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# CONVEYING MINERAL INTERESTS — MASTERING THE PROBLEM AREAS

Bruce M. Kramer†

## I. INTRODUCTION

When Justice Benjamin Cardozo first analogized the ownership of property interests to the ownership of a bundle of sticks,<sup>1</sup> it is unlikely he was thinking specifically about the severed mineral estate. Nonetheless, Justice Cardozo's quaint aphorism is an appropriate way to begin a discussion of the conveyancing issues which arise with the mineral estate because of the seemingly infinite variety of ways the fee simple absolute owner of a mineral estate can convey parts of the estate. She can divide the mineral estate not only into its component parts but also into any of the recognized estates, either legal or equitable, that have been developed since the feudal beginning of modern property law.

One of the universal objectives of real property conveyancing rules is that courts will attempt to reach results which ensure title certainty. But at times, courts in Texas and Oklahoma pay little heed to this objective. The following discussion highlights inconsistencies, failures to follow or distinguish prior case law, and applications of conflicting canons of construction in one small area of conveyancing—the division of a mineral estate into its component elements.

## II. THE CONSTITUENT ELEMENTS

In 1986, the Texas Supreme Court in *Altman v. Blake*<sup>2</sup> identified

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1. B. CARDOZO, *The Paradoxes of Legal Science*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 251, 331 (M. Hall ed. 1947). Cardozo stated that "[t]he bundle of power and privileges to which we give the name ownership is not constant through the ages. The faggots must be put together and rebound from time to time." *Id.*

2. 712 S.W.2d 117 (Tex. 1986). See also R. HEMINGWAY, THE LAW OF OIL AND GAS §§ 2.1-

what it called the "five essential attributes" of a mineral estate. The attributes are: "(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."<sup>3</sup> These should not be labelled "essential" because they can be distributed to several different individuals, and yet only one person will be considered the owner of a mineral estate. More accurately, they are the inherent or constituent five sticks that make up the original bundle but which may be individually or collectively transferred to third parties. While many people can own all or part of each constituent stick of the mineral estate, only one person owns the corporeal or possessory mineral estate.<sup>4</sup>

In the absence of express language or the application of certain canons of construction, these five sticks will be owned by the transferee when a mineral estate is transferred. As Professor Masterson hypothesized:

Assume that *A* conveys to *B* all of the minerals under a given tract. The interest which *B* thereby acquires includes the following: (a) a right to develop—that is, to drill wells upon the tract in question and produce and market the oil and gas recovered; (b) power to execute oil and gas leases; (c) right to bonuses paid by the oil and gas lessee; (d) right to delay rentals payable by said lessee; (e) right to royalties so payable; [and] (f) right to any other interests reserved to the lessor.<sup>5</sup>

Thus, it is important for both parties to know the nature of the rights attached to each stick.

The development stick carries with it an implied easement of surface

2.5 (1971); 1 E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS §§ 15.1 to 15.9 (1987); 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 301 (1989) [hereinafter WILLIAMS & MEYERS]. When he revised the first edition, Professor Hemingway rewrote the list, omitting the right to develop. He replaced it with the right to receive shut-in royalty and the catch-all phrase "and other rights." R. HEMINGWAY, THE LAW OF OIL AND GAS § 2.1, at 34 (2d ed. 1983).

3. *Altman*, 712 S.W.2d at 118. Judge Morris used a similar list in describing the nature of the mineral estate in *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, 263-64 (1959). As with most matters relating to oil and gas, Judge Morris not only effectively analyzed the issues but also predicted the problems that would appear when the bundle of sticks was separated. *Id.* See Maxwell, *A Primer of Mineral and Royalty Conveyancing*, 3 UCLA L. REV. 449 (1956); Maxwell, *The Mineral-Royalty Distinction and the Expense of Production*, 33 TEX. L. REV. 463 (1955); Meyers, *The Effect of the Rule Against Perpetuities on Perpetual Nonparticipating Royalty and Kindred Interests*, 32 TEX L. REV. 369 (1954).

4. In non-ownership jurisdictions, the person would own an incorporeal mineral estate. 1 WILLIAMS & MEYERS, *supra* note 2, § 2.03.

5. Masterson, *A Survey of Basic Oil and Gas Law*, 4 INST. ON OIL AND GAS L. & TAX'N 219, 237 (1953).

use so that the mineral estate can be fully enjoyed by its holder.<sup>6</sup> The full mineral estate owner, however, rarely uses the development stick because it forms the basis for the leasing transaction. Through the lease, the full mineral estate owner transfers the development right to the lessee in exchange for the monetary benefits that accompany the transaction. If the owner of a mineral estate transfers the mineral estate, the underlying ownership of the development rights automatically follow.<sup>7</sup>

After the bundle of sticks is separated, the most controversial element of the mineral estate is the executive power or the power to lease.<sup>8</sup> As will be discussed later, the exact nature of the executive power and how it can be transferred has been the subject of several recent decisions which redefined the nature of the executive power, including its new classification as a property interest.<sup>9</sup> Once the executive power stick is stripped from the mineral estate, two labels attach: "non-executive mineral interest"<sup>10</sup> or "non-participating mineral interest."<sup>11</sup>

The three remaining sticks, the rights to receive royalties, delay rentals, and bonuses, comprise most of the economic benefits that flow from the leasing transaction.<sup>12</sup> In addition to these sticks, other economic benefits such as shut-in royalties or oil production payments fall into the economic benefit category. While it seems logical that the person possessing the power to lease would receive the bonus and delay

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6. *Harris v. Currie*, 142 Tex. 93, 99, 176 S.W.2d 302, 305 (1943); *Guffey v. Stroud*, 16 S.W.2d 527, 528 (Tex. Comm'n App. 1927, opinion adopted).

7. *Harris*, 142 Tex. at 99, 176 S.W.2d at 305. In *Harris*, the Texas Supreme Court stated that "the grant or reservation of minerals carries with it, as a necessary appurtenance thereto, the right to use so much of the surface as may be necessary to enforce and enjoy the mineral estate conveyed or reserved." *Id.*

8. For a general discussion of the executive power, see 1 E. KUNTZ, *supra* note 2, § 15.7 and 2 WILLIAMS & MEYERS, *supra* note 2, § 338. Although this element is usually referred to as the executive *right*, I will exercise academic prerogative and call it an executive *power*. Under the Restatement of Property, it is clearly a power and not a right because there is no correlative duty. Instead, exercising the power changes the legal relations of another party in respect to a property interest, and the person subject to the power is under a disability. RESTATEMENT OF PROPERTY § 3 (1936).

9. See *infra* notes 137-183 and accompanying text.

10. Williams & Meyers, *The Impact of Pooling and Unitization on Term Interests in Oil and Gas*, 11 Sw. L.J. 399, 401 (1957).

11. See, e.g., 1 E. KUNTZ, *supra* note 2, § 15.3; Comment, *Protecting the Rights of the Nonparticipating Mineral Owner*, 20 TULSA L.J. 433 (1985).

12. In all states but Kansas, the full mineral estate owner can carve out of the mineral estate a royalty interest that will be perpetual in nature even though no lease exists at the time of the conveyance. For representative Texas cases, see, e.g., *Watkins v. Slaughter*, 144 Tex. 179, 189 S.W.2d 699 (1945) and *Brown v. Smith*, 141 Tex. 425, 174 S.W.2d 43 (1943). Kansas has developed a position that transferring a perpetual royalty interest on lands not covered by an existing lease violates the rule against perpetuities. *Lathrop v. Eyestone*, 170 Kan. 419, 227 P.2d 136 (1951). See generally 1 E. KUNTZ, *supra* note 2, § 15.4, at 440.

rental payments, the parties are free to create non-participating bonus or delay rental interests.<sup>13</sup> These interests may be given to the owner of the royalty interest for a limited time, reverting after the expiration of the time period to the owner of the mineral interest.<sup>14</sup>

Given the choices available to owners of the full mineral interest, it is not surprising that problems arise when the written instrument does not fully explain the division of the original bundle of sticks that make up the full mineral interest. When confronting these problems, courts consistently try to carry out the intent of the parties to the deed insofar as they expressly define the division of the sticks. More difficult issues arise when courts fill in the lacunae where the drafters or the parties themselves were not clear in specifying which of the elements are granted and which are reserved. After a short excursion into some of the historical background of these issues, the problem areas as reflected in the most recent appellate court decisions from Texas and Oklahoma will be discussed.

### III. HISTORICAL BACKGROUND

#### A. *The Power to Separate the Sticks*

At first, the courts in Texas resisted severing each of the sticks from the mineral estate, often resulting in anomalous interpretations. For example, in *Klein v. Humble Oil & Refining Co.*,<sup>15</sup> the issue was whether the deed reserved a mineral interest or a royalty interest. If the deed reserved a royalty interest, the present owner would be entitled to an one-eighth share of production. If, however, a mineral interest was reserved, the present owner would only be entitled to one-eighth of an one-eighth share of production. The language of the original deed reservation stated that “[g]rantors . . . reserve . . . one-eighth (1/8) of all mineral rights . . . [but] grantors herein are not to participate in any oil lease or rental bonuses that may be paid on any lease . . . .”<sup>16</sup> Under the plain meaning of the language, the grantors expressly reserved a fractional share of the full mineral estate in the first phrase and then transferred at least two of the remaining four component elements. In today’s parlance a “non-executive mineral interest” would have been created.<sup>17</sup> The

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13. See, e.g., *Burns v. Audas*, 312 S.W.2d 417 (Tex. Civ. App.—Eastland 1958, n.w.h.); *Martin v. Snuggs*, 302 S.W.2d 676 (Tex. Civ. App.—Ft. Worth 1957, writ ref’d n.r.e.).

14. See, e.g., *Harriss v. Ritter*, 154 Tex. 474, 279 S.W.2d 845 (1955).

15. 126 Tex. 450, 86 S.W.2d 1077 (1935).

16. *Id.*

17. H. WILLIAMS AND C. MEYERS, OIL AND GAS TERMS 552 (6th ed. 1984)

phrase "any oil lease or rental bonuses that may be paid on any lease,"<sup>18</sup> however, is ambiguous. The first part of that phrase may be interpreted as an implied waiver of the executive power,<sup>19</sup> although another reading could treat the language as giving up not the power to lease but merely the rights to receive lease bonus or delay rental payments. Without a complete explanation, the court decided that the executive power had been transferred, leaving the grantors with only the development right and the right to receive royalty.<sup>20</sup>

The court's conclusion that the executive power was transferred is clearly defensible; its conclusion that the reservation was a royalty interest is not. The reasoning underlying the conclusions is somewhat contradictory: "it was the intention of the parties . . . that the mineral estate reserved was to become a royalty interest under any lease thereafter executed, and that [the grantee] had the authority to subject that interest to the terms of a lease."<sup>21</sup> This quote suggests that the deed reserved a non-executive mineral estate which still retained the right to receive royalty and the development right. The court ultimately concluded that the parties intended to reserve a royalty interest, entitling the grantor successors to a full one-eighth share of production.<sup>22</sup> This conclusion is inconsistent with the statement that a mineral estate was reserved which, upon execution of a lease, would become a royalty share so that the grantor's successors would receive one-eighth of one-eighth.

Two years later, *Schlittler v. Smith*<sup>23</sup> first recognized the concept that a full mineral estate could be broken down into its component parts and transferred individually.<sup>24</sup> As in *Klein*, the issue in *Schlittler* was whether the interest reserved by the grantor was a mineral or a royalty

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18. *Klein*, 126 Tex. at 452, 86 S.W.2d at 1078.

19. *Id.*

20. The *Klein* court used parole evidence to ascertain the intent of the grantors even though it did not state that the deed was ambiguous. After recording the deed, the grantor recorded an instrument. In the instrument, he labelled the reserved interest a "royalty interest," thus denying himself the right to join in the execution of the leases covering the acreage in question. *Klein*, 126 Tex. at 456, 86 S.W.2d at 1080. It is doubtful in today's jurisprudence that parole evidence would be admitted because the language of the deed is not legally ambiguous.

Williams and Meyers agree with the result in *Klein*, although not its analysis, based on their assumption that the transfer of the executive power and other economic benefits evinces an intent not to reserve a mineral estate. 1 WILLIAMS & MEYERS, *supra* note 2, § 304.10, at 501-04.

21. *Klein*, 126 Tex. at 457, 86 S.W.2d at 1080.

22. *Id.*

23. 128 Tex. 628, 101 S.W.2d 543 (Tex. Comm'n App. 1937, opinion adopted).

24. The concept is a natural consequence from the early decision that the surface and mineral estates could be severed and owned independently. *Humphreys-Mexia Co. v. Gammon*, 113 Tex. 247, 254 S.W. 296 (1923).

interest.<sup>25</sup> The deed reserved to the grantor "as oil and gas or other minerals are being produced an undivided one-half interest in and to the royalty rights on all of oil and gas . . . in, on and under or that may be produced . . . ."<sup>26</sup> Interpreting this reservation as a royalty interest, the court observed that "[a] conveyance of land without reservations would include all minerals and mineral rights. However, it is well settled that a grantor may reserve minerals or mineral rights and he may also reserve royalties, bonuses, and rentals, either one, more or all."<sup>27</sup>

Recognizing the severability of the component parts of the mineral estate places the burden on the mineral owner to specify which of the component parts are being granted or reserved. The result of this rule is at odds with the result in *Klein* because the rule follows the label attached to the interest as the determinative factor rather than which party possesses the constituent elements of a mineral estate. Where the grantor uses the term "royalty" in the reservation, the court, without resorting to any canons of construction, simply finds that a royalty interest has been reserved and that the remaining sticks of the full mineral interest have been transferred. In essence, the mineral estate conveyed is burdened by an outstanding royalty which must be satisfied before the mineral owner can receive the royalties that she may have negotiated in the leasing transaction.

Although the recognition in *Schlittler* that the component parts of a mineral estate can be divided freed alienability of the various sticks, it perpetuated the problems of deed interpretation. A comparison of *Watkins v. Slaughter*<sup>28</sup> with *Klein* illustrates the impact of *Schlittler* on mineral interest conveyancing. These cases also, however, lay the foundation for interpretation problems when compared with the later case of *Grisom v. Guertersloh*<sup>29</sup>

The deed in *Watkins* contained language similar to the deed in *Klein*. In both deeds, the grantors reserved a one-sixteenth interest in the

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25. See 1 WILLIAMS & MEYERS, *supra* note 2, §§ 301-303 for a complete discussion of the mineral-royalty issue, including its consequences and the factors used by the courts to determine which interest has been granted or reserved.

26. *Schlittler*, 128 Tex. at 629, 101 S.W.2d at 544. When interpreting this language, the court of civil appeals found the interest reserved was a mineral estate entitled to share in the executive power, bonuses, delay rentals, and royalties. *Id.*

27. *Id.*

28. 144 Tex. 179, 189 S.W.2d 699 (1945). For a later case applying the *Watkins* rationale, see *Arnold v. Ashbel Smith Land Co.*, 307 S.W.2d 818 (Tex. Civ. App.—Houston 1957, writ ref'd n.r.e.).

29. 391 S.W.2d 167 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.). See *infra* notes 34-42 and accompanying text.

minerals while conveying to the grantor the executive power and the rights to receive bonus and delay rentals.<sup>30</sup> As with *Klein*, the development right did not appear in the reservation clause.

Using the canon of interpretation that the deed must be considered as a whole, the *Watkins* court concluded that the grantor reserved a royalty interest despite the presence of the phrase "in and under." The issue in *Watkins* was whether the grantor was the owner of a non-executive mineral interest entitled to one-sixteenth of one-eighth of production or the owner of a full one-sixteenth. Without resorting to extrinsic evidence, the court found that the language of the deed describing the transfer of the executive power and the rights to receive bonus and delay rental indicated that the grantor intended to reserve only a royalty interest.<sup>31</sup> This conclusion is inconsistent with *Klein* but consistent with *Schlittler*. To reach this conclusion, the court used the canon of interpretation that the deed must be considered as a whole.<sup>32</sup> When applying the canon, however, the court ignored the use of the term "in and under," which historically has been interpreted to mean that a mineral estate has been transferred.<sup>33</sup>

After *Watkins* and *Klein*, one could conclude that, regardless of the language used, the party who possesses an interest that is bereft of the executive power and the rights to receive bonus and delay rental owns a royalty interest. That conclusion was not the result in *Grissom v. Guertersloh*.<sup>34</sup>

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30. 144 Tex. at 181, 189 S.W.2d at 699. The deed provided in part:

[T]he grantor retains title to a 1/16 interest in and to all of the oil, gas and other minerals in and under and that may be produced from said land; . . . the grantor . . . shall not receive any part of the money rental paid on any future lease; and the grantee . . . shall have authority to lease said land and receive the cash bonus and rental; and the grantor . . . shall receive the royalty retained herein only from actual production of oil, gas or other minerals . . . .

*Id.*

31. *Id.* at 182-83, 189 S.W.2d at 700.

32. *Id.*

33. 1 WILLIAMS & MEYERS, *supra* note 2, § 304.5, at 477. Williams and Meyers state: "Perhaps the most common method of creating a mineral interest is by a grant or reservation of 'oil, gas and other minerals in and under and that may be produced from' the land." *Id.* See, e.g., Halbert v. Green, 156 Tex. 223, 293 S.W.2d 848 (1956); Richardson v. Hart, 143 Tex. 392, 185 S.W.2d 563 (1945).

The court in *Watkins* also did not address the deed's failure to mention the development rights and access and ingress. In *Miller v. Speed*, 248 S.W.2d 250 (Tex. Civ. App.—Eastland 1952, n.w.h.), the deed reserved an undivided 1/24 of oil, gas, and other minerals "produced, saved and made available for market." *Id.* at 251. This language clearly indicates that a royalty interest was intended while the language in *Watkins* is equivocal because the deed in *Watkins* used the phrase "in and under."

34. 391 S.W.2d 167 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.).



The court in *Grissom* confronted the issue of the quantum of production from deed language similar to *Watkins*. In *Grissom*, the deed provided:

[R]eserving and excepting . . . an undivided one-sixteenth 1/16th of all the oil, gas and other minerals in and under the tract of land hereby conveyed; But the grantors waive all interest in and to all rentals or other consideration which may be paid to grantees for any oil and gas lease . . . .<sup>35</sup>

The first clause reserves a mineral interest while the second clause transfers the rights to receive bonus and delay rental. No mention is made of the executive power, the development right, or the right to receive royalties. The grantors wanted an undivided one-sixteenth while the grantees argued that the grantors were entitled only to one-sixteenth of one-eighth.<sup>36</sup>

Although stripped of three of its five major elements, the court concluded that the reserved interest remained a mineral estate. The grantors primarily relied on *Watkins* and *Klein* to claim that the deed reserved a royalty interest.<sup>37</sup> As in *Watkins*, the deed in *Grissom* conveyed two sticks of the mineral estate. The grantors also conceded that the grantees possessed the executive power, undoubtedly to strengthen their position that only a royalty interest was reserved.<sup>38</sup> The court disagreed with the grantees' reliance on *Watkins* through a highly technical, if not arcane, view of the deed language in *Watkins*. It characterized the *Watkins* result as saying that the added terms "that may be produced" and "actual production" signified an intent to reserve only a royalty interest.<sup>39</sup> Rather than rely on *Watkins*, the *Grissom* court treated the "in and under" language as signifying that a mineral estate was reserved,<sup>40</sup> even though the deed in *Watkins* also contained the term "in and under" and reached the opposite conclusion.<sup>41</sup>

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35. *Id.*

36. In *Grissom*, because the grantor did not execute the lease, the court was forced to decide the issue of whether the grantee possessed the executive power over the 1/16 mineral estate, and ultimately if the reserved estate was a mineral estate. *Grissom*, 391 S.W.2d at 170. For a more complete discussion of problems relating to the executive power, see *infra* notes 137 to 208 and accompanying text. See generally 1 WILLIAMS & MEYERS, *supra* note 2, § 338.

37. *Grissom*, 391 S.W.2d at 168.

38. *Id.* at 171.

39. *Id.*

40. *Id.* at 169.

41. *Grissom*, 391 S.W.2d at 171. In *Miller v. Speed*, 259 S.W.2d 235 (Tex. Civ. App.—Eastland 1952, n.w.h.), the deed used the term "produced [and] saved," which typically signifies a royalty interest. *Id.* at 236, 238. In *Klein v. Humble Oil & Ref. Co.*, 126 Tex. 450, 86 S.W.2d 1077 (1935), neither the term "in and under" nor "produced and saved" was used. *Id.* at 452-53, 86 S.W.2d at

It is difficult to reconcile *Grissom* and *Watkins*. The *Grissom* court's highly technical reading of the deed language is artificial. If the court is searching for the intent of the parties, the language of the deeds in both cases seem to indicate that the result should be the same. *Grissom* does, however, reinforce the *Schlittler* position that the mineral estate can be broken down into its component elements without losing its basic character.<sup>42</sup>

### B. *The Development Right*

Only a few early cases involve attempted transfers of interests that specifically mention the development right in the deed. In *Williams v. J. & C. Royalty Co.*,<sup>43</sup> the deed reserved "one-half of the royalty retained" in a pre-existing lease but later stated that the grantor was given access and development rights.<sup>44</sup> The grantee argued that the deed created a royalty interest which terminated when the existing lease terminated.<sup>45</sup> Disagreeing, the court of appeals emphasized that a retention of the development right revealed an intent that the interest would survive the

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1078. The *Miller* court distinguished *Klein* primarily because the *Klein* court admitted parole evidence. In *Grissom*, both parties agreed that the language was unambiguous; therefore, parole evidence was not admissible. *Grissom*, 391 S.W.2d at 168.

42. In *Loeffler v. King*, 149 Tex. 626, 236 S.W.2d 772 (1951), the Texas Supreme Court interpreted an instrument which purported to transfer one-sixth of the one-eighth royalty in the first clause but then stated that the grantee was, in addition, to receive one-sixth of the money rentals, all future rentals, and lease interests in the event the existing lease terminated. *Id.* at 628-29, 236 S.W.2d at 773. The court disregarded the label "royalty" because it felt that tying in the executive rights (lease interests) and rentals showed an intent to transfer a mineral estate. *Id.* In dictum, the court suggested that all of the elements of the mineral estate had passed to the grantee which would have included the unmentioned development right and right to bonus. *Id.*

43. 254 S.W.2d 178 (Tex. Civ. App.—Eastland 1953, writ ref'd). It is important to remember that the power to lease and the development rights are separate sticks. For example, *A* retains a one-half non-executive mineral interest in a deed giving the executive power over the entire interest to *B*, who also gets a one-half mineral interest. If *B* develops the premises herself without a lease, *A* does not get a royalty payment but is entitled to one-half of the proceeds from production less one-half of the costs incurred. *Bullard v. Broadwell*, 588 S.W.2d 398 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.). If *A* clearly retains a fractional mineral interest through the appropriate language, but has given the executive power to *B*, *A* should be entitled to develop the mineral estate himself, while accounting to his co-tenant for the amount of production less the cost of production.

While *Williams* found that the use of the term "royalty" was not dispositive in resolving the mineral-royalty issue, *In re Hite* found that the use of the term "royalties" was important in limiting the scope of a devise to royalties in existence at the time of the testatrix's death. The devisees of the royalty interest were therefore not entitled to receive other unleased mineral interests in existence at the time of the testatrix's death nor royalties which accrued under a lease executed after the testatrix's death. 700 S.W.2d 713, 717 (Tex. App. — Corpus Christi 1985, writ ref'd n.r.e.).

44. *Williams*, 254 S.W.2d at 178-79.

45. *Id.* at 179.

termination of the existing lease.<sup>46</sup> The court also indicated that the retained interest was a mineral interest even though the parties used the term "royalty interest."<sup>47</sup>

### C. *The Executive Power*

#### 1. Separation of the Executive Power from the Rights to Receive Bonus and Delay Rental

Several early cases involving the executive power created interpretation problems that remain unresolved. In *Burns v. Audas*,<sup>48</sup> the deed specifically gave the grantee a full executive power over the grantor's reserved fractional mineral interest.<sup>49</sup> No mention was made of how the bonus or delay rental sticks were to be divided. Although the grantee executed a lease and received over \$4,000 in bonus money, he did not proportionately distribute the bonus money to the grantors.<sup>50</sup> The grantors sued for their share claiming that they had not transferred away their right to bonus or delay rentals.<sup>51</sup>

Following the basic rationale of *Schlittler*, the court in *Burns* agreed with the grantors that the full mineral estate is freely severable and if a mineral estate is retained, all incidents of the mineral estate remain with the mineral owner except those specifically transferred.<sup>52</sup> In *Burns*, the grantor retained four of the elements of the mineral estate, other than the executive power.<sup>53</sup> Regardless of the economic practicality of separating the rights to receive bonus and delay rental from the power to lease, the *Burns* court endorsed the position that where the language clearly retains or transfers a mineral estate, the severance of the executive power alone will not change the status of that mineral estate to a royalty interest.<sup>54</sup>

*Martin v. Snuggs*<sup>55</sup> reinforced the position in *Burns* that the mineral

46. *Id.* at 179-80.

47. *Id.* at 180.

48. 312 S.W.2d 417 (Tex. Civ. App.—Eastland 1958, no writ).

49. *Id.* at 419.

50. *Id.* at 418.

51. *Id.* An earlier Louisiana case, *Ledoux v. Voorhies*, took the position that in the absence of language to the contrary the person owning the executive right also owns the rights to bonus and delay rentals. The court reasoned that the executive power and the rights to receive bonus and delay rentals were so intertwined that the parties must have intended to keep them together unless they expressly stated otherwise. 222 La. 200, 206-07, 62 So. 2d 273, 276-76 (1952). If *Ledoux* is followed, then the non-executive mineral interest is probably transformed into a royalty interest although the issue of the correct fractional share and the development right remains.

52. *Burns*, 312 S.W.2d at 420.

53. *Id.* at 419-20.

54. *Id.* at 420.

55. 302 S.W.2d 676 (Tex. Civ. App.—Ft. Worth 1957, writ ref'd n.r.e.).

estate owner may retain the executive power, even if the deed transferred the rights to bonus and delay rentals. In *Martin*, the grantor reserved "an undivided one-half interest in and to all oil and mineral rights in and under the land."<sup>56</sup> This phrase clearly reserves a mineral estate. A later clause, however, specifies that the grantor could not participate in cash bonus or delay rental payments. The grantee executed a lease purporting to cover both the granted and the reserved interest. The court followed the rationale of *Burns*, again emphasizing that the individual component parts of the mineral estate are freely severable. The court concluded:

The owner of minerals has the right to execute oil, gas and mineral leases, selecting the lessee and fixing the terms of the lease, and to receive therefrom the bonuses, delay rentals and royalties. *All these rights are transferable and a grantor can transfer all of them, or only part of them, but in reserving the minerals, all are retained that are not specifically granted.*<sup>57</sup>

The *Martin* and *Burns* decisions confirm two important conveyancing principles found in most of the earlier Texas decisions. First, each of the component elements or sticks of the full mineral estate is freely severable if so stated. Second, if the language of the deed creates a mineral estate in either the grantor or the grantee, that party possesses all of the elements or sticks not expressly excluded. The cases do not resolve, however, the underlying conflicts between *Klein* and *Watkins* and between *Schlittler* and *Grissom*.

## 2. The Classification of the Executive Power

The final historical note relates not to a conveyancing issue per se but to a title or status question; namely, what is the proper classification for a severed executive power? Prior to 1962, most Texas courts which addressed the issue treated the executive power as a power coupled with

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56. *Id.*

57. *Id.* at 678 (quoting *Westbrook v. Ball*, 222 Miss. 788, 77 So. 2d 274, 275 (1955)) (emphasis in original).

The result in *Martin* does not follow the rationale of *Hudgins v. Lincoln Nat. Life Ins. Co.*, 144 F. Supp. 192 (E.D. Tex. 1956). The grantor retained a one-half interest in the "oil, gas and other minerals in, under and on said property" but transferred the right to receive the entire bonus and delay rental payments. *Id.* at 193. The court essentially transformed the retained mineral interest into a royalty interest by not only inferring that the executive power passed to the grantee along with the rights to receive bonus and delay rentals but also suggesting that the unmentioned development right also transferred. The *Hudgins* result transformed the reservation of a mineral estate into a reservation of a royalty interest, thereby suggesting that whoever owns the executive power and the rights to receive bonus and delay rental also owns the full mineral estate notwithstanding the language used by the parties. *Hudgins* is therefore consistent with *Klein* and *Watkins* but contrary to *Schlittler* and *Grissom*.

an interest.<sup>58</sup> For example, in *Odstrcil v. McGlaun*,<sup>59</sup> the grantor reserved a one-half mineral estate but transferred to the grantee the executive power.<sup>60</sup> The grantor also expressly reserved the rights to receive bonus and delay rental payments.<sup>61</sup> Describing the nature of the interest received by the grantee, the court concluded that "[the interest] constituted a power coupled with an interest which could not be revoked at the will of the [grantors]."<sup>62</sup> In addition to prohibiting the grantor from revoking the grant of the executive power, the court also denied the grantor the right to seek a partition since that right would interfere with the express terms of the deed and the allocation of the elements of the mineral estate.<sup>63</sup>

The classification of the executive power as a power coupled with an interest changed with *Pan American Petroleum Corp. v. Cain*.<sup>64</sup> In *Cain*, the grantor transferred a one-fourth mineral interest while reserving the power to lease the entire mineral estate.<sup>65</sup> When the grantor died, the issue arose of whether the executive power died with him or passed to his heirs.<sup>66</sup> The court suggested that the interest must be a possessory estate in order for a power to be coupled with an interest.<sup>67</sup> Because the executive owner does not own a possessory estate in the non-executive

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58. See, e.g., *Superior Oil Co. v. Stanolind Oil & Gas Co.*, 150 Tex. 317, 240 S.W.2d 281 (1951), *aff'g*, 230 S.W.2d 346 (Tex. Civ. App.—Eastland 1950); *Allison v. Smith*, 278 S.W.2d 940 (Tex. Civ. App.—Eastland 1955, writ ref'd n.r.e.); *Odstrcil v. McGlaun*, 230 S.W.2d 353 (Tex. Civ. App.—Eastland 1950, n.w.h.).

59. 230 S.W.2d 353 (Tex. Civ. App.—Eastland 1955, n.w.h.).

60. *Id.* at 354.

61. *Id.*

62. *Id.*

63. *Id.* at 354-55. In *Allison v. Smith*, 278 S.W.2d 940 (Tex. Civ. App.—Eastland 1955, writ ref'd n.r.e.), the owner of the non-executive mineral estate raised the issue of what interest was coupled with the executive power. The grantor reserved the executive power and transferred to the grantee a one-half mineral estate along with the rights to receive bonus, delay rental, and royalty. *Id.* at 941. A successor in interest to the grantor executed a lease, but the lessee failed to make a proper delay rental payment to a successor in interest of the grantee. *Id.* at 941-43. The lease terminated as to that grantee, but the executive's interest was still the subject of the lease. The grantee's successor argued that the executive's attempt to re-lease his interest was void because there was no possessory interest with which the executive power could be coupled. *Id.* at 943. The executive's mineral estate had been transferred to the lessee who had the possessory interest at the time the second lease was executed. *Id.* The court concluded, however, that terminating the first lease did not revoke the executive power and, in addition, while the executive power is a power coupled with an interest, the executive's reversionary and royalty interests in the corpus prevented the power from being revoked. *Id.* at 946.

64. 163 Tex. 323, 355 S.W.2d 506 (1962). Recently, *Day & Co. v. Texland Petroleum, Inc.*, 786 S.W.2d 667 (Tex. 1990), overruled *Pan American Petroleum*.

65. 163 Tex. at 324, 355 S.W.2d at 507.

66. *Id.* The deed did not specify that the executive power was for the benefit of heirs, assigns, or devisees. *Id.*

67. *Id.* at 326, 355 S.W.2d at 507.

mineral estate subject to the power, the court concluded that common law rules dictated that the executive power was not a classic power coupled with an interest.<sup>68</sup> In addition, the executive power is clearly not a possessory estate in land; therefore, it was not inheritable unless the parties stated otherwise.

#### IV. MODERN DEVELOPMENTS IN MINERAL INTEREST CONVEYANCING

##### A. *The Modern Mineral-Royalty Debate*

###### 1. The Approach in Texas

The mineral-royalty issue was the focal point of *Altman v. Blake*,<sup>69</sup> which discussed many of the historical trends in the area of conveying the independent elements of the full mineral estate. The deed provided in part:

W.R. Blake, Jr. . . . does hereby grant . . . unto W.R. Blake, Sr. . . . 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 . . . . *But does not participate in any rentals or leases* . . . with the rights of ingress and egress at all times for the purpose of mining, drilling, exploring, operating and developing . . . .<sup>70</sup>

Through this deed, Blake, Jr., used traditional mineral interest phrases to reserve his interest and transferred the executive power and the right to receive delay rentals.<sup>71</sup> The deed also transferred the development right but mentioned neither the right to receive bonus nor the right to receive royalty.<sup>72</sup> Blake, Jr., then sold the underlying acreage to Clark through a deed which referred to the interest of Blake, Sr., as a one-sixteenth, non-participating mineral interest.<sup>73</sup> Years later, a dispute arose when the heirs of Clark claimed that the reserved interest was a mineral interest while the heirs of Blake, Sr., claimed that it was a royalty interest.<sup>74</sup>

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68. *Id.* at 329, 355 S.W.2d at 508-09. The court stated that the parties could choose to make the executive power assignable, devisable, or inheritable, but because there was no language in the deed to that effect, the interest would not be treated as an inheritable property interest. The court distinguished earlier cases because the words "heirs and assigns" appeared in the deed language relating to the executive power. *Id.* at 328, 355 S.W.2d at 510-11.

69. 712 S.W.2d 117 (Tex. 1986).

70. *Id.* at 117-18 (emphasis in original).

71. *Id.* at 118.

72. *Id.*

73. *Id.*

74. *Id.*

The heirs of Blake, Sr., relied on *Watkins*,<sup>75</sup> in which the Texas Supreme Court interpreted similar but not identical language to create a royalty interest. In *Watkins*, the deed granted a 15/16 mineral estate and reserved a one-sixteenth interest using mineral estate language. It also transferred the executive power and the rights to receive bonus and delay rental to the grantee.<sup>76</sup> Under these circumstances, *Watkins* found that only a royalty interest was reserved.<sup>77</sup>

The court in *Altman* could have distinguished *Watkins* by emphasizing the difference between the language in each deed because the deed in *Watkins* did not mention the right of access.<sup>78</sup> If any of the attributes of a mineral estate are essential, it must be the development or access right because it gives the estate its required possessory nature. Where the parties specifically agree that one possesses an interest containing the development right, that interest must be labelled the mineral estate. In *Altman*, unlike *Watkins*, the reserved interest holder owned a possessory interest through the right to mine, explore, develop, and operate.

Instead, the *Altman* court analyzed a series of cases undercutting the *Watkins* position that the person controlling the executive power and the rights to receive bonus and delay rental owns the mineral estate.<sup>79</sup> The most important of these cases is *Delta Drilling Co. v. Simmons*.<sup>80</sup> Through an instrument entitled a "mineral deed" the grantor transferred a one-fourth undivided interest in the minerals "in and under" the described lands,<sup>81</sup> as well as the development right.<sup>82</sup> The grantor, however, specifically retained the "lease interest and all future rentals."<sup>83</sup> Using an earlier Texas Supreme Court decision,<sup>84</sup> the court interpreted the phrase "lease interest" to mean the executive power when describing

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75. *Watkins v. Slaughter*, 144 Tex. 179, 189 S.W.2d 699 (1945). See also *supra* notes 28 to 33 and accompanying text.

76. *Id.* at 781, 189 S.W.2d at 700.

77. *Id.* at 781-82, 189 S.W.2d at 700.

78. *Altman*, however, distinguished the *Watkins*' deed from the deed at issue on the ground that the deed in *Watkins* "unequivocally stated that the grantor should 'receive' the royalty retained herein only from actual production." *Altman*, 712 S.W.2d at 119.

79. *Id.*

80. 161 Tex. 122, 338 S.W.2d 143 (1960). The other two cases discussed at length in *Altman* are *Etter v. Texaco, Inc.*, 371 S.W.2d 702 (Tex. Civ. App.—Waco 1963, writ ref'd n.r.e.) and *Grisson v. Gutersloh*, 391 S.W.2d 167 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.). The *Grisson* case is discussed at length at the text accompanying notes 34 to 42 *supra*.

81. *Id.* at 123-24, 338 S.W.2d at 144.

82. *Id.* at 125, 338 S.W.2d at 145.

83. *Id.* The mineral estate at the time of the deed was subject to an existing lease, and the deed contained a "subject-to" clause. *Id.*

84. *Garrett v. Dils Co.*, 157 Tex. 92, 299 S.W.2d 904 (1957). The deed also did not mention who owned the right to receive bonus. *Id.*

the interest held by the party after an existing lease terminated. Thus, the grantor possessed the executive power and the right to delay rentals. Because *Watkins* labelled the interest owned by the party possessing these same rights a mineral interest, it follows that the grantor in *Delta Drilling* likewise owned a mineral interest. The court, however, refused to rely on the inclusion of the development right as the linchpin of its conclusion and, in fact, did not refer to *Watkins*. The court simply ignored the *Watkins* holding and labelled the grantee's interest a mineral estate.<sup>85</sup>

The heirs of Blake, Sr., in *Altman* sought to distinguish the damning effect of *Delta Drilling* by interpreting their deed as reserving the development right despite express language to the contrary. According to the heirs of Blake, Sr., the development right and the executive power must be held by the same person.<sup>86</sup> The court did not answer this contention because the court in *Delta Drilling* found that a mineral estate could exist without the executive power.<sup>87</sup> Thus, even if the executive owner impliedly owned the development right, the non-executive interest was still a mineral interest rather than a royalty interest.<sup>88</sup>

*Altman* answers several questions about conveying the constituent elements of a mineral estate. Courts will look first to the manner in which the parties expressly divided the elements to determine if the interest is a royalty interest or a mineral interest. Courts also will examine traditionally used clauses that signify one or the other estate. Merely because an estate is stripped of the executive power and the rights to

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85. See *Delta Drilling Co.*, 161 Tex. at 126-27, 338 S.W.2d at 146. A subsidiary issue decided by the court was whether the non-executive mineral interest owner was entitled to share pro rata in the executive's negotiated overriding royalty interest. Although not deciding whether sharing pro rata violated the executive's duty to the non-executive, the court concluded that the mineral owner/grantee could share in all royalty provided in the lease whether it was denominated an overriding royalty or a landowner royalty. The mineral owner was not deprived of the right to receive royalty. Therefore, the mineral owner was entitled to receive his pro rata share of all royalty provided for in the lease. *Id.* at 126-27, 338 S.W.2d at 146-47. For a discussion of the relationship between the executive and non-executive mineral estate, see 2 WILLIAMS & MEYERS, *supra* note 2, § 339 and Smith, *Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right*, 64 TEX. L. REV. 371 (1985).

86. *Altman*, 712 S.W.2d at 119.

87. *Id.* The *Altman* court also cited *Etter v. Texaco*, 371 S.W.2d 702 (Tex. Civ. App.—Waco 1963, writ ref'd n.r.e.) and *Grissom v. Guetersloh*, 391 S.W.2d 167 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.). *Id.*

88. It is hard to imagine that in an ownership-in-place jurisdiction, such as Texas, that a court would find that an owner of an interest which does not have the development right is a mineral estate owner. Of all the constituent elements, only the development right gives the owner the right to possess a corporeal estate. The executive power, on the other hand, merely gives the owner the right to transfer the possessory interest to a third party, thereby stripping the former owner of her possessory rights.



receive bonus or delay rental, the mineral-royalty issue will not be resolved in favor of the royalty interest. Thus, while not directly overruled, *Altman* severely restricts *Watkins* to its facts.

After *Schlittler* and *Altman*, it is indisputable that the executive power can be severed from the mineral estate and the estate remains a mineral interest rather than a royalty interest. The recent case of *Buffalo Ranch Co. v. Thomason*<sup>89</sup> takes the *Schlittler* and *Altman* proposition further by suggesting that even where the parties expressly transfer away both the executive power and the development right, the reserved interest remains a mineral estate. The deed in *Buffalo Ranch Co.* stated:

[Grantors reserve] an individual one-half (1/2) interest in and to all of the oil, gas and other minerals . . . (the "Reserved Mineral Interest") and Grantors . . . reserve . . . an undivided one-half (1/2) interest in and to all of the royalty rights . . . . Grantees . . . shall have and enjoy exclusive, full and complete dominion and control over any executory rights . . . including but not limited to, the rights either to develop or not develop, or lease or not lease . . . .<sup>90</sup>

Despite the label of "Mineral Interest," the grantees argued that the reserved interest was a royalty interest<sup>91</sup> because transferring not only the executive power but also the development right "stripped" the reserved interest of its possessory character.<sup>92</sup> Ignoring other cases where courts rejected the label as controlling,<sup>93</sup> the court relied heavily on the use of "Mineral Interest" to conclude that the reserved interest was a mineral interest. Thus, transferring the development right and the executive power to the grantee did not necessarily strip the reserved estate of its mineral interest character.<sup>94</sup>

The recent case of *Prairie Producing Co. v. Schlachter*<sup>95</sup> followed the *Altman* rationale to determine the nature of the interest.<sup>96</sup> The original

89. 727 S.W.2d 331 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

90. *Id.* at 333.

91. In *Etter v. Texaco, Inc.*, the court found that although the instrument was labelled a "royalty contract," the interest that was conveyed was a mineral estate. 371 S.W.2d 702, 705 (Tex. App.—Waco 1963, writ ref'd n.r.e.).

92. *Buffalo Ranch Co.*, 727 S.W.2d at 333-34.

93. See, e.g., *Atlantic Ref. Co. v. Beach*, 78 N.M. 634, 436 P.2d 107 (1968) ("mineral deed" was actually a royalty transfer); *Arkansas-Oklahoma Gas Co.*, 222 Ark. 213, 258 S.W.2d 51 (1953) (same). See also 1 WILLIAMS & MEYERS, *supra* note 2, § 304.1.

94. *Buffalo Ranch Co.*, 727 S.W.2d at 334.

95. 786 S.W.2d 409 (Tex. App.—Texarkana 1990, writ ref'd).

96. *Schlachter* also raises issues relating to the "two-grant" theory and the impact of *Alford v. Krum*, 671 S.W.2d 870 (Tex. 1984), on the continued viability of *Hoffman v. Magnolia Petroleum Co.*, 273 S.W. 828 (Tex. Comm. App. 1925, opinion adopted). See also *Hawkins v. Texas Oil & Gas Corp.*, 724 S.W.2d 878 (Tex. App.—Waco 1987, writ ref'd n.r.e.).

deed in *Schlachter* purported to transfer one-half of the mineral estate to the grantees with a specific clause granting the development right.<sup>97</sup> The deed contained a "subject-to" clause because of an existing lease which conveyed one-half of all lease benefits except for the right to receive delay rentals and bonus.<sup>98</sup> There was also a "future lease" clause which had a similar disposition of the component parts of the mineral estate.<sup>99</sup> The deed, however, did not mention the executive power. As successors in interest to the grantor, the Schlachters sued the lessees of the grantees.<sup>100</sup> They claimed that the deed only transferred a royalty interest and therefore the leasing of the lands in question by the grantees was void.<sup>101</sup>

Disagreeing with the Schlachters, the court found that the deed transferred a mineral estate because the parties used the traditional words to describe a mineral estate, "in and under and that might be produced," and titled the instrument "Mineral Deed."<sup>102</sup> Following the *Altman* rationale, the full mineral estate was transferred by the first clause of the deed and the later clauses expressly retained two of the five sticks. Applying the "greatest interest" canon, the court agreed that in the absence of language to the contrary all sticks are conveyed.<sup>103</sup> Here, the grantors expressly conveyed the development right and the right to receive royalty, and by application of the canon, impliedly transferred the executive power. Those three elements are sufficient to show an unequivocal intent to transfer a mineral rather than a royalty interest. The court would not imply the anomalous result suggested by the Schlachters that a royalty interest would be given the development right.<sup>104</sup> Thus, a mineral interest shorn of the right to receive bonus and delay rentals was conveyed to the grantees, who had the power to lease that interest.

Finally, *Brady v. Security Home Investment Co.*<sup>105</sup> defined the extent of the "greatest estate" canon's application in the royalty-mineral debate. In *Brady*, the grantor of several deeds owned a royalty interest and also

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97. *Schlachter*, 786 S.W.2d at 411.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 412.

103. *Id.* See also *Day & Co. v. Texland Petroleum, Inc.*, 786 S.W.2d 667 (Tex. 1990); *Tenneco Oil Co. v. Alvord*, 416 S.W.2d 385 (Tex. 1967); *Schlittler v. Smith*, 128 Tex. 628, 101 S.W.2d 543 (Tex. Comm'n App. 1937, opinion adopted).

104. *Id.* See also *Day & Co. v. Texland Petroleum, Inc.*, 786 S.W.2d 667 (Tex. 1990); *Tenneco Oil Co. v. Alvord*, 416 S.W.2d 385 (Tex. 1967); *Schlittler v. Smith*, 128 Tex. 628, 101 S.W.2d 543 (Tex. Comm'n App. 1937, opinion adopted).

105. 640 S.W.2d 731 (Tex. App.—Houston [14th Dist.] 1982, n.w.h.).

received the rights to share in bonus and delay rentals.<sup>106</sup> The grantor then sold fractional shares of his royalty interest.<sup>107</sup> These deeds did not grant nor reserve the rights to receive bonus or delay rentals.<sup>108</sup> Nonetheless, the grantees argued that they received all of the interests owned by the grantor, including the bonus and delay rental rights.<sup>109</sup>

Rejecting the applicability of the "greatest estate" canon beyond the constituent elements of the interest being transferred, the court found that the grantor retained the rights to receive bonus and delay rentals. The grantees claimed that application of the "greatest interest" canon gave them the rights to bonus and delay rental because they were not specifically reserved from the grant.<sup>110</sup> The "greatest estate" canon declares that a deed passes whatever interest the grantor possesses unless express words evince an intent to convey a lesser estate.<sup>111</sup> Disagreeing with the grantees, the court limited the application of the canon to the transfer of constituent elements of the mineral interest.<sup>112</sup> Because a royalty interest was the subject of the conveyance and the rights to bonus and delay rentals are not elements of that interest, the canon did not apply.<sup>113</sup> The anomalous result was that the grantor retained rights to receive bonus and delay rental payments even though he retained no interest in either the mineral or royalty estate.<sup>114</sup> Such a result is consistent with the *Schlittler* and *Altman* holdings but probably disregards the actual intent of the parties.

## 2. The Approach in Oklahoma

Like Texas, Oklahoma has struggled with the mineral-royalty issue and the questions of how and when the constituent elements of the mineral estate can be independently transferred. In 1987, the Oklahoma Court of Appeals in *Sharp v. Gayler*<sup>115</sup> mirrored the *Altman* approach of

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106. *Id.* at 733.

107. *Id.*

108. *Id.* at 733-34.

109. *Id.* at 733.

110. *Id.*

111. The "greatest estate" canon was used by the court in *Day & Co. v. Texland Petroleum, Inc.*, 786 S.W.2d 667 (Tex. 1990). See *infra* notes 163-183 and accompanying text.

112. *Brady*, 640 S.W.2d at 734.

113. *Id.*

114. The court also distinguished several cases which suggest that where a party has retained no interest in the estate there can be no claim for delay rentals or bonuses. See, e.g., *Humble Oil & Ref. Co. v. Harrison*, 146 Tex. 216, 205 S.W.2d 355 (1947); *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302 (1943); *Alfrey v. Ellington*, 285 S.W.2d 383 (Tex. Civ. App.—Eastland 1955, writ ref'd n.r.e.).

115. 737 P.2d 120 (Okla. Ct. App. 1987).

having independently transferable constituent elements of the mineral estate.<sup>116</sup> The court also recognized that each of the constituent elements may be separately transferred.<sup>117</sup>

By leaving the bonus right out of the language of the deed, the parties created interpretation problems for the court. The deed stated:

[Grantors reserve an] undivided one-half (1/2) interest in and to the oil and natural gas in, to and under the above described lands . . . . [Grantors] further grant . . . to [grantee] exclusive, sole and absolute rights to explore for, develop, produce, transport, and market and/or lease for said purposes, all of the oil, gas and other minerals . . . ."<sup>118</sup>

Successors to the grantee leased the premises and refused to share the \$146,000 lease bonus.<sup>119</sup> The grantors argued that they retained the right to bonus and were thus entitled to a share proportionate to their interest. The language of the deed does not provide express guidance to resolve the issue. Although it retains a one-half mineral interest while clearly giving the full executive power to the grantee, no mention is made of royalties, delay rentals, or bonus.<sup>120</sup>

In order to decide who possessed the bonus right, the *Sharp* court was forced to choose between two contradictory interpretation canons. The first canon is a statutorily mandated "greater estate" rule whereby a transfer of an interest gives the grantee all of the interest in the premises described owned by the grantor.<sup>121</sup> Application of the canon requires a grantor who is reserving a non-participating mineral interest to specify what rights are reserved. But a line of Oklahoma cases run opposite to the rule by construing mineral deeds and leases against the lessee or grantee so that rights claimed by those parties must be "conferred in

116. *Id.* at 122. The court said:

[T]he ownership of mineral interest 'has distinct incidents of ownership with respect to future leases, and [the owner] may alienate such incidents or property rights in whole or in part. Such incidents are: (a) the power to lease, (b) the right to receive bonuses, (c) the right to receive delay rentals, and (d) the right to receive royalties.

*Id.* at 122 (citations omitted).

117. *Id.*

118. *Id.* at 121.

119. *Id.*

120. Granting the development rights over the entire estate raises fundamental questions of whether there is an irreconcilable conflict between the mineral interest language and the development right language. How can the grantor reserve a mineral estate if she has no development rights? As noted earlier, the development right should be the *sine qua non* of the mineral estate, but in *Sharp*, the language conveying that right to the grantee is ignored by the court. See *supra* note 7 and accompanying text.

121. OKLA. STAT. tit. 16, § 19 (1981). The statute provides that deeds "shall convey to the grantee . . . the whole interest of the grantor in the premises described . . ." *Id.*

direct terms."<sup>122</sup> The court found the common law canon controlling. Thus, the grantees received only the expressly stated executive power.<sup>123</sup>

The unconventional result in *Sharp* reveals that the court should have applied the "greatest estate" statutory canon rather than the common law rule. The dissent argued that the statutory canon applied because it was used in several Oklahoma decisions which allowed the parties to separate the right to bonus from the executive power so long as it was done by clear and express language.<sup>124</sup> By applying the "confer in direct terms" rule instead, the majority opinion ignored the fact that the development right to the entire mineral estate was also given expressly to the grantee.<sup>125</sup> Normally, in order to own a non-participating mineral interest rather than a royalty interest, the owner must possess the development or access right.<sup>126</sup> Although the fraction reserved in *Sharp* made it doubtful that the grantor intended to reserve a royalty interest, the majority decision resulted in a non-participating mineral interest stripped of its development right, which is not really a true mineral interest.

When resolving a mineral-royalty issue caused by unclear deed language, Oklahoma courts admit parol evidence more often than their Texas counterparts. Texas takes a very limited view of what constitutes ambiguous language. That view results in the rare admission of parol evidence and the use of inconsistent canons of construction to resolve issues of ambiguity. Oklahoma, on the other hand, tends to find ambiguous language more often, resulting in the more frequent admission of parol evidence.

The recent court of appeals decision of *Shuler v. Barnes*<sup>127</sup> reflects the parol evidence approaches of Texas and Oklahoma in the context of the classic mineral-royalty issue. The contract for deed contained the following clause:

[Grantors] reserving . . . an undivided 1/2 of the production of mineral from said land; with rights of ingress and egress, they to receive a full 1/2 of 1/8th of all mineral production, but not to share in delay rents

122. *Sharp*, 737 P.2d at 122 (citing *Hammett Oil Co. v. Gypey Oil Co.*, 95 Okla. 235, 218 P. 501 (1921)). See also *George v. Curtain*, 108 Okla. 281, 236 P. 876 (1925).

123. *Sharp*, 737 P.2d at 122 (citing several Texas cases, including *Houston v. Moore Inv. Co.*, 559 S.W.2d 850 (Tex. Civ. App.—Houston [1st Dist.] 1977, n.w.h.), and *Burns v. Audas*, 312 S.W.2d 417 (Tex. Civ. App.—Eastland 1958, n.w.h.)).

124. *Sharp*, 737 P.2d at 123-24 (Hunter, J., dissenting) (relying on *Crews v. Burke*, 309 P.2d 291 (Okla. 1957); *Elliott v. Berry*, 206 Okla. 594, 245 P.2d 726 (1952)).

125. *Sharp*, 737 P.2d at 121. The deed stated that "[Grantors] further grant . . . exclusive, sole and absolute rights to explore for, develop, produce, transport, and market . . ." *Id.*

126. See, e.g., *Crews v. Burke*, 309 P.2d 291 (Okla. 1957).

127. *Shuler v. Barnes*, 793 P.2d 301 (Okla. Ct. App. 1990).

under present lease; nor to share in any bonus or delay rentals under future lease; the [grantee] to have the right to lease said land . . . provided all leases shall provide a full 1/8th of production . . . .<sup>128</sup>

The lease existing when the parties executed the deed terminated and a new lease was signed providing for a three-sixteenth royalty. The issue was whether the grantor reserved a non-participating mineral interest or a one-sixteenth royalty interest. In Texas, courts would treat this deed language as unambiguous and would resolve the issue by applying various canons of construction. In Oklahoma, however, the *Shuler* court found the language ambiguous because the second sentence reserves a specified royalty interest while the first and third sentences reserve a stripped non-participating mineral interest. The district court admitted parole evidence including a prior contract for deed and determined that parties really intended to reserve a one-half of royalty interest.<sup>129</sup>

The result in *Shuler* illustrates another difference between the approaches of Texas and Oklahoma—the standard of review on appeal. It is doubtful that the language in the *Shuler* deed creates a one-half of royalty interest. However, in Oklahoma the appellate court's review does not encompass a de novo review of the deed's language but accepts the trial court's factual finding unless there is no evidence to support it.<sup>130</sup> Appellate courts in Oklahoma have a much less intrusive role than those in Texas. Under the Oklahoma standard, the trial court in *Shuler* required affirmation because there was some evidence to support the factual findings.<sup>131</sup>

*Jolly v. Wilson*<sup>132</sup> confronted the mineral-royalty issue with a list of guidelines to decide the issue. There, the deed language stated that the grantor reserved "one-half of one-eighth of all minerals in and under said land, the same being reserved and excepted, and said royalty is nonparticipating in the lease or lease rentals."<sup>133</sup> The first phrase clearly uses mineral estate language. The last phrase, however, specifically refers to

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128. *Id.* at 301-02. An earlier contract for deed contained different language. It provides: [Grantors] to reserve a one-half non participating mineral interest, in and under the land conveyed, with rights of ingress and egress, but not to share under the present lease on the land in delay rentals; nor to share in any future lease, the [grantees] to have the right to lease said land for mineral development or production provided that any lease executed . . . shall reserve a full 1/8th of production . . . .

*Id.*

129. *Id.*

130. *Id.* at 302.

131. *Id.*

132. 478 P.2d 886 (Okla. 1970).

133. *Id.* at 886-87.

the reserved interest as a royalty but adds to the confusion by stating the interest does not possess the lease rentals nor shall it participate in the lease.

The Oklahoma Supreme Court listed several factors to determine whether a deed created a mineral interest or a royalty interest. The court's list of five factors states:

- (1) If the interest conveyed or retained is of the oil and gas in and under the land, a mineral interest is indicated. On the other hand, if the interest conveyed is in oil and gas to be produced, a royalty interest may be the result.
- (2) Who has the right to grant leases, and to receive bonuses and rentals? If it is the grantee of the interest, a mineral interest is created. If not a royalty or nonparticipating mineral interest may be the result.
- (3) If the right of ingress and egress and of exploration is granted, the interest conveyed is mineral not royalty.
- (4) If there is an oil and gas lease in existence at the time the deed is made, the word "royalty" when used to describe the interest reserved or conveyed, is usually interpreted to mean royalty in the restricted sense as a share in production only; but, in the absence of an existing lease, "royalty" is likely to be interpreted in its loose, broad sense to mean a mineral interest.
- (5) If the interest conveyed or retained is 'royalty' in its restricted sense, the fractional designation of the quantum of interest usually refers to that fractional part of the gross production. If the interest is 'mineral' the fractional designation of the quantum conveyed or retained usually entitles the grantee to only that fractional part of the lessor's share of production.<sup>134</sup>

Although the court cited the factors, it admitted that the second factor is ambiguous and not much help where, as here, nothing is expressed about the bonus.<sup>135</sup>

The deed language could be interpreted as a reservation of a nonparticipating mineral interest shorn of the executive rights and the right to receive delay rental but not the rights to receive bonus or royalty or the development right. Depending on the interpretation of the term "nonparticipating in the lease," this result would probably be reached in Texas. The Oklahoma court, however, concluded that the language reserved a mineral estate. The court primarily relied on the phrase "in and under" and decided that the term "royalty" did not negate the intent

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134. *Id.* at 887 (citing Bowen, *Pitfalls in Mineral Conveyancing in Oklahoma*, 9 OKLA. L. REV. 133, 139 (1956)).

135. *Id.* at 888.

expressed by using mineral interest language.<sup>136</sup>

Rather than focusing on deed inconsistencies pertaining to bonuses, delay rentals, and the executive power, if the mineral interest is capable of being divided into its constituent elements, the key element should be the development right language because that language is more indicative of what the parties really intended.

### C. *The Executive Power*

#### 1. Texas Cases

In the last decade, courts in Texas decided three cases, each affecting the nature and scope of the executive power differently. These courts retreated from earlier positions on the severability of the executive power from the rights to bonus and delay, sanctioned the use of a joint executive power, and reclassified the power as a property interest.

##### a. *Diamond Shamrock Corp. v. Cone*

The effect of the decision in *Diamond Shamrock Corp. v. Cone*<sup>137</sup> is a retreat from the position in earlier cases that the executive power can be severed from the rights to delay rental and bonus. There, the reservation clause stated:

There is reserved . . . all oil, gas and other minerals in, under and that may be produced . . . . However, grantors herein shall receive no part of any lease or bonus money . . . , or 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 of oil, gas or other minerals . . . .<sup>138</sup>

The last clause is very similar to the reservation language used in *Klein*,<sup>139</sup> where the Texas Supreme Court found that by implication the grantees had received the executive power and that the reserved interest was a royalty and not a non-executive mineral estate.

After the grantee leased the forty acre mineral estate to Diamond

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136. *Id.* The fourth and fifth factors tend to confuse rather than guide a court to ascertain the intent of the parties because either the mineral or royalty reference has to be ignored. Using royalty in a restricted and a nonrestricted manner merely obfuscates the difficult task of determining which of the conflicting terms or signals is to control. Earlier Oklahoma cases tended to treat interests which used the term 'in and under' as denoting mineral interests notwithstanding conflicting language and the transfer of some of the constituent elements of the mineral estate to the grantee. *See, e.g., Pease v. Dolezal*, 206 Okla. 696, 246 P.2d 757 (1952); *Elliott v. Berry*, 206 Okla. 594, 245 P.2d 726 (1952).

137. 673 S.W.2d 310 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.).

138. *Id.* at 312.

139. *Klein v. Humble Oil & Ref. Co.*, 126 Tex. 450, 453, 86 S.W.2d 1077, 1078 (Tex. Comm'n App. 1935, opinion adopted). *See supra* notes 17-21 and accompanying text.



Shamrock, a successor to the grantor brought this action claiming that the lease was void because the original grantor had reserved the executive power.<sup>140</sup> The deed on its face reserves the mineral estate in the grantor but also clearly transfers the right to receive bonus and delay rentals. No mention is made in the deed about the executive power or the development right. The court went back to *Schlittler* for the basic proposition that the constituent elements of the mineral estate can be granted or reserved independently.<sup>141</sup>

To decide the issue, the court had to deal with *Schlittler*, *Watkins*, *Klein*, and *Grissom*, all of which gave mixed signals regarding the interpretation of this kind of deed. *Klein* and *Grissom* indicated that the ownership of the executive power follows the ownership of the right to bonus and delay rentals where it is not specifically mentioned.<sup>142</sup> These courts essentially converted a non-executive mineral interest into a royalty interest. Additionally, the court in *Watkins* decided that the owner of the executive power and the rights to receive bonus and delay rental possessed the mineral estate.<sup>143</sup> *Schlittler*, on the other hand, is more consistent with the *Altman* rationale that the language creating the subject estate controls even though various elements of the estate are conveyed to third parties.<sup>144</sup> The *Diamond Shamrock* court was aided in its analysis by treating the last clause of the deed as surplusage or descriptive language,<sup>145</sup> rather than *Klein's* view of similar language as clearly evincing an intent to reserve only a royalty interest.<sup>146</sup> The last clause, which refers to receiving compensation only upon production, is inconsistent with the initial clause reserving a mineral estate. In order to harmonize rather than create a clear repugnancy, however, the *Diamond Shamrock* court ignored the clause.

The court in *Diamond Shamrock* also had great difficulty with the "greatest estate" canon which had been used by the court in *Hudgins v. Lincoln National Life Insurance Co.*<sup>147</sup> Normally, a deed passes the greatest possible interest to the grantee and reserves only that which is

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140. *Diamond Shamrock*, 673 S.W.2d at 312.

141. *Id.* at 313. The court also recited the usual litany of canons of construction including the four corners test, the ambiguity rule, the intent ascertaining canon, the harmonizing canon, the plain and necessary repugnance canon, and the "everything has meaning" canon. *Id.*

142. See *supra* notes 15-22, 34-42, and accompanying text.

143. See *supra* notes 28-34 and accompanying text.

144. See *supra* notes 23-27 and accompanying text.

145. *Diamond Shamrock*, 673 S.W.2d at 314.

146. *Klein*, 126 Tex. at 457, 86 S.W.2d at 1080.

147. 144 F. Supp. 192 (E.D. Tex. 1956).

expressly stated. In this case, the court did not apply the "greatest estate" canon because the court determined that the parties' intent was clear; namely, to reserve a non-executive mineral interest containing all of the constituent elements not granted away.<sup>148</sup> The court also distinguished *Hudgins* because the court in *Hudgins* doubted the grantor's intent used the "construe against the scrivener" canon as a justification for applying the "greatest estate" canon. In *Diamond Shamrock*, the court felt strongly that the parties' language clearly evinced an intent to reserve a mineral estate.<sup>149</sup> Therefore, resort to either the "construe against the scrivener" or "greatest estate" canons was not warranted. But the language in the deed in *Diamond Shamrock* and the other deeds were not remarkably dissimilar. The court distinguished *Klein* and *Grissom* because both trial courts in those cases found that the executive power was also conveyed to the owner of the bonus and delay rental rights.<sup>150</sup> Here, the court did not make a similar finding, although in the earlier cases the executive power was implicitly and not expressly conveyed or reserved. Nonetheless, the court treated the language reserving a mineral estate as controlling and refused to apply the "greatest estate" canon.<sup>151</sup>

The court could have applied the "greatest estate" canon and reached the same result. After all, what was the nature of the transferred estate in *Diamond Shamrock*? The grantor reserved all of the mineral estate. The grantee merely received the surface estate. Because the surface estate was severed from the mineral estate there was no appurtenant estate to attach the executive power to other than the reserved mineral estate. The "greatest estate" rule should apply only to an estate being specifically transferred, in this case, the surface estate. Unrelated estates or constituent parts thereof, otherwise held by the grantor should not fall under the "greatest estate" rule.<sup>152</sup> Thus, where Blackacre is transferred and Whiteacre is reserved, the greatest estate rule should apply to the constituent elements of Blackacre but not of the elements of Whiteacre or Mauveacre or Blueacre.

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148. *Diamond Shamrock*, 673 S.W.2d at 313-14.

149. *Id.* at 313.

150. *Id.* at 315.

151. *Id.*

152. The Texas Supreme Court did not make such a distinction in *Day & Co. v. Texland Petroleum*, 786 S.W.2d 667 (Tex. 1990). See *infra* notes 163-183 and accompanying text. The "greatest estate" canon is related to the doctrine against implied reservations. See *Miller v. Melde*, 730 S.W.2d 12 (Tex. App.—Corpus Christi 1987, n.w.h.), and *Monroe v. Scott*, 707 S.W.2d 132 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) for two recent cases applying that canon where the reservation referred to non-existing prior conveyances.

b. *Elick v. Champlin Petroleum Co.*

In the second important case, *Elick v. Champlin Petroleum Co.*,<sup>153</sup> the court sanctioned the use of a joint executive power. The grantors transferred the surface and mineral estate but made the following reservation:

[S]ave and except and undivided 1/32 royalty interest in and to all of the oil, gas and other minerals in, to and under and that may be produced from the land . . . together with the right of ingress and egress at all times for the purpose of storing, treating, marketing and removing the same therefrom. It is further expressly agreed . . . that [the grantors] shall participate in one-half of the bonus paid . . . and in one-half of the money rentals . . . and [the grantors] shall join in the execution of any future oil, gas, or mineral lease.<sup>154</sup>

The grantees executed a lease on the premises, but the grantors never joined the lease.<sup>155</sup> The deed on its face creates some substantial problems. The term "royalty interest" is used to describe what is reserved, but that term is immediately followed by mineral estate language.<sup>156</sup> The grantor apparently then reserved some form of ingress and egress right which would seemingly require a finding that a mineral estate has been reserved. Upon a careful reading, the ingress and egress right, however, is quite limited. It only relates to the collection and storage of royalty oil and does not contain the development rights typically possessed by a mineral owner. That clause is followed by the retention of a different fractional share of the bonus and delay rentals.<sup>157</sup> The final clause, "grantors shall join in the execution of [future] leases,"<sup>158</sup> also was not a typical executive power clause because it would create a joint executive power rather than the more typical unified or sole power to lease.

Treating each of the clauses independently, the court in *Elick* determined that while the first clause merely reserved the royalty estate, the remaining clauses were all limitations on the elements of the mineral estate that were being conveyed.<sup>159</sup> The initial problem for the court was to determine whether the lease was valid as to the grantee's mineral estate. The trial court determined that the deed, as a matter of law, did not

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153. 697 S.W.2d 1 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

154. *Id.* at 2.

155. *Id.* at 2-3.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 4.

reserve a joint executive power to the grantor.<sup>160</sup> The court of appeals disagreed, relying largely on *Schlittler*, and predicted the *Altman* result of a year later.<sup>161</sup> The court did not deal with the anomaly that a joint executive power was being reserved while in all of the prior cases the executive power was being held individually. The court was not interested in the economic ramifications but merely the language used by the parties. The grantee received the entire mineral estate less that specifically reserved by the grantor.<sup>162</sup>

c. *Day & Co. v. Texland Petroleum, Inc.*

The most recent, most important, and in some ways, most troubling decision relating to the executive power, is *Day & Co. v. Texland Petroleum, Inc.*<sup>163</sup> *Day & Co.* not only overrules *Pan American Petroleum Corp. v. Cain*<sup>164</sup> but affects also how the individual component elements of the mineral estate are divided in cases where deeds do not expressly allocate them between the grantor and the grantee.

In *Day & Co.*, Keaton and Young conveyed by warranty deed an eighty acre mineral estate to Day, reserving an undivided one-half mineral interest.<sup>165</sup> The warranty deed expressly transferred the executive right to Day.<sup>166</sup> Thus, Keaton and Young own a non-executive one-half mineral interest, shorn only of the executive power, and Day owns the surface a full mineral estate as to one-half and the executive power over the other one-half.<sup>167</sup> Day then conveyed to the Shoafs an interest in a ten-acre parcel within the original eighty-acre grant.<sup>168</sup> The Day-Shoaf deed expressly reserved an undivided one-fourth mineral estate in the grantors and the undivided one-half mineral estate previously reserved

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160. *Id.* at 3. Normally, the executive power is separated to minimize transaction costs by having a single party responsible for leasing fractional mineral interests. In *Elick*, the grantor who was apparently giving away all of the mineral estate reserved an absolute veto power over the leasing of an estate he had no control over. *Id.* The grantor was put into an enviable economic position because he had relatively little to lose and much to gain.

161. *Id.* at 3-4.

162. *Id.* at 7.

163. 786 S.W.2d 667 (Tex. 1990). *Day & Co.* is another in a long line of major oil and gas decisions where the Texas Supreme Court issued a "trial balloon" opinion in the Texas Supreme Court Journal only to retract that opinion upon a motion for rehearing and issue a second opinion which differs significantly from the first. The first opinion, 32 Tex. Sup. Ct. J. 549, was a 6-3 decision. The second opinion was unanimous even though the court went from a reversal of the court of appeals decision to an affirmance.

164. 163 Tex. 323, 355 S.W.2d 506 (1962). See *supra* notes 64-68 and accompanying text.

165. *Day & Co.*, 786 S.W.2d at 668.

166. *Id.*

167. *Id.*

168. *Id.*

by Keaton and Young.<sup>169</sup>

After both the Shoafs and Day executed leases covering the premises,<sup>170</sup> Day claimed that the Day-Shoaf deed did not convey the executive power to the one-half interest reserved by Keaton and Young, and thus, the Shoafs never possessed the power to lease.<sup>171</sup> Shoaf argued that the executive power was conveyed to them because the executive power over the Keaton and Young one-half mineral interest was not reserved in the Day-Shoaf deed.<sup>172</sup> The court of appeals applied the "greatest estate" canon to hold that the executive right owned by Day covering the entire eighty acres was so intimately tied in with the mineral estate that it was conveyed to the Shoafs.<sup>173</sup> Day relied on the *Cain* classification of the executive power as a contractual power and not a power coupled with an interest to counter the application of the canon.<sup>174</sup>

Although in its initial opinion the Texas Supreme Court agreed with Day and continued to follow *Cain*,<sup>175</sup> on rehearing a unanimous court concluded that the executive power is not a contractual power but a property-based power subject to the "greatest estate" canon.<sup>176</sup> The court concluded that "[i]n 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 . . . ."<sup>177</sup> The court further stated that "[e]ven when it is severed from the other rights or attributes incident to a mineral estate, it remains an interest in property."<sup>178</sup>

While classification as a property interest is probably in accord with most other jurisdictions,<sup>179</sup> it does not answer the ultimate issue in this case. Having concluded that the executive power owned by Day is a property interest does not necessarily mean it is a property interest appurtenant to the property interest being transferred. For example, in the

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169. *Id.*

170. Day believed that Texland, who had succeeded to the Shoafs' lessee interest, was no longer a lessee because it had failed to tender delay rental payments to Keaton and Young. Day then sought to exercise the executive power it claimed from the Keaton and Young deed by leasing the premises to an alter ego corporation. *Day & Co.*, 786 S.W.2d at 668.

171. *Id.*

172. *Id.*

173. *Day & Co. v. Texland Petroleum, Inc.*, 718 S.W.2d 384, 389 (Tex. App.—Amarillo 1986, writ granted).

174. *Id.* at 388-89.

175. *Day & Co. v. Texland Petroleum, Inc.*, No. C-6007 (Tex. July 12, 1989) (LEXIS, States library, Tx file).

176. *Day & Co.*, 786 S.W.2d at 669.

177. *Id.*

178. *Id.*

179. See generally 2 WILLIAMS & MEYERS, *supra* note 2, § 338.

*Brady* case discussed above,<sup>180</sup> the court concluded that the “greatest estate” canon should not apply so that the executive power would accompany a grant of a royalty interest held by the grantor even though there was no specific reservation of the executive power.<sup>181</sup> Likewise, in this case Day could argue that the only executive power that is appurtenant in this situation is that which attaches to the mineral interest being transferred in the ten-acre parcel. The subject matter of the deed is not the mineral estate in the eighty acres, but merely the mineral estate in the ten acres being conveyed. Thus, the executive power granted to Day over the Keaton & Young mineral estate might not fall under the greatest estate canon and would remain with Day. The court, however, did not make such a fine distinction. Instead it recited the “greatest estate” canon and summarily concluded that whatever interests were not specifically reserved and which were appurtenant to the transferred interest were conveyed.<sup>182</sup>

*Day & Co.* contains some further internal inconsistencies. With regard to the one-fourth mineral interest specifically reserved by Day, the executive power and all other constituent elements were retained by Day. The deed reserved a three-fourth mineral estate, one-fourth to Day and the one-half previously retained by Keaton and Young. If Keaton and Young had not conveyed the executive power conveyed to Day over the one-half interest, it would be clear that Shoaf would only get his one-fourth mineral estate with no other interest. But because Day had negotiated the transfer of the executive power over an estate that was never part of the transfer, he loses the power.

A few hypotheticals illustrate these inconsistencies. What would have happened if Day had received the right to lease bonus in addition to the executive power? Under the rationale of the court, both the executive power and the bonus right would have transferred to Shoaf insofar as the outstanding one-half mineral estate was concerned. Likewise, what would have happened if Day had received only the right to bonus and delay rentals while Keaton and Young had reserved the executive power. Again the result would have to be that Shoaf would get anything not specifically reserved. These results disregard the fact that the deed to

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180. *Brady v. Security Home Inv. Co.*, 640 S.W.2d 731 (Tex. App.—Houston [14th Dist.] 1982, n.w.h.). See *supra* notes 105-114 and accompanying text.

181. *Brady*, 640 S.W.2d at 734-35.

182. *Day & Co.*, 786 S.W.2d at 669-70.

Shoaf on its face reserved a three-fourths mineral estate, one half to Keaton and Young and one fourth to Day. Why didn't that operate to reserve all of the components of those interests? After all, if Shoaf did a title search he would uncover the fact that Day owned the full executive power covering the entire eighty acre parcel. Because Shoaf was only purchasing ten out of the eighty acres, it is likely that he expected to receive an executive power covering the non-covered seventy acres as well as the one-half minerals which Shoaf did not own. It is the old Whiteacre and Blackacre hypothetical. The subject matter of the transfer here was clearly only a one-fourth mineral estate in a ten acre parcel. Call that Blackacre. It is clear that as to either the mineral estate in the non-conveyed seventy acres or the 1/24 interest in the ten acres reserved to the grantors, the Shoafs possessed no interest and could not reasonably expect to receive benefits from an estate nowhere mentioned in their deed. If the seventy acre parcel or the 1/24 mineral interest is Whiteacre, you have the strange result that the "greatest estate" canon is being used to convey an interest that is unrelated to the transfer of Blackacre. This is hardly a result which mirrors the intent of the parties.

Although the "greatest estate" rule is reasonably clear, its application depends on how the court defines the appurtenant interest which will attract all non-reserved elements of the mineral estate. If *Brady* is correct, then royalty grantors need not worry about giving up mineral estate sticks without specifically reserving them. But if *Day & Co.* applies to any mineral estate transfer, regardless of areal limits, grantors need to reserve all related or unrelated component elements of mineral estates which might otherwise be treated as being conveyed to the grantee under a general warranty deed.<sup>183</sup> The Texas Supreme Court has once again made it very difficult to ascertain the state of mineral titles in this state through its inconsistent opinions which ignore but do not overrule prior decisions that would lead to a different result. Perhaps in time, the court will rethink the various positions it has taken on the mineral-royalty and executive power cases, throw out its reliance on numerous

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183. The court in *Day & Co.* did not discuss the problem of applying the Rule Against Perpetuities to the "naked" executive power. In *Dallapi v. Campbell*, 45 Cal. App. 2d 541, 545, 114 P.2d 646, 650 (1941), the court found an executive power not coupled with an interest as void for violating the Rule. A later case, *Keville v. Hollister Co.*, 29 Cal. App. 3d 203, 207, 105 Cal. Rptr. 238, 240 (1972), found that the executive power was more like a power of appointment and therefore not subject to the Rule. Treating it as a property interest does not solve all of the problems. Perhaps the court should not worry about the classification problem but about carrying out the intent of the parties. If the court generally allows the component elements of a mineral estate to be individually transferred, they should be able to stand alone and be validated regardless of whether they might violate the Rule.

canons of construction, and develop a clear rationale for interpreting commonplace deed provisions so that parties can draft instruments that will be understandable by all.

## 2. Oklahoma Cases

Unlike Texas, which has a long and sometimes inconsistent jurisprudence relating to the executive power, Oklahoma has decided relatively few cases to shape and define the executive power. The cases that have been decided, however, hint that the executive power is an assignable property interest subject to the same rules of construction as other property rights.

Shortly after allowing the executive power to be separated from the mineral estate, Oklahoma classified the power as a "power in trust." The early case of *Swearingen v. Oldham*<sup>184</sup> recognized that an owner of a mineral estate could reserve a non-participating mineral interest and yet transfer the executive power over that interest. But the court merely assumed that the exercise of the executive power by the grantee of a deed which reserved a non-participating mineral interest was valid.<sup>185</sup> No effort was made to define the nature or scope of the executive right. In *Howard v. Dillard*,<sup>186</sup> the court interpreted a clause reserving the executive right as merely reserving a "power in trust" which was personal to the grantor and which expired at the death of the grantor.<sup>187</sup> This interpretation was consistent with the *Cain* decision treating the executive power as something less than a property interest.<sup>188</sup>

Distinguishing *Howard*, the court in *Skelly Oil Co. v. Butner*<sup>189</sup> treated the executive power as a de facto property interest. There, the original grantor transferred either a one-half royalty or mineral interest to a grantee, yet specifically reserved the right to receive present and future delay rentals, future bonuses, and the "exclusive right at all times

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184. 195 Okla. 532, 159 P.2d 247 (1945). See generally Kuntz, *The Rule Against Perpetuities and Mineral Interests*, 8 OKLA. L. REV. 183 (1955).

185. *Swearingen*, 195 Okla. at 535, 159 P.2d at 250.

186. 198 Okla. 116, 176 P.2d 500 (1947).

187. *Id.* at 119, 176 P.2d at 502-03. The deed contained the following language:

It is expressly understood and agreed however, that this conveyance is made, executed and delivered with the express understanding and agreement that the [grantor] shall retain management and control of the minerals and privileges hereinbefore mentioned, and that he shall have the sole and exclusive right to lease said lands to any person . . . .

*Id.* at 118, 176 P.2d at 502.

188. *Pan American Petroleum Corp. v. Cain*, 163 Tex. 323, 355 S.W.2d 506 (1962). See *supra* notes 64-68 and accompanying text.

189. 201 Okla. 372, 205 P.2d 1153 (1949).



to execute leases.”<sup>190</sup> The grantor then transferred the mineral estate without any reservation to a third party.<sup>191</sup> The lease in existence at the time of the grants expired, and then both the original grantor and the third party executed new leases covering the entire mineral estate.<sup>192</sup> If *Howard* had been followed, the executive power reserved by the grantor would have been personal to him and would not have been transferred to the third party by the deed. The court, however, refused to read *Howard* as requiring that all executive powers be treated as powers in trust.<sup>193</sup> Rather, it treated the power as a de facto property interest subject to the Oklahoma statutory canon of construction that a deed will be interpreted to include “every right of whatever character pertaining to the premises described.”<sup>194</sup> This statutory provision is akin to the Texas common law canon transferring the “greatest estate” possible. As applied to the facts, the court concluded that the executive power was not personal to the grantor. Thus, the executive power was capable of being transferred along with the grantor’s retained mineral estate.<sup>195</sup>

*Stone v. Texoma Production Co.*<sup>196</sup> confirmed the assignability of the executive power while declining to define the nature of the executive power. The predecessor in interest to the plaintiff transferred one-fourth mineral interests to two separate parties, specifically reserving in each

190. *Id.* at 373, 205 P.2d at 1154. The court never answered the question of whether the original grantee received a one-half mineral interest shorn of bonus, delay rentals, and executive power or a one-half of royalty interest. *Id.*

191. *Id.* at 373, 205 P.2d at 1154-55.

192. *Id.* at 374, 205 P.2d at 1155.

193. *Id.*

194. *Id.* (citing OKLA. STAT. tit., 16, § 14 (1941)).

195. *Id.* The court’s explanation is somewhat arcane, but the result is nonetheless clear: the executive power is an assignable interest subject to the statutory canon relating to transfers of real property interests by deed. The court stated:

[I]t follows that . . . any right to lease . . . necessarily passed under the deed . . . unless it can be said, as contended, that the right to lease reserved . . . was severed from the estate of the grantor in the land and non-assignable. As supporting such contention reliance is placed upon the holding in *Howard v. Dillard* . . . as declaring that the right so reserved is a power in trust. The holding there was not predicated upon the theory that the reservation of the right to lease the interest granted was of itself a power in trust and the case is not authority therefor.

*Id.* (citation omitted).

Dean Kuntz ably argued that calling the executive power a power in trust did not necessarily make the power non-assignable. Kuntz, *supra* note 192, at 196-97. I prefer the finding that the power is clearly a property interest which is capable of independent existence and subject to all of the appropriate rules of property relating to conveyancing.

The doctrinal confusion relating to the executive power was continued in *Peppers Ref. Co. v. Barkett*, 208 Okla. 367, 256 P.2d 443 (1953).

196. 336 P.2d 1099 (Okla. 1959).

deed the exclusive executive power.<sup>197</sup> The plaintiff was the lessee taking through the grantor's successors.<sup>198</sup> The defendants, who succeeded to the grantee's interests, claimed on the basis of *Howard* that the executive power was not assignable.<sup>199</sup> The court opted to follow *Butner* and find that the executive power was assignable or inheritable, especially where the parties expressly authorize the power to be transferred.<sup>200</sup> Again, the Oklahoma Supreme Court eschewed a definition of an executive power other than to reiterate that it is assignable, incident to the mineral estate granted or reserved.<sup>201</sup>

The court in *Sharp v. Gayler*<sup>202</sup> once again refused to definitively state the nature of the executive power but, by implication, treated the executive power as a component or constituent element of the mineral estate, and thus, subject to the same conveyancing rules that apply to realty.<sup>203</sup> Thus, Oklahoma aligned itself with other states which treat the executive power as a property interest capable of independent existence and subject to all of the normal rules or canons of construction that apply to the creation or transfer of property interests.

Finally, when the deed is silent with regard to the executive power, and the deed divides the other component elements, Oklahoma impliedly gives the executive power to the party owning the bonus and delay rental rights. In *Anderson v. Mayberry*,<sup>204</sup> the deed reserved an undivided one-half mineral estate but further added that the interest "shall be nonparticipating in bonus and rental rights . . ."<sup>205</sup> Depending on which canon was used, the executive power was either granted or reserved. The "greater interest" statutory canon would cause the executive power to be transferred since it was not specifically reserved. The court reached that result without citing the statute.<sup>206</sup> But the court also concluded that the grantor reserved a nonparticipating mineral estate.<sup>207</sup> As such, why was

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197. *Id.* at 1100.

198. *Id.*

199. *Id.*

200. *Id.* at 1100-01.

201. *Id.* at 1101.

202. 737 P.2d 120 (Okla. Ct. App. 1987).

203. *Id.* at 122. The executive power was listed as one of the distinct incidents of ownership or property rights of the mineral estate.

204. 661 P.2d 535 (Okla. Ct. App. 1983).

205. *Id.*

206. The *Anderson* court cited *Grissom v. Guetersloh*, 391 S.W.2d 167 (Tex. Civ. App.—Amarillo [121st Dist.] 1965, writ ref'd n.r.e.) for the proposition that the executive power follows the transfer of the bonus and delay rental rights. *Id.* at 536. See text accompanying notes 34-43 *supra* for a discussion of *Grissom* and analogous cases in Texas.

207. *Anderson*, 661 P.2d at 536.

the grantor shorn of the executive power if he was the owner of the full mineral estate prior to the conveyance? The grantor must have reserved the development right even though nothing specifically was said other than the language denoting a mineral estate. Nonetheless, the court treated the reservation as a nonparticipating mineral estate with only the development right and the right to receive royalty.<sup>208</sup> The court's holding must be based on its intuitive sense that the executive power follows the bonus and delay rental rights unless there is an express division made between them. This may be a "logical" and economically sensible result, but it is inconsistent with the general theory that parties are free to divide up the constituent elements of a mineral estate as they individually determine.

## V. CONCLUSION

The confusion surrounding the conveyancing of the mineral interest results when the Texas and Oklahoma courts fail to adequately distinguish past cases or give an adequate basis for their holding. The confusion is compounded by the use of conflicting canons of construction to interpret deeds. Perhaps in time the courts will assimilate various conflicting positions, throw out reliance on numerous canons of construction, and develop a clearer rationale for interpreting commonplace deed provisions so that parties can draft instruments which will be understandable by all.

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208. *Id.* See also *McVey v. Hines*, 385 P.2d 432 (Okla. 1963). In *McVey*, the grantor reserved the right to receive bonuses and delay rentals and granted a nonparticipating mineral interest. *Id.* at 433. The court found that the grantor reserved the executive right, in essence, denying that the "greater interest" canon applied. *Id.* at 435.