0/a 2-5-88

SUPREME COURT OF FLORIDA

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| CONWAY LAND, INC., ETC., ET AL., | : | PETITIONERS' INITIAL 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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Second Issue

WHETHER THE DISTRICT COURT OF APPEAL ERRED IN CONCLUDING THAT THE INTEREST CREATED BY THE RESERVATION CONSTITUTED AN INTEREST IN REAL PROPERTY AND WAS, THEREFORE, AN INTEREST FOR WHICH COMPENSATION WAS PAYABLE FROM A CONDEMNATION AWARD.

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STATEMENT OF THE CASE AND FACTS

This case arises out of a condemnation proceeding in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida. Conway Land, Inc., a dissolved Florida corporation, and parties claiming under it were collectively referred to in the trial court as the "Brunetti Defendants." They are the Petitioners here. As a result of the condemnation, the fee simple title to the land owned by the Petitioners was taken. Fair compensation for the real property was found by the jury to be $264,000.00 (R.p. 89, App. 2).

The Petitioners derived their title to the real property under two deeds executed to Weewahotee Ranch Inc., a predecessor in title. One of those deeds was executed in 1954 by George Terry and Mary E. Terry, his wife (App. 3). The other deed was executed in 1954 by Magnolia Ranch, Inc., a Florida corporation (App. 4). Both deeds contain an identical reservation of rights to Magnolia Ranch, Inc.

The Respondents, David E. Terry, Mary E. Terry and George A. Terry, Jr., were also defendants in the circuit court action. The Terry Respondents claim to be successors in interest to Magnolia Ranch, Inc., and entitled to participate in the condemnation award by reason of the reservation in the deeds mentioned above.

The language of the deeds under which the Respondents claimed an interest in the real property subject to the condemna-

tion reads as follows:

> SUBJECT HOWEVER, to the following:
>
> 1. Taxes and assessments of the County of Orange, Florida, for the year 1954.
>
> 2. That certain oil, mineral, and gas lease and agreement entered into between Magnolia Ranch, Inc., George Terry and Mary Elizabeth Terry, his wife, as parties of the first part, or lessors, and Warren Petroleum Corporation, which said lease and agreement is dated the 24th day of June, 1953, and recorded in Deed Book 951 at page 230-8, in the public records of Orange County, Florida, the rental with respect to which is on an annual basis of fifty cents (50c) per acre, which said oil, mineral and gas lease and agreement to the extent that it embraces the lands aforesaid is hereby assigned, transferred and set over unto party of the second part, the annual rental thereof with respect to which shall be prorated between Magnolia Ranch, Inc. and the party of the second part herein as of the date hereof, 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, one-half of any and all royalties that may be paid or obtained from the lands aforesaid on account of any oil, mineral, minerals, or gas which may be taken from said real property herein conveyed, provided however, this 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.

After entry of the final judgment in the condemnation proceeding, the circuit court held that the deed reservations created no compensible interest in the Respondents and granted a motion for summary judgment for the Petitioners (R.p. 132, App. 1). The District Court of Appeal for the Fifth District, in a decision rendered on 16 June 1987, held that the reservations created a <u>vested</u> interest in real property which entitled the Terry Respondents to compensation. <u>Terry v. Conway Land, Inc.</u>, 508 So.2d 401 (Fla. 5th DCA 1987); reh. den. June 16, 1987. The

Petitioners filed a timely notice to invoke the discretionary jurisdiction of this Court. By order dated 12 November 1987 this Court accepted jurisdiction and directed the Petitioners to serve their brief on the merits on or before 7 December 1987 (App. 9).

## ISSUES PRESENTED FOR REVIEW

### First Issue

WHETHER THE DISTRICT COURT OF APPEAL ERRED IN CONCLUDING THAT THE GRANTOR'S RESERVATION BY DEED OF A ROYALTY INTEREST IN OIL, GAS AND MINERALS APPLIED TO ALL FUTURE OIL, GAS AND MINERAL LEASES WHETHER EXECUTED BY WEEWAHOTEE RANCH, INC. OR ITS SUCCESSORS IN TITLE AND, AS THUS APPLIED, WAS NOT INVALID UNDER THE RULE AGAINST PERPETUITIES.

### Second Issue

WHETHER THE DISTRICT COURT OF APPEAL ERRED IN CONCLUDING THAT THE INTEREST CREATED BY THE RESERVATION CONSTITUTED AN INTEREST IN THE PROPERTY AND WAS, THEREFORE, AN INTEREST FOR WHICH COMPENSATION WAS PAYABLE FROM THE CONDEMNATION AWARD.

## SUMMARY OF ARGUMENT

The District Court of Appeal had before it deed reservations which reserved to Magnolia Ranch, Inc., its successors and assigns forever, one half of any and all royalties paid "... on account of any oil, mineral, minerals, or gas which may be taken from said real property herein conveyed..." (emphasis added). The District Court erroneously construed this reservation as creating a royalty interest in all future oil, gas and mineral leases whether the same be executed by the immediate grantee or its successors.

Furthermore, the District Court of Appeal erroneously classified the reserved interest as a "vested" interest in real property and thus not subject to the rule against perpetuities. In reaching this conclusion, the District Court overlooked the speculative nature of the interest reserved and failed to take into account the fact that under the language of the reservation, the interest would never vest until oil, minerals or gas was extracted.

The District Court likened the reserved interest to that which was considered by the Second District Court of Appeal in Welles v. Berry, 434 So.2d 982 (Fla. 2d DCA 1983), but failed to recognize that the interest at issue in Welles v. Berry: (a) was not created by a reservation but by a direct grant; (b) was not a perpetual interest, but was subject to a time limitation; and (c) was not held by the Second District to necessarily imply a collateral duty to exploit the land for the development of the oil, gas and mineral interest.

The court below failed to recognize that what was reserved by the deeds under consideration was not an interest in the oil, minerals and gas in the ground, but only a right to receive a royalty upon the extraction of any such oil, minerals or gas as might be taken from the ground. The District Court's failure to distinguish between a reservation of the oil, minerals and gas in the ground and a reservation of a royalty which would accrue, if at all, only after severance of the oil, minerals and gas led the court into direct conflict with the decision of the Supreme Court in Miller v. Carr, 137 Fla. 114, 188 So. 103 (1939), wherein the Court held such a royalty interest to be personal property. The error of the District Court in failing to correctly apply Miller v. Carr is the basis for this Court's jurisdiction. However, this Court, having accepted jurisdiction, may consider each of the asserted errors of the District Court. Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977).

Had the District Court properly construed the reservation in the deeds or properly classified the reserved interest as an interest in personal property, it should have affirmed the judgment of the trial court because in either instance, there would have been no basis for an apportionment of any part of the condemnation award to the Respondents. The trial court was, of course, entitled to be affirmed regardless of the rationale for its ruling, if any theory consistent with the record supported an affirmance. Vandergriff v. Vandergriff, 456 So.2d 464 (Fla. 1984).

## ARGUMENT ON ISSUES PRESENTED FOR REVIEW

### Introduction

When the Court examines the critical language in the deeds, the Court will notice that the deeds convey the full fee simple title, in one instance from Magnolia Ranch, Inc. and in the other from George Terry and Mary E. Terry, his wife, to Weewahotee Ranch, Inc. The language giving rise to the present controversy states that the title conveyed is subject to "that certain oil, mineral and gas lease and agreement entered into between Magnolia Ranch, Inc., George Terry and Mary Elizabeth Terry, his wife, as parties of the first part, or lessors, and Warren Petroleum Corporation ...."* After thus identifying the lease to Warren Petroleum Corporation as an encumbrance on the title to the estate conveyed, the same sentence assigns to the grantee, Weewahotee Ranch, Inc., that very lease. The assignment, however, is immediately followed by language which provides:

> 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, one-half of any and all royalties that may be paid or obtained from the lands aforesaid on account of any oil, mineral, minerals, or gas which may be taken from said real property herein conveyed, provided however, this 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.

Thus the interest which the Respondents claim as a basis for their right of apportionment was created not by an exception from

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* All parties agree that that lease expired by its own terms before the condemnation action.

the fee but by a reservation from the grantor's otherwise absolute assignment of an existing oil, mineral and gas lease.

With respect to that reservation, the District Court of Appeal held:

> ... (1) the reservation in question was not limited to the then existing lease which had since expired, but applied to future leases as well, and reserved a perpetual non-participating royalty interest in oil, mineral or gas leases; (2) that the interest was a presently vested interest in real property as it applied to unsevered oil, gas or minerals; and (3) because it created a presently vested interest, the rule against perpetuities was not violated.... (Id. at 405).

## Issue #1

WHETHER THE DISTRICT COURT OF APPEAL ERRED IN CONCLUDING THAT THE GRANTOR'S RESERVATION BY DEED OF A ROYALTY INTEREST IN OIL, GAS AND MINERALS APPLIED TO ALL FUTURE OIL, GAS AND MINERAL LEASES WHETHER EXECUTED BY WEEWAHOTEE RANCH, INC. OR ITS SUCCESSORS IN TITLE AND, AS THUS APPLIED, WAS NOT INVALID UNDER THE RULE AGAINST PERPETUITIES.

When the exception under which the Respondents claim is read in light of the principles of construction which favor the grantee, the exception should be construed to reserve royalties not under future leases, but under the lease which was in existence at the time of the deeds to Weewahotee Ranch, Inc. The reservation on which the Respondents rely immediately follows an otherwise unlimited assignment by the grantor to the grantee of the grantor's rights in the existing oil, mineral and gas lease. Because the reservation stands as an exception to an absolute assignment, it should be narrowly construed. Central and Southern Fla. Flood Con. Dist. v. Surrency, 302 So.2d 448, 490 (Fla. 2d DCA 1974); Saltzman v. Ahern, 306 So.2d 537, 539

(Fla. 1st DCA 1975); Ball-Hamilton Corp. v. Jones, 147 So.2d 610, 612 (Fla. 3d DCA 1962); Hillsborough County v. Sutton, 150 Fla. 601, 8 So.2d 401 (1942); Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So.2d 938, 941 (Fla. 1979). That this is a reasonable construction is reinforced by the fact apparent from the deeds themselves that the deeds impose no obligation on the grantee to create future leases.

The reference to future leases in the last four lines of the exception only heightens the strength of this conclusion. 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. See Federal Land Bank of Wichita, Kansas v. Nicholson, 251 P.2d 490, 494 (Okl. 1952). While the Petitioners recognize that each case must stand on its own facts, one opinion from the Tenth Circuit Court of Appeals involves sufficiently similar facts to be instructive. In Rogers v. Jones, 40 F.2d 333 (10th Cir. 1930), the court had before it a deed which had an exception in the habendum clause reading as follows:

> Except party of the first part reserves one half of all rentals and royalties due from oil leases on the above described land and hereby conveys and transfers to party of the second part the other one half of all rentals and royalties due from oil leases on the above described premises.

At the time the deed was delivered in November 1916, the property was subject to an existing oil and gas lease which the grantor had executed in 1915. The issue under Oklahoma law was whether or not the deed created in the grantor a royalty interest in

future leases. Even though the language of the exception was not expressly limited to royalties under the existing lease, the court by applying traditional canons of construction reached that conclusion.

In its opinion, the court noted:

> ... Counsel for appellant emphasize the fact that the word "leases" is used in the exception clause, and insists it must be taken as including future leases. But such was not the expression. The omission of the word "future" or any reference to leases of grantees is significant. A contrary meaning is drawn from the words, "due from oil leases on above described land"; that is, "due" and "on" the land. A construction that future leases were contemplated is not justified, without a clear reference to them and their terms and conditions. Surely, if that had been the meaning, it would have been so stated. There was no occasion for the use of more accurate language if the reference was to a lease theretofore executed. It is more reasonable to regard the exception as intended to apply to any outstanding lease of the land. We are convinced this is a proper construction of the deed on its face. Id. at 334.

If the language on which the Respondents rely was in fact intended to reserve a right to royalties accruing under future leases, the reservation should be construed to apply only to future leases by the grantee, to-wit, Weewahotee Ranch, Inc., which parted with its fee title without having executed any such leases. If the reservation in the deeds is so broadly construed as to create an interest in royalties accruing under future leases by all fee holders ad infinitum, such would not only violate the rule that deeds should be construed most favorably to the grantee, but would also create an invalid perpetuity. The rule against perpetuities has been recognized as part of the common law of Florida since 1934. Story v. National Bank & Trust Co., 115 Fla. 436, 441; 156 So. 101, 104 (1934). It is a rule of

law not of construction and applies to legal and equitable states in both realty and personalty. The rule invalidates agreements creating interests which may not vest within 21 years after lives in being at the time of the creation of the interest. Ingelhart v. Phillips, 383 So.2d 610, 614 (Fla. 1980). The rule is of course now recognized legislatively in essentially its common-law form. See Section 689.22, Fla. Stat. (1985).

The construction of the reservation in the deeds which the Respondents urged upon the trial court and which was accepted by the District Court of Appeal clearly renders the reserved interest void under the rule against perpetuities because no royalty interest would necessarily vest within lives in being plus 21 years. In this respect it should be observed that the language in the reservation does not require the grantee or its successors to enter into oil, mineral or gas leases and, even if such a duty were implied, there could be no assurance that a royalty interest would ever "be paid or obtained" under future leases.

The speculative nature of such a reserved interest has been recognized by the Court of Appeals for the Second District in Welles v. Berry , 434 So.2d 982, 987 (1983), wherein the court stated:

> ... that in many royalty reservations, particularly where a substantial cash consideration accompanies the reservation, development appears from the facts to be an incidental or speculative purpose only, and covenants to exploit should not and are not implied either in law or in fact.

Without meaning to be unduly repetitious, it must be emphasized that the reservation in question does not reserve to the grantors

oil, minerals or gas in the ground but only a royalty payable on the extraction of the oil, minerals and gas, if any. For this reason, the interest reserved, if construed to be perpetual, clearly would not necessarily vest within the limits of the rule against perpetuities.

A similar issue was twice before the Supreme Court of Kansas, once in Lathrop v. Eyestone, 227 P.2d 136, 144 (Kan. 1951), and again in Cosgrove v. Young, 642 P.2d 75, 83 (Kan. 1982). In each intance the court held that contracts creating royalty interests in future mineral leases were invalid under the rule against perpetuities where the document creating the royalty interest did not require the grantor or his successors to execute future oil and gas leases within any particular time. In Cosgrove v. Young, the court stated:

> ... Naturally, if no future oil and gas leases are made and executed, there would never be a vesting of title to any royalty interest. If it is not certain the vesting will occur within the time stated in the rule, then the rule has been violated and the conveyance is void. Even if an oil and gas lease were required to be executed within the time prescribed by law, there would still be no vesting of title until royalty becomes due and payable to the grantor or his successor. The execution and delivery of an oil and gas lease does not ensure there will ever be any production attributable to the lease. Additionally, as was the situation in Lathrop v. Eyestone, the instrument s not prohibitive of the grantor developing the minerals for himself, without any oil and gas lease being involved. Under such circumstances, there would never be any royalties paid to anyone.... We conclude that the trial court correctly held that the instrument was in violation of the rule against perpetuities.... Id. at 83.

Respectfully it is submitted that the District Court erred in construing the reservation in the deeds to apply to future leases and in failing to recognize that the construction so given

necessarily created a perpetuity in violation of the rule against perpetuities. The practical effect of the District Court's decision is to cloud real property titles with highly speculative, but perpetual interests. Such a result is completely alien to policy underlying the rule against perpetuities. Had the District Court construed the reservation as applying only to royalties accruing under the existing lease or under leases executed by the original grantee, Weewahotee Ranch, Inc., the necessary result would have been an affirmance of the summary judgment entered by the circuit court.

## Issue #2

WHETHER THE DISTRICT COURT OF APPEAL ERRED IN CONCLUDING THAT THE INTEREST CREATED BY THE RESERVATION CONSTITUTED AN INTEREST IN REAL PROPERTY AND WAS, THEREFORE, AN INTEREST FOR WHICH COMPENSATION WAS PAYABLE FROM A CONDEMNATION AWARD.

The Respondents took the position before the District Court that the interest created by the reservation constituted a perpetual non-participating royalty extending to existing and future oil, mineral and gas leases. A royalty is a share of minerals or proceeds therefrom after production is had. Federal Land Bank of Wichita, Kansas, et al. v. Nicholson, et al., 251 P.2d 490, 494 (Okl. 1952). As such, a non-participating royalty is personal property. Lathrop v. Eyestone, supra. See also Stokes v. Tutvet, et al., 328 P.2d 1096 (Mont. 1958), wherein the court stated:

This court has consistently adhered to the view that the

> word "royalty" standing alone has a "'very well understood and definite meaning in mining and oil operations. As thus used, it means a share of the produce or profit paid to the owner of the property. Webster's Dictionary.' The expression 'a share of the produce or profit paid to the owner of the property' is quite different from a share or interest in the property itself. It recognizes that the originator of the royalty is still the owner of the real property to which it relates, and that the assignee's interest is only in the 'produce or profit' therefrom, -- namely, in the personal property which the owner is to receive for the granted privilege of producing minerals from his land." Id. at 1100.

The law of Florida, as stated in Miller v. Carr, 188 So.2d 103, 137 Fla. 114 (1939), is clearly consistent with the foregoing authorities. In Miller, the Florida Supreme Court held that a royalty interest in extracted oil constitutes personal property. The District Court of Appeal, although aware of Miller, simply failed to apply its principle to the substantially similar fact situation before it. Instead the District Court 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.

The error of the majority in the court below was clearly illuminated by the dissenting judge who stated:

> The applicable language in the reservation provided:
>
> ... 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, one-half of any and all royalties that may be paid or obtained from the lands aforesaid on account of any oil, mineral, minerals, or gas which may be taken from said real property herein conveyed.... (Emphasis added.)
>
> Clearly this language does not vest title in the oil, gas or

> minerals as they exist in the real estate. It merely reserves the right to receive payment from the sale of said oil, gas and minerals once they are "taken from the said real property."
>
> The majority cite Miller v. Carr, 137 Fla. 114, 188 So. 103 (1939) as adopting the view that a royalty interest in unsevered oil is an interest in real property. That is so. But Miller also adopts the view that an interest such as we have in the case at bar is not an interest in unsevered oil, gas and minerals and is, therefore, personal property.
>
> Id. at 406.

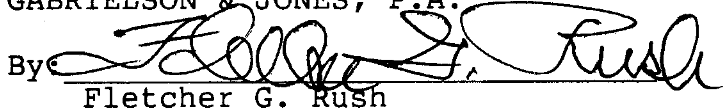
Had the District Court applied the principle of Miller v. Carr, supra, to the essentially identical fact pattern presented in the present case, the appropriate conclusion would have been an affirmance of the judgment of the circuit court. The jury verdict represented an award for the value of condemned real property. Had Respondents' interest been properly classified as personal property, there obviously would have been no basis for apportionment of any part of the award to the Respondents under Section 73.101, Fla. Stat. (1985).

## CONCLUSION

The Petitioners respectfully request that the decision herein by the Fifth District Court of Appeal be reversed and that the cause be remanded to the District Court with instructions to vacate its mandate and affirm the judgment of the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, from which this proceeding arose.

DATED this 30th day of November, 1987.

RUSH, MARSHALL, BERGSTROM, REBER GABRIELSON & JONES, P.A.



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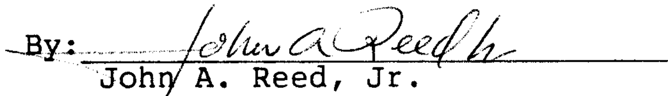

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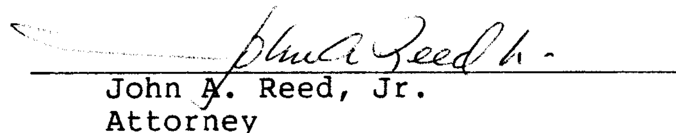
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Initial Brief on the Merits and attached Appendix thereto were furnished by U.S. Mail to ROBERT N. REYNOLDS and ARNOLD D. BARR, ESQS., 9100 S. Dadeland Blvd., Miami, FL 33156, Attorneys for Co-Defendants, Respondents; and to RICHARD W. LASSITER, ESQ., P.O. Box 1273, Orlando, FL 32802, Attorney for Plaintiff, Respondent City of Orlando, this 30th day of November, 1987.



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