference to the line of cases raising questions about the application of the Rule Against Perpetuities.

The primary focus of such concern has been whether the creation of an executive right or power violates the Rule Against Perpetuities. Simply stated, the Rule is to the effect that any limitation or provision is invalid if its purpose or possible effect is to cause an estate to commence in the future more than twenty-one years after a life or lives in being.\textsuperscript{97} Because the Rule is directed against the vesting of interests at a remote time in the future, it has no application to an interest that is already vested.

The executive right raises a concern under the Rule if the exercise of the executive right causes an interest in property to vest that was not theretofore vested. To return to Transaction 2 above, if Bacon sells an eighty acre tract to Coke, reserving one-half of the royalties derived from leasing Blackacre and recognizing that Coke has the exclusive power to lease the tract, does Bacon have a vested interest, or does Bacon have an interest that will come into existence only when Coke grants a lease? Is Coke's power to grant a lease a vested interest or does it "vest" only when exercised? If the power to grant a lease is conveyed to another and is shorn from any other

\textsuperscript{95} 176 P.2d 500 (Okla. 1947).
\textsuperscript{96} The court stated:

[T]he grantor reserved unto himself the right to lease the lands involved on such terms as should be suitable to him and also the sole and exclusive right to develop for oil and gas and carry on other mining operations. These personal rights and privileges constitute rights in trust none of which were exercised by the grantor before his death and no trust relationship, coupled with an interest, came into existence. These reserved rights or privileges came to an end under the circumstances at the death of the grantor.

\textit{Id.} at 502.

\textit{Howard} was distinguished in \textit{Skelly Oil Co. v. Butner}, 205 P.2d 1153 (Okla. 1949). In \textit{Skelly}, the owners of the land conveyed a half interest in the minerals and reserved the exclusive right to lease. They later conveyed "all of the following described real estate . . ." to a third party but claimed at trial that the executive right had not passed under the general warranty deed because it was a power in trust that was personal to the plaintiffs. The court held that the executive right passed under the deed to the purchaser. \textit{Howard} was also distinguished in \textit{Stone v. Texoma Prod. Co.}, 336 P.2d 1099 (Okla. 1959). Here, the mineral deed reserving the executive right clearly evidenced the grantor's intent that the right be assignable and heritable.

interest, is it a vested right in itself? A review of only a few cases will serve to indicate the prevailing approach of the courts of the producing states.

A case that has reflected the view that an executive right may violate the Rule is Dallapi v. Campbell. In this case, the court held that a bare reservation of the right to lease, unaccompanied by any interest in the estate, violated the Rule and was thus void. The plaintiffs had received deeds to residential lots in which the right to execute oil and gas leases and distribute the royalties to the landowners was reserved to the corporate grantor. Pursuant to the reservation, the grantor leased the land to the defendant. The plaintiffs also leased the land and then brought suit to quiet title. Which lease was valid? The court held the reservation void under the Rule against Perpetuities because it enabled the grantor to create an estate in land at any time in the future, so the lease given by the plaintiffs was the only valid lease. Dallapi has subsequently been limited by the California courts. In Keville v. Hollister Co., the court ruled that an executive right was valid when the executive had an interest in the mineral estate because the executive interest vested together with the associated estates.

Kansas is the only other state that has found certain non-executive interests within the Rule Against Perpetuities. In Lathrop v. Eyestone, the owner of minerals had attempted to convey undivided interests in royalties under future leases as well as under an existing lease, but the grantor reserved to himself the exclusive power to lease. The court held these conveyances contrary to the Rule Against Perpetuities, basing its decision on the doctrine that in Kansas a right to royalty alone confers no interest in the land itself but is regarded as personal property. This personal property right could not vest until the oil and gas were severed from the soil, an event that might be too remote under the Rule. The Kansas court followed Lathrop in Cosgrove v. Young. In Cosgrove, the conveyance was of "one-half (1/2) of the royalty in Oil and Gas produced" which specifically included "royalties to become due and owing by reason of any future oil and gas leases." For thirty years there was payment. But the Kansas court found that the Rule was violated and the royalty ceased. The court reasoned as follows:

[T]he instrument does not require the grantor or his successors to execute and deliver any future oil and gas leases at any future time. Naturally, if no future oil and gas leases are made and executed, there would never be a vesting of title to

98. 114 P.2d 646 (Ca. 1941).
100. 227 P.2d 136 (Kan. 1951).
any royalty interest. If it is not certain the vesting will occur within the time stated in the rule, then the rule has been violated and the conveyance is void. Even if an oil and gas lease were required to be executed within the time prescribed by law, there would still be no vesting of title until royalty becomes due and payable to the grantor or his successor. The execution and delivery of an oil and gas lease does not insure that there will ever be any production attributable to the lease. Additionally, as was the situation in Lathrop v. Eyestone, the instrument is not prohibitive of the grantor developing the minerals for himself, without any oil and gas lease being involved. Under such circumstances, there would never be any royalties paid to anyone.\(^{102}\)

There was a vigorous dissent by Justice Herd, who distinguished Lathrop\(^ {103}\) and noted that the Kansas treatment of perpetual royalty as falling under the Rule has been severely criticized.

The Kansas court does not treat a mineral interest that has been stripped of the executive right as falling afoul of the Rule.\(^ {104}\) The careful attorney can achieve all of the same effects of royalty creation in Kansas by artful crafting of the conveyance and not violate the Rule.\(^ {105}\)

Several cases in other states have expressly or implicitly rejected the Dallapi and Lathrop ruling. The Arkansas Supreme Court in Hanson v. Ware\(^ {106}\) found the California and Kansas cases to be flawed in their analysis. In confirming the validity of a 1919 agreement conveying a perpetual royalty in the oil and gas while retaining the leasing power in the grantor, the Arkansas Supreme Court ruled that the royalty was a vested right even if no lease were granted. It said:

\(^{102}\) Id. at 83.

\(^{103}\) He argued:

[The instant instrument is clearly distinguishable from those in Lathrop v. Eyestone. It does not make the conveyance dependent upon leases, present or future. It merely instructs the lessees to pay royalty to Stewart and his heirs. It provides that the Akers are selling one-half (1/2) their royalty under the half section to Stewart now. There is no delay. The conveyance is not contingent upon leasing as a condition precedent. It is the sale of a present interest and vests immediately. The rule against perpetuities applies only to future interests.


\(^{105}\) D. Pierce, KANSAS OIL & GAS HANDBOOK §§ 4.15—4.16 (1986) provides guidance as to how a nonparticipating mineral interest can be created that will not be construed to create a royalty interest and hence will not violate the rule against perpetuities.

\(^{106}\) 274 S.W.2d 359 (Ark. 1955).
We are decidedly of the opinion that the rule against perpetuities was not violated by the conveyance to these appellees, for the reason that they acquired a present interest rather than a future interest in the land. To treat the appellees' royalty as a future interest involves a failure to distinguish between their estate in real property, which is an abstract legal conception, and the likelihood of their ultimately receiving a share in the production of oil and gas, which is purely a practical matter.

It is plain that, under our law, the appellees acquired an estate in the land at the moment they received the deed in question. That estate was one of absolute ownership, although limited in extent, just as the perpetual right to hunt upon another's land has been referred to as 'the fee-simple privilege of hunting'. Council v. Sanderlin, 183 N.C. 253, 111 S.E. 365, 368, 32 A.L.R. 1527. The appellees' estate was doubtless speculative in value, but the uncertainty stemmed from a fundamentally different reason from that which makes an ordinary contingent remainder an estate of doubtful worth. In the latter case the physical property is known to exist; the uncertainty is whether the contingent remainderman or some third person will eventually acquire the absolute ownership. Here, however, no third person is involved. The appellees' title being complete, the doubt is occasioned not by the possibility that some one else may acquire the property but by the possibility that there may in fact be no oil and gas within the land. In short, the typical contingent remainderman has an uncertain interest in the fee simple, while these appellees have a fee simple interest in the uncertain.

The Alabama Supreme Court rejected the claim of the applicability of the Rule Against Perpetuities in Dauphin Island Property Owners Ass'n v. Callon Institutional Royalty Investors I. The suit was a quiet title action by the grantor of a 1981 royalty deed to defendant's predecessor seeking a declaration that the royalty grant was void because it was in violation of the

107. Id. at 362.

108. 519 So. 2d 948 (Ala. 1988). On later appeal the court held that the action challenging the validity of the perpetual royalty interest constituted a constructive eviction that breached the covenant of quiet enjoyment implied in the deed that created the royalty. Callon Institutional Royalty Investors v. Dauphin Island Property Owners Ass'n, 569 So. 2d 343 (Ala. 1990). The court used the term "groundless" in connection with the Rule Against Perpetuities suit; one should perhaps be reluctant to assert the claim in similar circumstances.
Rule Against Perpetuities. There was no production at the time of the grant, and the grantor claimed that the Rule was violated because the grant did not require that production occur not later than twenty-one years after some life in being at the creation of the interest; production, the grantor asserted, was necessary for the royalty to vest. The Alabama court followed the rationale of the Hanson v. Ware decision. As to whether a royalty is real property or personal property, the court said it was not necessary for it to decide that a royalty was real property for all purposes simply to hold that its creation did not violate the Rule. The court declared:

We do not think it sound to view a royalty interest in minerals as personal property simply because the profits therefrom may be realized only when the minerals are extracted, but we do not find it necessary to hold that royalty interests are real property for all purposes. Instead, we deem it sufficient to disapprove the Lathrop rule and hold that, whether a non-participating royalty interest be construed as an interest in the minerals or as a personal property right in the minerals once they are extracted, it does not violate the rule against perpetuities, because it is a vested interest even though uncertain in the enjoyment.

The Supreme Court of Florida has also rejected the Kansas approach to the Rule and followed Hanson v. Ware. In Conway Land, Inc. v. Terry, the Florida court addressed a question whether the royalty owners were to participate in a condemnation award. The royalty was clearly intended to be perpetual and not limited to an interest in an existing lease. The court said such a royalty was an interest in realty and only became personal property when the minerals were severed from the ground.

109. The deed provided for "a royalty interest free of the costs of production, which is equal to ... 1/8th of the whole of any oil, gas, ... or any other minerals ... produced from an undivided 234/350 interest in the minerals in, on and under" the described property. 519 So. 2d at 949. The deed recognized there was an existing lease from which the grantee would receive its share. It further provided that the grantor:

reserves the right to grant future leases affecting said interest in minerals so long as there shall be included therein, for the benefit of [Dumont] the royalty rights herein conveyed; and the [Association] further reserves the right to collect and retain all bonuses and rentals paid for or in connection with any future lease or accruing under the lease now outstanding.

Id.

110. Id. at 951.

111. 542 So. 2d 362 (Fla. 1989).

112. For a discussion of Conway v. Terry, see Ronald Benton Brown, Real Property Survey, 14 NOVA L. REV. 939 (1990). Brown calls attention to the fact that Florida has now adopted
In summary, only in Kansas does it appear that there is any continuing concern about validity of perpetual royalty interests to which the exercise of the executive right might pertain.

VII. THE EXECUTIVE RIGHT AND BONUS/Delay RENTAL

A. Analytical Approaches

A royalty does not share in bonus and delay rental because it is defined as a share of production, and bonus and delay rental are not part of production. But a mineral interest owner who grants a lease is entitled to bonus and delay rental unless stripped of these. Does the right to bonus and delay rental arise because the mineral interest owner has granted the lease or is it because bonus and delay rental are part of the mineral interest (or put in a different way because bonus and delay rental are interests in the bundle of interests owned by the mineral interest owner)? The distinction becomes very practical when the power to lease/develop is separated or stripped from the mineral interest.

There are several approaches we may take to this question of bonus and delay rental when the executive right has been separated from a mineral interest and there has been no specification as to whom the bonus and delay rental should flow. Each of the following can find some logical support or specific case authority supporting them:

1) A mineral interest stripped of the executive right is no more than a royalty. Ergo, the holder of the executive right enjoys all bonus and delay rental when he owns the interest that is subject to the royalty.

2) Bonus and delay rental are contractual payments for the execution of a lease. Because they flow strictly from the exercise of the leasing power and not from the minerals themselves, the holder of the executive right may retain all such payments.

He comments:

The analysis of this case would be no different under the new Uniform Rule because both it and its predecessor would apply to nonvested future interests. However, it would be far less likely that this case would ever have reached the court under the new statute because the new statute (1) applies only to gratuitous transfers, and it is unlikely that the transfer here was gratuitous; (2) includes a ninety year wait-and-see provision, and there is no indication here that the ninety years has expired; and (3) provides for the court to reform a transfer according to the intent of the grantor in the event that it appears that it will not vest in time.

Id. at 959 (footnotes omitted).
3) Because bonus and delay rental normally accompany the granting of a lease, it must be that when the executive right was created, it was implied that the holder of the executive right would also receive the benefits flowing from the exercise of the executive right.

4) The executive right is an interest in property. For that interest to have economic value, it must be that payments flowing from its exercise go to the person holding that interest. Bonus and delay rentals are corollaries of the power to lease.

5) The executive right is a separate interest in property from bonus and delay rentals. For the executive right owner to enjoy bonus and delay rentals they must have been the subject of a specific grant to him.

6) The executive right is merely a power over another's mineral interest. Bonus and delay rental are incidents and attributes of a mineral interest, and the mineral interest owner is entitled to these attributes unless specifically given over to another. Or, similarly, bonus, delay rental and royalty are all rent payable by the lessee to the mineral interest owner by virtue of the ownership of the mineral interest that has become the subject of the lease.

7) Bonus and delay rental are interests in property and go to whomever own those interests.

Elements of each of these analyses are to be found in the cases from oil and gas producing jurisdictions. We will consider the analyses given in discussing the cases in the context of particular deed patterns.

B. Bonus and Delay Rental Specified but not Executive Right; "nonparticipating" interests.

Cases in Oklahoma indicate that the power to lease is implied in the person who has a right to bonus and delay rental, so that if the instrument in question specifies who receives the bonus and delay rental, that person has the power to lease. In Anderson v. Mayberry, Mayberry and three co-

113. We have argued that the reservation of the executive right in a grant of minerals should not be construed as an implied reservation of bonus and rental. We have also argued that the reservation of bonus and rentals in such a grant should not be construed as a reservation of the executive right. This argument proceeded on the theory that a mineral estate has as its incidents bonus, rental, and royalty under a lease and the right to execute a lease. One or more of these incidents can be separated from the mineral estate without affecting the others. Parties creating a mineral estate should be presumed to intend it to have all incidents except those specifically excluded.

owners executed warranty deeds in 1966 that conveyed all the surface rights to the grantees, and that further provided:

... excepting and reserving unto the grantors, [names omitted], and in the proportions now owned by them, and unto their respective heirs, devisees, successors and assigns, an undivided one-half (1/2) interest in and to all of the oil, gas and other minerals in and under and that may be produced from said property, for a term of twenty (20) years from the date hereof, and as long thereafter as oil or gas or other minerals are produced therefrom, the said interest in the oil, gas and other minerals so reserved shall be non-participating in bonus and rental rights on oil and gas leases, ... .

The Oklahoma appeals court agreed with the trial court that Mayberry impliedly conveyed the right to execute leases since "to hold otherwise would negate the whole idea of a non-participating interest ... ."\(^{115}\) Mayberry had conveyed the right to collect bonuses and delay rentals, and had retained a non-participating mineral interest. The grantor in McVey v. Hines\(^ {116}\) reserved the right to collect bonuses and delay rentals, and conveyed a non-participating interest. The Supreme Court of Oklahoma found that McVey intended to reserve all executive rights pertaining to oil and gas leases.

A case arising in Texas used the analysis that the person with a right to bonus and delay rental must be the person with the power to grant leases. In a case where the bonus and delay rentals were separated from the ownership of an undivided one-half interest in the minerals, the court in Hudgins v. The Lincoln National Life Ins. Co.\(^ {117}\) held that the power to lease was in the person entitled to the bonus and delay rental. Here a reservation of "an undivided one-half interest in the oil, gas and other minerals in, under, and on said property but [grantor] shall not be entitled to receive any part of any bonuses . . . or . . . rentals" was construed as a royalty reservation because of the lack of participation in bonus and rentals. Professor Masterson suggested that the effect of this decision was to recognize that the right to bonuses and delay rental carried with it the power to lease.\(^ {118}\) Several other Texas cases have supported this view.\(^ {119}\)
analysis of the Hudgins court was to the effect that the stripping of bonus and delay rental indicated an intent to create royalty interest, and royalty had no power to grant leases.

An approach contrary to Hudgins is given in Martin v. Snuggs, but the court went on to grant reformation of the instrument so to provide that the person receiving bonus and delay rental would in fact be the holder of the leasing power. The landowner conveyed the land to the grantee, reserving "an undivided one-half interest in and to all oil and mineral rights in and under the land described herein." The conveyance further provided: "It is agreed, however, that the Grantor shall not participate in the cash bonus or cash rentals paid for drilling or delay payments." The grantee executed a lease to the entire mineral estate and a question arose as to the validity of this lease, the grantor claiming he reserved the executive right as to his half interest. The court held as a matter of construction that the provision for the bonus and rentals was not a grant of an exclusive leasing right. Thus, the grantor still had the right to lease. However, the instrument was reformed for mutual mistake in omitting a provision giving the grantee the exclusive leasing right, which was clearly the intention of the parties. The court stated:

The reservation is an outright reservation of an undivided one-half interest in and to all oil and mineral rights in and under the land described. The only limitation placed on said reservation is that the grantor shall not participate in the cash bonus or cash rentals paid for drilling or delay rights. . . .

"We agree with appellees that the reservation in the Frost deed, on its face, did not give the grantee exclusive leasing rights, but reserved to Frost an undivided one-half of the mineral estate with all the rights inherent in a mineral estate, except only the right to cash bonuses and delay rentals.

By the reformation of the instrument the court was able to avoid the difficult problem discussed earlier in connection with the holding in Thornhill where the party with the power to negotiate a lease does not receive the bonus and rentals arising from the negotiations.

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owner of a one-fourth interest in the minerals was to have an undivided NONE of the lease interest, the court held that exclusive right to lease was held by the grantor. See also Etter v. Texaco, Inc., 371 S.W.2d 702 (Tex. App. 1963), where the deed provided that "the lease interests and all future rentals on said land, for oil, gas and mineral privileges" were excluded from grant, the exclusive power to lease and develop remained with the grantor.

120. 302 S.W.2d 676 (Tex. App. 1957).
121. Id. at 677-78.
In Diamond Shamrock Corp. v. Cone, the court considered a deed which reserved "all oil and gas... in, under and that may be produced from forty (40) acres in a square in the Northeast corner of [Blackacre]" but went on to provide that grantors "shall receive no part of any lease or bonus money from any oil and gas... lease on [Blackacre] or from any delay rental paid to keep said lease in force. The grantors herein shall receive money from such lease only in case of actual production... from said forty acres..." The court held that "the entire mineral estate, excepting only the bonus and delay rental interests that were conveyed, was retained, the retention of which includes the right to execute leases of the mineral estate." The Hudgins case was distinguished on the ground that "[t]he Hudgins court had a doubt as to the construction to be given the reservation and... construed it against the grantor and in favor of the grantee. The applied rule of construction is inapplicable to the instant reservation, for we have no doubt that a correct interpretation of the reservation is one reserving the entire mineral estate... excepting only the bonus and delay rental interests which passed to the grantee." As mentioned in connection with Thornhill, the approach of this court presents the very strange circumstance of a mineral interest owner negotiating a lease with all the bonus and delay rental going to someone else.

One should mention here another recent Texas case producing a strange leasing arrangement through a "shared" executive right. This is the decision in Elick v. Champlin Petroleum Co. In this case the grantor of an 89.38 acre tract of land reserved a 1/32 royalty interest and provided that grantor was to participate in one-half of bonus and delay rentals. The deed further stated that the grantor "shall join in the execution of any future oil, gas, or mineral lease." The court held that this latter provision meant that the grantor retained the power to lease so that a lessee would have to negotiate with the grantor and grantee and the lease was void without the consent of the grantor. The result is that even though the grantee got all the minerals except for a 1/32 royalty and half of the bonus and delay rental the grantee could not get development of the minerals without the consent of the grantor. A more common sense reading of the provision for the grantor to "join in" is that it signified in advance that the grantor would ratify any lease executed by the grantee. Title examiners in Texas often call for

122. 673 S.W.2d 310 (Tex. App.1984). See also Prairie Producing Co. v. Schlachter, 786 S.W.2d 409 (Tex. App. 1990) where there was a conveyance of half the minerals but it was further specified that no bonus or delay rentals from future leases were to go to grantees. Applying the bundle of sticks approach, the court held that the grantees were to have the power to lease their half interest in the minerals.

123. 673 S.W.2d at 314.

124. Id. at 315.

125. 697 S.W.2d 1 (Tex. App. 1985).
ratification of leases by nonexecutive owners, in part because such ratification may be essential for effective pooling of the leasehold. If he had the independent right to negotiate for a lease, why would it be necessary to specify that he got half of the bonus and delay rental since he could negotiate for any amount he wanted? A straight-forward reading of the clause would be that it meant exactly what it said - the nonexecutive shall [must] join in the execution [signing, not separately negotiating] of a lease.

Other cases from other jurisdictions have followed the same approach as Cone and Thornhill, with the result that a mineral interest owner has the power to grant a lease but is excluded from bonus and delay rental arising from the lease. Westbrook v. Ball had so interpreted a deed; there the grantor had also clearly “retain[ed] all of the oil, gas, and other minerals excepting sand and gravel, in, on, and underlying, and as may be mined and produced from said land, together with rights to go upon, enter, to explore for, drill for, mine, store, transport, and remove all of said minerals at any and all times from and after the date hereof.” The court noted that these development rights were “necessary to the execution of an oil, gas, and mineral lease...” It was agreed that the grantee was to receive the cash bonuses and delay rentals payable under any oil, gas, and mineral lease executed upon the land but that all royalties payable would go to the grantor. The court concluded that the party who retained the development rights also impliedly retained the leasing rights even though the bonus and rentals would go to the landowner.

The more recent case of Antelope Production Co. v. Shriners Hospital arising in Nebraska posed the issue of who had the power to lease when the landowner under a warranty deed was specified as having the right to all bonus and delay rental pertaining to a reserved half-interest in the minerals. The deed in question provided:

Grantor expressly reserving unto themselves an undivided one-half interest in the oil, gas and other minerals in, on and under said real estate provided, however, grantee, its successors and assigns, shall have the right to have and receive all of the bonuses and delay rentals which may result from the oil and gas leases executed on and after August 12, 1960 with

127. 77 So. 2d 274 (Miss. 1955).
128. Id. at 275.
130. Id. at 160-61.
reference to the real estate above described or any portion thereof and such shall be true notwithstanding the reservation herein of an undivided one-half interest in the oil, gas and other minerals by the grantor . . . .

The court held that a grant of the rights to bonuses and delay rentals did not raise an inference that the right to execute oil and gas leases was also conveyed. The court applied the rule that "in the absence of a clear expression of intent to the contrary the executory right remains with the interest to which it is incident . . . ."131

If a party in the position of the grantor in this line of cases (Snuggs, Cone, Thornhill, Westbrook, Antelope) has the power to grant a lease but is not to derive bonus and delay rental from the leasing, what duties does the party owe to the person having the right to bonus and delay rental? Does he not have a strong incentive to bargain for a higher royalty with no provision for bonus or delay rental?

A variation on the same problem under discussion is when the interest reserved or conveyed is specified simply as being "nonparticipating." The problems associated with employing the term "non-participating" are seen in HNG Fossil Fuels Co. v. Roach.132 The grantees (Thomsons) acquired by two deeds fifty per cent of "oil, gas, and all other minerals" in certain real estate and the deeds specified that the interests were to be "non-participating." The question presented by the deeds is obvious to us now: in what did the mineral interest grantees not participate? Could they lease but not participate in bonus or in delay rental? Could they not participate in leasing but enjoy a share of bonus and delay rental? Could they not participate in all three: leasing, bonus or delay rental? The court upheld the trial court's ruling that the "nonparticipation" extended to leasing, bonus or delay rental, relying on parol evidence to make that determination.133 A Colorado case, Mull Drilling Co. v. Medallion Petroleum, Inc., concluded that the nonexecutive owner was not entitled to participate in bonus when the deed expressly provided that "the reservation and exception being nonparticipating in any leases, participation being limited to royalties only payable under said leases . . . ."134

In the Alabama case of McCall v. Nettles135 the deeds in question provided how rentals and royalties were to be split but did not specify who had the power to grant leases. The clause of the deeds in question excepted

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131. Id. at 162.
132. 656 P.2d 879 (N.M. 1982).
135. 37 So. 2d 635 (Ala. 1948).
fifty percent of the rentals and royalties derived from coal, oil, gas or other mineral leases. It stated:

The grantors further except from this conveyance and reserve unto themselves, their heirs and assigns forever, fifty per centum (50%) of all rentals that may be derived from coal, oil, gas or other mineral leases in and to said other lands hereinabove described, and fifty per centum (50%) of all royalties, whether in kind or money, that may be derived therefrom.

The court rather clearly held that this was a mineral interest reservation rather than simply a royalty. The court observed, "we think that the deeds reserve an interest in the minerals themselves as they are imbedded in the ground before there is an effort to extract them."136 Although it was a mineral interest, the implication of the deeds was that the landowners were to have the power to grant leases. The court concluded that the "deeds imply a power granted to the appellees to make leases of the mineral rights, whereby rentals or royalties will be obtained in kind or money, in which the grantors will have one-half interest."137 The reasoning of the court appears to be that if the grantors had retained the power to lease there would have been no point in reserving half the rentals and royalties.

Another case of interest arose in Kansas, Shepard v. John Hancock Mutual Life Insurance Co.138 The issue before the court was whether the interest in question was a mineral interest or a royalty interest. If it were the latter, then under the Kansas application of the Rule Against Perpetuities the interest was void. The instrument reserving the interest specified that its owners would not participate in bonus and delay rentals.139 This caused the court to conclude that the interest was a mineral interest by the following reasoning:140

136. Id. at 637.
137. 37 So. 2d at 637 (in dictum, the court said that this created a "sort of trust relation").
139. The deed in pertinent part stated:

[Excepting and reserving with right of ingress and egress, an undivided 1/4 of the landowners 1/8 royalty, or, 1/32 of the interest in and to all oil, gas or other minerals (of every character and kind) in or under the said land for a period of fifteen (15) years from April 1, 1940 and as long thereafter as oil, gas or any other mineral, is produced from said land, or operations for any such mineral are being conducted thereon by grantees or grantor (their Successors or assigns). The said royalty reservation shall not be participating in bonuses or rentals, but shall be participating in other rights, royalties and other benefits accruing under any existing or future oil, gas or mineral lease while the said royalty reservation is in full force and effect.

Id. at 21.
140. Id. at 25.
[H]ad the parties intended the defendant reserve only a royalty interest there would have been no necessity to make the reservation nonparticipating as to bonuses and delayed rentals since the plaintiffs would have been entitled to them as owners of the surface and of all the minerals in place in fee. On the other hand, had the parties intended the defendant reserve a fractional interest in minerals in place, the defendant's right to participate in such payments would naturally follow and to entitle the plaintiffs to receive them, it would have been necessary to expressly exclude them from the reservation. Likewise, the language that the defendant 'shall participate in other rights' accruing under any lease is further evidence that minerals in place were reserved.

As to the last sentence in this quote the court concluded that a right "accruing under a lease" was the right to grant a lease. Thus said the court, the reserved quarter interest in the minerals had the right to grant a lease.

C. Executive Right Specified but not Bonus and Delay Rental

When the conveyance has provided for the executive right or power in one person but has made no provision for bonus and delay rental, the cases in Texas hold that the executive right holder must share the bonus and delay rental with the mineral interest owner. In Burns v. Audas the executive right holder contended that the reservation of a mineral interest in the grantors accompanied by a provision granting the grantee the exclusive right to execute oil and gas leases was, in effect, the same as the reservation of only a royalty interest. He argued that the provision granting the grantee the exclusive right to execute oil and gas leases reduced the reserved mineral interest to a simple royalty interest without the right to bonuses or rentals. The court held:

The interests reserved in the deeds in question, in which interest appellees are owners of undivided fractional portions were interests 'in and to all the oil, gas and mineral and mineral rights in the lands' in controversy. The ownership of an unrestricted mineral interest includes all the incidents of ownership, some of which are the right to execute oil, gas and mineral leases and the right to receive bonuses, rentals and royalties. The right to execute oil and gas leases is only one of

141. 312 S.W.2d 417 (Tex. App. 1958).
142. Idat 420. It is worth noting that the court recognized the executive right holder had the right to a credit for certain items of expense incurred in leasing the land. Since he had authority to execute an oil and gas lease on the land in question, he had authority to incur necessary and reasonable expenses in connection therewith.
the incidents of ownership of minerals. The fact that [grantee], the owner of the surface and the owner of an undivided fractional interest in the minerals under this land was given the right to execute leases without the joinder of the other mineral owners does not deprive such other mineral owners of other incidents of ownership, that is, the right to participate proportionately in any bonuses, rentals and royalties. The reservation is not ambiguous but clearly contemplates a surrender of none of the incidents of ownership in the minerals reserved except appellees' right to execute oil and gas leases.

The rationale of Burns v. Audas was followed in Houston v. Moore Investment Co.143 holding that the owner of a nonexecutive mineral interest was entitled to share in the bonus received by the executive. The court rejected the effort to distinguish Burns v. Audas on the basis that because the instrument in question reserving the mineral interest specifically provided that the owner was to share in royalty, it was intended that the owner would not share in bonus.144 The court ruled:

It appears to us that the grantor surrendered only one incident of ownership, the right to execute an oil, gas, and mineral lease, a right known as the executive right. A grant of the executive right does not deprive the grantor of the right to participate proportionally in bonuses, rentals and royalties. . . . A grantor who reserves half of the minerals retains half of all the incidents of ownership inherent in the minerals except those specifically granted. . . .

All parts of the deed in the case at bar can be given legal effect. Appellant argues that the express grant of a right to half of the royalties impliedly excludes bonuses and all other incidents of mineral ownership which would normally flow from the general grant. A similar argument was rejected and a somewhat similar recital was held to be nothing more than

143. 559 S.W.2d 850 (Tex. App. 1977).
144. The instrument stated:
   There is reserved and excepted from this conveyance, and Grantor hereby retains the title to, an undivided one-half interest in all oil, gas or other minerals in, on or under the lands hereinabove described, but the Grantee herein shall have the right and privilege of executing an oil, gas and mineral lease on such land, without the joinder of Grantor, with the understanding that any such lease shall provide for a royalty to the owners of the land in an amount not less than one-eighth of the minerals to be produced from said land, and further provided that Grantor shall be entitled to one-half of any such royalties retained in such lease.

145. Id. at 852-53.
a statement of the legal effect of the transfer of the mineral title in Alfrey v. Ellington, 285 S.W.2d 383, 387 (Tex.Civ.App. 1955, writ ref., n. r. e.). In our case Moore Investment reserved an interest in half of the mineral estate with no express exception and was therefore entitled to half of the bonus payments. There was no ambiguity and no fact issue which would preclude the granting of appellee's summary judgment motion.

Houston v. Moore Investment Co. was more recently followed in Buffalo Ranch Co., Ltd. v. Thomason. The grantors clearly reserved one-half the minerals and one-half the royalties while providing that the executive right was with the grantees. The executive right provision stated:

Notwithstanding any provision to the contrary herein, it is expressly understood that Grantees, their heirs and assigns, shall have and enjoy exclusive, full and complete dominion and control over any executory rights to deal with the Reserved Mineral Interest, including but not limited to, the rights either to develop or not develop, or lease or not lease the Reserved Mineral Interest. Grantees shall have the exclusive power to execute and deliver any and all leasing contracts and agreements, either for the development of or the conservation of the Reserved Mineral Interest and Grantors shall not be a necessary or proper party to any such leasing contracts or agreements.

This did not convert the mineral interest to a royalty interest. The court said that the owner of a mineral interest may grant the executive right to lease, and still be entitled to a proportional share of the lease bonus. Accordingly, the court awarded the grantors their proportional share of the lease bonus payment.

A recent case from an Oklahoma appeals court indicates that where the executive right has been separated from a mineral interest and no specification of to whom bonus and delay rentals are to be paid, such payments go to the mineral interest owner, not the person with the executive right. This was in Sharp v. Gayler. The court stated: "With

146. 727 S.W.2d 331 (Tex. App. 1987).
147. 737 P.2d 120 (Okla. Ct. App. 1987). The Oklahoma Supreme Court was earlier able to avoid the question posed here because the grantor abandoned his claim that he held a mineral interest at the trial. In Federal Land Bank of Wichita v. Nicholson, 251 P.2d 490 (Okla. 1952) the grantor reserved "1/2 interest in all royalties received from any oil and gas leases" grantee may give "but the grantee is to receive all rentals." The question arose as to whether the right terminated when the grantee conveyed the land and if it did not terminate whether the grantor received a share of the bonus money from leasing. Because the claim as to a
regard to the transfer or conveyance of a mineral estate or interest, it has long been the rule in this state, and others, that all rights not specifically granted in a mineral conveyance are deemed to have been reserved in the absence of specific grant." The dissent observed cogently that the grant in question was of all of the property including all oil and gas with the exception of what was reserved, and that by statute a warranty deed conveyed to the grantee the whole interest of the grantor in the premises described. Thus, he said, the deed specifically granted all the incidents of ownership and reserved none unless we can find that the right to participate in bonus and delay rentals was withheld by silence. The West Virginia Supreme Court of Appeals appears to follow the Texas and Oklahoma approach.

Louisiana has taken an approach contrary to the foregoing authorities. Article 105 of the Mineral Code provides:

The executive right is the exclusive right to grant mineral leases of specified land or mineral rights. Unless restricted by contract it includes the right to retain bonuses and rentals.

This article was a codification of the decisions in Mt. Forest Fur Farms v. Cockrell and Ledoux v. Voorhies. These two decisions follow the analysis that bonus and delay rentals are income from the granting of the leases and they go with the power to lease unless excluded. The Ledoux court observed that "[b]onuses and delayed rentals were sources of income or profit which leases might bring; they were not specified as being excepted from the reservation . . . " The same court accepted the argument concerning the reference to royalty that had been rejected by the Texas court in Houston v. Moore Investment Co.. The Ledoux court stated:

The reservation in this case appears to us to reflect . . . the idea that bonuses and rentals under leases were never intended to be retained under its terms because the clause granting their vendees the exclusive right to lease is immediately followed by another clause providing for an apportionment of mineral interest was abandoned, the court held that only a royalty had been created, and royalty, said the court, has no right to share in bonus.

148. 737 P.2d at 122.
149. "Although the Bills have the right to lease, they are entitled only to one-half of the proceeds of the rental payments. Furthermore, the Bills must share any fees or other inducements they may receive for entering into a lease with the Donahues on a fifty-fifty basis." Donahue v. Bills, 305 S.E.2d 311, 312-13 (W. Va. 1983).
151. 155 So. 228 (La. 1934).
152. 62 So. 2d 273 (La. 1952).
153. Id. at 275.
154. Id. at 276.
the royalty in case of production under such leases. The parties were undoubtedly contemplating all sources of income to be derived from the transaction between them and it strikes us that if they had had the bonuses and rentals in mind as well as the royalties, these would have been specified also.

In Andrus v. Kahao the ownership of the right to receive bonus and delay rental was again at issue. The sellers of a tract of land had retained an undivided one-half interest in the minerals; the purchasers received the other one-half interest together with the executive rights to all minerals. When the purchasers exercised the executive rights by leasing the land, they retained all bonuses and delay rentals. The owners of the nonexecutive one-half interest brought suit claiming one-half of the bonus and delay rental. Defendants filed an exception of no cause of action based on the assertion that the executive right owner has an exclusive right to bonus and delay rental unless specifically granted or reserved to the nonexecutive owner in the act of sale. The district court and the court of appeal maintained this exception and dismissed the plaintiff's claim. On its first decision the Louisiana Supreme Court reversed, stating that while the holdings below were in accordance with Article 105 the Mineral Code, the rights in question arose before the Mineral Code became effective and it thus did not apply. The Louisiana Supreme Court also held that to the extent that the decisions below were in accordance with the jurisprudence prior to the Mineral Code, namely Ledoux v. Voorhies and Mount Forest Fur Farms of Am., Inc. v. Cockrell, those cases were overruled so that the case could be heard on its merits as to the intent of the parties. On rehearing, however, the court decided that the earlier decisions had created rules of property which had been relied upon for many years by those dealing with mineral rights in Louisiana. They should not be overruled, concluded the court, particularly since the legislature had codified them by the enactment of article 105 of the Mineral Code. Hence, the court reversed its initial decision and affirmed the courts below.

D. Bonus and Delay Rental when Interest is not Subject to the Lease under which Bonus and Delay Rental Arise

Several circumstances can arise in which a person grants a lease and receives bonus and delay rental which may then be claimed by a person whose interest was not subject to the lease. Exploring these possibilities may shed additional light or provide guidance on proper treatment of bonus and delay rental payments to which an executive right owner lays claim.

155. 414 So. 2d 1199 (La. 1982).
If Bacon and Coke are cotenants in Idyll Acres (whether land or severed mineral estate), each owning an undivided one-half, each may lease his interest. Clearly if Coke leases to Rex Oil and Rex produces oil or gas, then Coke and/or Rex owe a share of production to Bacon or an accounting. This is because of Bacon's property interest in the oil or gas. But just as clearly when Coke leases to Rex, Coke does not owe a share of bonus and delay rental to Bacon and Rex owes nothing to Bacon. This is because the bonus and delay rentals are simply contract rights. It seems to follow that when Coke acquires the exclusive right to lease Bacon's interest, he has also the contract rights that arise from the exercise of that leasing power. The bonus and delay rental are not part of the minerals themselves. It follows that Coke has the bonus and delay rental unless expressly excluded from his power.

Another example to consider is this one: Bacon grants a lease thinking that Coke has only a royalty, and Bacon receives bonus and delay rental of $100. Rex drills and produces 100 barrels of oil. Coke contends successfully that he has a mineral interest for 50% of the minerals instead of 50% of the royalty. Is Coke entitled to a share of the bonus paid to Bacon? Is Coke entitled to a share of the oil produced by Rex? I think most oil and gas lawyers would agree that Coke would be entitled to one-half the oil less one-half the cost of producing the oil and not to one-half of the royalty. I think it follows that Coke would not be entitled to one-half of the bonus and delay rental paid to Bacon since Coke's interest was not leased. Rex might have a claim against Bacon, but that would be purely a matter of contract between Rex and Bacon. However, there is a case that takes a contrary approach. This is Tvedt v. Bork. It held that the owner of severed minerals was entitled to bonus and rentals paid to the surface owner under an oil and gas lease executed by the surface owner. The court said that because "Tvedt owned the full mineral interests, it follows that the incidents of ownership entitled him to receive any payments or delay rentals consistent with his interests in the minerals." The result seems most curious. The claimant was not bound by the lease and did not ratify the lease. He had

158. Id. at 14.
159. The South Dakota court relied on Allison v. Allen, 326 P.2d 1059 (Okla. 1958) but it differed in that the claimant effectively had to recognize that his interest was subject to the lease in question. In that case, the record title holder, who took with notice of a prior unrecorded mineral deed, executed an oil and gas lease to an operator who paid the bonus in good faith and without notice of the unrecorded mineral interest. The court held that the record title holder owed the bonus to the true owner because he held it as constructive trustee for him.
suffered no injury or loss of any kind. The decision has been the subject of considerable criticism as being bizarre by Professor David Pierce.\textsuperscript{160}

E. Concluding Remarks on Bonus and Delay Rental

It would seem that the clearest way to bring logical order to oil and gas conveyancing would be for courts to treat the right to grant leases and the right to bonus and delay as emanating from the same general power to control the development of minerals on property unless the specific document suggests otherwise. That is to say, if standing alone a person has been given or has retained the power to grant leases, then he has the right to receive bonus and delay rentals from the lease; if standing alone a person has been given or has retained the right to receive bonus and delay rentals from a lease, then he has the power to grant leases. The approach suggested is consistent with the manner in which the Texas courts have recognized that the power to lease and the power to develop are correlative of one another. It is no doubt consistent with what most people engaged in mineral transactions have understood when they have designated an interest as "nonparticipating." Most people when they identify where bonus and delay rental are to go are identifying the one they think has the power to grant leases, and a line of cases reflects this understanding as well as Martin v. Snuggs, which granted reformation to reflect this understanding. An approach contrary to this has led to a number of cases in which a person is recognized as having authority to grant a lease but is not the one to get bonus and delay rental from the lease. It is difficult to imagine that people have intended this result. If on the other hand, one person has been given the power to grant leases with respect to another's mineral interest and the document specifies that the other person is to share in bonus and/or delay rentals then that other person would so share.

VIII. THE STANDARD OF CARE IN EXECUTIVE DECISIONS

A. Standards of Executive Conduct

A controversial and frequently discussed aspect of the executive right is the question of the duty owed by the executive to non-executive owners. The practical aspect of this question is whether the executive is required to lease the property and if he has leased whether the lease terms as affecting the non-executive (whether initially or in implementation) are consistent with the standard of care owed to the non-executive. From the initial discussion of the variety of circumstances in which the executive right

\textsuperscript{160} David E. Pierce, Winter 1988 OKLA. B. ASS'N. MIN. L. SEC. NEWSL. 11.
arises and the differing purposes that the executive right may serve it should be seen that no single standard is likely to be found applicable nor should there be such a single standard. The standard should depend upon the nature of the interests involved, the circumstances in which they arose, and the relationship that the parties have themselves established, not merely that there is an executive/nonexecutive relationship.

There are probably four distinct standards that could be applied in connection with the executive right holder's duties in various circumstances. As specified in a number of court decisions these are:

1. **No standard.**

   While there may be no duty upon the executive right holder in relation to some specific duty, such as a duty to lease, there may still be a duty in other circumstances.

2. **Good faith; fair dealing.**

   This is the subjective standard of ordinary good faith generally applied in commercial dealings.

3. **Prudent operator or utmost good faith or utmost fair dealing.**

   Also referred to as an "intermediate standard," this standard is similar to or derived from the standard of conduct owed by a lessee to a lessor in implied covenant controversies. It appears to have the most support from courts and writers as a default standard but its supporters generally also favor applying this standard in a flexible manner depending on the circumstances in which the executive right arose.

4. **Fiduciary.**

   The strictest standard is a fiduciary standard. Although some recent cases have used this label, we will see that they do not use the "fiduciary" standard in its strictest sense.

   Often these terms for standards are stated but the standard is not defined with any precision by a court using them. Some cases specify a standard but the expression of a standard is dictum.\(^{161}\) In still other courts' decisions, the standard applied by the court may in a sense be irrelevant because the executive right holder's actions would be acceptable under any standard (or unacceptable under any of the three latter standards).\(^{162}\) The standard's specification may, however, become particularly important when exemplary damages or other remedies turn on the characterization of the conduct.\(^{163}\)

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161. E.g., McCall v. Nettles, 37 So. 2d 635 (Ala. 1948).

162. E.g., Shelton v. Exxon Corp., 921 F.2d 595 (5th Cir. 1991).

163. "Recovery against a breaching fiduciary is not limited to an accounting of profits received by the fiduciary, but can also include exemplary damages . . . . This is in contrast to a suit for breach of contract, which will not support a judgment for exemplary damages even if the agreement is maliciously breached." Manges v. Guerra, 673 S.W.2d 180, 184 (Tex. 1984).
B. Executive Duties: A Functional Analysis

1. Duty to Lease

The executive right holder’s power to lease is going to come into controversy when it is withheld most often when the nonexecutive has a term interest that will cease to exist due to a lack of production. Because the holder of the power to lease or develop often will be the beneficiary of the termination or reversion of the term interest, he will have a direct conflict with the interest of the nonexecutive.

The case authority on a duty to lease is not extensive. The leading case finding such a duty seems to be Federal Land Bank of Houston v. United States.164 When he sold the lands in question in 1937 the plaintiff had reserved a 1/16th nonparticipating royalty interest which was to last for twenty years and as long as the note given by the grantees in the deed in which it was reserved remained unpaid. The lands eventually were acquired by the United States in 1950 for the establishment of the Perrin Air Force Base in Grayson County, Texas. In June 1955 drilling operations were commenced on land adjacent to the air force base. In August 1955 a producing well was completed on those lands, and in the next succeeding months other producing wells were completed on other adjacent lands. By December, 1955 the Department of the Air Force initiated action to transfer jurisdiction over the mineral deposits in the land included within the Perrin Air Force Base (which included the lands in controversy) to the Department of the Interior, so as to lease the land for mineral exploitation and thereby protect the interest of the United States against drainage of the oil and gas underlying the base by reason of commercially producing oil wells located outside the boundary of the Perrin Air Force Base. Within a year the land was leased and within sixty days of the lease the lessee commenced a well that was completed as a producer on April 12, 1957. Under these facts, the court found that the United States as the owner having power to lease had breached an implied covenant: “We believe as between the mineral fee owner and the royalty owner there is an implied covenant in the deed that the mineral fee owner will use the utmost fair dealing and diligence in obtaining lease agreements in order to protect the royalty owner’s interest.”165 The court specified that this standard meant “that the court should require the same degree of diligence and discretion on the part of the mineral fee holder as would be expected of the average land owner who because of self-interest is normally willing to take affirmative steps to co-

165. 168 F. Supp. at 791.
operate with a prospective lessee." The fact that a term interest was involved, said the court, meant that a more stringent standard should apply to the person with the power to lease and develop. The court found that the government had delayed leasing to allow the Government to include in the proposed leasing, lands not belonging to the plaintiff; the delay could only have affected the interest of the Government, or perhaps some third party, and there was no benefit to the plaintiff from the delay. In discussing damages, the court focused on the fact that there was drainage by adjacent wells, and the court seemed to run together a duty to lease with a duty to take steps to prevent drainage and a principle of unjust enrichment. Thus, the court declared that the "Government received the benefit by receiving royalties during a period which otherwise would have inured to the benefit of the plaintiff." It announced a damage measure based on drainage: "we believe . . . the loss of royalty interest should be measured by the amount of oil actually taken from the land in question." The facts as to the benefit the government received from drainage and the extent of drainage were not developed by the court; apparently the loss to plaintiff was only $207.12.167

The case seems dreadfully wrong unless taken as an unjust enrichment case. Surely there is nothing imprudent about delaying leasing for the benefit of the United States when the loss for the nonparticipating royalty owner is as small as $207.12. And surely the United States government in managing the mineral resources of the American people has important duties to obtain the greatest benefits it has the right to from leasing. As the dissent brings out, the standard used by the court is "tantamount to that of a fiduciary."168 The United States had never had any dealings with the person who reserved the term royalty, and the deed creating the interest imposed no express duties on the owner of the land or powers over the reserved royalty interest. To suggest that a person who buys a piece of land to use as an air force base (or shopping center or residence) must actively go out and try to do something else with the property in favor of a distant former owner of the property strikes one as elevating a very slight speculation into a dominant relationship akin to a lawyer representing a client. The case should be seen as an oddity from a court unfamiliar with oil and gas law and which no doubt was aware it was not establishing binding precedent for state property or contract law (one can be expansive on principle when so little is at stake); the decision is more

166.  Id.
167.  The judgment in this case was rendered on December 3, 1958. The report of the case in the Court of Claims Reports states the following concerning the damages: "In accordance with the opinion of the court and on a memorandum report of the commissioner as to the amount due thereunder, it was ordered on April 24, 1959, that judgment for the plaintiff be entered for $207.12." 144 Ct. Cl. 173, 180 (1959).
168.  168 F. Supp. at 792.
an unjust enrichment case than anything else. When a person buys property and royalty is reserved, the landowner should have only a duty not to deliberately impair the interest of the royalty owner.

Under the dissent's analysis in Federal Land Bank of Houston, there would be liability to the holder of the power to lease only if the fee owner had acted for the purpose of defeating the royalty owner's interest. Such a case appears to have arisen in Kimsey v. Fore. Here the owners of an interest described as "one-half of the royalty . . . for a period of five years from the date of the instrument and as long thereafter as oil and gas was produced" sued successfully for a breach of the "implied covenant" of "utmost fair dealing . . . arising from the royalty deed" and "imposed upon the owners of the executive right to lease." It was found that the executive failed to lease within such time and form (length of primary term) as to make it reasonably possible for production to be obtained before the plaintiffs' term royalty interest expired. The lessors and lessees agreed to a three year term, going past the expiration of the term royalty, with lease provisions that gave a substantial incentive to the lessee to delay drilling until after expiration of the term interest. The lessee instructed the operator not to drill until the term royalty expired. The court found liability on the executive and the lessee. This case differs significantly in several ways from Federal Land Bank of Houston. The plaintiffs in Kimsey had not reserved royalty from a sale of land but instead had purchased one-half of the royalty from an 854-acre ranch from the owners of 4/5ths of the mineral interest. Under such circumstances it is far more sensible to find that the sellers of the royalty interest had implied duties to the purchasers. Moreover, from the negotiations for the lease it is clear there was an effort to defeat the interest of the royalty owners.

A Florida appeals court recognized an implied duty to lease for the benefit of a nonparticipating royalty when, as in Kimsey, that royalty had apparently been purchased as investment; this was in Welles v. Berry. Quoting extensively from Federal Land Bank, the court concluded that the complaint of nonexecutive owners against the executive for mandatory injunction to require execution of oil and gas leases and for damages was sufficient to state a cause of action. Involved was a 1963 agreement covering some 16,000 acres of land in which the landowners sold (the court seems to have so treated it) an interest to the plaintiffs. The agreement provided for: "one-half of all income and one-half of all sales proceeds from any sources received from the leasing, sale or other disposition of any oil, gas, casing-head gas, shell, rock, sand, and all other minerals and metals saved and produced from the aforesaid described premises and each and every part

thereof, for a period of twenty-five years from the date hereof and so long thereafter as any income or sale proceeds from the same are being received by the then owners of said property or any part thereof." The sellers reserved: "the right to enter into all agreements concerning the leasing, sale or other disposition of said products, without the joinder therein of the Buyers or any of them, and to settle and unilaterally determine the prices, terms and conditions of payment therefor; provided, however, upon receipt of payment of any rents, royalties or proceeds from the sale of any and all of said products, one-half thereof shall forthwith be remitted to the Buyers in proportion to their ownership, consisting of one-fourth of said one-half to each of said Buyers, their personal representatives, heirs or assigns." In 1965 the landowners entered into an oil lease in which they received $2,045 in rentals and pursuant to the agreement paid appellants one half of this amount. A second oil lease was entered in 1971 from which the landowners obtained approximately $81,000 but nonexecutives had to sue to obtain their one-half share of the income. Thereafter the landowners apparently refused to enter more leases though they had the opportunity to lease. The court characterized the interest created as a "nonparticipating royalty interest" and found that there was an implied covenant that the landowner would lease as an "ordinary, prudent landowner" would. The court's rationale was as follows:

A major reason for placing a duty upon the holder of the executive right is the disparity between the positions of the parties. The owner of the nonparticipating royalty interest cannot demand partition of the mineral fee estate and has no right to execute any leases. Terminable or defeasible nonparticipating royalty interests are especially vulnerable to deliberate dilatory tactics of the executive to postpone actual production until after the terminal date of the interest. 171

The court made a crucial distinction between a reserved interest and a carved out interest. That is, the court recognized that there should be different treatment of an implied leasing duty between reserved royalty (which is retained by the grantor at the time he conveys a larger interest) and carved out royalty (which results from the execution of an instrument which creates a royalty interest out of a larger interest which the grantor continues to own). As to reserved royalty, development of the minerals appears to be an incidental or speculative purpose only, and covenants should not and are not implied either in law or in fact. 172 The case was

171. Id. at 985.
remanded for further proceedings.

Louisiana has a "no duty to lease" standard that is reflected in the case of Sparks v. Anderson.173 In this case, a landowner who sold his land for lignite development rather than lease it did not breach a duty to a royalty owner who would have shared in lease bonus and royalty but had no share of sale of land. Plaintiff Sparks, a landowner, contracted to sell 512 acres to the Andersons, reserving oil, gas and other minerals. Before the title was conveyed, question arose whether lignite was a mineral under the reservation. To resolve the issue, the parties agreed to an additional reservation of 60% of royalty under any future lease affecting coal or lignite. After several negotiations with Phillips Coal Company (including cancellation of a lease to Phillips the Andersons had signed before the actual conveyance of title to them by Sparks) in which Phillips offered to lease the land, the Andersons decided not to lease to Phillips but instead sold Phillips 242 acres out of the 512 acres for $326,700 with their also getting back from Phillips an agricultural lease for ten years on the land. Sparks brought suit claiming that the Andersons had breached a duty to him by their refusal to lease, and he sought damages in the amount of at least the advance royalties which would have been paid. The trial court ruled for plaintiff that the Andersons and Phillips did not act in good faith towards Sparks and that their actions were taken to avoid the payment of royalties to Sparks. The Andersons appealed, and the Louisiana appeals court reversed and rendered judgment for them. The owner of an executive right is under no duty to lease, only to act in good faith and in the same manner as a reasonably prudent landowner whose interest is not burdened by a non-executive interest. 174 The Andersons did not breach this duty.

In Pickens v. Hope175 the issue was whether the holder of the executive rights had breached a duty owed to the owner of a term non-participating royalty interest by failing to lease his land to another for the development and production of tar from a deposit of tar underlying the land, or by failing to develop and produce the tar himself. The case arose from the Chaney Lake Ranch (3,023 acres) which was the subject of a 1965 conveyance. The grantors made the conveyance subject to the following reservation:

... as a non-participating royalty, an undivided 1/4 of the usual 1/8 royalty in all of the oil, gas or other minerals produced, saved and sold from the premises conveyed under the terms of any valid oil and gas lease ....

175. 764 S.W.2d 256 (Tex. App. 1988).
This royalty was reserved for a term of 20 years, and as long thereafter as oil, gas and other minerals was produced from the land "in paying or commercial quantities." The grantee had then undertaken an assessment of the mineral potential of the property. It revealed that 98,000,000 barrels of recoverable tar could probably be produced from the ranch. Several offers of leasing for oil and gas were made but none was acceptable to the landowner, who had the power to lease and was unwilling to lease the tar sands. He did lease the oil and gas rights in 1986, after the term royalty had become extinguished. When the landowner brought an action to remove a cloud on the title of the property, the claimants to royalty under the 1965 conveyance counterclaimed to establish that the landowner had breached a duty of utmost good faith by not pursuing the leasing of tar sand or developing them himself, relying on Manges v. Guerra. The court distinguished Manges on the basis that no duty to manage the non-participating royalty was ever conferred on the landowner. In Manges the executive committed specific acts of self-dealing which deprived his co-tenants of bonus, delay rentals and royalties. There was no such self-dealing in Pickens v. Hope. Moreover, the royalty in Pickens was fixed; in the event of production, the royalty owner would receive a 1/64th royalty, no more and no less, and this was true irrespective of who managed the lease or upon what terms were contained in a lease. The court stated: "We do not interpret Manges to hold that in every case the executive owes a fiduciary duty to the non-executive." The court made it clear that royalty per se (as described in the early part of this paper) was not owed the same duty as might be owed to the owner of some other sort of interest:

Pickens as owner of 100% of the mineral estate is the executive as a matter of law, not because of a special relationship undertaken to manage the royalty belonging to another. By the court's instruction and by law, he does not owe a superior duty to the royalty owner, the hallmark of a fiduciary relationship. Specifically, the reservation of the term royalty in the deed did not mandate that Pickens would manage and develop the minerals for the sole benefit of Hope.

The court concluded that a mineral owner did not owe a "fiduciary duty" to a term nonparticipating royalty owner and that the mineral owner did not breach "the duty of an ordinary prudent landowner in failing to lease the ranch for the production of minerals," thus causing expiration of a term royalty interest. It discussed the executive's duty to a nonexecutive owner of a term non-participating royalty as follows:

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176. 673 S.W.2d 180 (Tex. 1984) (see discussion infra note 217 and accompanying text).
177. 764 S.W.2d at 267.
178. Id. at 268.
The duty owed by the executive to the nonexecutive owner of a term non-participating royalty owner requires him to timely lease the land to another for mineral development, or to timely develop the minerals himself, if, during the term, it becomes reasonably apparent that minerals are under the land. The executive, in leasing the land, must act with reasonable regard for the interests of the non-participating royalty owner as a reasonably prudent landowner who owned all of the mineral estate would have acted under the same or similar circumstances. Matters of cash bonus, primary term, delay rentals and special provisions are matters of trading, and as long as the executive acts in good faith and with reasonable regard for the interests of the non-participating royalty owner, his judgment in leasing or refusing to lease is not subject to question, and his refusal to lease, absent arbitrariness, connivance or deliberate action calculated to deprive the non-executive of his royalty interest, will not constitute a breach of duty owed the owner of the non-participating royalty. The duty to develop known minerals by the executive depends upon economics. 179

The Pickens court found that the landowner was reasonable and prudent in the leasing of oil and gas and that he breached no duty in neither leasing nor developing the tar sands. The undisputed evidence showed that development of the tar sands on the Chaney Lake Ranch and surrounding environs could never, during the term of Hope's royalty, be attempted with a reasonable expectation of profit.

It is submitted that the authority of Federal land Bank of Houston is quite weak, emanating as it does from a court that had little dealing with oil and gas law and that was not establishing precedent for other state law property matters. The state decisions since then have been deferential to the decisions of landowners when a duty to lease has been urged by royalty or other interest owners who reserved their interests. The courts have given closer scrutiny only when royalty or other interest has been sold by the landowner and the circumstances surrounding the transaction lead to an inference that there was reasonable expectation of development efforts by the holder of the development power. Several writers have called for a significantly lower standard when reserved royalty is involved. Professor Merrill, a strong advocate of the implication of covenants in most cases, stated:

Suppose, instead of a sale of the oil rights, we have a sale of the land itself, with a reservation of a part of the oil interest.

179. Id. at 268-69.
Here I think we must realize that there are two possible situations. The transaction may be a sale of the land to a grantee who is interested primarily in exploiting it for agricultural or other purposes, the grantor seeking to retain a share in a possible future mineral development. In such a case the parties do not contemplate that the grantee will embark upon a career of exploration or development and there is no reason for implying any covenant to do so, since fair dealing does not call for it . . . . On the other hand, the sale may be to an operator for the express purpose of promoting the exploitation of the mineral wealth. In such a case it seems clear that the implied covenants should operate in favor of the grantor and against the grantee.  

It is submitted that this distinction is an appropriate one for reserved royalty and reserved mineral interests that have been stripped of the power to lease. It should be followed in future cases, and Federal Land Bank should be seen as providing little guidance for like cases.  

2. 1. Hiding or low-balling the royalty; bonus manipulation

A second area of concern and subject for litigation is an executive's strategic behavior in designing lease benefits so as to maximize his or her income to the diminution of the nonexecutive's interest. Thus, if a person with the power to lease has the right to all bonus and delay rental but must share royalty, that person may lease on terms that maximize bonus or surface damages, which need not be shared, rather than royalty, which must be shared. The lessee in such circumstances may well be indifferent to the structuring of benefits under the lease. Needless to say, if the executive can lease to himself, he will have a great incentive to minimize all benefits under the lease.

A leading case from Louisiana on bonus redefinition to maximize the benefits to the executive is Gardner v. Boagni. 181 The case illustrates the creation of an executive right both to facilitate leasing and to allow the landowner to control the development of minerals on his land. In Louisiana co-owners of land or minerals have limitations on their ability to develop minerals without the consent of their co-owners. 182 To overcome this consent requirement, the executive right or power is a very useful device. In Boagni...

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181. 209 So. 2d 11 (La. 1968).
the co-owners of several tracts of land partitioned the land. Each wanted a parcel, but each wanted the possibility of a share of the minerals that might be found on the parts of the land they were giving up. So they set up separate parcels, each burdened by a co-owned mineral servitude (or what would be called a mineral interest in other states). To avoid the veto power of co-owners, the owner of each separate tract would have the exclusive right to grant leases on the tract that person owned; this likewise gave the landowner the control of where development might take place. The executive (i.e. the landowner on each tract) would have the right to delay rental and bonuses but the non-executives would have a specified share of the royalty attributable to their interest. The deed further provided that the royalty on any lease should not be less than one-eighth but if it was more than this they would share in the royalty proportionately. It stated in part:

[T]he owner of the fee title to each of the said lots, as herein allotted, shall have the right to grant any lease or leases affecting his or her respective lands without the concurrence of the other royalty owners therein and any and all bonuses, rentals and other considerations (except royalties) paid for or in connection with any such lease or other contract shall be payable only to the owner of the lands so leased and the other parties as royalty owners shall not participate therein. It is further provided, however, that in the event any owner should grant a lease or leases affecting his or her land as herein allotted providing for the payment of royalties on oil, gas or other minerals in excess of one-eighth (1/8th) of the whole produced from said land then the other owners of the royalty rights therein reserved or transferred to them shall participate in such excess royalties in the same percentages herein set forth; and the total royalties in which said parties shall participate shall in no event be less than one-eighth (1/8th) of the whole of the oil, gas or other minerals produced from the land.

The controversy in the case arose when the landowner/executive right owner of one of the tracts granted a lease for a one-eighth royalty and then took an overriding royalty as “bonus”. The question was whether this violated a duty to the non-executives under the deed. The Louisiana Supreme Court ruled that it did not. Applying a standard announced in Uzee v. Bollinger,\(^{183}\) the court said that “Louisiana has rejected the doctrine of implied agency and fiduciary relationship as between the owner of royalty interest and the owner of the right to lease the land for mineral

purposes.\textsuperscript{184} The continuing authority of Boagni in Louisiana is doubtful in light of the standard of care for an executive’s conduct adopted in the Louisiana Mineral Code.\textsuperscript{185} Article 109 of the Louisiana Mineral Code states:

109. Obligation of owner of executive interest.

The owner of an executive interest is not obligated to grant a mineral lease, but in doing so, he must act in good faith and in the same manner as a reasonably prudent landowner or mineral servitude owner whose interest is not burdened by a nonexecutive interest.

This article makes it clear that there is no duty to the non-executive to grant a lease at all, as seen in Sparks v. Anderson above.\textsuperscript{186} However, if there is a lease, the terms must such that they will stand scrutiny under a good faith, “reasonably prudent landowner” standard. To this extent, the comments to the article state that it is the intent of the Article “to reverse the decisions in Whitehall Oil v. Eckart [Gardner v. Boagni], 252 La. 30, 209 So.2d 11 (1968) and Uzee v. Bollinger, 178 So.2d 508 (La.App. 1st Cir.1965) insofar as they hold that the executive owes no duty whatsoever to the nonexecutive.” Another article specifies that a mineral lease granted in violation of the standard of conduct required by Article 109 is not invalid for that reason, but the owner of a nonexecutive interest may recover any damages sustained by him by a personal action against the owner of the executive right.\textsuperscript{187}

Other cases from other jurisdictions have found that the taking of “overriding royalty” or an “oil payment” as bonus or as surface damages is a breach of the implied obligations of the executive to the nonexecutive party. For example, a case from Texas with facts quite similar to Boagni in the manner in which the executive rights arose found a breach of the executive’s duties in taking benefits in the form of “surface damages.” This was Portwood v. Buckalew,\textsuperscript{188} which involved surface owner-executives

\textsuperscript{184} 209 So. 2d at 15.


\textsuperscript{186} For the background of this, see Vincent v. Bullock, 187 So. 35 (La. 1939) and Humble Oil & Ref. Co. v. Guillory, 33 So.2d 182 (La. 1946).


\textsuperscript{188} 521 S.W.2d 904 (Tex. App. 1975). In deciding this case, the court here relied in part on Griffith v. Taylor, 291 S.W.2d 673 (Tex. 1956). In Griffith the grantor conveyed one-half of the minerals to the grantee, reserving bonus, rental and executive rights. A lease thereafter executed by the executive provided for a 1/16 interest in oil produced and saved as a “bonus royalty,” in addition to the usual 1/8 lessor's royalty. The issue litigated was the grantee's right to 1/2 of this 1/16 bonus royalty. The court held this was a royalty because it continued for the life of the lease; it therefore had to be shared with the grantee. See also
who elected to exact from the lessee a substantial overriding royalty (25%) or a substantial cash payment "in consideration for the execution of a release of anticipated surface damages." The trial court disregarded jury findings that the executive dealt with "utmost fairness" toward the nonexecutive owners, and this action was sustained on appeal. The court regarded the labels of payments for surface damages as a subterfuge in order to deprive nonexecutives of their rightful share to the royalties and bonuses derivable from a lease. The payments were in excess of those customary in the area in amount and in their form as overriding royalty; moreover, actual surface damage from the wells was negligible. The executives could not, acting for themselves and the other non-executives, exact royalty for themselves, label it surface damages, and thereby defeat the right of the nonexecutives to participate therein.

A similar concern that the executive was taking too much as surface damages was the issue in Hawkins v. Twin Montana, Inc.. This decision sustained a trial court finding that the executives were not acting in good faith in accepting a one-eighth royalty and a more generous payment for surface damage ($3000 for the first well versus $500) rather than a one-fourth royalty. The deed creating the executive right provided that any lease executed shall provide for a royalty of "at least 1/8," but circumstances, said the court, "may require more than the minimum provided, to be acting in good faith." The rights to the minerals of the litigants are unclear to this writer. The court states the interests as follows:

Appellants own the surface, the right to execute oil and gas leases and the right to receive all bonus and delay rentals for all the Charles E.F. Auburg Survey in Young County; except appellants own only 87.5% of such interest in the southwest 40 acres. Appellees own the nonexecutive mineral interest in the tract.

The finding of bad faith is somewhat more questionable than under the facts in Portwood. The court does not indicate the full nature of the rights or how they arose, though it seems that the executives may have had no rights to royalty. The amount for surface damages was substantially less
than in Portwood and there was no override; it seems a bit much to require that the landowner give up substantial damages to the land to maximize the potential benefit to the nonexecutive. For example, if the executive were to have granted the lease with the higher royalty but less surface damages and the lessee drilled a dry hole, the executive's land will be no less damaged and the executive will have diminished compensation. The nonexecutive is a free-rider in such circumstances and has every incentive to demand that the landowner give up its interests for the benefit of the nonexecutive. If the executive right is a property right acquired by the executive, its value is substantially diminished by turning it into a stringent executive duty that requires its holder to sacrifice its own interests in the land. The court does not state what the customary surface damages payments were in the area, so there may have been more of a factual basis for the court's holding than my criticism would support. However, one should expect the question of valuing surface damages payments should become more important in the future. Landowners are discovering that they may be exposed to considerable remediation costs or potential liability from mineral activities on their lands that may far exceed the fair market value of the land. Demanding additional compensation for such potential liability is appropriate, and there is no reason for the executive to share such compensation with nonexecutives when the nonexecutives face no similar cost or liability.

In Schroeder v. Schroeder,191 the court found a breach of duty in the execution of a lease reserving additional overriding royalty to the executive. The dispute was somewhat colored by the fact that the executive was the ex-husband of the plaintiff; pursuant to a court-ordered disposition of the parties' property at the time of the divorce, in 1972 the plaintiff (a school teacher) quitclaimed her interest in the fifty-four acres to the defendant Schroeder (a farmer) reserving her right, title, and interest in the oil, gas and other minerals. She granted to the defendant Schroeder, until his death or until the sale of the property, the exclusive right to lease the reserved mineral interest for the purpose of producing oil, gas, coal and other minerals. Their son was a farmer and oil operator who negotiated the lease initially with an override to go for both parents and himself, but the father/ex-husband insisted on negotiating the override himself and took it all for himself. The court adopted a standard "of 'utmost fair dealing' and the amplification provided by Williams and Meyers as applicable in Illinois."192 It granted a remedy of assignment of an appropriate share of the override and cancellation and rescission of the executive right.

192. Id. at 399.
Another suit growing out of a divorce property settlement was Whittington v. Whittington.\textsuperscript{193} Here the ex-husband conveyed by quitclaim deed to his ex-wife all of his land, reserving one-quarter of a one-eighth royalty, and one-quarter of any bonus or delay rentals received on any lease which the executive ex-wife should execute in the future on the minerals. In 1975 the executive ex-wife entered into a lease but also executed an unrecorded side agreement that gave her special benefits for the lease. A second side agreement was signed with the lease promoter in 1978 providing for overriding royalty for her. The Mississippi court held that the nonexecutive ex-husband was entitled to one-quarter of any bonus. The executive had “fraudulently concealed the bonus” in the form of an overriding royalty interest and a share of the working interest.\textsuperscript{194} Thus the nonexecutive was entitled to a share of the overriding royalty and working interest retained as bonus.

Before discussing the Texas cases concerning the leasing duties of the executive, we should note the special circumstances of the Texas Relinquishment Act, which provides a statutory basis for a fiduciary duty. Texas has a unique arrangement for certain of its public lands that are the subject of the Relinquishment Act.\textsuperscript{195} The State has owned the minerals on lands conveyed by the state unless it clearly conveyed the minerals to the landowner. From the first days of the Texas Republic to a mineral release act of September 1, 1895, various constitutional and statutory mineral release enactments were worded as present releases of the minerals to the landowner. They operated retrospectively only. After 1895 the state routinely reserved all minerals in sales of state land. But a 1901 Texas Supreme Court ruling\textsuperscript{196} held that to be effective as a reservation the land had to have a mineral classification. In 1919, the state was leasing the land on which it had reserved the minerals and armed conflict with the surface owners was threatened. To accommodate the landowners, the Texas legislature enacted the Relinquishment Act. Under its terms, the state “relinquishes and vests in the owner of the soil an undivided fifteen-sixteenths of all oil and gas which has been undeveloped . . . .” This was a problem, for the Texas Constitution prohibited the state from conveying away permanent school funds without compensation. The Texas Supreme

\textsuperscript{193} 535 So. 2d 573 (Miss. 1988).
\textsuperscript{194} Id. at 574.
\textsuperscript{196} Schendell v. Rogan, 63 S.W. 1001 (Tex. 1901).
Court provided a neat, if not an entirely logical, way out of the problem. It ruled in Greene v. Robison, 197 that the legislature did not intend to convey a mineral interest to the landowner but instead intended to make the landowner the agent of the state in leasing the state's mineral interest. Under this approach, the compensation received by the owner is not part of the proceeds of a sale, but instead is compensation to the owner for the lessee's use of the surface estate. Since the compensation to the landowner does not concern passage of title to the minerals, it does not violate the constitution.

The Relinquishment Act was effectively superseded by the Sales Act of 1931, which sets forth the state's interest in surveyed and unsurveyed public free school land sold with a mineral reservation after August 21, 1931. As a result of these developments, the Relinquishment Act applies only to public free school and asylum lands sold with a mineral classification or reservation during the thirty-six year period between September 1, 1895, and August 21, 1931. About seven million acres have been subject to the Relinquishment Act. When the surface owner of mineral classified lands sells such acreage, he cannot reserve part of the minerals because he owns no minerals to reserve. However, the owner can convey the surface land and still benefit from future oil and gas development by expressly reserving the right to receive rentals and royalties to accrue during the life of the lease.

In State v. Durham, 198 the State of Texas sued the successors of a Relinquishment Act landowner and his colleagues for profits obtained from oil and gas transaction that took place in 1934. Turner was one of the surface owners of a Relinquishment Act tract when the State had a receivership proceeding to facilitate the drilling of wells on the tract. Turner submitted a lease proposal to the receiver. Turner was awarded fee simple title to the tract, and the lease he had made was found to be the most advantageous proposal. Turner subsequently increased his share in the lease, and the state sought a share of this increased stake more than 50 years later. In 1985, an amendment to the Relinquishment Act required the surface owner to act as a fiduciary and prohibited the owner from leasing the minerals to himself or a related entity. 199 Did the landowner owe the

197. 8 S.W.2d 655 (Tex. 1928).
198. 860 S.W.2d 63 (Tex. 1993), rev'g 804 S.W.2d 312 (Tex. App. 1991).
199. Senate Bill 1018 [1985] clarifie[s] the fiduciary duties of surface owners acting as the state's agent for oil and gas development on Relinquishment Act lands. The bill further empowere[s] the GLO Commissioner to file suit through the Attorney General to forfeit the surface owner's agency rights upon a determination that such agent breached these fiduciary duties. The bill also prohibited self-dealing by the surface owner by restricting such
state a fiduciary duty under the Relinquishment Act as it existed in 1934? The Durham court concluded that he did. The court stated:

Within the scope of the Relinquishment Act . . . the surface owner is the State's agent to the extent that the State's assets are entrusted to the control of the surface owner, who must not abuse that trust. It is well settled that an agent charged with selling an asset for the owner owes a fiduciary duty to the owner, and that the agent violates this duty by acquiring the asset for his own benefit.200

The case was remanded to determine whether there had been a breach of duty to obtain fair compensation for the State.

The leading case in Texas on self-dealing by the holder of the power to lease is Manges v. Guerra.201 Clinton Manges entered into a contract to purchase 72,000 acres of land from the M. Guerra & Son Partnership. Manges was to purchase all of the surface and an undivided one-half of the partnership's 55,000 to 60,000 mineral acres. The sale was to include the executive rights to the one-half mineral interest reserved by the Guerras. As a result of litigation among members of the Guerra family, the land was placed with a receiver. In August 1971, the receiver executed a deed conveying the land to Manges which provided that Manges was not to lease the Guerras' mineral interest for less than a one-eighth royalty. It provided further that the Guerras were to participate "in all bonuses, rentals, royalties, overriding royalties and payments out of production." An agreed judgment rendered on June 11, 1974, adjudged that Manges was the owner of 53.4 percent of the minerals and the Guerras owned 46.6 percent. Manges had also acquired lands of the Virginia C. Guerra Estate, which consisted of 21,000 surface acres and about 16,000 mineral acres; as to this land also, Manges received all of the surface and an undivided one-half of the minerals and the executive rights. The Guerras sued Manges for failure to exercise diligence in leasing the minerals to third persons and for leasing a portion of the minerals to himself at allegedly unfair terms. The following jury instruction was given:

the possessor of an 'Executive Right' as herein defined owes to the co-mineral owners the same degree of diligence and discretion in exercising the rights and powers granted under such Executive Rights as would be expected of the average

agent from leasing the land to himself or to a corporation or partnership in which such agent has a vested financial interest.


200. 860 S.W.2d at 66.
201. 673 S.W.2d 180 (Tex. 1984).
land owner who because of self-interest is normally willing to take affirmative steps to seek or to cooperate with prospective lessees ... that in the exercise of the executive rights, the holder thereof is required to use utmost good faith and fair dealing as to the interest of the non-executive mineral interest owners. You are further instructed that the holder of the executive rights has a duty to prevent drainage of oil or gas from any lands covered by the executive rights. In any lease executed by the holder of the executive rights, the holder thereof is required to obtain all benefits that could be reasonably obtained from a disinterested third party.202

Based on the jury's findings, the trial court rendered judgment that among other things removed Manges as holder of the executive rights to the Guerras' mineral interests; cancelled the Manges-to-Manges lease as of the date of its execution; adjudged Manges to be a drilling and producing co-tenant with the Guerras in three producing wells and two dry holes drilled by him; required an accounting by Manges of income from production from the producing wells, less necessary and reasonable costs of drilling and production; and awarded the Guerras actual damages against Manges of $382,608.79 plus $500,000 exemplary damages. Manges appealed, and the court of civil appeals affirmed the judgment of the trial court. The Texas Supreme Court agreed with the courts below that "Manges' conduct amounted to a breach of his fiduciary duty as found by the jury in making the lease to himself, in agreeing upon a $5 nominal bonus for 25,911.62 acres of land, and in dealing with the entire mineral interest so that he received benefits that the non-executives did not receive."203 While the Manges-to-Manges lease was correctly cancelled, the Supreme Court held that it did not follow that Manges had to be removed as the executive. This was because the Guerras elected to have him remain as executive so that they might take the damages as found by the jury. The exemplary damages were upheld as recovery against a breaching fiduciary is not limited to an accounting of profits received by the fiduciary.204

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202. Id. at 183.
203. Id. at 184.
204. Ernest Smith comments that "[t]he court's second opinion in Manges did not unequivocally adopt a fiduciary standard. Commentators can and have disagreed on its interpretation." Ernest E. Smith, Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right, 64 Tex. L. Rev. 371, 379 (1985). He observes that Laity, Oil, Gas and Minerals, Annual Survey of Texas Law, 39 Sw. L.J. 351, 352 n.11 (1985) concludes that the court subjects the executive "to a standard lower than that of a strict fiduciary." Smith, 64 Tex. L. Rev. at 706 n.41. But James L. Armour, Recent Developments in Nonregulatory Oil and Gas Law, 36 Inst. On Oil & Gas L. & Tax'n 1-1, 1-3 to 1-4 (1985) and Lloyd Lochridge, Abuse of Executive Rights, id. at 2-1, 2-16, analyze the opinion as creating a fiduciary obligation.
Manges was followed in Dearing, Inc. v. Spiller. The case grew out of a 1943 conveyance of a 600-acre tract of land owned by the Haag family was to R.H. Dearing & Sons. The deed conveyed the property in its entirety to Dearing but reserved to the Haags an undivided 1/2 interest in the minerals. The deed also granted Dearing the exclusive right to execute leases on the minerals provided that the royalty reserved was "no ... less than the usual one eighth (1/8) royalty." After securing the termination of an existing lease in 1981 or 1982 the executive rights holder received a written offer from a third party who would lease the property for a royalty of 1/4 and bonus payments of $100 an acre. This offer also included a continuous drilling clause. Instead, the executive rights holders leased the acreage to themselves by executing a mineral lease to Royal Petroleum Corporation, another family corporation. The "insider" leases provided for no bonuses, only a 1/8 royalty and the larger lease contained no Pugh clause or continuous drilling clause even though the lease covered 580 acres. The plaintiffs brought suit against the executive and Royal seeking actual and exemplary damages for the breach of the duty of utmost good faith, cancellation of the leases, termination of the executive leasing rights over the mineral interests owned by plaintiffs, and for an accounting of the profits made under the insider leases. The court upheld findings based on breach of the duty of utmost good faith through self-dealing. The court upheld cancellation of the executive rights over mineral interests of the plaintiffs, and the establishment of the plaintiffs as co-tenants of the executive with respect to the production on the premises. An accounting was ordered with respect to all of the production and expenditures incident to the development of the premises through the Dearing/Royal lease. The judgment further apportioned the revenues, less the applicable costs of development, to the appropriate parties and awarded the plaintiffs $300,000 in exemplary damages from each defendant. The court believed that the facts were quite close to those of Manges. Like Manges, the language of the deed called for a royalty of no less than 1/8; the percentage return was left to the efforts of the executive. The executive had a duty to manage the executive interest by obtaining the highest royalty possible, and was likewise prohibited from self-dealing. The court held this duty was breached when the lease he awarded himself did not provide for at least the fair market royalty prevalent in the surrounding area at that time. The fact that the executive was co-tenant with the plaintiffs was irrelevant to a determination of the duty owed by an executive. The court expressed the duty as follows:

206. Id. at 730.
Generally, where a party having executive leasing privileges enters into a transaction in which he and the non-executive mineral holders are both interested, and the executive is authorized to act for both parties, he must exact for the non-executive every benefit that he exacts for himself. If he could obtain overriding royalties or cash bonuses for the non-executive and himself, it was his duty to have done so.\footnote{207}

The court said it did not mean to imply that an executive is barred, as a matter of law, from developing the premises himself. However, when the market value of a lease is so much greater than the terms the executive grants to himself, this would be regarded as clear evidence of a breach of his duty of utmost good faith.

In dictum the court in Mafrige v. U.S.\footnote{208} accepted the Manges v. Guerra and Dearing v. Spiller suggestion that an executive owes a fiduciary duty to the non-executive even though there was no self-dealing or special relationship between the parties. The grantor of land brought an action to quiet title to an interest in the land purchased by United States for a reclamation project and to seek damages for breach of a fiduciary duty by the United States. The essence of the non-executive’s claim was that the United States leased for a 1/8th royalty while other leases in the area had reserved a larger fractional share of production. The district court simply denied the Government’s motion to dismiss the non-executive’s claim for breach of a fiduciary duty of utmost good faith. This ruling did not address the issue of whether this particular tort fell within the discretionary function exception to the Federal Torts Claims Act.

The case of Mims v. Beall\footnote{209} found a breach of duty by the executive in executing a lease to the executive’s own son for an unreasonably low 1/8th royalty which he then assigned for an override. In 1947, the plaintiffs’ predecessors sold approximately 200 acres of land to John and Chattie Mims retaining an undivided 1/4th non-participating interest in the royalties obtained through leasing of the tract. In 1979 the Mimses leased the property to their son for a 1/8th royalty without a cash bonus. A short time later the son assigned the lease to Henderson Clay Products, Inc. in return for a 1/16th overriding royalty on the leasehold estate. The plaintiffs claimed that these activities constituted a breach of duty to the non-participating royalty owners because the 1/8th royalty was unreasonably low; they asserted that the overriding interest obtained by the son was proof of a breach of duty. The court upheld findings that the Mimses breached their duty as executive rights holders to the plaintiffs and awarded $500.00

\footnote{207.  Id. at 733.}
\footnote{208.  893 F. Supp. 691 (S.D. Tex. 1995).}
\footnote{209.  810 S.W.2d 876 (Tex. App. 1991).}
in actual damages for this breach. It also upheld a finding that the son participated in the breach and awarded $31,127.67 in actual damages. Upon separate findings that the Mimses acted in an unconscionable, willful and wanton manner and in total disregard of the plaintiffs' rights, the jury also awarded $2,500 in exemplary damages from John Mims and $5,000 in exemplary damages from the son Angus Mims. A constructive trust was imposed on 1/4th of the 1/16th overriding royalty interest owned by the Mims' son. The standard applied by the court was "utmost good faith" which the court observed had become a fiduciary standard with Manges v. Guerra. However, the court further noted that the Manges court did not apply the customary standard that the fiduciary must subordinate its own interest to those of the non-participating interest owner, but instead charged the fiduciary with acquiring for the non-executive every benefit that he exacts for himself.

In Miller v. Gahagan the executive was the successor to the grantor of an undivided one-fourth interest in the minerals in a tract of 246.4 acres of land to the plaintiffs. The grantor reserved unto himself, his heirs and assigns, the absolute power and authority to execute oil, gas and other mineral leases on said land as might seem proper to grantor, and to receipt for and collect any bonus or other down payment on such leases, without the joinder by the grantees, but with the obligation to pay to appellees one-fourth of such bonus or other down payments. The executive leased the acreage but denied he had leased the interest of the plaintiffs. The court found that he had leased their interest and was thus liable for the sum of $616 as the plaintiffs' share of the bonus plus exemplary damages of $400 and attorney's fees of $250.

Another case finding the existence of a duty and that the duty had been breached by the executive is Teas v. Twentieth Century-Fox Film Corp.. Land had been sold to a movie company with a reservation of minerals but with a stipulation that there could be no surface use by the mineral interest owners. Once oil was discovered in the vicinity of the land, the parties entered into an agreement to allow development, with the landowner having the power to enter into leases. The nonexecutive owners, the mineral interest owners, were entitled to receive a one-twelfth royalty and 50% of any bonus payments or land rentals made by any lessee and received by the executive or by any of its subsidiaries as consideration for making or entering into any lease. The executive entered into a lease providing for a 20% royalty and a 50% variable participating royalty. The nonexecutives claimed a one-half interest in the gross royalty of 20% and in the variable participating royalty on the basis that all royalty or other

payment above $16^{2/3}\%$ was bonus. In holding the nonexecutives entitled to judgment on their claims, the trial court discussed the relationship between the parties in fiduciary terms.\textsuperscript{212}

On appeal the trial court's judgment was affirmed as to the nonexecutives' right to share in the variable participating royalty but reversed as to their right to 50% of the 20% royalty.\textsuperscript{213} The court ruled that although $16^{2/3}\%$ was the customary royalty in California when the contract was negotiated, the executive was free to bargain for a higher royalty. In reaching this result, the court found it unnecessary to pass on the question whether the executive was subject to a "quasi-fiduciary duty to make the best lease agreement it could for the joint protection of itself and of plaintiffs." \textsuperscript{214}

In Comanche Land & Cattle Co. v. Adams\textsuperscript{215} the grantors conveyed in 1964 some 180 acres of land to Comanche Land and Cattle Company, Inc. with a royalty reservation. It provided for "a one-half royalty interest on all royalties that might be paid on oil, gas and other mineral leases that might be made on said land for a period of twenty years from the date of this deed and at which time said royalty interest will pass to the then owners of the land."\textsuperscript{216} In March 1976, Comanche Land and Cattle Company, Inc. entered into a joint venture "oil and gas mining agreement" with Corpening Enterprises. The agreement was essentially a net profits agreement. The court concluded that the owner of the executive right purposely entered into an agreement that was calculated to defeat the rights of the royalty owners. This violated the duty of "utmost good faith."

The discussion of these cases on the content of the terms of a lease should clearly indicate that the courts recognize a fairly high standard of conduct to be observed by the executive when negotiating the initial terms of the lease that will control benefits flowing to the executive and nonexecutive owners. The prudent operator standard appears adequate to control the conduct of the executive. A fiduciary standard, which apparently is prompted by a desire to punish overreaching by the executive, goes too far. Punishment is probably best left to the criminal law system. Most writers have found that the nature of the oil and gas business does not warrant a fiduciary standard because the parties themselves do not suppose themselves to be establishing a fiduciary relationship.\textsuperscript{217} When the principal

\begin{itemize}
\item \textsuperscript{212} \textit{Id.} at 748-49.
\item \textsuperscript{213} Twentieth Century-Fox Film Corp. v. Teas, 286 F.2d 373 (5th Cir. 1961).
\item \textsuperscript{214} \textit{Id.} at 375.
\item \textsuperscript{215} 688 S.W.2d 914 (Tex. App. 1985).
\item \textsuperscript{216} \textit{Id.} at 915.
\item \textsuperscript{217} Mack Keith McCollum, \textit{Manges v. Guerra: The Executive Right Holder Undergoes Close Scrutiny, 38 Baylor L. Rev.} 189, 205 (1986) reviews the "many eminent writers" who espouse the "ordinary prudent landowner standard" in such cases.
\end{itemize}
transaction is the purchase and sale of land, the buyer who obtains the exclusive right to lease and develop is generally not to be thought of as agreeing to shoulder fiduciary duties to the seller who reserves a share of minerals that may never have been discovered to be on the land. The relationship is not at all like the typical fiduciary relationship, such as a banker who is entrusted with the assets of an estate or the attorney who undertakes to represent a client. If the executive right is created for the benefit of the executive right holder and the executive right holder's own property, surely it is mistaken to require him to subordinate his own interest to that of the nonexecutive. To take such an approach turns the relationship on its head and deprives the executive right holder of his bargain. A somewhat closer scrutiny by the courts is called for when the executive has sold off rights than when the rights were created by reservation. This may strike some as unduly formal but the manner in which the interest arises reflects a rather different relationship between the parties.

3. Failure to manage the lessee

A third area of concern and litigation over the rights and duties of executives relates to management of the lessee's activities once the tract's minerals have been leased or development has commenced. Management of the compliance with the lease terms and the lessor-lessee relationship is a logical extension of the right and power to lease and to develop. It would be rather awkward and perhaps unmanageable to have one party lease and another party with contrary interests managing the lease. Just as the nonexecutive may suspect that an executive has manipulated the lease terms during their negotiation to the nonexecutive's detriment, so too may the nonexecutive have fears that the executive has colluded with the lessee to diminish the benefits and advantages of the nonexecutive's interest. In lease management cases, it appears the courts actually employ the standard of an "ordinary, prudent landowner" rather than a more stringent or fiduciary standard, and liability will not be found when the executive has adhered to this standard. However, the cases recognize that if the executive acts to destroy the interest of the nonexecutive to the exclusive benefit of the executive, then liability will be imposed.

An early West Virginia case, Lamp v. Locke,218 recognized a duty on a landowner to protect a royalty from drainage in circumstances where the landowner had leased the land to an affiliated entity but was causing the drainage through another affiliated entity. The plaintiffs were successors to the grantor of a 68 acre tract. In 1907 he had conveyed the land and reserved a royalty of 1/16th for a fixed term of 15 years. The grantee's successor, W. P. Jones, leased the land in 1917 to a company in which he

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218. 108 S.E. 889 (W. Va. 1921).
had an interest and paid a royalty on the production from the well. Jones also had a family interest in the adjacent land and arranged to lease that land to another company in which he had an interest. The plaintiffs filed suit when a well was drilled on the adjacent land that was within five feet of the land in which they held the 1/16th royalty. They claimed that Jones was conspiring with others to deprive them of their royalty interest through the drainage to the adjacent land. The West Virginia court agreed with plaintiffs that the landowner owed them a duty to protect their interest, not destroy it. The court borrowed from the cases recognizing implied covenant obligations of a lessee to a lessor to hold that the defendant had an implied covenant to protect the royalty owners. The court affirmed an award of a mandatory injunction to drill an offset well.

A later West Virginia case was less protective of the nonexecutive's interests but still recognized some liability against the executive for the manner in which he managed the lease in circumstances suggesting drainage of the nonexecutive's interest. In Robinson v. Milam the plaintiff was the owner of one-fourth of the minerals in a 70-acre parcel which was a part of a 214-acre leasehold. The defendant owned the balance of the minerals in the 214 acres and had the exclusive leasing power. One producing well was drilled on the 214 acres, but it was located off the 70 acres in which the plaintiff had an interest. A second well was drilled on the tract of land adjoining the 214 acres. The executive made demand for further development of the 214 acres, apparently to offset drainage. In lieu of further development, the lessee agreed to pay defendant a royalty on production from the adjoining tract. The plaintiff sued for a share of the royalties accruing from production from the one well on the lease and for a share of the royalty on production from the adjoining tract being paid to defendant in lieu of further development. The court held for plaintiff as to the latter but for the defendant as to the former. The court declared that the non-apportionment theory was followed in West Virginia, so the plaintiff was not entitled to a share of the royalty from the producing oil well. As concerns the payment in lieu of further development the court commented as follows:

However, where a lessor and lessee agree, in lieu of development of a leasehold upon which a test well has been drilled, that the lessee will pay a certain sum, however measured, the owner of a portion of the minerals in a subdivision of the leasehold is entitled to a share of such payments, based upon his proportionate mineral ownership. . . . [T]he agreement herein . . . provides that it shall be nullified by the drilling of another well on the leasehold, in which event it necessarily

follows that payment of the royalties therefrom will depend upon the location thereof.

We do not intend by what has been said herein to relax the rule as to apportionment of royalties . . . but we believe that money to be paid by a lessee in lieu of further development is to be distinguished from royalties, the money so paid being a consideration for forbearance to enforce a covenant for reasonable development; while royalty is paid for a license to explore for minerals and when found to sever the same from the land. . . . The defendants having contracted with reference to property and an undivided interest of a portion of such property being owned by the plaintiffs, and the defendant deriving profits by reason thereof from such agreement, we believe and so hold that the plaintiffs are entitled to a proportionate share of the money arising from the agreement in lieu of further development. 20

The West Virginia court awarded an apportionment of the royalty being paid to defendant on the production from the adjacent tract. While the court did not identify it as such, the court effectively treats the executive as having breached a duty as executive by not sharing in the in lieu royalty.

A rather similar case with a similar result from Texas is Andretta v. West. 21 The holders of the executive right had the right to bonus and rentals but had to share in royalties with the nonexecutive. The land was under lease and the executives made demand for an offset well to protect against drainage by the lessee on adjacent land. The executives and the lessee reached an agreement, a lease amendment, under which the lessee paid cash payments in lieu of drilling operations. When the nonexecutive sought a share of such payments, the executives asserted they were "rentals" and not royalty. The court held the payments were to be treated as royalty rather than as rental, and hence the owner of a nonparticipating royalty interest was entitled to a share thereof. An amicus curiae suggested that the case presented an appropriate opportunity to define the precise standard of conduct required of the holder of the executive right. The court declined this invitation, saying that it was unnecessary to determine whether the executive violated any duty to the nonexecutive in the execution of the lease and the lease amendment because the nonexecutive was not challenging the agreements.

Other cases from Texas have generally been deferential to the executive in decisions concerning lease management. The courts have tended to recognize that the retention of the executive right has been an

20. Id. at 239.
21. 415 S.W.2d 638 (Tex. 1967).
important right to the executive for the executive's own benefit. They have also tended to conclude that a lower standard of conduct should be applied in cases involving royalty than in cases involving the executive as cotenant.

An example of the deference is seen in Allison v. Smith.\textsuperscript{222} This case grew out of a 1941 grant of an undivided one-half interest in the oil, gas and other minerals together with "one-half of all bonuses, rentals, royalties and other benefits accruing or to accrue under any future leases" but with a reservation of executive right to the grantor. Apparently an interest as to a quarter of the minerals held by certain non-executive owners was first covered by a lease and then lost by the lessee for failure to pay rentals to those owners. The landowner/executive granted a new lease after the non-executive owner had attempted to revoke the power to lease. The second lease made the lessee's obligation to drill absolute rather than optional. The court held that this second lease was within the power of the executive owner. He had a power coupled with an interest, which could not be revoked. The court further held that the transaction in which the absolute drilling obligation was negotiated was in "good faith" and "not for the purpose of evading payment to appellants of a cash bonus or greater royalty for the lease." It is interesting that the court focused on the point that the grantor of the half interest in the minerals retained the executive right for her own benefit. The court observed:

The power to make oil and gas leases reserved by Bertha B. Clark was for her benefit and to protect her one-half interest in the minerals. It was retained to prevent parties acquiring an interest in the minerals from hindering development. It is evident that it would have been impossible to secure a lessee who would drill a well on the land with the one-fourth interest in the minerals owned by appellants outstanding and not covered by the lease.\textsuperscript{223}

A claim that the executive had failed to preserve the term interest of the nonexecutive was unsuccessful in Union Producing Co. v. Scott.\textsuperscript{224} In this case, the executive right owner asserted a term interest terminated for nonproduction while the lease granted by the executive was shut-in under a shut-in clause. The nonexecutive term interest was created in 1935 with the following special limitation and provision concerning leasing:

It is further agreed and herein stipulated that in case there is no paying production on said land on or before April 25, 1955, and for six months thereafter, that this grant shall become null and

\textsuperscript{222.} 278 S.W.2d 940 (Tex. App. 1955).
\textsuperscript{223.} Id. at 945.
void, and the minerals hereby conveyed shall revert to said Grantor, her heirs and assigns, but should there be such production, then and in that event, this grant shall remain in full force and effect until such production ceases, after which this instrument shall become null and void.

It is further agreed that Grantee shall have One-half (1/2) interest in any bonus money received by the Grantor in any future lease or leases given on said land; and that it shall not be necessary for the Grantee to join in any such lease or leases so made; . . .

The parties evidently all took this second paragraph as recognizing an exclusive right to lease in the grantor. A lease was granted by the executive, and on October 23, 1955, a lessee completed a gas well on the leased premises. A second well was completed December 2, 1955. These wells were capable of producing gas in commercial quantities but were shut in immediately upon completion, and no oil or gas was actually physically produced, stored, sold, or marketed, until April 4, 1956, at which time marketing began and continued. The owners of the term mineral interests contended that the shut in gas well provision in the lease not only kept the lease alive but their mineral interests as well since the owners of the reversionary estate as exclusive lessors were agents of the term mineral owners and bound to exercise this power with the utmost fair dealing. They argued further that all the parties, owners of the reversionary rights as well as the term mineral interests, together with Union, modified the provisions of the mineral deeds requiring paying production on or before April 25, 1955, and for six months thereafter, by virtue of the shut-in gas well provision in the lease and the ratification of the lease by the owners of the term mineral interests. The court agreed that where the exclusive right to lease is reserved there is a duty of utmost fair dealing on the part of the grantee. But here there was no semblance of unfair dealing. There was no modification of the term deeds and the ratification of the lease did not alter the terms of the deeds. The district court found:

There is nothing in the pleadings, the affidavits or the requirement for utmost fair dealing of an exclusive agent for leasing that suggests that the owner of the reversionary right must surrender his property right upon termination of the term of the grant. The shut-in gas well provision was quite common in oil, gas and mineral leases by the time this one was executed; so, not only was there nothing unfair about it but, as pointed out above, its inclusion may have commanded a better bonus for the lease; indeed without it there might have been no lease at all; so development was had which could have resulted in perfecting the mineral grants before October 25, 1955.
I hold, therefore, that the fact that the reversionary owners were exclusive agents for leasing, or acted as such, did not extend the term mineral grants beyond the period provided in the deeds.\textsuperscript{225}

In affirming the district court the Fifth Circuit apparently concluded the case of Midwest Oil Corp. v. Winsauer,\textsuperscript{226} was inapplicable as there had been no production for which the temporary cessation doctrine could apply. To have had benefit of the shut-in well clause, there would have had to have been such a provision in the term deed.

In a more recent case from Texas, Shelton v. Exxon Corp.,\textsuperscript{227} the Fifth Circuit has recognized that abuse of a nonexecutive's interests may occur if the holder of executive rights manipulates lease terms so that benefits usually shared by all mineral owners inure solely to the benefit of the executive. The plaintiff in this case was a former director of the King Ranch. In 1976 and 1977 he exchanged his shares in the Ranch for certain interests, including mineral and royalty interests. The latter included an interest in a pending claim for deficient royalties against the lessee, Exxon. As a result of the manner in which assets of King Ranch were distributed, the King Ranch remained as executive of certain of Shelton's interests and claims. The rather comprehensive executive right clause is as follows:

\begin{quote}
King Ranch, Inc., Grantor herein, hereby reserves unto itself and its successors and assigns, the exclusive power and right, without the joinder of the Grantees herein, to execute amendments to the Oil, Gas and Mineral Lease of Exxon Corporation now covering the lands described herein and, in the event such Lease terminates for any reason as to all or any portion of such lands ... to execute future mineral leases covering any of the mineral interests in the lands described herein, or any parts of parts thereof ... Grantees shall be
\end{quote}

\textsuperscript{225} 173 F. Supp. at 365.

\textsuperscript{226} 323 S.W.2d 944 (Tex. 1959), rev'd 315 S.W.2d 608 (Tex. App. 1958). Winsauer concerned a term royalty that was to last for 15 years and as long thereafter as oil, gas or other minerals, or either of them was produced or mined from the lands. There was a lease and a well on the property, but the landowner brought suit contending that the lease had terminated due to a cessation of production. The landowner took over the well and restored it to production. The royalty owners sought a declaration that their royalty survived though there was no production from a well at the end of the 15 year term. The parties stipulated there was no lack of diligence on the part of any of the parties. The landowner with the power to lease had breached no duties to the term royalty owners. However, the Texas Supreme Court applied the temporary cessation doctrine to rule that the term royalty had not been extinguished by the relatively short period in which there was no production. The court seemed to attach no significance to the fact that the executives were the ones who sought the termination of the existing lease and who then developed the minerals.

entitled to receive their proportionate part, as herein conveyed to them, of any and all cash payments, bonus payments, rental payments, royalties and other considerations, if any, paid and to be paid under any such leases, contracts and other instruments, as to the mineral interests in land conveyed herein, but Grantor, its successors and assigns, shall have the exclusive right to enforce the obligations of such existing or future leases, contracts, and other instruments and to contract and negotiate with the lessee thereunder with respect to each such obligation.228

In 1980 King Ranch entered a settlement agreement with Exxon on the claims of underpayment of royalty. Shelton refused to accept the settlement and claimed that Exxon continued to market production imprudently. In a suit originally filed against both Exxon and King Ranch, Shelton prevailed in the district court against Exxon on the latter claim and was awarded $11 million in damages. The Fifth Circuit reversed on this damage award, finding that King Ranch had the authority to enter into settlements of lease claims, that the 1980 settlement had released Exxon from claims of imprudent marketing, and that King Ranch did not manipulate settlement terms to its own advantage. The executive right held by King Ranch did not create an agency relationship, and King Ranch did not have to cater to each mineral interest or royalty owner to maximize each owner’s tax benefits or other benefits. As to the appropriate standard of conduct of the executive, the court found that King Ranch violated no duty whether one looked to the Manges standard of “utmost good faith” (applicable to cotenants in the court’s view of Manges) or a less stringent Pickens v. Hope “ordinary, prudent landowner” standard (applicable to royalty interests in the court’s view of Pickens).

A recent Texas state court decision also indicated that a lower standard of conduct was applicable to royalty owners in regard to decisions of lease management. Marathon Oil Co. v. Moye229 grew out of an assignment of Colombian coal licenses to Marathon under a binding letter of intent. The assignor reserved what the court described was a “nonparticipating royalty interest in exchange for the licenses.” It later brought suit against Marathon claiming Marathon breached a contractual duty to use its best efforts in maintaining the coal licenses in good standing when the Colombian government nationalized the domestic coal industry. The assignor sought damages for loss of royalties because Marathon gave up the coal licenses that it had transferred to Marathon. The relationship and duties of Marathon to the assignor came up in connection with a discovery

228. Id. at 598-99.
229. 893 S.W.2d 585 (Tex. App. 1994).
order for documents claimed to be privileged. The assignor asserted that the letter of intent created a relationship analogous to the relationship between an executive interest holder and a nonexecutive interest holder in the oil and gas context. Relying on Pickens v. Hope, the court said that the contractual relationship reserving a nonparticipatory royalty interest in the assignor did not create a fiduciary duty. Manges was distinguished because in Manges the executive and nonexecutive were cotenants in a mineral estate. Here, there was no cotenancy in a property interest, only assignment of licenses with a reservation of a nonparticipating royalty interest.

These lease management cases all reflect that managing the development of mineral properties can involve difficult questions. The executive need not put the interests of the nonexecutive over his own interests, for this would result in the diminution of his own property rights. But the executive must not deliberately impair or destroy the rights of the nonexecutive for the purpose of enhancing his own interests. It is submitted that the standard of good faith, which is reflected in the “ordinary, prudent landowner” standard, is adequate to protect the interests of nonexecutives in these types of cases and that this is the standard that the courts have applied.

IX. DRAFTING SUGGESTIONS

It will be obvious from the preceding discussion that there are no standard or customary executive right provisions for conveyances. Drafters of deeds would do well to recognize the power of the “bundle of sticks” metaphor. This is the way some lawyers and judges conceptualize rights and obligations and it is hard to dissuade them of it. So if you are going to create something that looks like a stick, then take up the rest of the bundle in the instrument you are drafting. But if you describe the absence of the sticks you run the risk of being treated like the Temple-Inland decision; you are thought to be conveying when you describe the absence of the attributes. It may be impossible to avoid a mis-application of common sense.

If your concerns are well-defined then you might be precise in achieving them even without providing for an exclusive executive right in one party. Thus if you represent a purchaser of land who does not wish to have an oil well drilled in the rose garden, then you might spell out that the seller reserving half the mineral rights and his assigns shall have no right to any use of the surface without the landowner’s written consent. Such a provision would be in lieu of an executive right provision in the land purchaser yet would accomplish surface control for the landowner.

It would seem prudent in granting or reserving the executive right to attempt to lessen uncertainty over the attributes of the power by creating the right and then specifying its attributes, at the same time making it clear
that the right created is not personal to the holder of the executive right. Thus one might state:

Grantor hereby reserves and shall own one-half of the oil, gas and like minerals of Blackacre but Grantee, his heirs and assigns, shall have the executive right to Grantor's mineral interest; this executive right shall consist of and shall include the exclusive power to lease or develop Grantor's mineral interest and shall include the right of Grantee, his heirs and assigns, to retain bonus and delay rentals arising from any exercise of this executive right.

A further prudent step would be to specify the duty owed by the executive right holder to the nonexecutive interest:

The Grantee shall have no duty to lease or develop the premises for the benefit of the Grantor; however, if the Grantee should lease or develop the premises he shall do so in the manner of a reasonable and prudent interest owner.

One might wish to define further the rights of the Grantor and Grantee by illustrating the intended operation of the grant.

For example, if the Grantee should execute a lease of the premises for a one-fifth royalty, then Grantor shall be entitled to one-half of the one-fifth royalty arising from the lease.

If the intention of the parties is to create a royalty interest rather than a mineral interest, it may be prudent to specify that one is describing the attributes of the interest rather than creating a mineral interest and stripping the interest of certain characteristics. For example in creating a one-sixteenth royalty one might state:

Grantor hereby reserves and shall own a one-sixteenth royalty of the oil, gas and like minerals of Blackacre, the same being equal to one-sixteenth of all oil, gas and like minerals produced from Blackacre free of costs at the well or point of production. Because the interest created herein is a royalty, Grantor's interest carries with it no right or power to lease nor any right to share in bonus or delay rental.

Perhaps these suggestions may help, but the possibilities for differing circumstances in a transaction and differing trades are so great that no general provision can be recommended. It is this variety of possibilities of conveyance circumstances and of actions under the operation of the conveyance that insures that the courts not be ousted of their interpretive function and will also have occasion to turn to implied obligations and to flexible standards to determine whether an executive has acted in keeping with the conveyance establishing the executive right.
X. CONCLUSION

With the great good sense that have characterized his career, my friend and co-author Richard Maxwell has observed: "We have not... chosen a system in which only officially approved documents are admitted to the property records. For the most part, we have the freedom to draft in whatever form we wish documents that will have a permanent place in the land records and take the consequences." Litigation is a frequent consequence. As long as scriveners write and judges construe, we will have with us the problems of interpretation of mineral/royalty conveyances. What we can do as practitioners of what seems to be an arcane craft is attempt to bring clarity to our instruments. For the attorney to whom the executive right is important in a conveyance this clarity can be achieved by stating explicitly the client's purposes and goals. A carefully crafted executive/development right provision in a deed can obviate a great many of the problems attendant to severed interests. Beyond this, I would suggest that most people to oil and gas transactions do not intend to enter into strange deals with strange consequences. Moreover, few landowners or other persons in the oil and gas industry intend to assume fiduciary duties to the persons with whom they deal. Accordingly, judges should be reluctant to impose strange constructions of deeds and contracts upon parties before them and should find fiduciary duties only in circumstances in which the parties appear clearly to have contemplated assuming fiduciary obligations.