

April 1964

Mineral Interests and the Executive Right in West Virginia

Thomas Franklin McCoy
West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Oil, Gas, and Mineral Law Commons](#)

Recommended Citation

Thomas F. McCoy, *Mineral Interests and the Executive Right in West Virginia*, 66 W. Va. L. Rev. (1964).
Available at: <https://researchrepository.wvu.edu/wvlr/vol66/iss3/5>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

West Virginia Law Review

Published by the College of Law of West Virginia University. Official
publication of The West Virginia Bar Association.

STUDENT BOARD OF EDITORS

Robert Edward Haden, *Editor in Chief*
Robert William Burk, Jr., *Associate Editor*
Thomas Edward McHugh, *Associate Editor*
Sterl Franklin Shinaberry, *Associate Editor*
Stephen Grant Young, *Associate Editor*

Fred Adkins	Charles Marion Love, III
Richard Marion Alker	Lee Ames Luce
Victor Alfred Barone	John Ralph Lukens
Earl Moss Curry, Jr.	Thomas Franklin McCoy
Ralph Charles Dusic, Jr.	Charles David McMunn
Frank Thomas Graff, Jr.	William Walter Smith
Eugene Triplett Hague, Jr.	Ward Day Stone, Jr.
Charles Ellsworth Heilmann	Boyd Lee Warner
George Charles Hughes, III	

Willard D. Lorensen, *Faculty Editor in Charge*
Agnes A. Furman, *Business Manager*

STUDENT NOTES

Mineral Interests and the Executive Right in West Virginia

Because the risk and expense incident to the drilling and completion of an oil and gas well is great, a mineral owner is seldom able to undertake such an operation himself. In practice, therefore, the only way he may benefit from his ownership in the minerals is by leasing the right to develop them on a royalty basis.¹

In West Virginia, because of the confusion surrounding the effect and validity of the "executive right"² and because of the

¹ United Carbon Co. v. Presley, 126 W. Va. 636, 29 S.E.2d 466 (1944). Of course if the mineral owner is sufficiently affluent he may himself develop the underlying minerals, but such affluence is seldom encountered in the average West Virginia mineral owner.

² The term "executive right" is used to designate the right to execute oil and gas leases on premises affected by a royalty or non-executive interest.

strict adherence to the common law rules of waste,³ the lessee is forced to obtain from all the owners of interests in the oil and gas the exclusive right to prospect for those minerals which may underlie a specific tract of land. As one generation succeeds another, the number of persons necessary to execute the lease inevitably increases, with the result that the expense of tracing title to each fractional interest may, by itself, create a serious deterrent to alienability. Likewise, when various interests have been carved out of the full mineral interest, doubts may be created with respect to whether any such interest carries with it a power to lease. It is readily apparent that if the full mineral interest has been divided into many small, undivided interests, securing agreement on the terms of the lease from all the interested parties could be a practical impossibility, thereby preventing development of the minerals.⁴ Consequently, if the oil and gas cannot be exploited because of a strict adherence to the common law rules of waste, or because of a failure to give effect to the executive right, the owner of an interest in those minerals has been needlessly deprived of the beneficial enjoyment he should have had in the minerals.⁵

Morris, *Mineral Interest or Royalty Interest?* SOUTHWESTERN LEGAL FOUNDATION 10TH INSTITUTE ON OIL & GAS LAW & TAXATION 259 (1959). "The executive right to lease and the separated exclusive power of one to lease the lands or a mineral interest of another for oil and gas operations and development have the same meaning." Everett, *Executive Right to Lease*, 3 ROCKY MOUNTAIN MINERAL L. INSTITUTE 509 (1957).

³ W. VA. CODE ch. 37, art. 7, § 2 (Michie 1961); *Freeman v. Egnor*, 72 W. Va. 830, 79 S.E. 824 (1913); *DONLEY, COAL, OIL & GAS IN WEST VIRGINIA & VIRGINIA* §§ 11-13 (1951).

⁴ See *Law v. Heck Oil Co.*, 106 W. Va. 296, 154 S.E. 601 (1928), where the owner of a 1/768th mineral interest, who had refused to lease, was permitted to enjoin drilling operations, even though he was being unreasonable in his demands for a bonus in light of the minute amount of production near the tract in question. *Contra*, *Garcia v. Sun Oil Co.*, 200 S.W.2d 724 (Tex. Civ. App. 1957), where the court held that a nonconsenting cotenant was not entitled to an injunction to prevent entry and development, and the cotenant making the entry to drill for oil and gas was entitled to an injunction to restrain the nonconsenting cotenant from interfering with such entry.

⁵ 2 WILLIAMS & MEYERS, OIL & GAS LAW § 502 (1959); "No owner of an interest in property, however great or small, should be able to veto the development of it by the owner of another interest, and at the same time be in turn subject to a veto by that other." Olds, *Future Interests in Oil & Gas*, SOUTHWESTERN LEGAL FOUNDATION 8TH INSTITUTE ON OIL & GAS LAW & TAXATION 163, 165 (1957). Under the rule which is applied in the majority of states, a cotenant in the fee may enter to explore for and produce the oil and gas without the consent of his cotenants. *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566, 40 A.L.R. 1389 (8th Cir. 1924); *Stephens v. Click*, 287 S.W.2d 630 (Ky. 1955); *McIntosh v. Ropp*, 233 Pa. 497, 82 Atl. 949 (1912). "In Illinois, Louisiana, Michigan, and West Virginia, the rights of cotenants to extract minerals are severely restricted in comparison to the rights of cotenants

For some time the West Virginia Supreme Court of Appeals held that the use of the words "royalty" or "royalty interest" in a mineral conveyance created an interest in the minerals in place rather than a royalty interest.⁶ The reason advanced for such a construction was the common law dictum known as "Coke's rule"⁷—a grant of the profits of the land is a grant of the land itself. The adoption of this rule had the apparent consequence of forbidding the creation of a non-executive interest by influencing the court to construe instruments as creating a mineral rather than a royalty or other non-executive interest.⁸ The court in adopting this rule did not seem to realize that classification of an interest a royalty or other non-executive interest was desirable because such a classification avoided a division of the management and leasing powers into small units and promoted trading in the various interests without making it difficult to lease the land subject to such transactions.⁹

Most courts have either expressly rejected Coke's rule or ignored it.¹⁰ In these jurisdictions the non-executive has no right to join in the execution of an oil and gas lease and there is no need for

in those states which follow the majority rule." 1 KUNTZ, OIL & GAS § 5.4 (1962). Cotenants who commit waste are wrongdoers and may be sued either jointly or severally. *Stewart v. Tennant*, 52 W. Va. 559, 44 S.E. 223 (1903).

⁶ "In a series of cases, beginning with *Toothman v. Courtney*, 62 W. Va. 167, 58 S.E. 915 (1907), it has been held or recognized that a grant or . . . reservation of the . . . royalties to be derived from the land, unlimited in time, is in legal effect, a grant, or an exception and reservation of title to the minerals in place." DONLEY, *op. cit. supra* note 3, § 162a. Oklahoma and Colorado also hold with the minority position and create a mineral interest. *Simson v. Langholz*, 133 Colo. 208, 293 P.2d 302 (1956); *Meeks v. Harmon*, 201 Okla. 459, 250 P.2d 203 (1952). Oklahoma has modified its position somewhat and states that as a rule of construction the term "royalty" is to be considered in the broad sense of denoting mineral rights when there is no oil and gas lease on the property, and in the restricted sense denoting an interest in the production alone when the property is under lease. *Elliott v. Berry*, 206 Okla. 594, 245 P.2d 726 (1952); *Purcell v. Thaxton*, 202 Okla. 612, 216 P.2d 574 (1950); Stanton, *Recent Developments in the Construction of Mineral Estates*, SOUTHWESTERN LEGAL FOUNDATION 7TH INSTITUTE ON OIL & GAS LAW & TAXATION 301, 309 (1956).

⁷ ". . . If a man seized of lands in fee by his deed granteth to another the profit of those lands, the whole land itselfe doth passe; for what is the land but the profits thereof. . . ." 2COKE UPON LITTLETON [146.b], V. (2) (1812).

⁸ 1 WILLIAMS & MEYERS, OIL & GAS LAW § 304.9 (1959).

⁹ See Note, *Exclusive Power to Lease*, 34 TUL. L. REV. 375 (1959).

¹⁰ *Tyler v. Baucher*, 225 Ark. 806, 285 S.W.2d 524 (1956)—interest involved was described as a share of the oil "produced and saved." *Miller v. Sooy*, 120 Kan. 81, 242 Pac. 140 (1926); *Hassie Hunt Trust Co. v. Proctor*, 215 Miss. 84, 60 So. 2d 551 (1952); 1 WILLIAMS & MEYERS, *op. cit. supra* note 8.

examining his title. Recognition of the non-executive interests increases the ease of alienability by enabling small shares of future bonuses, rentals, or royalties to be transferred without complicating the mineral title. Operators seeking to purchase leases or examining title prior to drilling need only to establish that the outstanding interests are royalty or non-participating mineral interests.

In *Davis v. Hardman*,¹¹ by distinguishing the incidents of ownership of a royalty interest from those of a mineral interest and by relegating Coke's rule to a rule of construction, the validity of a pure royalty interest was upheld for the first time in West Virginia. This decision should have a profound effect on mineral transactions in this state. However, before an analysis of the *Davis* case can be meaningful, and, particularly, its effect on the validity of a severance of the executive right from the mineral estate, it will be necessary to define the interests involved, and to examine their nature and the typical methods of creating them.

THE MINERAL INTEREST

By the weight of authority, the term "minerals" normally includes the oil and gas unless other language in the instrument restricts the definition of the term as used by the parties so that it excludes these resources.¹²

Oil and gas in West Virginia are susceptible to absolute ownership in place.¹³ Therefore, title to these minerals may be transferred or conveyed in any manner that would be appropriate for a transfer of title to any other kind of real property.¹⁴ After a severance of the mineral fee from the ownership of the surface, the mineral owner may do all that the fee simple absolute owner might have done.

¹¹ 133 S.E.2d 77 (W. Va. 1963). This case will be more fully discussed and analyzed later.

¹² *Sult v. Hockstetter Oil Co.* 63 W. Va. 317, 61 S.E. 307 (1908); For a collection of cases illustrating the majority view, see generally Annot., 17 A.L.R. 156 (1922); Annot., 37 A.L.R.2d 1440 (1954).

¹³ *Robinson v. Milam*, 125 W. Va. 218, 24 S.E.2d 236 (1942); *Williamson v. Jones*, 39 W. Va. 231, 19 S.E. 436 (1894). A mineral interest is viewed as real property. *Lockhart v. United Fuel Gas Co.*, 105 W. Va. 69, 141 S.E. 521 (1928). 61 W. VA. L. REV. 72, 74 (1958), observes that it is difficult to ascertain whether the Lessee's interest under an oil and gas lease is regarded as real or personal property in West Virginia. See *Charter v. Maxwell*, 132 W. Va. 282, 52 S.E.2d 753 (1949); *DONLEY, op. cit. supra* note 3, §§ 21-22. Texas views the interest of an oil and gas lessee as a corporeal estate and thus real property. *Renwar Oil Corp. v. Lancaster*, 154 Tex. 311, 276 S.W.2d 774 (1955); 1 *WILLIAMS & MEYERS, op. cit. supra* note 8, § 210.5.

¹⁴ *DONLEY, op. cit. supra* note 3, § 27.

The full mineral interest represents the total of all interests possible in the oil and gas and other minerals. Specifically, with reference to the benefits to be derived from the exploitation of the minerals, the owner of the full mineral interest has (1) the right of ingress and egress; (2) the right to drill and develop the minerals; (3) the right to lease the minerals for development; and (4) the right to receive bonuses, delay rentals, and royalties.¹⁵ When title to the minerals is severed from the fee simple title, it is not necessary for the conveying instrument to state that any one or more these various incidents of ownership are conveyed, for the mineral fee owner will acquire all of the incidents of ownership because they inhere in the very nature of a severed mineral interest.¹⁶ According to conventional real property terminology, the right of the mineral fee owner to receive payment of bonuses, rentals, and royalties, after the granting of a lease, is described as being incident to his reversionary interest. However, the pattern of such payments has become standardized to such an extent that it is common, now, for the courts to treat the right to these payments as being incident to the full mineral interest, irrespective of an outstanding lease.¹⁷

The owner of the mineral fee, in a jurisdiction adopting the ownership in place theory,¹⁸ may convey to another an undivided interest in the minerals thereby creating ". . . some form of cotenancy."¹⁹ The owner of this undivided interest must, by definition, share proportionally in those rights which are inherent in the mineral fee.²⁰ This conveyance—the transfer of an undivided

¹⁵ 1 WILLIAMS & MEYERS, *op. cit. supra* note 8, § 202.2; Morris, *op. cit. supra* note 2, at 264.

¹⁶ W. VA. CODE ch. 55, art. 12, § 7 (Michie 1961), provides that a deed conveys all of the grantor's right, title, and interest unless an exception is made therein. W. VA. CODE ch. 36, art. 1, § 11 (Michie 1961), provides that when real property is conveyed or devised the whole estate or interest of the testator or grantor is devised or conveyed unless a contrary intention appears in the instrument. Boggess v. Milam, 127 W. Va. 654, 34 S.E.2d 257 (1945); Simson v. Langholf, *supra* note 6.

¹⁷ Cormier v. Ferguson, 92 So. 2d 507 (La. App. 1957); Crews v. Burke, 309 P.2d 291 (Okla. 1957); 1 KUNTZ, *op. cit. supra* note 5, § 15.1.

¹⁸ The oil and gas in place is considered real property, and as such subject to absolute ownership. Kennedy v. Ohio Fuel Oil Co., 84 W. Va. 585, 101 S.E. 159 (1919); Rymer v. South Penn Oil Co., 54 W. Va. 530, 46 S.E. 559 (1904); DONLEY, *op. cit. supra* note 3, § 3. A severed mineral or royalty interest is generally viewed as incorporeal in those states not adopting the ownership in place theory. 1 WILLIAM & MEYERS, *op. cit. supra* note 8, § 209.

¹⁹ 1 KUNTZ, *op. cit. supra* note 5, § 15.2.

²⁰ Boggess v. Milam, *supra* note 16; Simson v. Langholf, *supra* note 16.

interest in the mineral fee—may be made by grant, reservation, or exception.

Historically, there was an important distinction between an exception and a reservation. An exception in a deed withheld from the grantee title to some existing part of the property embraced by the description which would otherwise pass under the instrument, with the result that an exception of the minerals or an interest in those minerals to the grantor retained title to the minerals in the grantor.²¹ A reservation created some new right in the grantor issuing out of the property conveyed.²² Technically, at common law, incorporeal interests might be reserved in a grant and corporeal interests excepted from it. Strict application of the common law rule might result in a finding that language of "reservation" is ineffective to sever a mineral interest in a jurisdiction, such as West Virginia, where such interests are viewed as corporeal estates. Similarly, language of "exception" could be ineffective to reserve a mineral interest in a state where such are viewed as incorporeal estates.²³ In modern conveyancing however, both terms are used in a cumulative fashion and have been described as interchangeable.²⁴ Consequently, a mineral interest may now be conveyed by either a grant, reservation, or exception.²⁵

The classification of an interest as either a mineral interest, or as a royalty interest, is important in determining the share of the

²¹ *Silvis v. Peoples Natural Gas Co.*, 386 Pa. 453, 126 A.2d 706 (1956); *DONLEY, op. cit. supra* note 3, § 29.

²² A reservation creates some new right in the grantor which is "reserved" or "regranted" to him. *Tate v. United Fuel Gas Co.*, 137 W. Va. 272, 71 S.E.2d 65 (1952); See *Freeport Coal Co. v. Valley Point Mining Co.*, 141 W. Va. 397, 126 S.E.2d 296 (1955).

²³ 1 *WILLIAMS & MEYERS, op. cit. supra* note 8, § 210.5; See also *DONLEY, op. cit. supra* note 3, § 29 at 34.

²⁴ *Freeport Coal Co. v. Valley Point Mining Co.*, *supra* note 22; *Brown v. Kirk*, 127 Colo. 453, 257 P.2d 1045 (1953); *Ewing v. Trawick*, 208 Okla. 311, 256 P.2d 182 (1953). The physical location of the clause which purports to retain some interest in the grantor is no longer important, unless the word "except" is used alone in connection with the warranty clause instead of the word "reserved" in which case the exception may be construed to operate only as an exception to the covenant of warranty and not to the granting clause. *Rose v. Cook*, 207 Okla. 582, 250 P.2d 842 (1952); *Westcott v. Bozarth*, 202 Okla. 149, 211 P. 2d 258 (1949). See Professor Donley's comment on this point. *DONLEY, op. cit. supra* note 3, § 29 at 31.

²⁵ See *Preston v. White*, 57 W. Va. 278, 50 S.E. 236 (1905), where the grantor "reserved" a mineral interest in a conveyance of land and the court gave effect to it, although a mineral interest in West Virginia is viewed as a corporeal rather than as an incorporeal estate, by construing the reservation as an exception.

production to which the owner is entitled—a right to the prescribed fraction of gross production as a royalty interest or a right to the prescribed fraction of the royalty provided in the lease as a mineral interest.²⁶ Also, the classification of an interest as a mineral interest, or as a non-executive interest is important in determining the extent to which there will be a division of the management and leasing powers.

When the granting clause of a deed uses appropriate language to convey a mineral interest, and then proceeds to strip from that interest one or more of its usual incidents of ownership, a difficult construction problem is presented.²⁷

THE NON-PARTICIPATING MINERAL INTEREST

One of the more frequently encountered mineral conveyances, in recent years, has been the transfer of a non-participating mineral interest.²⁸ The interest is granted as an undivided fractional interest in the minerals in place, but the grantor reserves to himself, his heirs and assigns, the exclusive right to execute oil and gas leases.²⁹ By virtue of the ownership of an interest in the oil and gas in place, the owner of the non-participating mineral interest enjoys all of the other incidents of ownership of a full mineral interest.³⁰

It is generally held that the mere separation of the executive right from the grantee's mineral interest does not change that interest into a royalty interest.³¹ This holding is based upon the

²⁶ 1 KUNTZ, *op. cit. supra* note 5, § 15.3.

²⁷ Morris, *op. cit. supra* note 2, at 265.

²⁸ Woodward, *Sharing of Lease Benefits*. B. A. SECTION OF MINERAL & NATURAL RESOURCES LAW (1961). "Because the right to receive bonuses and rentals is normally associated with the right to lease, problems of construction may arise when an instrument is not clear as to whether or not it was intended to grant the power to lease when the right to receive rentals and bonuses was granted. . . . The problem should be one of construction of instruments. . . ." 1 KUNTZ, *op. cit. supra* note 5, § 15.7.

²⁹ 2 WILLIAM & MEYERS, *op. cit. supra* note 5, § 502 at 193. Of course both the non-participating mineral interest and the royalty interest can be created by reservation and exception, whereby the executive right and the mineral interest would pass to the grantee. Morris *op. cit. supra* note 2.

³⁰ Horn v. Skelly Oil Co., 224 La. 709, 70 So. 2d 657 (1954); Simpson v. Burris, 365 P.2d 134, 137 (Okla. 1961); McNeil v. Shaw, 295 P.2d 276 (Okla. 1956).

³¹ Alfrey v. Ellington, 285 S.W.2d 383 (Tex. Civ. App. 1955); Morris, *op. cit. supra* note 2, at 275. Because the owner of the non-participating mineral interest has no right to lease, it follows that he has no right of ingress or egress, nor does he have the right to develop the minerals himself. It is the absence of these rights which distinguish this interest from a mineral interest. Williams & Meyers, *Impact of Pooling & Unitization on Term Interests in Oil & Gas*, 11 Sw. L.J. 399, 401 (1957).

fact that the non-executive, although having no right to lease or to develop the property, has the right to his share of the bonuses, delay rentals, and royalties, a right not given to an owner of a pure royalty interest.³²

The West Virginia court has never specifically dealt with a conveyance involving a non-participating mineral interest.

THE ROYALTY INTEREST

Another frequently encountered mineral conveyance is the transfer of a royalty interest. The Indiana definition of royalty as a share of the product or profit reserved by the owner for permitting another to use his property³³ is considered to be an example of the common law and majority definition.³⁴ Williams and Meyers define royalty as a right to a share of the gross production from the land or of the proceeds from the sale of such production free of the costs of drilling, equipping, and operating the well.³⁵ Merrill, following these same lines, maintains that the royalty owner's "sole right" is to share in the royalties to the extent of his interest.³⁶

The incidents of the royalty interest may be described in a positive fashion. The owner of such an interest is entitled to a prescribed fraction of the oil and gas produced and saved, free of costs, and he is entitled to the utmost fair dealing in the exercise of the leasing power by the owner of that right.³⁷ The royalty owner, however, enjoys no right of access for the purpose of utilizing the oil and gas.³⁸ Consequently, the owner of such an interest cannot give a valid oil and gas lease, nor is it necessary for him to join in the execution of the lease.³⁹ Professor Donley

³² *Texas Gulf Producing Co. v. Griffith*, 218 Miss. 109, 65 So. 2d 834 (1953); 1 WILLIAMS & MEYERS, *op. cit. supra* note 8, § 202.3. See generally Morris, *op. cit. supra* note 2, at 294.

³³ *Indiana Natural Gas & Oil Co. v. Stewart*, 45 Ind. App. 544, 90 N.E. 384 (1910).

³⁴ *Federal Land Bank v. United States*, 168 F. Supp. 788, 144 Ct. Cl. 173 (1958).

³⁵ 2 WILLIAMS & MEYERS, *op. cit. supra* note 5, §§ 502-505.

³⁶ MERRILL, *COVENANTS IMPLIED IN OIL & GAS LEASES* § 191C (2d ed. 1959).

³⁷ *Voyta v. Clonts*, 134 Mont. 156, 328 P.2d 655 (1958).

³⁸ *Horner v. Gas Co.*, 71 W. Va. 345, 76 S.E. 662 (1912); *Lathrop v. Eyestone*, 170 Kan. 419, 227 P.2d 136 (1951). "It is the rule that what appears to be a royalty interest will be converted into a mineral interest if the owner is expressly given the right of ingress and egress for the purpose of development." Morris, *op. cit. supra* note 2, at 302.

³⁹ *Davis v. Mann*, 234 F.2d 553 (10th Cir. 1956); *Pease v. Dolezal*, 206 Okla. 696, 246 P.2d 757 (1952); 1 KUNTZ, *op. cit. supra* note 5, § 15.2.

states that “. . . royalty . . . brought to the surface is personal property . . .”⁴⁰

The royalty interest is usually created by grant, reservation, or exception, as is a mineral interest. The grant or reservation of a royalty interest is usually in language that refers to participation in production rather than to ownership of the oil and gas in place, or, in language that shears the recipient of the executive powers and the right to participate in the other leasing and development benefits.⁴¹ The royalty interest may be created either prior to or subsequent to a lease of the land for oil and gas purposes.⁴² The mineral estate has all the rights, powers, privileges, and immunities after the transfer of a royalty interest that it had before, except one—the right to receive all the royalty on the production from the land.⁴³ The executive right remains in the grantor⁴⁴ as an incident of the mineral interest not terminated by a royalty grant.⁴⁵

THE DAVIS CASE

In the majority of the oil-producing states a mineral interest—whether an undivided interest or the whole mineral fee—carries with it all the incidents of ownership possible in a mineral estate; a non-participating mineral interest has all of such incidents of ownership, save the right to join in the execution of a lease.⁴⁶ It should be borne in mind that the owner of a royalty interest has no present or prospective possessory interest in the land; that he owns no part of the minerals, as such, in place; that he does not become a cotenant in the mineral estate; and that his interest is merely a present, vested incorporeal interest in the land carrying with it only a right to the stated proportion of the gross production.⁴⁷

⁴⁰ DONLEY, *op. cit. supra* note 3, § 26.

⁴¹ *Calcote v. Texas Pac. Coal & Oil Co.*, 157 F.2d 216 (5th Cir. 1946); *Rich V. Donaghey*, 71 Okla. 204, 177 Pac 86 (1918); 1 WILLIAMS & MEYERS, *op. cit. supra* note 8, § 202.3. “The retention of such rights as . . . the right to lease for oil and gas are incompatible with the reservation of a pure royalty interest.” *Pease v. Dolezal*, *supra* note 39.

⁴² *Watkins v. Slaughter*, 144 Tex. 179, 189 S.W.2d 699 (1945); Jones, *Problems Presented by the Separation of the Exclusive Leasing Power from Ownership of Land, Minerals, or Royalty*, SOUTHWESTERN LEGAL FOUNDATION 2d INSTITUTE ON OIL & GAS LAW & TAXATION 271 (1951); DONLEY, *op. cit. supra* note 3, § 163.

⁴³ *O’Daniel v. Roth*, 320 S.W.2d 51 (Tex. Civ. App. 1958).

⁴⁴ See 1 WILLIAMS & MEYERS, *op. cit. supra* note 8, § 208.

⁴⁵ *Stone v. Texoma Prod. Co.*, 336 P.2d 1099, 1101 (Okla. 1959).

⁴⁶ See *Pease v. Dolezal*, *supra* note 39; *Law v. Stanolind Oil & Gas Co.*, 209 S.W.2d 381 (Tex. Civ. App. 1948).

⁴⁷ *Clampitt v. Ponder*, 91 F. Supp. 535 (W.D. Ark. 1950); *La Laguna Ranch Co. v. Dodge*, 18 Cal. App. 2d 132, 114 P.2d 351 (1941); *Arnold v.*

As was mentioned earlier, prior to the decision in the *Davis* case the West Virginia court had refused to uphold the validity of a pure royalty interest.⁴⁸ Basically, the conveyances the court was faced with in the *Davis* case were these: *O*, the owner of the land in fee, devised the tract to his four sons, *A*, *B*, *C*, and *D*. *A* conveyed his one-fourth undivided interest to *D*, which gave *D* an undivided one-half interest in the land and minerals. *B* and *C* conveyed their interests to *D*, but each reserved one-fourth of the oil and gas royalty, when produced. As a result of these conveyances, *D* owned the tract in question subject only to the one-half royalty interest retained by his two brothers. *D* sold the tract to *E*, reserving a one-half royalty interest for himself, his heirs and assigns.⁴⁹ *E*'s successor in interest leased the land to *X*; *B*, *C*, and *D*'s successors in interest leased the land to *Z*. The question presented to the court was whether *E*'s successor or the successors of *B*, *C*, and *D* had the right to lease the land. In order to determine the rights of the parties, it was necessary for the court to determine the nature of the reservations made by *B*, *C*, and *D*.⁵⁰ The court held that the reservations were pure royalty interests and thus the tract could be leased only by *E*'s successor in interest.

The reservations in the deeds were reservations of the profits to be derived from the production of oil and gas, and an application of the rule as stated in *Toothman v. Courtney*⁵¹ would require a mineral rather than a royalty construction. The court, however, stated that the legal principle on which the holding in the *Toothman* case was based was ". . . merely a rule of construction which

Smith Land Co., 307 S.W.2d 818 (Tex. Civ. App. 1957). In *Jackson v. Dulaney*, 37 W. Va. 309, 67 S.E. 795 (1910), title to the "oil in place" was reserved and the grantee given the right to lease and develop the minerals. This is normally sufficient to establish a non-participating mineral interest, but the grantor was given only the right to receive one-tenth of the gross production as a royalty interest rather than a right to the prescribed fraction of the royalty provided by a lease as a mineral interest. This is an indication of the confusion in West Virginia prior to the *Davis* decision.

⁴⁸ Note 6 *supra* and accompanying text. The West Virginia court had, however, adopted the Indiana definition of royalty, although it failed to follow the definition. *Robinson v. Milam*, *supra* note 13.

⁴⁹ *Davis v. Hardman*, 133 S.E.2d 77, 78 (W. Va. 1963).

⁵⁰ The determination needed was "whether the right to lease is in the owner of the fee, subject to certain reservations of oil and gas rights; or whether the right to lease is in the persons owning the rights thus reserved." *Ibid.*

⁵¹ 62 W. Va. 167, 58 S.E. 915 (1907). The court in this case held that a grant or reservation of the royalties to be derived from the land is, in effect, a grant or reservation of title to the mineral. *Id.* at 175, 58 S.E. at 918. See *Coke's* rule, *supra* note 7.

cannot control or override an intention to the contrary expressed in the language of the . . . writing under consideration."⁵² In *Paxton v. Benedum-Trees Oil Co.*, the court had held that a grant of the rents and royalties resulting from the production of oil was a ". . . grant of the oil in such land."⁵³ In the present case, however, the court stated that the rule set forth in the *Paxton* case has no application ". . . if it appears that the intention of the parties is clearly expressed in the language which created the oil and gas reservations now under consideration."⁵⁴ The court then stated that a royalty interest and a mineral interest each have separate, distinguishing incidents of ownership, and a deed will be construed as establishing either a royalty or a mineral interest depending on which of these incidents are granted or reserved.⁵⁵

It is submitted that Coke's rule has lost its importance and significance, even as a rule of construction, by the court's pointing out the distinction between the incidents of ownership in a mineral interest and those of a royalty interest. The grant or reservation of a mineral interest or a royalty interest is dependent, now, on the particular incidents of ownership conveyed or withheld rather than on the application of a common law dictum.

The apparent emphasis placed by the court on the words "when produced" should not be interpreted as requiring the use of such words to create a royalty interest. This apparent requirement was negated by the court's statement that a ". . . construction which places in the grantees the ownership of the oil and gas in place, subject to mere royalty rights, renders all of the language of the reservations meaningful and purposeful."⁵⁶ The court was obviously following the rule of giving effect, if possible, to every word used in the instrument⁵⁷ rather than attempting to require the use of the words "when produced" to create a royalty interest.

Briefly stated, the effect of the *Davis* case is to construe an instrument as reserving a pure royalty interest, and not as a reservation of the minerals in place—a construction which would have been required by an application of *Coke's rule* and the series of cases beginning with *Toothman v. Courtney*.⁵⁸

⁵² *Davis v. Hardman*, *supra* note 49, at 80.

⁵³ 80 W. Va. 187, 94 S.E. 472 (1917)

⁵⁴ *Davis v. Hardman*, *supra* note 49, at 81.

⁵⁵ *Id.* at 81.

⁵⁶ *Id.* at 82.

⁵⁷ *DONLEY*, *op. cit.* *supra* note 3, § 65 at 84.

⁵⁸ Note 6 *supra* and accompanying text.

THE EXECUTIVE RIGHT

If the reservations involved in the *Davis* case had been construed as reservations of the oil and gas in place, instead of royalty interests, the court would have been faced with the problem of determining the validity of the executive right given to *E* and his successor in interest. Recognition of this right is essential if there is to be a full and complete utilization of the oil and gas estate.⁵⁹ Unfortunately, the court in the *Davis* case failed to clarify the confusion in West Virginia with regard to the effect and validity of the executive right.

The West Virginia court by upholding the validity of a non-executive interest, in order to remain consistent must also recognize the validity of the executive right, for it is illogical to imply the right when a royalty interest is outstanding and then to refuse to recognize it when a non-participating mineral interest is outstanding.⁶⁰ Professor Donley has stated that to invalidate the executive right is inexplicable; “. . . it results in the defeat of a perfectly legitimate business transaction; and it permits the promisor to break his promise with impunity.”⁶¹

Various efforts have been made to identify the executive right with conventional property concepts. The right has been classified as a power of appointment;⁶² as a power coupled with an interest;⁶³ and as a common law power of exchange—which exists in some states as a power in trust.⁶⁴ Despite the different views taken by the courts and the writers in sustaining the executive right, the majority agree that it cannot be sustained on the theory of a power coupled with an interest.⁶⁵ The problems inherent in an attempt

⁵⁹ See generally Morris, *Some Legal Consequences Resulting from a Separation of the Incidents of Ownership of a Mineral Interest*, 7 OKLA. L. REV. 285 (1954).

⁶⁰ Everett, *op. cit. supra* note 2, at 519.

⁶¹ DONLEY, *op. cit. supra* note 3, § 138 at 183.

⁶² Dallapi v. Campbell, 45 Cal.App.2d 541, 114 P.2d 646 (1941).

⁶³ Bonzo v. Nowlin, 285 S.W.2d 153 (Ky. 1955); See also Drake v. O'Brien, 99 W. Va. 582, 130 S.E. 276 (1925).

⁶⁴ See generally Kuntz, *Rule Against Perpetuities & Mineral Interests*, 8 OKLA. L. REV. 183 (1955).

⁶⁵ “The difficulty with this theory is that the grantor has no interest in the undivided mineral fee interest of his grantee over which he has attempted to reserve this power.” Gilmer v. Veatch, 121 S.W. 545 (Tex. Civ. App. 1909). The West Virginia court in *Drake v. O'Brien*, *supra* note 63, attempted to uphold an executive right on the theory of a power coupled with an interest. Two later cases, from other jurisdictions, considered the executive right and held it valid despite the contention that it was a power not coupled with an interest. Kilfayle v. Wright, 300 F.2d 626 (Cir. 1962); Dat v. Breitung, 136 So. 2d 501 (La. App. 1963); See generally Kuntz, *supra* note 64.

at classification are avoided if the right is recognized as a distinct and separately alienable incident of mineral ownership—whether or not it has an exact counterpart in feudal land law.⁶⁶ It has been considered consistent in theory to recognize the validity of the right as a separate and distinct property right which is alienable as one of the incidents of ownership of an undivided mineral interest.⁶⁷

If the exclusive power to lease the minerals of another is upheld as a separate property right the question is presented as to whether or not it may be created as a naked right, independent of ownership of any other associated interest in the minerals. If the right is to be treated as a separately alienable interest of mineral ownership, it is capable of being created as a naked power. It should be a matter of construction to determine whether it was intended that the right be in gross, as a naked right, or be appurtenant to an undivided part of the full mineral interest. If the right is in gross it should pass with a conveyance of the mineral interest which the holder of the right possessed at the time of "creation,"⁶⁸ unless it is expressly excluded from the grant.

The confusion in West Virginia with regard to the executive right is illustrated by the case of *Rawling v. Fisher*.⁶⁹ In that case a grant containing a reservation of one-half of the minerals, the executive right and the right to receive rentals expressly vested in the grantee, was construed as a personal covenant, unenforceable by a successor in title of the grantee against the grantor. Thus, it was held, that the grantor could lease his one-half interest and collect the rentals therefrom.⁷⁰ The court's error in char-

⁶⁶ 1 KUNTZ, *op. cit supra* note 5. § 15.7.

⁶⁷ *Cockrell v. Texas Gulf Sulphur Co.*, 157 Tex. 10, 299 S.W.2d 672 (1957); *Pan Am. Petroleum Corp. v. Gain*, 355 S.W.2d 506, 511 (Tex. Civ. App. 1962), (dissenting opinion); *Martin v. Snuggs*, 302 S.W.2d 676 (Tex. Civ. App. 1957).

⁶⁸ *Burns v. Audas*, 312 S.W.2d 417 (Tex. Civ. App. 1958); 1 KUNTZ, OIL & GAS § 15.7 at 349. *Contra*, 2 WILLIAMS & MEYERS, OIL & GAS LAW § 502 at 193 (1959), the right is in the nature of an incorporeal hereditament.

⁶⁹ 101 W. Va. 253, 132 S.E. 489 (1926).

⁷⁰ It would seem that in all jurisdictions, if a mineral interest is stripped of all its incidents of ownership, except royalty, the courts would hold the grant or reservation to be one of royalty only. *Morris, Mineral Interest or Royalty Interest?* SOUTHWESTERN LEGAL FOUNDATION 10TH OIL & GAS LAW & TAXATION 259, 298 (1959). Since the mineral reservation here was stripped of all the incidents except royalty, the court was wrong in not characterizing that interest as a royalty interest. *Texas Gulf Producing Co. v. Griffith*, 218 Miss. 109, 65 So. 2d 834 (1953).

acterizing interests in oil and gas as covenants was compounded by the conclusion that the executive right, as a covenant, did not touch and concern the land, and thus there was no privity of estate; hence the grantor was not bound by the provisions in his deed. "Fortunately this contribution to the learning on oil and gas has not received wide circulation."⁷¹ Given the fact that the owner of a mineral interest may sever, as separate property rights, the incidents of ownership inherent in that interest⁷² and that the executive right is inherent in the ownership of the oil and gas in place,⁷³ it is impossible to justify the court's holding that the subsequent grantee's interest was unenforceable because it was a personal covenant. No mention was made of the *Rawling* case in the *Davis* decision.

If the executive right could be considered a covenant, it could only be a covenant which runs with the land. A covenant running with the land has been defined as an incident of the land, the benefit or burden of which passes to subsequent owners. It is created initially by the grantor and grantee having privity of estate at the time of the conveyance under which a grantor or grantee agrees to do or not to do something on the land conveyed so that a subsequent grantee of either is bound by the covenant.⁷⁴ West Virginia has held that for a covenant to run with the land it must respect the thing granted, and concern the estate conveyed.⁷⁵ Because the executive right is an inherent portion of the ownership of a mineral interest, it must necessarily touch and concern an estate granted in the minerals, and therefore, as a covenant must run with the land.⁷⁶ According to Thompson's definition, the incident of the land which passes to a subsequent grantee is created initially by a prior grantor and grantee.⁷⁷ The executive right cannot be created initially by a covenant between a grantor and grantee for the right is already in existence as an inherent part of the ownership of a mineral interest. A grant or reservation of the executive right is not a covenant running with the land or otherwise.⁷⁸

⁷¹ 1 WILLIAMS & MEYERS, OIL & GAS LAW § 304.9 (1959).

⁷² Note 16 *supra* and accompanying text.

⁷³ See *Davis v. Hardman*, *supra* note 49, at 81; Note 15 *supra* and accompanying text.

⁷⁴ 7 THOMPSON, REAL PROPERTY § 3688 (perm ed. 1941).

⁷⁵ *Tennant v. Tennant*, 69 W. Va. 28, 70 S.E. 851 (1911); See generally DONLEY, COAL, OIL & GAS IN WEST VIRGINIA & VIRGINIA § 138 (1951).

⁷⁶ DONLEY, *op. cit. supra* note 75, § 138 at 183.

⁷⁷ Note 74 *supra* and accompanying text.

⁷⁸ *Pan Am. Petroleum Corp. v. Cain*, *supra* note 67, at 510.

In the instance where the executive right is severed from an undivided part of the full mineral interest, and a non-participating mineral interest created, the validity of such a right is recognized to the same extent as it is in regard to a royalty interest.⁷⁹ For example in *Superior Oil Co. v. Stanolind Oil & Gas Co.*,⁸⁰ a Texas court was called upon to decide the validity and legal effect of an attempt by the grantor to pass to the grantee the perpetual power to execute oil and gas leases on the undivided one-half mineral interest retained by the grantor in the deed to the grantee conveying the surface and the other one-half mineral interest—the identical factual situation existing in the *Rawling* case. The court held that neither the grantor nor his assigns could thereafter lease the retained interest; that the grantee had the exclusive right and power to lease the land; and that the power was irrevocable. Conversely, on the conveyance of a non-participating mineral interest, the grantor may reserve to himself, his heirs and assigns, the exclusive right to lease the conveyed interest, and a lease executed by his successors in interest is valid.⁸¹ The executive right is a vested right which may pass by inheritance or by assignment.⁸² The grant or reservation of the executive right may, of course, be in such terms that it is construed as a non-assignable right purely personal to the grantor or grantee, which necessarily terminates on the death of the holder of the power.⁸³

Many competent oil attorneys have been constantly plagued by the fear that the courts might hold any attempt to place in the hands of one cotenant the perpetual and exclusive power to lease the entire mineral fee estate invalid as a violation of the Rule Against Perpetuities or of the rule against restraints on alienation, or both. The vast majority of cases involving the executive right ignore these issues and recognize the validity of the transaction.⁸⁴

It has been pointed out that recognition of the executive right increases the alienability of the interests subject thereto, and also

⁷⁹ I KUNTZ, *op. cit. supra* note 68, § 15.7.

⁸⁰ 239 S.W.2d 346 (Tex. Civ. App. 1950).

⁸¹ *De Busk v. Cosden Petroleum Corp.*, 262 S.W.2d 767 (Tex. Civ. App. 1953).

⁸² *Stone v. Texoma Prod. Co.*, *supra* note 45; *Cockrell v. Texas Gulf Sulphur Co.*, *supra* note 67.

⁸³ Sullivan, *Executive Power to Lease*. B. A. SECTION OF MINERAL & NATURAL RESOURCES LAW (1962).

⁸⁴ Jones, *Separation of Exclusive Leasing Power from Ownership of Land, Minerals or Royalty*, SOUTHWESTERN LEGAL FOUNDATION 2D INSTITUTE ON OIL & GAS LAW & TAXATION 271 (1951); Note, *Exclusive Power to Lease*, 34 Tul. L. Rev 375 (1959).

of the right itself. It is ridiculous therefore, to maintain that a grant or reservation of the executive right violates the rule against restraints on alienation. Furthermore, the Rule Against Perpetuities, by preventing the remoteness of vesting, is designed to render land more marketable. It is a travesty—in the name of the Rule—to defeat this objective by invalidating a non-executive mineral interest or the executive right.⁶⁵

It seems clear that the courts will not leave the mineral or royalty owner completely at the mercy of the owner of the executive right.⁶⁶ It is obvious therefore, that certain duties should be imposed upon the holder of the exclusive leasing power in the exercise of that right.⁶⁷ The proprietor of the executive right clearly owes a duty to protect the concerns of such an interest.⁶⁸ The very nature of the royalty and nonexecutive mineral interests contemplates development, for it is only by development that the holder of the interest may benefit. This being true, it is reasonable to assume, even though the particular conveyance is silent, that the law will impose a duty upon the person holding the sole right to develop or cause development to use all reasonable means at hand to bring about the exploitation of the underlying minerals.⁶⁹

In all jurisdictions having decisions on the subject,⁷⁰ with the possible exception of Louisiana,⁷¹ it has been held or assumed that the holder of the executive right owes a duty to the owners of the interests subject to such a power. Some of the cases indicate that the fiduciary standard of conduct will be required of the holder

⁶⁵ "No interest in property is valid unless it must vest, if at all, not later than 21 years after a life in being at the time of the creation of the interest." GRAY, RULE AGAINST PERPETUITIES, § 201 (4th ed. 1942). 2 WILLIAMS & MEYERS, *op. cit. supra* note 68. Walker maintains that the executive right will not violate the Rule Against Perpetuities or the rule against restraint on alienation if the right can be defeated by partition. Walker, *Developments in the Law of Oil & Gas in Texas During the War Years — A Resume*, 25 TEXAS L. REV. 1, 19-20 (1946). A later decision held the executive right could not be defeated by partition. *Hudgins v. Lincoln Nat. Life Ins. Co.*, 144 F. Supp. 192 (E.D. Tex. 1956).

⁶⁶ *Jones, Non-Participating Royalty*, 26 TEXAS L. REV. 569, 571 (1948).

⁶⁷ 1 KUNTZ, *op. cit. supra* note 68, § 15.7; See generally 2 WILLIAMS & MEYERS, *op. cit. supra* note 68, 339.

⁶⁸ *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S.W. 290 (1923); See *Allison v. Smith*, 278 S.W.2d 940 (Tex. Civ. App. 1955).

⁶⁹ Turpin, *Mineral Deeds & Royalty Transfers*, SOUTHWESTERN LEGAL FOUNDATION 1ST INSTITUTE ON OIL & GAS LAW & TAXATION 221, 235 (1949).

⁷⁰ *E.g.*, *Federal Land Bank v. United States*, *supra* note 34; *Lamp v. Locke*, 89 W. Va. 138, 108 S.E. 899 (1921).

⁷¹ See *Spiner v. Phillips Petroleum Co.*, 94 F. Supp. 273 (W.D.La. 1950).

of the executive right;⁹² others seem to impose only the duty to act with prudence and good faith—the “utmost good faith.”⁹³ Professor Merrill has stated the general rule concerning the executive’s duty of care: “If the holder of the executive right uses reasonable diligence to secure the best terms for the common good, the beneficiary has no legal ground of complaint.”⁹⁴

The remedies available to the owner of a non-participating interest who has reason to complain have not yet been fully developed. It has been held, however, that the non-executive can require the executive to exercise some degree of good faith, either in leasing or in refusing to lease.⁹⁵ In a particular instance, therefore, if there has been an intentional violation of duty, cancellation of the lease may be proper. Monetary damages should be available, depending on the facts, either as the sole remedy, as an alternative to cancellation of the lease, or in conjunction with a cancellation of the lease. In addition to the duty of executing a lease in a timely manner, it has been held that the holder of the executive right must contract for no less than the customary one-eighth royalty.⁹⁶

In summary, it may be said that the general custom or usage of employing the executive right in oil and gas transactions has received “. . . a sufficient sanction from the law so that its rejection would unsettle property rights or cause some other adverse consequence, especially in the petroleum industry where the executive right prevades the entire business.”⁹⁷ The fact that the West Virginia court, in the *Davis* case, recognized the executive right as a separate attribute of ownership⁹⁸ and that a reservation of such a right was incompatible with a reservation of a pure royalty interest⁹⁹ seems to indicate that the errors of the *Rawling* case will not be repeated. The holder of the executive right, whether in gross or appurtenant to an interest in the minerals, should be held to have the right to pass to a lessee the possessory right incident to a mineral estate for the purpose of obtaining exploration for the development of the oil and gas, resulting in benefit both to the executive and to the non-executive.

⁹² *E.g.*, *Wright v. Brush*, 115 F.2d 265 (10th Cir. 1940).

⁹³ *E.g.*, *Warren v. Amerada Petroleum Corp.*, 211 S.W.2d 314 (Tex. Civ. App. 1948).

⁹⁴ MERRILL, *op. cit. supra* note 36, § 191C.

⁹⁵ *McCall v. Nettles*, 251 Ala. 349, 37 So. 2d 635 (1948).

⁹⁶ *Odstrcil v. McGlaun*, 250 S.W.2d 353 (Tex. Civ. App. 1950).

⁹⁷ *Everett, Executive Right to Lease*, 3 ROCKY MOUNTAIN MINERAL L. INSTITUTE 509, 518 (1957).

⁹⁸ *Davis v. Hardman, supra* note 49, at 81.

⁹⁹ *Id.* at 82; accord, authorities cited note 41 *supra*.

The executive right, the royalty interests, and the non-participating mineral interest each were established in order to provide for easier alienation and development. Unfortunately, recognition of the validity of these interests will not provide the ultimate answer to the complete utilization of the minerals. The purpose of the executive right is to avoid frustrating the exploitation of the minerals because of the practical difficulty of locating and securing oil and gas leases from a number of people—a situation which occurs when the full mineral interest has been divided into many undivided interests, each with full incidents of ownership.¹⁰⁰ Inasmuch as this right is treated as a separately alienable interest in mineral ownership—a separate property right—it must be considered divisible. To allow a division of the executive right would defeat the purpose for which it is used, and could result in a failure to develop the oil and gas underlying the particular tract.

It is submitted that a more complete development of the oil and gas will be accomplished if legislation is enacted abolishing the common law rules of waste as these rules apply to the exploitation of the oil and gas. The majority rule, allowing a cotenant in the mineral fee to enter and explore for the oil and gas without the consent of his cotenants, should be adopted.¹⁰¹ If the legislature refuses to abolish the rules of waste, it is submitted that, as an alternative, legislation similar to the Texas Relinquishment Act be enacted.¹⁰² The Act does not release or relinquish title to any part of the oil and gas in place to the owner of the soil but merely con-

¹⁰⁰ 1 KUNTZ, *op. cit. supra* note 68, § 15.7 at 349.

¹⁰¹ TEX. CIV. STAT. ch. 38, §§ 5367-79 (1961). See generally 2 AM. L. OF MINING §§ 12.1 - 12.17 (1963). As to the lands which are subject to the Relinquishment Act:

"The Relinquishment Act applies to all public free school lands or asylum lands sold by the state . . . with either a mineral classification or mineral reservation and it is immaterial whether the land has been patented or is merely held under a purchase contract, and it is immaterial whether the original sale made between 1895 and 1931 was forfeited and the land repurchased under the terms of the Relief Act. The only exception to this . . . seems to be a small amount of land that may have been classified and sold as mineral land under the special provision of the Mineral Act of 1895." Walker, *Texas Relinquishment Act*, SOUTHWESTERN LEGAL FOUNDATION 1ST INSTITUTE ON OIL & GAS LAW & TAXATION 245, 255 (1949).

¹⁰² "Section Two of the act (§ 5368), since the decision in *Greene v. Robinson*, 117 Tex. 516, 8 S.W.2d 655 (1928), is clear that the owner of the soil does not have title to any part of the oil and gas in place and does not have any power . . . over these minerals other than by a sale of an oil and gas leasehold in them as agent of the state." Walker, *op. cit. supra* note 101, at 265; Jones, *Separation of the Exclusive leasing Power from Ownership of Land, Minerals or Royalty*, SOUTHWESTERN LEGAL FOUNDATION 2D INSTITUTE ON OIL & GAS LAW & TAXATION 271 (1951).

stitutes him the agent of the state for the purposes of leasing the land for oil and gas development.¹⁰³ If such legislation should be enacted in West Virginia, the owner of the surface would be agent for the owner of the mineral interest for the sole purpose of leasing the oil and gas. Of course, the mineral owner should have the right to terminate this agency at any time, on notice to the surface owner.¹⁰⁴ Provision should also be made for a division of bonuses, and it should be provided that any income from royalty established by the lease be deposited in a bank—in an escrow account for instance—in the county from whence the royalty minerals were produced. The benefits of such legislation are obvious: It would enable an operator to secure a lease without the necessity of tracing the mineral titles, it would remove the restrictions placed on development by the common law rules of waste, and it would make it incumbent on those claiming an interest in the proceeds from the production to prove their title. Legislation, similar to that outlined above, is necessary if West Virginia is to obtain the greatest benefit from its petroleum and natural gas reserves.

Thomas Franklin McCoy

¹⁰³ The right to terminate the agency at will should operate so as to prevent a mineral owner from being deprived of his property without due process of law, thus keeping the legislation within constitutional limits.