O/a 2-5-88

SUPREME COURT OF FLORIDA

CONWAY LAND, INC., ETC., ET AL.,	:	RESPONDENTS' ANSWER BRIEF ON THE MERITS
Petitioners,	:	CASE NO. 70,845
vs.	:	DISTRICT COURT OF APPEAL 5TH DISTRICT-NO. 86-514
DAVID E. TERRY, ET AL.,	:	
Respondents.	:	

_____/

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(A separately bound Appendix accompanies this Brief.)

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Note:
The following abbreviations will be used in this brief:

PB-M .... Petitioners' Initial Brief on the Merits.
PA .... Petitioners' Appendix to Brief on the Merits.
RA .... Respondents' Appendix

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STATEMENT OF THE CASE AND FACTS

Respondents accept the Statement of the Case and Facts of Petitioners, subject to the following additions and corrections.

Respondents qualify their acceptance of the Statement of Case and Facts by noting a difference between the Statement of the Case and Facts in Petitioners Brief on Jurisdiction and Petitioners Initial Brief on the Merits. In their brief on Jurisdiction Petitioners inadvertently refer to the ". . . reservation of rights under an oil and gas lease . . . " This statement is corrected by being deleted from the Brief on the Merits. As so corrected, the Statement of The Case and Facts in the Initial Brief on the Merits is accepted.

Respondents respectfully add the fact, not disputed by the parties, that no oil, gas, or other mineral production ever occurred under the oil, gas and mineral lease which encumbered the lands of the grantor at the time of the conveyances in question. The conveyances affected only a portion of the approximately forty-six thousand acres leased to Warren Petroleum Corporation.

Respondents respectfully add that the Fifth District Court of Appeal found that the disputed reservation was intended by the grantor to reserve an interest in real estate of fee simple duration, namely a perpetual non-participating royalty on oil, gas, and minerals under the lands, and further that the common law rule against perpetuities in Florida did not apply to the reserved interest.

Respondents respectfully qualify their acceptance and take issue with the statement at page 1 of the Petitioners' Statement of the Case and Facts viz: "The Terry Respondents claim to be successors in interest to Magnolia Ranch, Inc. . . " (Emphasis Added). The fact that the Terry Respondents are successors to Magnolia Ranch, Inc. has never been disputed in this case. Further, the Court below affirmatively found that "[a]ppellants are successors in interest to Magnolia Ranch, Inc., the former owners of the property involved." Whether they are entitled to a share of the condemnation award, as those successors, is the sole issue in this case.

ISSUES PRESENTED FOR REVIEW

FIRST ISSUE

WHETHER THE DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THE INTENT OF THE GRANTOR IN THE DEEDS AT ISSUE, AND THEREBY PROPERLY CONCLUDED THAT THE RESERVATION OF ROYALTY IN THE DEEDS WAS A PERPETUAL NONPARTICIPATING ROYALTY IN THE NATURE OF A PRESENTLY VESTED INTEREST IN REAL ESTATE OF FEE SIMPLE DURATION, AND THUS WAS COMPENSABLE IN A CONDEMNATION OF THE FEE SIMPLE INTEREST IN THE LANDS SUBJECT TO THE RESERVATION OF ROYALTY.

SECOND ISSUE

WHETHER THE FLORIDA COMMON LAW RULE AGAINST PERPETUITIES HAS ANY APPLICATION TO A PERPETUAL NONPARTICIPATING ROYALTY.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal in this case is correct for the following reasons:

The District Court properly reviewed the entire content of the deeds at issue to ascertain the intention of the grantor. The District Court properly refused to ignore any part of the language of the deeds while reviewing those deeds. The District Court, in so reviewing the deeds at issue correctly determined the intention of the grantor to create a perpetual nonparticipating royalty in the oil, gas, and minerals of the lands conveyed.

The District Court correctly interpreted the holding of Miller v. Carr, 137 Fla. 114, 188 So. 103 (1939), and the other cases cited in its opinion, to mean that Florida follows the overwhelming weight of primary and secondary authority concerning the nature of a royalty interest in oil, gas, and other minerals. Such an interest is a presently vested fee simple interest in real property and is not personalty. The District Court correctly determined that the Florida common law rule against perpetuities has no application to a perpetual nonparticipating royalty interest.

The decision of the District Court is consistent and in no way conflicts with Miller v. Carr, supra, is supported by overwhelming authority, and is based upon sound reasons of public policy. The position of Petitioners is supported only by a small minority of legal opinion, in particular Kansas, and only because of principles unique to the law in Kansas.

ARGUMENT ON ISSUES PRESENTED FOR REVIEW

The following abbreviations will be used in this brief:

PB-M .... Petitioners' Initial Brief on the Merits.
PA .... Petitioners' Appendix to Brief on the Merits.
RA .... Respondents' Appendix

FIRST ISSUE

WHETHER THE DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THE INTENT OF THE GRANTOR IN THE DEEDS AT ISSUE, AND THEREBY PROPERLY CONCLUDED THAT THE RESERVATION OF ROYALTY IN THE DEEDS WAS A PERPETUAL NONPARTICIPATING ROYALTY IN THE NATURE OF A PRESENTLY VESTED INTEREST IN REAL ESTATE OF FEE SIMPLE DURATION, AND THUS WAS COMPENSABLE IN A CONDEMNATION OF THE FEE SIMPLE INTEREST IN THE LANDS SUBJECT TO THE RESERVATION OF ROYALTY.

BACKGROUND OF OIL AND GAS

The law of oil and gas can only be properly comprehended by first acquiring an understanding of the scientific, engineering, and practical physical realities of the industry. To speak of "royalty" or oil "produced and saved", or to speak of "minerals" or oil "in and under" the ground is to use terms of art peculiar to the business. Failure to define terms with particular care before communicating in this field leads to confusing and conflicting results, as is evidenced by the abundance of case law in this country. Once the terms are understood and meanings are agreed upon, however, the cases can (usually) be explained and evaluated. An understanding of certain basics in the oil and gas industry will be found helpful in evaluating the issues in the instant case. The ensuing remarks are based upon a representative treatise in the field, 1 Williams and Meyers, Oil & Gas Law, §103 et seq. (1985); See also, Summers, A Treatise on the Law of Oil and Gas, §1 et seq. (1958).

Certain of the principles described in that work are especially important when considering the intent of the parties dealing with, as in this case, large tracts of potential oil and gas lands.[1] When it is realized that a dry hole may cost anywhere from $100,000.00 to $1,000,000.00 and up[2], with zero results, it is not hard to understand that a particular tract may, or may not, be adequately tested depending on the resources and knowledge of the exploration company. In "wildcat" (unproven) oil territory, a rule of thumb is that one in nine wells are producers. The resources of a given exploration company are limited. Oil exists far below ground in reservoir (stratigraphic) traps. These are not to be confused with the notion of "rivers" or "pools" of oil and gas. Rather the substances are, more or less, tightly bound within the microscopic spaces in a given limited rock formation. There may be one, two, several, or no such oil bearing formations existing independent of each other, at various depths and locations under a given tract of land. A given well (translate as "a given amount of money") can only test a limited portion of a given tract, and then only to certain depths. If the exploration company is fortunate it may penetrate one or more producing

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[1] The oil and gas lease in this case covered some seventy-two (72) square miles (46,000 acres) of central Florida ranchlands. R-App. Exhibit 1. The deeds covered only a limited portion of the lands under lease.

[2] One [in]famous investor has been quoted as saying that "[i]t has become cheaper to look for oil on the floor of the New York Stock Exchange than in the ground." Scott, Restrictions on Alienation Applied to Oil and Gas Transactions, 31 Rocky Mtn. Min. L. Inst. Section 15.01 (1985) quoting T. Boone Pickens in Time Magazine, March 4, 1956 at 56.

formations. A given well might produce from one oil-bearing formation and leave another sealed off for the future. If a well penetrates to five thousand feet with no results, can it then be said there is therefore no oil at seven or ten thousand feet? Just how deep is fee simple? From the foregoing it can be reasonably concluded that there is considerable monetary risk to be passed around in the oil business. How landowners and their lessees and grantees deal with that risk is central to an understanding of the issues raised by this Appeal.

DEFINITION OF TERMS

"This Appeal points up some of the complexities involved in the creation of interests in oil and gas". This statement, appearing at the beginning of the opinion in Welles v. Berry, 434 So.2d 982, 983 (Fla. 2d DCA 1983), applies with equal, and perhaps, even greater force to the instant appeal. When dealing with "royalty" in the field of oil and gas law the reported decisions collectively form a complex maze of almost staggering proportions.[3] A definition[4] of terms is essential.

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[3] See, eg., the comments in Annot., 4 A.L.R. 2d 492 (1949); Annot., 56 A.L.R. 4th 539 (1987).

[4] An appreciation for the frustration in attempting definitions in this field of law can be gained from the Annotations in the American Law Reports. See eg. Annot., 4 A.L.R. 2d 492, 493-495 (1949). Therein it is said: "The word 'royalty' is often used loosely and inaccurately; at times by courts, and attorneys; very commonly by litigants and witnesses, and persons in general engaged in the petroleum industry or dealing in oil and gas holdings. . . . The term 'royalty' in its variety of misleading uses is freely employed in bargaining for petroleum interests. It creeps into legal documents of the most solemn character, appears in judicial opinions, and courts called upon to construe documents often find themselves seeming to say that that which is royalty is not royalty at all."

For example:

> The term 'royalty' does not have a single fixed definition because it is interpreted by reference to the instrument in which it is used. It is often used to describe varying property interests that are created by the conveyance or reservation of a royalty interest, as well as to describe the lessor's right to compensation for production. (Emphasis Added.)

Morse, Non Payment of Production Royalties under a Producer's 88 Lease: A Legislative Prescription to Cure a New Disease, 9 Fla. St. U.L. Rev. 447 (1981).

"Royalty" has been said to have three distinct "senses", first as an object of property rights, second as a measure or quantum of the estate in those property rights, and third as the actual payment made to the holder of the interest. Sullivan, All About Royalties, 16 Rocky Mtn. Min. L. Inst. 227, 237 n.35 (1971). With respect to the concept of duration, in a given case it might be a fee simple real property estate, or in a different case it could be a personal property interest limited in time to a term of years. The actual payment for the interest is, of course, always personal property (money), whether the interest itself is properly classified as real estate or personalty. One concept (payment for the interest) does not necessarily control the other (the true property nature of the interest itself).

The term "bonus"[5] is used to define the monetary consideration paid to the owner of the minerals (the landowner unless the mineral estate has been legally "severed".) for

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[5] The definitions in this section of the brief are taken from the treatises cited in this brief supra, and from Meyers, The Effect of the Rule Against Perpetuities on Perpetual Non-Participating Royalty and Kindred Interests, 32 Tex. L. Rev. 369, 380-381 (1954).

entering into the oil and gas lease. It is usually a one-time payment and is often calculated in terms of so-much per acre.

"Delay rental" is a term with special meaning and impact in the instant case. It can be thought of as a renewal fee. It keeps the lease alive for another period, usually a year. It is only paid when there is no oil or gas production taking place. It is not a substitute for production, but is paid in the typical situation when the exploration company has not yet drilled on the leased lands, or when it desires to keep the lease alive after drilling one or more dry holes. It is crucial to know that if the delay rental is not paid, the lease terminates. The landowner is then free to lease to another, or change the terms of a re-negotiated lease. The lessee takes special care to see that the delay rental payments are made, in the correct amount, at the proper time, and to the correct person. One mistake could cost the lessee the lease.

"Production royalty" (used interchangeably with "landowner's royalty") connotes the royalty due under a given oil and gas lease. It can be affected by the terms of the lease as far as amount, how it is paid for, when it is paid, and the accounting used to calculate the amount. A typical lease often refers to payment by delivering a portion of the oil itself as an option in one or the other party.

"Over-riding royalty" comes from the lessee's interest in the lease, and is free of cost.

"Working interest" is another way of saying an executive mineral interest that is subject to the expense of (usually) all

costs of exploration, extraction, and marketing. This is contrasted with a mineral interest that is "carried" for some or all of these costs, but also must be accounted for and paid.[6]

"Perpetual nonparticipating royalty" has been given a classic definition[7] by a Texas lawyer:

> It may be defined as an interest in the gross production of oil, gas, and other minerals carved out of the mineral fee estate as a free royalty, which does not carry with it the right to participate in the execution of, the bonus payable for, or the delay rentals to accrue under, oil, gas, and mineral leases executed by the owner of the mineral fee estate. The exclusive-leasing privilege remaining in the mineral fee owner is commonly referred to and known as the "executive right." Non-participating royalty interests may be created by grant or reservation either prior or subsequent to a lease of the land for oil and gas purposes, and their increased use is indicative of the trend away from the grant or reservation of fully-participating mineral interests.
> Jones, Non-Participating Royalty, 26 Tex. Law Rev. 569 (1948).

In any analysis of the concepts of oil and gas royalty rights, the process must contrast the two intermeshed, but distinguishable, concepts of "mineral rights" and "royalty rights". The process of defining these concepts is one that

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[6] See, eg., the discussion of the right of a co-tenant in minerals to exercise the executive rights to those minerals, but with the obligation to account to and pay the non-joining co-tenant in P & N Investment Corp. v. Florida Ranchettes, Inc., 220 So.2d 451 (Fla. 1st DCA 1968).

[7] Cited and adopted in numerous cases, See, eg., Hanson v. Ware, 274 S.W.2d 359 (Ark 1955); Welles v. Berry, 434 So.2d 982 (Fla 2d DCA 1983); and the majority opinion of the Fifth District Court of Appeal in this case.

courts have been repeatedly called upon to perform.[8]

Neel v. Rudman, 160 Fla. 36, 33 So.2d 234 (Fla. 1948) is one of the earliest Florida cases to venture a definition of a royalty interest contrasted with the definition of mineral interest. The Court notes that the concepts are entirely different, though easily confused. Id. at 237. The Court then sets forth the language from a royalty deed, and next, a mineral deed. The key to the difference between the two conveyances is that in the royalty deed, the predominant concept is payment for an interest in the oil "produced and saved" also called "saved production". (Emphasis added.) While, in contrast, the emphasis in the mineral conveyance is an "interest in the oil and gas and other minerals" and a defining of the rights of exploration, production, storing, and transporting the substances that may be discovered. These rights are discussed later in this brief as the "executive rights" that are a concomitant part of mineral interests. While the decision in Neel is helpful, it cannot be said to be exhaustive of the legal concepts there involved. To gain a full understanding of Neel, the facts that led to the suit must be detailed.

Curtis and Mattie Neel were landowners in Jackson County, Florida. They had granted an oil and gas lease to Sun Oil Company, reserving a typical 1/8th [production] royalty and a [delay] rental of 25 cents per acre. It was a ten year lease. A

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[8] See eg. the compilation of hundreds of cases and other authorities in the Annotations cited supra and in Jones, Exercise of Executive Rights in Connection with Non-Participating Royalty and Non-Executive Mineral Interests, 15 Inst. on Oil and Gas Law and Tax'n., 35, 41-50, n.15 (1964).

Mr. Rudman told the Neel's, admittedly unsophisticated in oil and gas matters, that he wanted to purchase half of their [production] royalty rights under the Sun Oil lease. He assured them that the sale of a portion of the [production] royalty (he was sophisticated) would not in any way affect or lessen the payment of the delay rentals (the annual payments to keep the lease in effect in the absence of production) from the oil company. The Neels felt Rudman was someone they could trust and signed what they thought was a partial [production] royalty transfer. In fact, Rudman had them sign a mineral deed, kept all the copies and recorded the original. Everything seemed fine until the time of the next annual delay rental payment. The check to the Neels was just half of the anticipated amount. Ultimately they found they had signed a mineral deed rather than a [production] royalty conveyance. Rudman (and some latter assigns of his) got the other half of the delay rental.

Respondents note that this is one of the earliest Florida reported cases dealing with the inherent differences between the executive rights in minerals (what Rudman attempted to take) and passive income rights in those same minerals, what the Neels intended to give. The key is that it is the executive right in the minerals that carries with it the rights to delay rentals under an oil lease, as well as rights to lease, lease bonus payments, explore, produce, and develop the minerals. This understanding will be seen to be crucial to the case sub-judice.

The distinction in Neel is a classic legal distinction in the field of oil and gas. "Produced and saved" usually means

royalty. "Interest in" the oil, gas, and minerals, (sometimes stated to be "in and under" the lands) connotes a full mineral interest. The nature of the interest as either real or personal property cannot be assumed just from these phrases, however.

> The classic formula "in and under," as contrasted with "to be produced from," as symbolic of the mineral-royalty distinction should not lead . . . to the conclusion that a mineral interest is an interest in land and a royalty interest is not. A proper analysis would classify an interest created by either formula as an interest in real property which is subject to the rules governing land transactions. Total ownership of land includes the minerals, and the landowner can transfer to another the full rights to such minerals, giving the grantee the power to develop these resources together with the necessary easements to carry out the development. A landowner can also transfer less than full ownership in the minerals, including interests that do not have development rights but are passive investment interests dependent on the entrepreneurial activities of others for an economic return. Such interests are traditionally royalty interests. (Emphasis Added.)
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> Maxwell, The Mineral-Royalty Distinction--A Question of How Much, 10 Gonzaga L. Rev. 731, 733 (1975)

Another important distinction must be made between a "landowner's royalty" which is a special creature created by an oil and gas lease and necessarily dependent thereon, and a general "royalty", often called a "perpetual royalty" which is not derived from a lease, but from mineral ownership.

> Unlike the landowner's royalty, the perpetual royalty is not the result of a reservation in an oil and gas lease. It is not ordinarily limited to the duration of any lease, although it can be so limited. It is frequently an interest in perpetuity; that is, an interest created to last for the duration of a fee simple. Such an interest

> could also be limited so as to endure for a term of years or for a term of years and so long thereafter as oil and gas is produced. The Baker v. Levy [507 S.W. 2d 613 (Tex. Civ. App. (1974), writ ref'd n.r.e.)] conveyance contained a habendum clause to "said Adrian F. Levy, his heirs . . . and assigns forever." creating an interest in fee simple duration. The owner of this royalty interest will, however, never have the power to lease to others, since such an interest includes no development rights; having no development rights to lease, it follows that such an interest will have no right to share in the proceeds of leasing, royalty, bonus, or delay rentals, unless such incidents are specifically included in the instrument creating the interest. The perpetual royalty will share in the oil production. That is its reason for being.
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> Maxwell, supra at 735-736.

THE DEEDS -- WHAT WAS RESERVED?

As stated earlier, when defining the word "royalty" in a given situation, the character of the instrument is an essential detail that must not be ignored. The phrases, words, and clauses under consideration here are contained in a deed of conveyance.[9] As will be discussed later, this is a detail that the dissenting opinion in this case, relied upon by Petitioners, overlooked.

Judicial interpretation and construction of a deed of conveyance requires a reading of the entire document. No one part is to be given preference over the other. All parts of the document are presumed to have meaning and no part may be ignored.

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[9] Contrasted, for example, with the same word appearing in an oil and gas lease. That this detail can be neglected is demonstrated, unfortunately, by the dissenting opinion in this case which uses language from an oil lease to construe language in a deed. Terry v. Conway Land, Inc., 508 So.2d 401, 406 (Fla. 5th DCA 1987).

Eg. Ansley v. Graham, 73 Fla. 388, 74 So. 505 (1917); West Yellow Pine Co. v. Sinclair, 83 Fla. 118, 90 So. 828 (1922). The purpose of reviewing the entire deed is to ascertain the guidepost of the grantor's intent. Child v. Child, 474 So.2d 299 (Fla. 3d DCA 1985).

Contrary to the limited strict constructionist arguments advanced by the Petitioners here,[10] the recognized modern trend in judicial construction of a deed is not to be overly impressed with the location of a given clause, at least not to the exclusion of construing the instrument as a whole. No part of the instrument can be ignored. Eg., Copello v. Hart, 293 So.2d 734 (Fla. 1st DCA 1974); Federal Landbank of Wichita Kansas v. Nicholson, 251 P.2d 490 (Okla. 1952). The principles of reviewing the entire deed and not ignoring any part, were recognized by the Fifth District Court of Appeal in the opinion under review. 508 So.2d at 403.

WORDS OF INHERITANCE -- DURATION OF THE RESERVATION

The first thing to note about the deeds in question is that there are two places where words creating a fee simple interest are used. The phrase "heirs and assigns, forever" are the words to use in creating an interest in fee simple. Reid v. Barry, 93 Fla. 849, 112 So. 846, 851 (Fla. 1927). In the deeds in question the phrase is first found in the grant language of the conveyed lands. The second time these words are used is in defining the intended duration of the royalty reservation in question.

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[10] See PB-M at 7-9.

> . . . except however, parties of the first part do hereby specifically reserve for the account, use, and benefit of Magnolia Ranch, Inc., its successors and assigns forever ...
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> PA Item 4, page 3.

The language in the deed does not say "so long as production is had." The language in the deed does not say "during the term of the lease to Warren Petroleum just described." The language in the deed does not say "for ten years." "Successors and assigns forever" is not a phrase often used in common everyday speech. It is, however, the phrase used by the legal draftsman to indicate an interest of fee simple duration. See eg. §689.02 Fla. Stat. (1985); Reid v. Barry, 93 Fla. 849, 112 So. 846, 851 (Fla. 1927). The phrase in the deeds is the corporate equivalent of "heirs and assigns forever", the classic words of inheritance. These words, and their fundamental meaning, are treated with profound indifference by Petitioner. Nevertheless, these words are part of the "entire document" that is subject to construction here with the purpose of determining the intent of the grantors. Specifically, the question before this Court, assuming jurisdiction, is whether the Fifth District Court of Appeal correctly divined the intent of the grantor(s). Respondents assert that these words, "successors and assigns forever", mean nothing less than just exactly what they say. There are however, other, and even more compelling reasons to sustain the opinion below.

Respondents have consistently and vigorously asserted in this case that what they own is a perpetual nonparticipating royalty interest under the lands that were condemned. No more, and no less.

ROYALTY ON SUBSTANCES "PAID OR OBTAINED" OR "TAKEN FROM"

The Petitioners, and the dissent in the Fifth District Court of Appeal, seize upon these phrases ("paid or obtained" or "taken from") in the deeds as the basis for their argument that the grantor only intended to reserve an interest in personal property. The proffer is that once oil is "taken" from the ground it is personal property. And, further, that "royalties that may be paid or obtained" refer only to the actual payment, which is personal property.

Stokes v. Tutvett, 328 P.2d 1096 (Mont. 1958) is quoted by Petitioners (PB-M pp 13-14) to support this argument. Petitioners have misconstrued this case, which strongly supports Respondents' position, apparently because they are mesmerized by the concept of "payment" and fail to recognize the nature of the interest from which the right to receive that payment arises. Stokes recognizes and accepts perpetual nonparticipating royalty, citing and quoting the same definition adopted by the Fifth District Court of Appeal here. 328 P.2d at 1101. Stokes also cites Hanson v. Ware, 274 S.W.2d 359 (Ark. 1955) a case of major importance to the Fifth District in this case. The royalty concepts in Stokes are entirely consistent with the multiple "sense" concept of royalty as a fee simple interest in real property, derived at its inception from fee ownership of the minerals. To cite Stokes for the proposition advanced by Petitioners here is an error in analysis of major proportions. Stokes is consistent with Hanson, and it is diametrically opposed to the royalty concepts followed in Kansas.

Petitioners' logic is fallacious for several reasons. The primary difficulty with the reasoning advanced by Petitioners on this point is that it is based, not on the meaning of phrases as they are defined in the field of oil and gas law, but on broader, everyday, and in this context, more inaccurate terminology. The word "paid" refers to the transfer of a thing in satisfaction of an obligation. It is not uncommon to confuse the concept of "payment" with the concept of the underlying obligation. As has been demonstrated, this is a dangerous error in the field of oil and gas law. The majority of the Fifth District Court of Appeal was acutely aware of this snare. See the quotation from 2 Williams and Meyers, Oil & Gas Law, §324.4 at 508 So.2nd 401, 405 --". . . to confuse the value of the right with the right itself." (Emphasis Added.) Again, the words "produced and saved" are classic words denoting royalty interest. They are used to contrast the reserved or conveyed interest with the concepts of mineral interest. "Royalty" may, in a given instance, refer only to payment or money, especially in a lease. But the document under consideration here is not a lease. While the document makes reference to the Warren Petroleum lease, the document being construed is a deed.

The dissent in the Fifth District, 508 So.2d at 406-407, quotes language from Miller v. Carr, 137 Fla. 114, 188 So. 103 (1939). What is quoted by the dissent is language from the lease which was before the Court in Miller. This quotation is used to bolster the argument that royalty is personal property.

The question presented to the Court in Miller was to define the effect in Florida of an oral promise to devise a royalty interest. Just how far will such an oral promise reach? Miller fully recognizes the multiple "sense" concept of royalty. The oral promise there might, if properly set forth in the pleadings, reach that portion of royalty that had become personal property by being taken out of the ground. The oral promise could not reach royalty on oil still in the ground. That royalty descended to the heirs of Alonzo A. Carr as an interest in real estate. Miller, 188 So. at 108.

Emphatically, Miller does not stand for the proposition that royalty is only personal property. Miller does stand for the proposition that royalty can, in the proper context, be personal property, but that it is also to be considered real property in another proper context. The cases cited by the Miller Court[11] all strongly support this multiple "sense" of royalty.

When a proper analysis of Miller is contrasted with the position of the Petitioners in this case, the mistake of Petitioners becomes clear. At page 14 of the Petitioners' Initial Brief on the Merits it is stated:

> Instead the [Fifth] District Court [here] held that the reservation of a royalty interest in oil, minerals or gas that may be taken from the Petitioners' real property created a vested interest in real property. In so doing, the District Court placed itself in conflict with the Miller decision. (First emphasis only added.)

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[11]. Arrington v. United Royalty Co., 188 Ark. 270, 65 S.W.2d 36 (Ark. 1933); Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788 (Cal. 1935); United States v. Noble, 237 U.S. 74, 35 S.Ct 532, 59 L Ed 844 (1915).

Respondents submit that "a royalty interest in oil that may be taken" is exactly what the Fifth District said it is--real property. In Miller this royalty descended to the heirs of Mr. Carr. It was precisely this interest that could not be reached by an oral promise to devise. This was real property. What might be reached by an oral promise was royalty that had been taken from the lands prior to the death of Mr. Carr. This was clearly and unassailably characterized as personal property both in Miller and in this case. Respondents wholeheartedly embrace these two concepts of royalty.

The teaching of Miller for the case at bar is that the proper inquiry is to determine whether the instrument under consideration in a given case, and the particular language of that instrument that applies, is concerned with royalty that has been taken from the land, or, on the other hand, is concerned with royalty that might be taken from the ground. This is always to be contrasted with a mineral interest that is related to substances "in and under" the land -- terms of art. Respondents assert that the words in the deeds at issue here, namely "paid or obtained" and "that may be taken" are nothing more or less than equivalent terms of art in the oil business for the words "produced and saved", which mean only "royalty". But the inquiry of the Court does not, and should not, stop there. The entire instrument is before the Court and must be read to discern the intent of the grantor. It is not enough to say that a royalty was intended.

THE TWO REFERENCES TO "DELAY RENTALS" IN THE DEEDS

The deeds refer to delay rentals in two distinct portions with two distinct results and intentions. The first reference is found at PA Item 4, page 3, beginning at line 7 of paragraph 2. The important language is found in lines 11 through 13 of paragraph 2 of the deed. The effect of this portion of the deed is to prorate between the parties, as of the date of the deed, the future delay rentals under the Warren Petroleum lease. The deed refers to "the annual rental" and there is no doubt, nor has it ever been contested in this case, that this "annual rental" means the "delay rental" as the term is understood in the oil business.

The grantee, Petitioners' predecessor in title, was conveyed fee title to all minerals and mineral and royalty interests not reserved[12] in the conveyance, as well as an assignment of the oil lease insofar as it encompassed the conveyed lands. In other words, the grantee received all executive rights in the minerals. The proration of the delay rentals under the Warren Petroleum lease eliminates any rational reason to deal further with delay rentals under that lease if Petitioners' construction is correct. Nevertheless, the draftsman of the deed does make a second reference to delay rentals.

The second, and even more important, reference to delay rentals is found in the deed at page 4 of Item 4 of Petitioners' Appendix. The reference is as follows:

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[12] Respondents take issue with the statement of Petitioners at the top of page 7 of the Initial Brief on the Merits to the effect that full fee simple title was conveyed to the grantee. Respondents contend a portion of the full fee simple title was reserved.

> . . . this [royalty] reservation shall not apply to participation in delay rental which may be paid on account of existing or any future oil, mineral and gas leases and arrangements affecting said real property.

The Fifth District Court of Appeal stated correctly that it could not "ignore or disregard" this language in the deed. The District Court found that the entire clause reserving royalty should be read, including the portion quoted above. The District Court correctly applied the rule that the whole instrument must be read to properly construe the meaning, and that only when this was done, did the quoted clause make sense. It made sense as reinforcing the intended application of the reserved royalty to future leases. If the grantor did not intend for the reservation to apply to future leases, then, in the context of the entire portion of the deed under consideration, it made no sense to refer to delay rentals under those future leases. It made no sense to the District Court to ignore the quoted provision. 508 So.2d at 403. The absence of any claim to the delay rentals under future leases helps describe the royalty according to the classic criteria for its definition: this royalty carries no executive rights -- delay rental is one of the most important attributes of those rights.

With reference to the same provision of the deed, Petitioners state at page 9 of their Initial Brief on the Merits:

> The reference to future leases in the last four lines of the exception only heightens the strength of this conclusion[13]. That

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[13] The "conclusion" Petitioners say is reinforced is not exactly clear to Respondents. It would seem to refer to the statements on page 8 of the Initial Brief on the Merits that ". .

> reference simply negates any assumption which otherwise might have been made with respect to delay rental which is a return clearly distinguishable from a royalty.

In fact, and in contrast with the conclusion of Petitioners, the clause, by negating the impact of the reservation on delay rentals from "any future leases or arrangements", shows that it was exactly such future leases and arrangements that were clearly in the mind of the draftsman with respect to the reservation. The draftsman was reserving a passive, non-executive, interest in royalty - a perpetual nonparticipating royalty. It was a royalty that would not share in the executive rights appurtenant to the minerals. And certainly one of the most critical of those executive mineral rights is the right to receive delay rentals under any lease.

Petitioners' argument (PB-M, page 9) that the clause in question did not mean "any future leases and arrangements" because the deed did not spell out any duty of grantee to execute any future leases or arrangements is not founded in the law. The leading case in Florida concerning this question is Welles v.

. the exception should be construed to reserve royalties not under future leases, but under the lease which was in existence . . ." (Emphasis Added). It might also refer to the conclusion at the top of page 9 of the Initial Brief to the effect that the "....deeds impose no obligation on the grantee to create future leases." Or perhaps the "conclusion" is that: 1. The clause should be construed to favor the grantee. 2. This is an exception to a reservation and should be narrowly construed. 3. When the clause is "narrowly construed" "to favor the grantee" the clause disappears! Even though the draftsman said "existing or any future leases and arrangements" it only means the existing lease, or at best leases or arrangements of the grantee. It is doubtful that few, if any, other such "rules of construction" could do more to increase sales of antacid within the community of real estate lawyers.

Berry, 434 So.2d 983 (Fla. 2d DCA 1983).[14] Welles stands for the proposition that the holder of the executive (mineral) rights generally does have a duty to the non-executive (royalty) owner. And, further, that the extent of that duty must be ascertained from all the surrounding circumstances. Welles cites authority for the concept of implied duty dating from the 1940's, well in advance of the date of the deeds in this case. The mere absence of words in an instrument referring to the duty does not negate the fact that the duty exists. Welles clearly recognizes nonparticipating royalty, and adopts the classic definition quoted earlier in this brief. Welles is also important because it appears to be the first Florida case to discuss the executive and non-executive rights concepts of royalty and minerals, at least by using those terms. Everything in the decision in this case is entirely consistent with the opinion in Welles and the authority cited there. The decision of the Fifth District here reinforces Welles and adds further meaning to Miller by holding the rule against perpetuities to be inapplicable to a perpetual nonparticipating royalty, a question not raised by either Welles or Miller.

Petitioners cite Federal Land Bank of Wichita, Kansas v. Nicholson, 252 P.2d 490, 494 (Okla. 1952) at page 9 of their Initial Brief to support the statement that a delay rental is different from a royalty. This is certainly proper. Federal Land

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[14] Welles is the second of three Florida cases found by Respondents to use the phrase nonparticipating royalty. The earliest, by date of decision, is Amerada Hess Corp. v. Morgan, 426 So.2d 1122, (Fla. 1st DCA 1983). The third case is the case sub judice.

Bank, however, supports the concept of nonparticipating royalty as being an interest in fee simple. See the language concerning successors and assigns at the bottom of page 494 of the opinion.

In attempting to negative the "futurity" provisions in the deed in this case, Petitioners cite Rogers v. Jones, 40 F.2d 333 (10th Cir. 1930) at page 9 of the Initial Brief. This is indeed curious. What Rogers says is that if the word "future" is not in the document, the Court should not insert the word for the parties. Apparently Petitioners would suggest that this somehow means that when the word "future" is in the document, as in this case, the Court should excise the word for the parties. Of course that is not what Rogers says or means. Rogers found the absence of the word to be "significant". Certainly the correct corollary is that the presence of the word would also be significant.

In summary, it is the position of Respondents that the Fifth District Court of Appeal was correct in its decision construing the deed to reserve a perpetual nonparticipating royalty. The decision was correct first in reviewing the entire instrument to ascertain the intent of the grantor. It was correct in determining that the grantor intended that the reserved royalty applied to "any future leases or arrangements", not just those of the grantee or its immediate successors. And it was correct in concluding that the grantor's reference to delay rentals under any future leases and arrangements reinforced the conclusion that the royalty reservation applied to any of those future leases and arrangements. The deed defines a reserved perpetual nonparticipating royalty.

SECOND ISSUE

WHETHER THE FLORIDA COMMON LAW RULE AGAINST PERPETUITIES HAS ANY APPLICATION TO A PERPETUAL NONPARTICIPATING ROYALTY.

INAPPLICABILITY OF THE RULE AGAINST PERPETUITIES

(Discussion confined to common law[15])

Petitioners have asserted (PB-M pages 10-11) that the Florida rule against perpetuities should be applied here to defeat the reserved royalty. Cut short, Petitioners' argument can be paraphrased as:

> First, the royalty intended by the grantor here is a personal property interest dependent upon a lease for its creation. A lease, and production of oil under a lease, is an uncertain event which may not occur during the period allowed by the rule for property interests to vest. Further (Petitioners argue), the deed at issue does not require the grantee or successors to enter into any leases for mineral development. Thus, there is no assurance any lease would be executed, and no assurance that any minerals would be developed by a lessee, and thus no assurance a royalty would ever be "paid or obtained". Therefore the interest is in

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[15] Respondents' discussion of the applicability of the Florida rule against perpetuities in this case is confined to Florida common law. §689.22, Fla. Stat. (1985) has no direct application here being enacted in 1977, several years after the instruments at issue were executed and delivered. In Iglehart v. Phillips, 383 So.2d 610 (Fla. 1980) the Court appears to have assumed the statutory enactment of the rule is not to be applied retroactively. 383 So.2d at 614.

suspense and is therefore not vested, and is accordingly in violation of the rule and must fail.

Petitioners have cited no direct Florida authority for the proposition that the Florida common law rule against perpetuities is applicable[16] to a perpetual nonparticipating royalty as the term was defined by the Fifth District Court of Appeal. Petitioners have cited no direct Florida authority for the proposition that the rule is applicable to royalty interests in general. Petitioners have cited no direct Florida authority that the rule is applicable to a royalty which is or might be classified as solely a personal property interest. Respondents have found no such authority either.[17]

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[16] For an extensive listing of cases from around the county where the validity of nonparticipating royalty is assumed valid with respect to the rule, or where the issue is not argued see 2 Williams and Meyers, Oil and Gas Law, Section 323, p. 21-22, n. 22. (1985). In Welles v. Berry, supra 434 So.2d 982 the interest under consideration was a twenty-five year contingent interest with no reference to lives in being. Thus it would seem to extend beyond the period for vesting allowed by the applicable common law rule against perpetuities, at least as Petitioners assert the rule. Respondents suggest, although there is no indication in the Welles opinion as to the rule against perpetuities, that Welles properly belongs in the list of cases just cited as assuming the rule to be inapplicable.

[17] Respondents assert that this case is one of first impression in Florida on these points. A case of first impression is, by definition, clearly distinguishable from all other cases in the Jurisdiction as to the issues or facts or both. As such, on this point -- the applicability of the rule to a royalty interest -- Respondents respectfully suggest that jurisdiction here has been improvidently granted, since the decision by the Fifth District Court of Appeal has not been certified by that Court as being one of great public importance, and cannot be in conflict on this point of law. If the decision of the Fifth District Court does not conflict (is clearly distinguishable) with another District Court or this Court, on the same point of law, or if the facts are clearly distinguishable, jurisdiction does not lie. In re Interest of M. P., 472 So.2d 732 (Fla. 1985); Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983).

Story v. National Bank & Trust Co., 115 Fla. 436, 156 So. 101 (1934), cited by Petitioners at PB-M page 10, is the lead case in this State defining the Florida common law rule against perpetuities. Petitioners seek to apply Story to invalidate a royalty interest which they would classify as a contingent personal property interest uncertain to vest. There is more to the argument than just this short proposition, of course, but when Petitioners' argument is boiled down, that is the residue.

In the leading case of Hanson v. Ware, 274 S.W.2d 359 (Ark. 1955)[18] the Arkansas Supreme Court dealt with the applicability of the Arkansas[19] common law rule against perpetuities to a royalty, and, in particular, the applicability of the rule to a perpetual nonparticipating royalty interest. The question of vesting was paramount in the mind of the Arkansas Court, which is, of course, the initial inquiry to be made when applying the rule. Just as the same question of vesting was of prime importance to the Supreme Court of Florida in Story, supra. What must vest within the confines of the rule is the ownership of the interest itself, not the possession of, the enjoyment of, or payment for, the interest itself. Story supra, 156 So. at 104-106. As stated by the Florida Supreme Court in Story, "The rule against perpetuities being concerned only with the vesting of estates or interests . . . [it is] indifferent to their enjoyment . . ."Id. at 104. In short, own now, get paid later.

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[18] Cited and quoted extensively by the Fifth District Court of Appeal in the decision in this case.

[19] The Arkansas common law rule against perpetuities is essentially identical to the Florida common law rule.

* * *

> The question of whether or not an estate is vested or contingent is one to be determined by the intent of the testator, as expressed in the will. Id. at 106. (Emphasis added).

* * *

> The law favors the early vesting of estates, and, in the absence of a clear intention of the testator to the contrary, estates are held to vest at the earliest possible date. If a will is fairly susceptible of two constructions, one of which would turn it into an illegal perpetuity and the other make it valid and operative, the latter should be adopted, as the law presumes that the testator intended to make a binding will. Id. at 107. (Emphasis added).

The same principles of ascertaining intent and construing the document in favor of a vested interest should, and do apply to the interpretation of a deed reserving a royalty.

Hanson and Story are in such close harmony they could substitute opinions on the question of vesting under the rule. Although the principles of Hanson, both as to the nature of the interest intended to be created by the grantor, and as to the applicability of the rule to that interest, are of cardinal importance to the decision of the District Court in this case, Hanson is neither cited or discussed by Petitioners. The dissenting opinion recognizes Hanson but, in effect, says it should not apply because that was Arkansas and this is Florida. The Hanson decision, and the reliance on that decision by the majority of the Fifth District Court of Appeal deserve, and this case requires, a more penetrating analysis.

The Hanson decision, and the reasoning it contains, is[20] uniformly praised in the technical legal literature in the field of oil and gas law. In the discussion at 4 O&G R. 330 (1955) the Hanson holding that a royalty is a real property interest, and that the rule against perpetuities does not apply to a perpetual nonparticipating royalty, is stated as being "both salutary and sound" (Emphasis Added). At 2 Williams and Meyers, Oil and Gas Law, §323, p. 21 the following comment appears:

> It is submitted that the result and the reasoning in Hanson v. Ware is sound, as applied both to royalty and non-executive mineral interests, and upon analytical and policy grounds. It should be accepted in all states . . . .

See also eg., 1 Kuntz, A Treatise on the Law of Oil and Gas, §17.3, p. 393;

Petitioners do not come right out and say that their position is that royalty is always personal property. Nevertheless, their arguments force them to that position. Only if royalty is always a personal property interest, dependent upon a lease, can the royalty that was reserved in the deed in this case be brought under the shadow of their argument. It is a position that is supported seriously only in the State of Kansas,[21] and only there by a seriously divided Court. See the dissent in Cosgrove v. Young, 642 P.2d 75, 87 (Kan. 1982).

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[20] With the probable exception of some, but not all, Kansas jurists.

[21] For a discussion of what is described a the "confusion" in the courts of Kansas on the realty-personalty distinction for royalty see 3A Summers, Law of Oil and Gas, Section 576 (1958).

Cosgrove follows Lathrop v. Eyestone, 227 P.2d 136 (Kan. 1951).[22] The dissent in Cosgrove calls for the overruling of Lathrop. Both of these Kansas cases have failed to gain any following by the courts outside of Kansas. See eg. Hanson v. Ware, 274 S.W.2d 359 (Ark. 1955). Hanson is considered to be a landmark case rejecting the rule against perpetuities as having any application to perpetual nonparticipating royalty.[23] 4 O&G R. 330 (1955). The Kansas decisions relied upon by the Petitioners are soundly criticized by the recognized scholars in the field. See eg. 2 Williams and Meyers, Oil and Gas Law, §323, pp. 16 and 22.; 3A Summers, The Law of Oil and Gas, §605, p. 371; 1 Kuntz, A Treatise on the Law of Oil and Gas, §15.4 and 17.3 (1962).

Hanson is completely in accord with the Florida concepts of royalty announced in Neel v. Rudman, supra, and Miller v. Carr, supra. Note the discussion in Hanson concerning the import of the words "produced and saved", 274 S.W.2nd at 361, as meaning

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[22] One eminent scholar said of Lathrup: ". . . an opinion not distinguished by clarity in either the statement of the case or the explanation of the result . . . " Meyers, The effect of the Rule Against Perpetuities on Perpetual Non-Participating Royalty and Kindred Interests, 32 Tex. Law Rev. 369, 375 (1954). He also comments on the [then] potential effect to the Lathrup decision by noting the probable reaction by Kansas mineral owners to the royalty interests of non-fee duration which are allowable in Kansas. "While some persons are willing to take such interests the risks involved will impel many persons to demand a fully participating fraction of the mineral estate, with the result that large areas of mineral land in Kansas are likely to be held by tenancy in common. . . It is doubtful that the policy of the Rule against Perpetuities is served by the division of minerals into small shares held in common." Id, at 377.

[23] See also, Denny v. Teel, 688 P.2d 803, 82 O&G R. 307, 56 A.L.R. 4th 527 (Okla. 1984).

royalty,[24] and the reliance on some of the same authority relied upon by the Miller court to define royalty as a real property interest at 274 S.W.2d 362.[25] That same authority relied upon by Miller to define royalty as a real property interest just happens to be an opinion by the Arkansas Supreme Court, the court that several years later issued the Hanson opinion.

At the beginning of this brief, Respondents suggested that sound reasoning in the field of oil and gas law is difficult to achieve without a basic understanding of the scientific (geological) and engineering realities in the industry. Hanson recognizes those realities, and in so doing, points up a telling fallacy in the position of the Petitioners. The Hanson court, speaking to an argument made there that is strikingly similar to the argument of Petitioners here, states:

> The appellant suggests that the estate would vest upon the execution of an oil and gas lease, but that position is not theoretically sound. Suppose for example, that a lease were executed and expired by its terms without production[26]; would the estate then again become contingent, awaiting a second vesting upon the making of another lease? A vested estate is by definition vested for all time; the concept itself precludes the possibility of a further contingency.

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[24] Hanson states: "In addition to referring specifically to royalties the instrument repeatedly mentions 'oil and gas produced and saved' from the land, which is not synonymous with those minerals in their natural state. We conclude the Hansons meant to convey a perpetual royalty in the oil and gas." 274 S.W. 2d at 361.

[25] Arrington v. United Royalty Co., 188 Ark. 270, 65 S.W.2d 36, 90 A.L.R. 765 (Ark. 1933).

[26] The situation in the instant case.

> It might also be argued that the estate would vest upon the actual production of oil and gas -- the view to which the Kansas court was driven[27] by reason of the royalty interest being considered as personal property. But in Arkansas the royalty interest is real property, and the severed oil or gas is personalty; there is no need to confuse the two. A particular producing well might be abandoned at any time, and even if operated to exhaustion it would drain only the oil-bearing stratum that it had penetrated, leaving untouched other deposits above or below. It is hard for us to conceive of an estate in real property which vests barrel by barrel or stratum by stratum.
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> 274 S.W.2d 362-363.

The argument of Petitioners, rejected so firmly by the Supreme Court of Arkansas, could certainly create some interesting legal questions for the oil industry in Florida, should those arguments be accepted here. It is not hard to imagine even an experienced draftsman for a landowner creating a legal juggernaut by inadvertence, and thereby causing the rule against perpetuities to destroy a client's royalty interests, in successive and ever deeper layers under the earth. The only practical answer would be to stay strictly with pure mineral interests, with all the resultant problems for land titles and oil exploration.

PRACTICAL AND PUBLIC POLICY CONSIDERATIONS

As has been demonstrated above, the strict legal precepts of the rule against perpetuities are not violated by the royalty interest reserved in this case because it is a presently vested interest in real property. While payment for the right

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[27] The Hanson court had previously discussed and rejected the Lathrop decision, the predecessor of Cosgrove.

may be uncertain to occur, the existence of the right is not dependent upon that fact. The recognition of these concepts by the vast majority of American courts actually fosters the purposes the rule was designed to promote. The use of nonparticipating royalty interests are a reflection of a long-standing trend away from an ever-finer division of the full mineral rights into small interests in co-tenancy. See Jones, Non-Participating Royalty, supra. This promotes the alienability of the land rather than hindering it.[28]

In Amerada Hess, 426 So.2d 1122 supra, the owners of such interests were found not to be necessary parties to a quiet title action and the concept of nonparticipating royalty was first acknowledged in Florida in those terms. Amerada Hess did not find the royalty interest holders to be dispensable parties because the royalty was personalty, but for the reason that their interests were passive, and followed the title no matter what.

In P & N Investment Corp. v. Florida Ranchettes, Inc., 220 So. 2d 451 (Fla. 1st DCA 1968) it was determined that one co-tenant in the minerals could extract oil without the joinder of the other co-tenants. The co-tenant could even charge the non-joining co-tenants in the minerals for the costs of "extraction and marketing", although those terms are not defined clearly in the opinion. 220 So.2d at 454. One very real question for a co-

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[28] "The argument that development and alienation of the land is enhanced, not restricted, by the several kinds of contingent interests seen in oil and gas instruments is persuasive." Scott, Restrictions on Alienation Applied to Oil and Gas Transactions, 31 Rocky Mtn. Min. L. Inst. Section 15.03[3] (1985). (Emphasis Added.)

tenant is whether he could force the other co-tenants to share in the costs of the exploration for the oil. Even if the opinion in P & N is given the broadest possible construction, it would seem to be difficult to charge exploration costs to an unwilling non-joining co-tenant unless and until oil was actually being produced and sold. At that point there would be a source of money. Until that time the exploring co-tenant is on his own, unless the Florida Courts would be willing to create a new cause of action such as a claim for damages for creating potential unjust enrichment, a doubtful proposition at best. As stated earlier, exploration costs are very high, and, especially in unproven territory, the odds of success are small. As a practical matter, the party desiring to explore for oil will want and, in fact, must have the other co-tenants participation as full working interests under a formal agreement and a clear understanding as to the costs each will bear in all phases of the project -- from coming up with the bonus money to pay the landowner for the lease, to paying for the pipeline or trucking charges for transporting the oil. It would certainly depend on the various amounts of the full executive mineral interest held by the full working owners or lessees as opposed to the non-joining owners. Change the percentages and you change the result. An owner or lessee of 98 percent of the executive mineral interests might be willing to explore, drill, produce, and market while giving the non-owner a free ride to the casing point or tank battery. An owner or lessee of only 75% or 50% might well have second and third thoughts about the economics of such a gratuitous venture.

> However, one of the facts of life is that prospecting for oil and gas is expensive. Much of the prospecting is done by large corporations which have large aggregates of capital and can spread the risk. The risk is frequently too great for individuals. For the price of the risk nearly all lessees demand seven-eighths of what is found. This means that lessees hesitate to develop unless seven-eighths or something near that amount can be appropriated by the lessee, an impossibility if only an undivided half interest is under lease. So even if an owner of a substantial interest in land wants it developed, he cannot do so without getting the consent of all or nearly all the owners of that land. As a practical matter unanimity is required. (Emphasis Added.)
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> * * *

The author of the foregoing states in a footnote to the quoted passage:

> A recognition of this fact caused a Federal district judge in Kansas to authorize a cotenant to drill and take all the seven-eighths working interest. Seeligson v. Eilers, 4 O.&G.R. 1737, 131 F.Supp. 639 (D. Kan. 1955). But he was reversed. Shell Oil Co. v. Seeligson, 5 O.&G.R. 1307, 231 F.2d 14 (10th Cir. 1956). (Emphasis Added.)

Olds, Impact of Future Interests on the Law of Oil and Gas, 8 Inst. on Oil & Gas Law and Txn. 163, 166 (1957).[29]

The prospects of an ever-finer division of subsurface rights into smaller and smaller mineral interests is both a real land title problem, and a result contrary to the very policies the rule against perpetuities was intended to promote. If landowners are forced to resort to reserving a partial interest in the full

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[29] For a discussion of the contrast with the Kansas concepts of nonparticipating royalty and mineral interests, and the Arkansas (Hanson) concepts of those same interests, see the Olds article just cited beginning at page 202. This article is in accord with the other authorities cited in this brief for the proposition that the best classification of royalty is one of a vested interest in real property.

executive mineral rights in order to preserve their right to potential oil, gas, or mineral income derived from those minerals, then the mineral interests become more difficult to assemble for exploration and development, and may be effectively removed from commerce. The rule was designed to prevent that result. The problem is not just prospective, but has already caused difficulty in some areas. Speaking of the present day impact resulting from the splitting of mineral[30] rights dating from the early days in the mineral business, it was noted:

> Once severed, few mineral titles were reunited with the surface estate after the initial mineral booms passed. Instead, the now-dormant mineral interests often pass by descent or default into the hands of scores or even hundreds of owners, many of whom are missing, unidentifiable, or uncooperative. This fractionalized, dormant severed mineral ownership pattern is viewed by many mineral developers as an incurable title disease. (Emphasis Added.)

Garver and Winmill, Medicine for Ailing Mineral Titles: An Assessment of the Impact of Adverse Possession, Statutes of Limitation, and Dormant Mineral Acts, 29 Rocky Mtn. Min. L. Inst. 267 (1983).

Clearly, then, the position urged by Petitioners is contrary to the sound policy reasons underlying the rule against perpetuities.

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[30] It should be noted that the authors are speaking of full fee simple mineral estates here. These are interests which carry the full executive rights in those minerals, especially the power to lease. This is to be compared with a passive, non-executive royalty right with no power to lease.

CONCLUSION

Respondents respectfully submit that the decision of the Fifth District Court of Appeals be affirmed and the cause be remanded to the trial court with instructions that the Final Summary Judgment be set aside and that an Order of Apportionment be entered in accordance with the evidence presented at a hearing held on December 23, 1986, before the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida.

DATED this 4th day of January, 1988.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of January, 1988, a true and correct copy of the foregoing Respondents' Answer Brief on the Merits and Appendix attached thereto was furnished by Federal Express Mail to:

FLETCHER G. RUSH, ESQ., Rush, Marshall, Bergstrom, Reber, Gabrielson & Jones, P.A., 55 East Livingston Street, P.O. Box 3146, Orlando, Florida, 32802;

and by U.S. Mail to:

JOHN A. REED, JR., ESQ., Lowndes, Drosdick, Doster, Kantor & Reed, P.A., 215 North Eola Drive, P.O. Box 2809, Orlando, Florida, 32802; and RICHARD W. LASSITER, ESQ., Gurney & Handley, P.A., Landmark Center Two, 225 East Robinson St., Suite 450, P.O. Box 1273, Orlando, Florida, 32802.

By: _____
Robert N. Reynolds