

1982

Western Development Company v. Arthur H. Nell : Brief of Appellant

Utah Supreme Court

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ET NO. 8293A

JER

STATE OF UTAH

WESTERN DEVELOPMENT COMPANY,
a corporation, *Plaintiff and Respondent,*

— vs. —

ARTHUR H. NELL and LORNA V. NELL,
his wife, and LUELLE T. VOORHEES,
Defendants and Appellants,

D. S. BAKER, *Defendant*
MOUNTAIN FUEL SUPPLY COMPANY,
a corporation,

Third-Party Defendant and Respondent,
and

HENRY I. VOORHEES and AILEEN
VOORHEES, his wife, and HILLARD
VOORHEES and PEARL VOORHEES, his
wife,

Third-Party Defendants and Appellants.

WESTERN DEVELOPMENT COMPANY,
a corporation, *Plaintiff and Respondent,*

— vs. —

HENRY I. VOORHEES and AILEEN
VOORHEES, his wife, and HILLARD
VOORHEES and PEARL VOORHEES, his
wife,

Defendants and Appellants,

D. S. BAKER, *Defendant*
MOUNTAIN FUEL SUPPLY COMPANY,
a corporation,

Third-Party Defendant and Respondent,
and

ARTHUR N. NELL and LORNA V. NELL,
his wife, and LUELLE T. VOORHEES,
Third-Party Defendants and Appellants.

BRIEF OF APPELLANTS

Appeal from the District Court of the Sixth Judicial District
in and for Sevier County, Utah
HONORABLE JOHN L. SEVY, JR., *Judge*

GUSTIN, RICHARDS & MATTSSON

Attorneys for Appellants

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

WESTERN DEVELOPMENT COMPANY,
a corporation, *Plaintiff and Respondent,*

— vs. —

ARTHUR H. NELL and LORNA V. NELL,
his wife, and LUELLA T. VOORHEES,
Defendants and Appellants,

D. S. BAKER, *Defendant*
MOUNTAIN FUEL SUPPLY COMPANY,
a corporation,

Third-Party Defendant and Respondent,
and

HENRY I. VOORHEES and AILEEN
VOORHEES, his wife, and HILLARD
VOORHEES and PEARL VOORHEES, his
wife,

Third-Party Defendants and Appellants.

Civil No.
8293

WESTERN DEVELOPMENT COMPANY,
a corporation, *Plaintiff and Respondent,*

— vs. —

HENRY I. VOORHEES and AILEEN
VOORHEES, his wife, and HILLARD
VOORHEES and PEARL VOORHEES, his
wife,

Defendants and Appellants,
D. S. BAKER, *Defendant*
MOUNTAIN FUEL SUPPLY COMPANY,
a corporation,

Third-Party Defendant and Respondent,
and

ARTHUR N. NELL and LORNA V. NELL,
his wife, and LUELLA T. VOORHEES,
Third-Party Defendants and Appellants.

BRIEF OF APPELLANTS ARTHUR H. NELL and LORNA
V. NELL, his wife, LUELLA T. VOORHEES, HENRY I.
VOORHEES and AILEEN VOORHEES, his wife, and
HILLARD VOORHEES and PEARL VOORHEES, his wife.

PREFATORY STATEMENT

The Appellants named above are Defendants and Third-Party Defendants in two civil actions instituted by Western Development Company, a corporation, as Plaintiff, to quiet title to certain alleged rights, particularly gas and oil, in lands described in its Complaint. Mountain Fuel Supply Company, a corporation, hereinafter referred to as Mountain Fuel, Cross-Complained against Appellants in both actions, basing its alleged rights on an Oil and Gas Lease from Plaintiff, Exhibit "N" (R. 113-116).

Appellants Answered, raising issues as to the ownership of oil and gas, and also Counter-Claimed against Plaintiff and Cross-Complained against Plaintiff's Lessee, Mountain Fuel, as to Tracts I and III hereinafter identified, and sought thereby to quiet their respective titles to the oil and gas rights in said Tracts. After all pleadings had been filed, a Stipulation was entered into (R. 55-117), consolidating the two cases, admitting various facts, and stipulating to such facts as being true and correct, which Stipulation incorporates and includes Exhibits "A" to "O", both inclusive (R. 77-117).

The consolidated cases were submitted to the District Court of Sevier County, Utah, on Plaintiff's Motion for Summary Judgment (R. 122-123), joined in by Mountain Fuel (R. 123) as Plaintiff's Lessee, and on a Cross-Motion for Summary Judgment made by Appellants (R. 125, 261-262). By Order dated April 12, 1954,

the District Court denied both Motions (R. 263-4).

At a subsequent hearing held June 11, 1954, none of the parties offered any additional evidence. After the submission of additional arguments and briefs, the District Court made its decision (R. 290-3) granting Plaintiff's Motion for Summary Judgment and denying Appellants' Cross-Motion. Consolidated Findings and Conclusions (R. 294-324) and Consolidated Decree and Judgment (R. 325-329) were entered accordingly. The instant Appeal is taken from that portion of the Consolidated Decree and Judgment quoted in Appellants' Amended Notice of Appeal (R. 334-336).

The actions also involved numerous issues between Appellants and Mountain Fuel on one side and Defendant D. S. Baker on the other side pertaining to purported Leases from Appellants to Defendant D. S. Baker, which issues were determined in favor of Appellants and Mountain Fuel and against Defendant D. S. Baker (R. 322-323). From such adverse judgment, Defendant Baker has not appealed or cross-appealed, the time for so doing having now expired. By virtue thereof, the District Court's determination is binding and conclusive as to Defendant Baker, and the issues involving him may now be ignored, which issues were the subject of a great portion of the pleadings.

Throughout this Brief, certain words or clauses are shown by us in italics for purposes of emphasis and are not italicized in any instruments being quoted.

STATEMENT OF FACTS

The issues before the Utah Supreme Court are limited to a determination of the ownership as between Plaintiff and its Lessee, Mountain Fuel, on the one side, and Appellants on the other side of oil and gas in, under and upon certain parcels of land in the high mountain ranges of Sevier County, Utah, identified as Tracts I and III in the Stipulation above mentioned (R. 56-57), which Tract I is shown in brown color on Exhibit "Q" (R. 260) and which Tract III is shown in red color on said Exhibit "Q".

In connection with said Tract I (Sections 4 and 17 and the Northwest quarter of Section 9, Township 22 South, Range 4 East, S.L.M. containing 1440 acres), both Appellants and Respondents claim such oil and gas rights as successors in interest to Knight Investment Company, a corporation, which owned the fee simple title in and to said lands on and prior to March 29, 1916. On that date Knight Investment Company made a Deed, Exhibit "B" (R. 79-81) conveying said Tract I to Isaac D. Voorhees, the predecessor in interest of the Appellants Henry I. Voorhees and Hillard Voorhees, which Deed contained the following reservation provisions:

"Reserving unto the said grantor, its successors and assigns all the coal, gold, silver, lead, copper and other precious and valuable ores, minerals, mines and mining rights.

"Reserving unto the said grantor, its successors and assigns rights-of-way for roads, rail-

roads, telegraph and telephone lines, water pipe lines, depot grounds and grounds for building coal mine appurtenances of all kinds by paying therefor to the party of the second part at the rate of Six Dollars per acre.

“Reserving unto the said grantor, its successors and assigns the further right to go upon the surface of the premises herein conveyed, to prospect for coal, gold, silver, lead, copper and other precious and valuable ores and also for the purpose of making surveys for any and all purposes.

“Reserving unto the said grantor, its successors and assigns the further right to any and all timber on the surface of the premises herein conveyed, except sufficient timber of aspen quality for corral and road purposes, which is hereby reserved to the party of the second part.

“Reserving unto the said grantor, its successors and assigns the further right to any and all waters that may be developed through tunnels or other underground workings made or used by the party of the first part.”

Whatever title Isaac D. Voorhees obtained to oil and gas in said Tract I by virtue of such Deed now belongs to Appellants Henry I. and Hillard Voorhees as his successors in interest. Whatever title to oil and gas Knight Investment Company reserved and retained by said Deed in said Tract I is now owned by the Plaintiff, subject to its Oil and Gas Lease to Mountain Fuel.

In connection with Tract III described in the Stipulation (R. 56-57) and being parts of Sections 5, 6, 7, 8

and 18, Township 22 South, Range 4 East, and of Sections 1, 12 and 13, Township 22 South, Range 3 East, S.L.M., containing a total of 1280 acres, more or less, both Appellants Arthur H. and Lorna V. Nell and Luella T. Voorhees on the one side and Respondents on the other side claim oil and gas rights as successors in interest to Isaac D. Voorhees and wife. Said Isaac D. Voorhees owned the full fee simple title in and to said Tract III on and prior to April 3, 1916, on which date he and his wife made a Deed, Exhibit "D" (R. 85-86-86A) to Knight Investment Company, the predecessor in interest of Plaintiff and Mountain Fuel, its Lessee. Said Deed was a conveyance of specifically listed rights in and to the lands described therein, the granting clauses and the provisions defining the rights and items conveyed being in the following language:

"WITNESSETH, That the parties of the first part . . . do grant, bargain, sell and convey . . . unto the said party of the second part, its successors and assigns, all the coal, gold, silver, lead, copper and other precious and valuable ores, minerals, mines and mining rights lying or being in Sevier County, State of Utah, to-wit:

(particular lands described, including Tract III)

"Together with rights of way for roads, railroads, telegraph and telephone lines, water pipe lines, depot grounds and grounds for building coal mine appurtenances of all kinds, by paying therefor to the parties of the first part at the rate of \$6.00 per acre.

“Together with the further right to go upon the surface of the premises herein conveyed to prospect for coal, gold, silver, lead, copper, and other precious and valuable ores and also for the purpose of making surveys for any and all purposes.

“Together with the further right to any and all timber on the surface of the premises herein conveyed, except sufficient timber of aspen quality for corral and road purposes, which is hereby reserved to the parties of the first part.

“Together with the further right to any and all waters that may be developed through tunnels or other underground workings made or used by the party of the second part.”

Whatever title to oil and gas rights Knight Investment Company acquired in Tract III by virtue of such Deed now belongs to its successor in interest, the Plaintiff herein, subject to Plaintiff's Lease to Mountain Fuel. Whatever title to oil and gas in said Tract III Isaac D. Voorhees and his wife did not convey by said Deed, Exhibit “D”, to Knight Investment Company now belongs to Arthur H. and Lorna V. Nell, his wife, and Luella T. Voorhees as his successors in interest.

On and prior to December 23, 1920, Knight Investment Company was also the owner in fee simple of the South half and of the Northeast quarter of Section 9, Township 22 South, Range 4 East, Salt Lake Meridian, described and identified as Tract II in the Stipulation (R. 56) and shown in purple color on Exhibit “Q” (R.

260) and of other adjoining lands, but on said date Knight Investment Company made to Isaac D. Voorhees a Deed, Exhibit "C" (R. 82-84), conveying said Tract II to him, but excepting and reserving "all the coal, hydro-carbons, *gas, oil*, gold, silver, lead, copper and other ores or mineral products, with the right and privilege . . . in, under or upon the surface of the land herein granted, to prospect for and mine coal, hydro-carbons, or any of the ores or mineral products herein reserved", and containing further reservation provisions along the lines of those set forth in Exhibit "B" (R. 79-81). As to said Tract II, Appellants disclaimed any right, title or interest in and to the oil and gas therein and thereunder, and all parties to the consolidated actions stipulated (R. 70) that the oil and gas rights within and under said Tract II are vested in Plaintiff, subject to the rights of Mountain Fuel by virtue of its Lease from Plaintiff, Exhibit "N" (R. 113-116). Tract II is not involved in any issues before the Court, except insofar as the Deed on it (Exhibit "C") helps disclose the intention of the parties in connection with Exhibits "B" and "D".

Tracts IV, V and VI are not involved in any of the issues now before the Utah Supreme Court.

The following are matters of general geographical and historical knowledge of which we feel the Court may take judicial notice.

All of the lands involved herein are located in the high plateau or mountain area of Sevier County, Utah.

Prior to the dates when Exhibits "B" and "C" were made, March 29 and April 3, 1916, respectively, no oil of commercial value nor any gas source or field worthy of the name had been discovered in Utah, no drilling of any nature for gas and oil had been conducted in either Sevier or Sanpete Counties or in the area of these lands or within some 60 airline or 100 road miles therefrom, and all oil and gas drillings theretofore conducted in Utah had been in the low plateaus or swells, valley, river and desert regions of the state. Certainly it is true that in 1916 the development of oil and gas in Utah was not of any great consequence or in the minds of very many people.

It was in 1920 that *The Federal Leasing Act* pertaining to the leasing of Federally-owned Oil and Gas Lands was adopted (*Act of February 25, 1920*). This gave great impetus to the development of oil and gas properties and focused attention on oil and gas acreages.

Any further pertinent facts will be developed in connection with the Argument set forth below.

STATEMENT OF POINTS

I. *The District Court erred in determining that Knight Investment Company reserved by Exhibit "B" (R. 79-81) the oil and gas within Tract I above described.*

II. *The District Court erred in determining that Isaac D. Voorhees and wife conveyed to Knight Investment Company by Exhibit "D" (R. 85-86A) the oil and gas within Tract III above mentioned.*

ARGUMENT

POINT I.

THE DISTRICT COURT ERRED IN DETERMINING THAT KNIGHT INVESTMENT COMPANY RESERVED BY EXHIBIT "B" (R. 79-81) THE OIL AND GAS WITHIN TRACT I ABOVE DESCRIBED.

We submit that insofar as Utah is concerned, the matters to be determined herein are questions of first impression.

A. Argument based on the assumption that the Court holds Exhibit "B" to be clear and unambiguous so as to require construction thereof without resort to extraneous matters in determining whether the intention was to reserve oil and gas.

If Exhibit "B" is held to be unambiguous and is construed on the basis of the Deed itself and from the face thereof, without resort to extraneous matters, then Appellants contend that such Exhibit shows on its face and by the language therein contained, construed in the light of March, 1916, conditions, that oil and gas were not reserved nor intended to be reserved thereby. The District Court, by originally denying both Motions for Summary Judgment, determined that the Deed was ambiguous and that resort should be had to extrinsic matters to determine its meaning and the intention of the parties with respect to oil and gas. At a further hearing, however, no additional proofs were offered by anyone. The

Motions for Summary Judgment were reiterated, re-argued and briefed, and then followed the Court's decision favorable to Respondents. We submit that whether or not resort was or is had to extraneous matters, the decision should have been and should now be that oil and gas were not reserved by Exhibit "B".

The Motions for Summary Judgment, made under Rule 56 (c), *Utah Rules of Civil Procedure*, require the Court to render a Summary Judgment "forthwith if the pleadings, deposition and *admissions on file* . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a Judgment as a matter of law". Such Motion includes *both phases* stated above, that is, *if the Deed is not obscure* as to whether or not oil and gas were reserved thereby, then the question should be determined from the face of the Deed itself, but *if the Deed is ambiguous* as to oil and gas, then the question should be determined from a consideration of all pleadings and "admissions on file", including the Stipulation (R. 55-117).

In either event, matters of which the Court may and should take judicial notice are to be considered, and in either event certain fundamental rules of law and particularly rules of construction are applicable. The crucial question is :

Did the parties to Exhibit "B", particularly the Grantor, intend to reserve the oil and gas in the property conveyed thereby?

The intention of the parties, particularly that of the Grantor, is controlling, 16 *Am. Jur.* 527, 528, 531, 580, 599 and 615. Rules of construction are a means to an end, being methods of reasoning which experience has taught will lead to intention. When such rules have been settled, it is the duty of the court to enforce them; otherwise, titles are rendered uncertain and insecure. Such recognized canons in deed cases are either identical or closely analogous to the rules controlling in contract cases. 16 *Am. Jur.* 527-8. The problem is to determine the sense in which the words were used, not what the words mean in their technical sense. 16 *Am. Jur.* 580.

In arriving at such intent, we submit that the following fundamental rules are applicable:

- (a) *The question as to whether Exhibit "B" reserved oil and gas is to be determined by ascertaining the intention of the parties thereto at the time and under the conditions existing when the Deed was made.*

If oil and gas were reserved by Exhibit "B", reliance for that result must be placed on the words "other precious and valuable ores, minerals, mines and mining rights" in the clause reserving "all the coal, gold, silver, lead, copper and other precious and valuable ores, minerals, mines and mining rights", and particularly on the word "minerals". However, it is of primary importance

to note here that the reservation was not of "minerals" alone, but that such word was used with several general words following an enumeration of specific minerals and ores.

The bare reservation of "all minerals" without any amplifying, explanatory or qualifying provisions indicating some other intention, has been held quite generally to include gas and oil, but where other words used in connection with the reservation and other provisions in the deed show the true intention of the parties, any prima facie meaning of the term "minerals" must give way and the true intention must be effectuated.

Any prima facie meaning must also yield to the intention considering the facts and circumstances surrounding the parties at the time the instrument was made. *Coltharp v. Coltharp*, 48 Utah 389, 160 Pac. 121. See *Annotation, L.R.A.* 1918A 491, which states that cases construing "minerals" as including oil and gas are not necessarily opposed to those reaching an opposite result as regards the particular instrument under construction, and that the words "minerals, mines and mining rights" do not have an absolute definition when used in legal documents, it being necessary to ascertain the intention of the parties to the instrument in which the term is used. *Prindle v. Baker*, 116 W. Va. 48, 178 S.E. 513, 514; *Winsett v. Watson* (Tex.) 206 S.W. 2d 656; *Dierk Lumber & Coal Co. v. Myer*, 85 Fed. Supp. 157.

In 1916 it appears obvious that the parties were not thinking in terms of oil and gas. There was no reason for them to consider such items. How, then, could the Grantor have been intending by Exhibit "B" to reserve items of which it was not thinking, particularly in view of the fact that no consideration was given to oil and gas in determining land values in the Sevier — Sanpete area. If the Court places itself in the position of the parties in 1916 and takes notice of any mutations in language, we feel the conclusion is inescapable that oil and gas were not intended to be reserved.

1 Summers Oil & Gas, Section 135, contains an excellent discussion on the subject as to "When a grant or reservation of minerals includes oil and gas". It is pointed out that when the Grantor, instead of using the words "oil and gas" uses the term "minerals", a question arises since that word is not a definite term and its meaning necessarily depends on the intent with which it is used. The following language is quoted:

"In a restricted and scientific use of the term, oil and gas are not minerals but hydrocarbon compounds. It is only in a broad sense, if all matters be divided into animal, vegetable and mineral, that oil and gas may be termed mineral, since they are neither animal or vegetable . . . From the fact that intention is . . . the controlling element . . . it is evident that there is bound to be much apparent conflict of authority, some courts holding that gas and oil are, and others that they are not,

included. If, however, the cases are viewed from the standpoint of intention of the parties, they may be entirely consistent”.

Summers points out that the language of the instrument and the facts and circumstances surrounding the parties have led courts in a number of instances to conclude that oil or gas were not included in grants or reservations of minerals. Various cases to that effect are quoted by him under Footnotes 25, 29 and 35.

In *Rice v. Blanton* (Ky. 1929) 22 S.W. 2d 580, 232 Ky. 195, the court held there was no conveyance of oil and gas because of the wording of the instruments and also in view of the extrinsic evidence admitted to explain intention, even though the words “pipe lines” were used in the documents involved.

Three Utah cases, to-wit, *Nephi Plastering & Mfg. Co. v. Juab County*, 33 Utah 114, 93 Pacific 53; *Utah Copper Co. v. Montana - Bingham Cons. Mining Co.*, 69 Utah 423, 255 Pac. 672; and *Deseret Livestock Co. v. State et al*, 110 Utah 239, 171 Pac. 2d 401, were cited by counsel for Respondents in the District Court Arguments and Briefs, but we submit that not one of these cases is in point or any authority in the present situation. In addition, two of them were decided after 1916 and none had to do with the determination as to whether or not oil and gas were minerals within the terms of a grant or reservation.

In connection with determining the intention of the parties, in view of the conditions which existed in 1916, the Court's attention is directed by way of judicial notice to the publication "*Oil and Gas Possibilities of Utah*" compiled by Dr. George G. Hansen and to Plate II entitled "*Oil and Gas Wells of Utah, 1891-1948*", which was published in connection therewith and is a part thereof. This publication shows that the closest wells drilled in Utah to the area involved in the instant Appeal prior to 1916 were in the Hanksville area of Wayne County, both being "dry" wells, and that a well was drilled in the Mt. Pleasant area of Sanpete County in 1918 which was also a "dry" well and was completed after Exhibits "B" and "D" were executed.

Furthermore, a "dry" well was drilled at Ephraim, Sanpete County, Utah, in 1920 prior to the execution of Exhibit "C", and during 1920 it is a matter of common knowledge and judicial notice that there was a flurry of interest and excitement in the Redmond—Axtell area in Sevier and Sanpete Counties, Utah, concerning oil and gas, and a number of Oil and Gas Leases were taken. The well-drilling history of Utah prior to 1916 would certainly tend to show that the parties to Exhibits "B" and "D" had no reason to be thinking in terms of gas and oil in that year, particularly in view of the location, elevation and topography of the area covered thereby. There were reasons in 1920 to think of oil and gas, which explains the specific mention of those items in the 1920 Deed, Exhibit "C".

- (b) *In determining the Grantor's intention, the entire Deed and all of its provisions, clauses and context are to be taken into consideration, including easements or privileges which help to show such intention. 16 Am. Jur. 532, 533, 534.*

36 *Am. Jur.* 305 states the rule as follows :

“In determining what is included in ‘minerals’ as used in the conveyance, the term must be construed in the light of the particular transaction and with reference to the nature of the instrument and its context, and where there is nothing else showing just what substances the parties intended to include by the language of the grant, the intention of the parties as to the extent of the minerals granted may be determined from the language of the mining rights granted as incident thereto.”

16 *Am. Jur.* 533 states that in applying the rule, the court is not confined to a strict and literal construction of the language used where such construction will frustrate the intention of the parties, and that particular words and clauses will not be stressed. It is not sufficient to resort to isolated words or phrases.

Before citing the case authorities we feel to be in point on this phase, we call attention to the language of Exhibit “B” which throws light on the intention :

First of all, *after* enumerating specific items being reserved, the phrase used is “other valuable ores, minerals, mines and mining rights”. Nothing is said about

drilling or boring rights or wells. The words "mining rights" help explain the items being identified and reserved, and exclude oil and gas.

Secondly, there is a reservation of rights-of-way for roads, railroads, telegraph and telephone lines, water pipelines, depot grounds and grounds for building coal mine appurtenances, no mention being made of easements for oil or gas pipelines, tanks, derricks, or anything having to do with boring and drilling for or extracting and removing gas and oil.

The next "reservation" paragraph reserves the right to "go upon the surface . . . to prospect for coal, gold, silver, lead, copper and other precious and valuable ores . . ." with no mention being made of any right to drill or prospect for oil and gas, of even minerals generally, indicative again of the fact that the parties were not thinking of oil and gas or intending to reserve the same but were thinking of ores and minerals of the type they listed. The reservation of timber also shows the Grantor was thinking in terms of mines and timbers for use therein.

The next reservation is of water "developed through tunnels or other underground works" which would seem to eliminate water developed by the drilling of wells for gas and oil, showing again that Grantor did not have in mind the drilling of wells.

Every single easement and right reserved is consistent with the conclusion that oil and gas were not intended to be reserved and is inconsistent with the conclusion that oil and gas were intended to be and were reserved.

The Utah Supreme Court has stated the applicable rule in *Haynes v. Hunt, et al.*, 96 Utah 348, 85 Pac. 2d 861, wherein it has quoted the following language with approval:

“A more modern rule and that now followed by the greater number of courts is that the whole deed and every part thereof is to be taken into consideration in determining the intent of the grantor, and clauses in the deed subsequent to the granting clauses are given effect so as to curtail, limit or qualify the estate conveyed in the granting clause.”

Courts in other jurisdictions have had occasion to determine the intent of the parties to Deeds in a number of cases involving recitations of easements and privileges inconsistent with or inappropriate to drilling for oil and gas and extracting and removing the same. Some of these are annotated in 86 *A.L.R.* 987 and 37 *A.L.R.* 2d 1453-4. In *Murphy v. VanVoorhis* (W. Va. 1938) 119 S.E. 297, the Court stated:

“It is apparent that the reservation for mining rights is for oil purposes, and the right of ingress and egress, and of placing machinery on the lands for oil purposes. The reservation expressly so states.”

The Court held that natural gas was not included in the reservation referring to minerals, even though ordinarily "minerals" would include both oil and gas.

In *McKinney's Heirs v. Central Ky. Natural Gas Co.* (Ky. 1909) 120 S.W. 314, 20 Ann. Cas. 934, the Court construed the instruments as a whole and stated that if natural gas was in the minds of the parties at the time, it would be expected to find terms referring specifically to the rights and privileges necessary to its development, and "that the absence of such expressions, and the presence of other easements not applicable to the production of natural gas, tended to show that it was not the intention that gas was to be included . . . If natural gas was in the minds of the parties . . . we would expect to find terms which would refer specifically to the rights . . . necessary to the development of it. We erect derricks and drill for gas and pipe it to market, but there was not a grant of a right to the use of timber in erecting derricks or of an easement for pipelines or with reference to the removal of machinery used in drilling."

In *Hudson v. McGuire* (Ky. 1920) 223 S.W. 1101, 17 A.L.R. 148, the words used were "all of the minerals (except stone coal), are conveyed with necessary right of ways and privileges for prospecting, mining and smelting." The Court held that while the word "minerals" generally is construed to include oil and gas, the addition here of "mining and smelting" required the introduction of extrinsic evidence to determine the intention of the

parties. This case discusses not only the point mentioned above, but covers very thoroughly the various rules and canons of construction referred to in the instant Brief. The Court's attention is respectfully called to that case in its entirety as being peculiarly analogous to our situation. In it the Court calls attention to the fact that the words "mining and smelting" have no place in the grant of oil or gas rights or privileges and that the use of these words, as well as the absence of suitable words to show that the oil or gas was intended to be conveyed, was sufficient to put a Grantee on notice that the grant did not include oil or gas.

The Court stated in *Shell Oil Co. v. Moore* (Ill.) 48 N.E. 2d 400, that since the intention of the parties is to be determined, it follows that anything in the Deed of a qualifying, limiting or explanatory nature may be considered.

In *Huie Hodge Lumber Co. v. Railroad Lands Co.* (La. 1922) 91 So. 676, the reservation of "the exclusive right to the iron, coal and other minerals" was held to exclude oil and gas where the following phraseology used was "all necessary privileges of mining on said land, and also the rights of way for rail and tramways for mining purposes through any portion of said land herein conveyed." The Court concluded that only solids, such as coal and iron were in contemplation, since nothing was said about boring, drilling or laying pipelines.

The case of *Barnard-Arque-Roth-Stearns Oil & Gas Co. v. Farquharson* (Eng. 1912) AC 864, Ann. Cas. 1913B 1212, is authority for the conclusion that even though the reservation was of "all mines and quarries of metals and minerals, and all springs of oil in or under said land", natural gas was not reserved since the words used indicated that "minerals" was not used in the wide and general sense as including all substances not denominated vegetable or animal, and also since further words in the reservation stated that the Grantor reserved the privilege of "search for, work, win, and carry away the same", which words were not applicable to a thing of the nature of natural gas.

Additional cases are annotated in 1 *A.L.R.* 2d 787 following the case of *Carson v. Missouri Pacific Railroad Co., et al* (Ark. 1948) 209 S.W. 2d 97, 1 *A.L.R.* 2d 784.

In *Gordon v. Carter Oil Co.* (1924) 19 Ohio App. 319, a Deed conveyed "all the coal and other minerals" with the right to enter on the land to make excavations, drains, etc., and with a right-of-way across the land "for the purpose of transferring said minerals from the land." The court held that in view of the language used in the Deed and the circumstances and surroundings of the parties at the time, oil and gas did not pass under "other minerals," as such was not the contemplation of the parties.

See also *Horse Creek Land & Mining Co. v. Midkiff* (1918) 81 W. Va. 616, 95 S.E. 26.

On the same theory, the Court in *Praeletorian Diamond Oil Association v. Garvey*, (Tex. 15) 15 S.W. 2d 698, held that a Mineral Lease covering "oil, gas and other minerals" did not include gravel, since the Lease provided for the erection of derricks, tanks and pipelines but contained no provision for mining or disposition of gravel.

The Court in *Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Company* (Tex. 1911) 137 S.W. 171, states that effect and meaning must be given to every part of the Deed and that the intent is deducible from the entire instrument and the language employed therein. To similar import is *Kentucky W. Va. Gas Co. v. Preece, et al.*, (Ky. 1935) 86 S.W. 2d 163, in which the conveyance was "all the coal, salt, water and minerals of every description . . . and the right to use the land for the purpose of exploring, *extracting, storing*, handling, manufacturing, *refining*, shipping or *transporting* all said minerals." The Court held this conveyance included oil and gas because the rights granted in connection with minerals have particular application theerto.

In California, the Courts state that oil may be regarded as a "mineral" if the word stands alone, but in *Cornwell v. Buck & Stoddard* (Calif. 1938) 82 Pac. 2d 516, the Court held that the production of oil was not "mining" within the meaning of the California Code.

Dictionary definitions at and prior to the year 1916, including *Black's Law Dictionary*, 1910 Edition, Page 780, did not refer to the extraction of oil and gas as being "mining." In addition to the California case, it was held in *State v. Indiana, etc., Min. Co.*, 120 Ind. 575, 22 N.E. 778, 6 L.R.A. 579, and *Williams v. Citizens Enterprise Co.*, 153 Ind. 496, 55 N.E. 425, that as ordinarily used, the term "mining" does not include sinking wells or shafts for petroleum or natural gas. Since the reference in Exhibits "B" and "D" is to "mining rights," it is evident that the parties did not intend to reserve in the one case, or to grant in the other case, oil and gas.

The case of *Missouri Pacific Railroad Co., et al., v. Strohacker*, 152 S.W. 2d 557, 202 Ark. 645, analyzes various cases in connection with the construction of reservations referring to "minerals" and emphasizes the necessity of ascertaining the intent from the language used and the general circumstances existing. The Court refers to numerous other cases including New Jersey and United States Supreme Court cases requiring reference to the time when and the circumstances under which the Deed was made, and stating that a contemporaneous construction is best and should be adopted.

Detlor v. Holland (Ohio 1898) 49 N.E. 690, 40 L.R.A. 266, involved a conveyance in which the language used was as follows:

"Do hereby grant, bargain, sell, and convey to the said Michael L. Deaver, his heirs and assigns, forever, all the coal of every variety, and

all the iron ore, fire clay, and other valuable minerals in, on, or under the following described premises: . . . together with the right in perpetuity to the said Michael L. Deaver, or his assigns, of mining and removing such coal, ore or other minerals; and the said Michael L. Deaver, or his assigns, shall also have the right to the use of so much of the surface of the land as may be necessary for pits, shafts, platforms, drains, railroads, switches, side tracks, etc., to facilitate the mining and removing of such coal, ore, or other minerals, and no more."

The Court asked the question "Do the words 'other valuable minerals' include petroleum oil?" and then called attention to the fact that the Deed was made in 1890 and must be construed in the light of oil developments as they then existed in the area, that Grantor was not shown to have any knowledge of the existence of oil in or near these lands, although oil was then produced in small quantities within from 10 to 20 miles, but there was nothing to show the parties had any knowledge thereof, that the incidents granted were all such as are peculiarly applicable to the mining of minerals in place, and not such as are in their nature of a migratory character, such as oil and gas. The Court further stated that nothing is said about derricks, pipelines, tanks, the use of water for drilling, or the removal of machinery used in drilling or operating oil or gas wells. After stating that the grant is to be construed most strongly against the Grantor, that the whole contract is to be considered to determine intention, that ordinarily "minerals" taken in its

broadest sense would include petroleum oil, and that if the easements granted had been intended to be applicable to producing oil, the parties would have used such words to express such intention, the Court concluded that the title to oil did not pass under the conveyance.

The annotations in 17 *A.L.R.* 156, 86 *A.L.R.* 983, and 37 *A.L.R.* 2d 1441, discuss the rule now under consideration as well as the other canons herein cited. Other helpful authorities are *Carothers v. Mills* (Tex. 1921) 232 S.W. 155; *U.S. Kentucky Coke Co. v. Keystone Gas Co.* (6 Cir. 1924) 296 Fed. 320; *Clements v. Morgan* (Ky. 1948) 211 S.W. 2d 164, and the following recent decisions: *Easley et al v. Melton et al* (Ky. 1953) 262 S.W. 2d 686; *Witherspoon et ux v. Campbell* (Miss. 1954) 69 So. 2d 384; *Elkhorn Coal Corp. et al v. Yonts et al* (Ky. 1953) 262 S.W. 2d 384; and *Long et al v. Madison Coal Co.*, (Ky. 1954) 125 F. Supp. 937, 4 Oil & Gas Rep. 226.

The annotation in 17 *A.L.R.* 156 follows the case of *Rock House Fork Land Co. v. Raleigh Brick & Tile Co.*, 17 *A.L.R.* 144, a West Virginia case in which the Court states that the term "mineral" is not a definite one capable of a definition of universal application but is susceptible of limitation according to the intention of the parties using it, that in determining its meaning regard must be had not only to the language used but also to the relative position of the parties and the substance of the transaction. In this case the Deed granted "coal and all other minerals" and then went on to grant certain rights

to be enjoyed by the Grantee in the production of such minerals, including the right to make and maintain "all necessary railroads, excavations, ways, shafts, drains, drainways, and openings necessary and convenient for the mining and removal of said coal and other minerals," and contained other provisions relative to hauling and transporting coal and other minerals. A number of cases and authorities are quoted, including *Lindley, Mines & Mining*, Sections 87 et seq., 18 R.C.L. 1093, and *Sult v. A. Hochstetter Oil Co.*, 63 W. Va. 317-323, 61 S.E. 307. The Court states that substantial aid is afforded by the language used in the Deed in conveying said mining rights in determining what the parties meant by the term "other minerals," and states that the rights granted were such as are incident to the production of minerals by means of mines; that is, by shafting or tunneling. The West Virginia Court in the *Rock House* case cited with approval the decisions of the Court of Appeals of New York to the effect that the meaning of words used in a grant will be construed in the light of the language used in granting mining rights, and that where the mining rights are those involved in the ordinary processes of mining, the items granted will be limited to such things as are recoverable by such processes.

All of the foregoing authorities support our contention that when the entire Deed, Exhibit "B", and all of its provisions, clauses and context are considered, including

the easements or privileges reserved, it is evident that the Grantor did not reserve nor intend to reserve the oil and gas rights.

(c) *In the construction of deeds, the rule of ejusdem generis should be applied. If there is an enumeration of particulars, followed by a sweeping clause comprising other things, the scope of such clause is restricted to things, within the description, of the same kind as the particulars enumerated. 16 Am. Jur. 537. Similarly, the expression of a particular subject implies the exclusion of subjects not enumerated, or, expressio unius est exclusio alterius. As stated in 16 Am. Jur. 537: "If a deed covers particular or express matters, the intention may be inferred to exclude other subjects which the general words of the deed may have been sufficient to include . . ."*

In *Huie Hodge Lumber Co. v. Railroad Lands Co.* (supra), the Deed reserved "the exclusive right to iron, coal, and other minerals . . ." The Court held that the rule of ejusdem generis required that the words "other minerals" following the specific terms "coal" and "iron" be construed as intending or including other minerals of a character similar to coal and iron, such as solids or minerals in place, requiring mining for their removal instead of drilling. To the same effect are the decisions in *Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co.* (Tex. 1913) 157 S.W. 737, 51 L.R.A. N.S. 268, and *Horse Creek Land & Min. Co. v. Midkiff* (W. Va. 1918) 95 S.E. 26, and

the cases cited in the Annotations in 17 *A.L.R.* 164, 86 *A.L.R.* 987, and 37 *A.L.R.* 2d 1449, to which the Court's attention is respectfully invited in connection with the instant point and the other rules cited.

In *Right of Way Oil Co. v. Gladys City Oil etc.*, (supra) where the Deed referred to "timber, earth, stone and mineral," the Court held that under the rule of ejusdem generis, the word "mineral" should be applied to the same class as the particular words listed, that is, materials found upon land near the surface, as gravel and the like, and not "mineral oil" which is found at great depth and is of much greater value.

If the parties to Exhibit "B" had intended to reserve oil and gas, they would have so stated, just as they did in connection with Exhibit "C" which was made nearly five years later in connection with an adjoining tract.

In *Vogel v. Cobb*, (Okla. 1943) 141 Pac. 2d 276, 148 *A.L.R.* 774, it was held, applying the rule of ejusdem generis, that "water was not conveyed by a grant of the oil, petroleum, gas, coal, asphalt and all minerals of every kind or character" or a grant "of the oil, gas and other minerals in and under and that may be produced from" the land.

In Exhibit "B" the case is clear for an application of the rules of ejusdem generis and *expressio unius est exclusio alterius*, since the general or sweeping clause follows an enumeration of particular items, from which it

should be concluded that the scope of the general clause is restricted to things of the same kind and character as the particulars listed, and that having listed these particular items of a particular type the intention must be inferred to exclude other subjects which the general words of the Deed may have been sufficient to include.

(d) *A Grant is construed most strongly against the Grantor when the language is ambiguous or doubtful, particularly in the case of exceptions or reservations. 16 Am. Jur. 599 and 615, 36 Am. Jur. 303, and Bundy v. Myers et al (Pa. 1953) 94 A. 2d 724, 2 Oil and Gas Rep. 352, in which the reservation clause read:*

“ . . . excepting and reserving, out of this land, the oil, coal, fire clay and minerals of every kind and character with rights of entry for the removal of the same . . . ”

The Court held that gas was not reserved, even though oil was specifically mentioned, along with “minerals of every kind and character.” To the same effect see *Barker v. Campbell-Ratcliff Land Co. (Okla.)* 167 Pac. 468.

As stated in 16 *Am. Jur.* 615:

“Also, in virtue of the rule that a grant is construed most strongly against the grantor, when the language of an exception or reservation is ambiguous or doubtful, it will be construed in such way as to resolve doubts against the grantor in favor of the grantee, for the grant will not be

cut down by the subsequent reservation to any extent beyond that indicated by the intention of the parties as gathered from the whole instrument."

This follows largely because the Grantor selects his own words and the Deed is prima facie an expression of the intention of the grantor.

In connection with Exhibit "B", the Knight Investment Company and its agents and officers selected the words to be used and indicated the items being reserved. The wording used, as indicated above, shows that gas and oil were not intended to be reserved, but if any ambiguity or obscurity exists, such ambiguity should be resolved against the Grantor in accordance with the foregoing rule.

We feel that the fair and logical application of the foregoing rules of construction lead inescapably to the conclusion that if Exhibit "B" is interpreted on its face without resort to extrinsic matters of any kind, except such as the Court may judicially notice in construing said Deed, that gas and oil were not intended to be nor were they reserved by virtue thereof.

B. Argument based on the assumption that the Court determines Exhibit "B" to be ambiguous and to require resort to extrinsic matters to construe the same and to determine the intention of the parties thereto as to whether gas and oil were reserved.

If, however, the Court determines that Exhibit "B" is obscure and ambiguous as to whether or not oil and gas were reserved, then resort should be had to the complete Record on Appeal and to any items therein contained to throw light on the intention of the parties. In this connection, it is pointed out that in December, 1920, the same parties made a third Deed, Exhibit "C", in which Knight Investment Company expressly reserved and listed hydro-carbons, gas and oil in addition to the same items and language previously used in Exhibit "B" in March, 1916.

Exhibit "C" is admitted as part of the Stipulation, and certainly throws light on the intention of the parties in connection with the 1916 Deeds, since it discloses that in 1920, after the drilling of two wells in Sanpete County, Utah, after the adoption of the *Federal Leasing Act of 1920*, and after a flurry of excitement concerning oil and gas in the relatively nearby Sanpete-Sevier area, the parties, particularly Knight Investment Company, had in mind oil and gas and therefore expressly listed the same, as contrasted to the situation in 1916 when oil and gas were not listed and were not in the minds of the parties.

The 1920 Deed is very helpful and significant, for in it the Knight Investment Company and its attorney and officers saw fit to include and did include a reservation of the same items as those mentioned in the 1916 Deeds, but added three specific items: "hydro-carbons, gas and oil."

In this 1920 Deed the parties were thinking in terms of oil and gas and so showed. The fact that they used the specific words to describe them, at the same time using the words "mineral products" shows that they did not consider that such phrase "mineral products" included oil and gas. They thus recognized that oil and gas were not included in the 1916 reservation and grant, because they had not intended to reserve them, and that to include them in the 1920 reservation it was not sufficient to rely on the general term "mineral products".

Parties intend to use the words that they do use, and they intend to use them for a purpose. In 1920 they intended oil and gas to be reserved and so stated. If they had been thinking in terms of oil and gas in 1916 and had wanted to reserve them in Exhibit "B" and convey them in Exhibit "D", they would have said so.

What better act of the parties is there than the 1920 Deed (Exhibit "C") to show that the parties did not have oil and gas in mind in the 1916 Deeds, Exhibits "B" and "D"?

Furthermore, Exhibit "O" (R. 117) shows that the purpose of the Knight Investment Company under its Articles of Incorporation was in connection with "mining, smelting, milling" and did not refer to drilling or related activities.

All of the rules of construction listed above apply and should be given proper effect, even though the Court

determines that Exhibit "B" was obscure and that resort must be had to extrinsic matters. In other words, those rules of construction should still be applied and should be coupled with resort to such other extrinsic matters as may be in the record and as may be pertinent to the inquiry in determining intention.

POINT II.

THE DISTRICT COURT ERRED IN DETERMINING THAT ISAAC D. VOORHEES AND WIFE CONVEYED TO KNIGHT INVESTMENT COMPANY BY EXHIBIT "D" (R. 85-86A) THE OIL AND GAS WITHIN TRACT III ABOVE MENTIONED.

A. Argument based on the assumption that the Court holds Exhibit "D" to be clear and unambiguous on its face and to require construction thereof without resort to extraneous matters in determining whether or not the intention was to grant oil and gas.

In contrast to Exhibit "B" which is the subject of argument under Point I above and which involves the construction to be placed on *reservations* contained therein, Exhibit "D", which is the subject of the instant argument, involves the construction to be placed on *grants* contained therein. Exhibit "D" was made under date of April 3, 1916, or five days after Exhibit "B" was made. By Exhibit "D", Isaac D. Voorhees and wife conveyed and granted to Knight Investment Company the items and rights listed therein, the wording being set forth in the above Statement of Facts (p. 4). It is to be noted that the description of the items reserved in the one Deed

(Exhibit "B") is identical with the description of the items conveyed in Exhibit "D", the properties involved being different, of course.

It follows that the rights of the Respondents herein depend, in the case of the properties described in Exhibit "B" and involved herein, on whether or not Knight Investment Company *reserved* oil and gas by that Deed, whereas in connection with the properties involved herein and included in Exhibit "D", Respondents' rights depend on whether or not Knight Investment Company was *granted* the oil and gas by said Deed.

The same rules, canons, principles, and arguments set forth under Point I above apply to Point II. In addition, however, we point out that in defining the rights and items being granted by Exhibit "D", the parties used the same language as that used by Knight Investment Company in connection with its reservations under Exhibit "B". It appears clear that Knight Investment Company, therefore, was the author of both instruments. The parties used the language they intended to use. The Knight Investment Company was interested in certain items, which it listed and defined in particular terms *followed* by general terms, again calling for the application of the rules of *eiusdem generis* and *expressio unius est exclusio alterius*.

Here again, if Knight Investment Company had been interested in purchasing and acquiring oil and gas, it

would have been so stated. The grant was not of the fee simple title, with reservations of certain items as in Exhibit "B", but was a grant of a limited and restricted number of items. Herein again, the mining rights, easements and privileges granted indicate the intention of the parties as to just what "minerals" were intended to be and were conveyed by Mr. and Mrs. Voorhees to Knight Investment Company. Exhibit "D" was a retention by Voorhees of their fee simple title, and a grant of "coal, gold, silver, lead, copper and other precious and valuable ores, minerals, mines and mining rights" and of easements or rights-of-way for roads, railroads, telephone and telegraph lines, water pipe lines (*not oil and gas lines or wells*), depot grounds, etc., by paying certain amounts, and of other easements, all of such a nature as to indicate that the parties were thinking of the mining of hard or solid materials and not of the drilling and boring of wells or the extraction, storage, or removal of oil and gas.

B. Argument based on the assumption that the Court determines Exhibit "D" to be obscure and ambiguous on its face and to require resort to extraneous matters to construe the same and to determine whether or not the parties thereto intended to grant oil and gas.

The arguments presented above in connection with Point I (B) apply with equal force and effect to Point II (B) and for that reason are not repeated.

We urge upon the Court the conclusion that Exhibit "D" did not convey or grant oil and gas rights to Knight Investment Company, but served to retain the same in Voorhees, the predecessor in interest of the Appellants Arthur H. Nell, Lorna V. Nell, and Luella T. Voorhees, and that the District Court's decision to the contrary is erroneous.

CONCLUSION

In connection with Point I, involving the construction to be placed on Exhibit "B", we respectfully contend that the parties thereto did not intend the said Deed to *reserve* oil and gas, and that such is true whether the Deed is construed on its face and without resort to extraneous matters or whether the Deed is held to be ambiguous and obscure on its face so as to require resort to the extraneous matters before the Court in the Record on Appeal in order to determine the intention of the parties to said Deed with respect to oil and gas.

In connection with Point II, involving the construction to be placed on Exhibit "D", we respectfully submit that the parties thereto did not intend said Deed to *grant* oil and gas, and that such conclusion should be reached whether the Deed is construed without resort to extraneous matters or, on the ground that it is held to be ob-

scure on its face, is construed in the light of the extraneous matters before the Court in connection with the Motions for Summary Judgment.

For all the reasons hereinabove stated, the Appellants request that the decision of the District Court be reversed and that Findings, Conclusions and Decree be entered in favor of Appellants on their Cross-Motion for Summary Judgment.

Respectfully submitted,

GUSTIN, RICHARDS & MATTSSON

By CARVEL MATTSSON

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