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Flying Diamond Oil Corporation, Formerly Known as Flying Diamond Corporation, a Utah Corporation v. Newton Sheep Company, a Limited Partnership; Ralph M. Newton, Eugene B. Newton And Scott F. Newton, General Partners; And Eugene B. Newton, Individually, And Edna Elliott Newton, His Wife : Brief of Respondent Newton Sheep Company, Et Al.

IN THE SUPREME COURT OF THE STATE OF UTAH

FLYING DIAMOND OIL CORPORATION, formerly known as FLYING DIAMOND CORPORATION, a Utah corporation, Plaintiff-Appellant, vs. NEWTON SHEEP COMPANY, a limited partnership; RALPH M. NEWTON, EUGENE B. NEWTON and SCOTT F. NEWTON, general partners; and EUGENE B. NEWTON, individually, and EDNA ELLIOTT NEWTON, his wife, Defendants-Respondents. and BASS ENTERPRISES PRODUCTION CO., a Texas corporation, Intervenor Defendant-Respondent.	:	Case No. 19178

BRIEF OF RESPONDENT
NEWTON SHEEP COMPANY, ET AL.

Appeal From the Judgment of the Third Judicial District Court of Summit County, State of Utah, Honorable Ernest F. Baldwin, Jr., District Judge.

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BRIEF OF RESPONDENT
NEWTON SHEEP COMPANY, ET AL.

NATURE OF THE CASE

The plaintiff-appellant brought the instant action for declaratory judgment contending that it was entitled to a 2 1/2 percent payment provided for in a Surface Owner's Agreement entered into between Champlin Petroleum Company and Newton. The case sought a resolution as to conflicting claims to the percentage payment.

DISPOSITION IN THE LOWER COURT

The appellant, Flying Diamond Oil Company, brought suit in the District Court of Summit County, State of Utah, on June 30, 1978, seeking various relief against Newton Sheep Company, et al., and included in Count I, which is relevant to this appeal, an action for declaratory judgment (R. 1-4). The instant appeal concerns only the matter raised in Count I of the appellant's complaint and the counterclaim thereto. An answer and counterclaim were duly filed by Newton Sheep Company, et al. (R. 17) and a reply duly filed by appellant (R. 28). Subsequently, Bass Enterprises Production Company sought and was granted intervention (R. 89, 90). Thereafter, Bass filed an answer and counterclaim to the complaint of Flying Diamond and a cross-claim against Newton Sheep. Bass contended for an interest in the payment involved in the litigation by virtue of a deed from Newton to Bass (R. 94). Replies were duly filed by Flying Diamond and Newton to the Bass pleadings (R. 109, 174). An amended answer, counterclaim, and cross-claim were filed by Bass and duly replied to by Flying Diamond and Newton. A pretrial order was entered by the trial court setting forth the narrow issue to be tried in the case (R. 276). It was agreed that the only issues to be tried were Flying Diamond's claims for declaratory judgment and the counterclaims thereon. Trial was held in the District Court of

Summit County, State of Utah, the Honorable Ernest F. Baldwin, Jr., District Judge, presiding, on January 19, 1982. Following the trial, an interlocutory judgment was entered on May 20, 1982, signed May 19, 1982 (R. 431, 433). Findings of fact and conclusions of law were also entered at the same time (R. 426, 430). A motion denying a motion to amend the proposed findings of fact and judgment was entered on June 7, 1982. A final judgment was signed April 8, 1983, and entered April 13, 1983 (R. 450). The trial court's judgment was in favor of Newton and Bass and against Flying Diamond. A notice of appeal was duly filed by the appellant on May 2, 1983.

RELIEF SOUGHT ON APPEAL

Respondent, Newton Sheep Company, seeks to have the judgment of the trial court affirmed.

STATEMENT OF FACTS

The instant appeal involves litigation over certain interests arising out of real estate transactions in Summit County, Utah. The defendant, Newton Sheep Company, is the successor in interest to properties originally owned by Hyrum J. Newton Company, a corporation (T. 7). The company became a limited partnership and the defendants include the partnership and the individual partners. On September 24, 1971, Champlin Oil Company, a subsidiary of Union Pacific Railroad, entered

into a Surface Owner's Agreement with Newton[1] (R. 2). The mineral interest claimed by Champlin, and not in dispute in this matter, is from a railroad grant to Union Pacific Railroad. This is not a case where the mineral interest was alienated to an oil company developer subject to reservation. It is the interest conveyed by the Surface Owner's Agreement that is involved in this litigation (Exhibit 1, R. 476). Section 2 of the Surface Agreement provided:

> Champlin agrees, so long as it is receiving oil and/or gas production from or oil and/or gas royalties upon production from the described premises or allocated thereto under the provisions of a unitization agreement, to pay or cause to be paid to the Land Owner in cash the value on the premises of two and one-half percent (2 1/2%) of all the oil and gas and associated liquid hydrocarbons hereafter produced, saved, and marketed therefrom or allocated thereto as aforesaid, except oil and gas and associated liquid hydrocarbons used in operations on the premises or used under the unitization agreement, and except that as to cashinghead gasoline and other products manufactured from gas there shall be deducted the cost of manufacture; . . . ."

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1. The trial transcript in the instant case refers to the Surface Owner's Agreement as a service owner's agreement. This appears to be a mistake of the court reporter.

   Newton Sheep Company will be referred to as "Newton" and Bass Enterprises Production Company as "Bass". Appellant will be referred to as Flying Diamond even though it has changed its name.

   The documents in the Record will be cited as (R. __). The trial transcript will be referenced as (T. __).

Section 4 of the agreement expressly disclaimed that the agreement constituted any covenant to drill by Champlin. Section 5 made Champlin liable for damage to the land owners (surface owner), lands, buildings, and growing crops caused by the erection or construction of facilities in conjunction with oil and gas operations (R. 476). Section 7 of the Surface Agreement provided:

> Subject to the provisions of Section 9 hereof, it is agreed that the covenants to pay the sums provided in Sections 2, 3, and 5 hereof shall be covenants running with the surface ownership of the described premises and shall not be held or transferred separately therefrom, and any sums payable under this agreement shall be paid to the person or persons owning the surface of the described premises as of the date the oil or gas or associated liquid hydrocarbon production is marketed. Champlin shall not, however, become obligated to make such payments to any subsequent purchaser of the described premises and shall continue to make such payments to the Land Owner until the first day of the month following the receipt by Champlin of notice of change of ownership, consisting of the original or certified copies of the instrument or instruments constituting a complete chain of title from the Land Owner to the party claiming such ownership, and then only as to payments thereafter made.

Subsequent to the Surface Owner's Agreement being entered into, Newton conveyed by deed part of the royalty interest or payment entitlement due Newton under the Surface Agreement (Exhibit 1) to the intervenor, Bass Enterprises (T. 12, R. 484). The deed transferring the interest was dated

February 1, 1972. The deed encompassed fee lands as well as railroad lands, but only the railroad lands are involved in this case. At the time Newton owned the surface of the lands in question and Union Pacific Railroad, e.g., Champlin, owned the mineral interests. Newton also owned fee lands and mineral interests that were not owned by the railroad. At the time of the execution of the deed to Bass Enterprises, the Surface Owner's Agreement was of record and Bass and Newton were aware fo the Surface Owner's Agreement (T. 11). Scott Newton, a general partner and secretary of Newton (T. 58), acknowledged that the purpose of the deed to Bass was to convey one-half of the 2 1/2 percent payment interest that Newton had by virtue of the Surface Agreement with Champlin (T. 60, 65). The deed from Newton to Bass expressly mentioned the Union Pacific Railroad Company lands (R. 485) and purported to grant, bargain, sell, convey, transfer, assign, and deliver to Bass "one-half of the royalty (of any type) from production of minerals that the grantor actually received or is entitled to receive until February 1, 2072 from identified Union Pacific lands." (R. 484, Exhibit 2). The deed, therefore, purported to assign one-half of the 2 1/2 percent interest that Newton had from the Surface Owner's Agreement to Bass. Thereafter, on April 12, 1974, Newton , as seller, entered into a real estate contract with appellant, Flying Diamond Corporation (R. 489). The

surface rights that Newton owned in the railroad and other lands were conveyed to Flying Diamond. Paragraph 6 of that agreement provided that the property being transferred "shall include the full surface and one-half of the oil, gas and other mineral rights and estates of" Newton. The mineral interest was defined as including "one-half of the royalty (of any type) from the production of minerals that the seller actually receives or is entitled to receive from the property so designated in Attachment A-1 until January 1, 2073." Thus, Newton's conveyance to Flying Diamond was expressly limited to one-half of the royalty interest remaining that had not been conveyed to Bass that Newton was entitled to by virtue of the Surface Owner's Agreement (R. 493). Scott Newton expressly advised Flying Diamond that Newton had sold 50 percent of the 2 1/2 percent royalty interest to Bass and that Newton wanted to keep at least one-half of the remaining interest they owned. This would mean that Newton would keep one quarter of the 2 1/2 percent and Flying Diamond would receive one quarter of the 2 1/2 percent (T. 64, 65). The language on page 4 of the Ranch Purchase Contract between Newton and Flying Diamond (Exhibit 3) pertaining to the royalty interest is the same language as appears on page 2 of the Bass/Newton contract (T. 50), thus showing that both agreements contemplated the same royalty or payment interest.

At the time of trial, Judge Baldwin indicated that although he would receive testimony about the transactions between the parties he would not consider the evidence for the purposes of varying the terms of the agreements but would have to study the agreements to properly interpret them (T. 54). Following the presentation of some testimony and further argument of counsel, the Court again refused to allow any testimony to come in in violation of the parol evidence rule (T. 82-84). The Court also indicated that although it would receive the depositions of Russell E. Neihart, William B. Callister and Robert B. Logerstrom that the Court would not receive the depositions for altering the written documents (T. 83-92). Judge Baldwin expressly said that he would not allow parol evidence to interpret the contract between the parties (T. 92). Further, after the court's ruling, counsel for the appellant expressly requested the Court to read all of the depositions and offered a greater amount of the deposition evidence than had been offered by Newton or Bass (T. 83-92).

Based upon the evidence heard and the contracts, the trial court entered findings of fact and conclusions of law. They were entered on May 19, 1982 (R. 426-430). The Court found that Newton entered into the Surface Agreement with Champlin in September of 1971, which agreement was recorded October 1, 1971 (R. 427). That in February, 1972, Newton

conveyed to Bass by warranty deed recorded on March 20, 1972, one-half of the royalty payment from the production of minerals that Newton was entitled to receive. The Court found that Bass was charged with knowledge of the terms of the Surface Owner's Agreement (R. 428). The Court found that in April, 1974, Flying Diamond, with knowledge of the Surface Owner's Agreement, and the Bass/Newton deed entered into the ranch purchase contract (Exhibit 3) in which they acquired one-half of Newton's oil, gas and mineral rights through the language previously referred to herein (R. 428). The Court found that Newton's transfer to Flying Diamond was with the intent that Flying Diamond acquire one-fourth of the 2 1/2 percent payment referred to in the Surface Agreement (R. 428). The Court's conclusions of law were to the effect that the Surface Owner's Agreement did not prohibit an assignment of an interest in monies paid by Champlin under the agreement and that there was no express prohibition in the Surface Agreement (Exhibit 1) against an assignment by Newton of an interest in the 2 1/2 percent payment. The deed from Newton to Bass was held effective to assign to Bass one-half of the 2 1/2 percent payment. The ranch purchase contract was held to have retained for Newton one-fourth of the 2 1/2 percent payment. The Court concluded that appellant, Flying Diamond, was entitled to retain one-fourth of the 2 1/2 percent payment. The Court

further found that Flying Diamond was estopped to deny that it only had a one-fourth interest in the 2 1/2 percent payment and that Newton and Bass were not estopped to assert the interests the Court found the parties were entitled to in the 2 1/2 percent payment (R. 429). The interlocutory judgment was entered thereon and the final judgment entered on April 13, 1983 (R. 460), implemented the Court's findings and conclusions.

ARGUMENT

POINT I

THE 2 1/2 PERCENT PAYMENT UNDER THE SURFACE AGREEMENT WAS NOT A COVENANT RUNNING WITH THE LAND TO WHICH FLYING DIAMOND OR THE SURFACE OWNER WAS PERPETUALLY ENTITLED.

Flying Diamond contends that it is entitled to the 2 1/2 percent interest referred to in the Surface Agreement between Newton and Champlin Oil Company by virtue of the fact that Flying Diamond subsequently acquired the surface interest. Paragraph 2 of Exhibit 1 provides that Champlin agrees so long as it is receiving oil and/or gas production from or oil and/or gas royalties upon production from the described premises or allocated thereto under the provisions of a unitization agreement, to pay or caused to be paid to the landowner in cash the value on the premises of two and one-half percent (2 1/2%) of all oil and gas and associated liquid hydrocarbons hereinafter produced. The right for anyone to

receive payment under the Surface Agreement is conditioned upon production of oil and gas and a royalty allocation from the production. The agreement also provides for the payment of the 2 1/2 percent from the commingling when the production of oil from lands under the several surface ownerships is placed in one central bank. Section 5 of the Surface Agreement provides that Champlin is required to pay for all damage to the landowner's lands, buildings and growing crops caused by the erection or construction of facilities to be used in connection with oil or gas or associated liquid hydrocarbon operation and to take various other actions to protect the surface of the lands. This obligation of Champlin is unrelated to the 2 1/2 percent payment. Therefore, the 2 1/2 percent payment is not to compensate the surface owner for injury to the property since Section 5 is an indemnification provision to cover the mineral developer's obligation to pay the surface owner or any damage to the land and to take actions to protect the surface owner's interest. Section 7 provides that "the covenants to pay the sums provided in Sections 2, 3 and 5 shall be covenants running with the surface ownership of the described premises and shall not be held or transferred separately therefrom, and any sums payable under this agreement shall be paid to the person or persons owning the surface of the described premises as of the date of the oil and gas or associated liquid

hydrocarbon production is marketed." (R. 480) Section 7 further provides that Champlin shall not become obligated to make payments to any subsequent purchaser of the premises until such time that Champlin is "given notice of a change of ownership". From these provisions Flying Diamond contends that Newton could not have transferred any interest in the 2 1/2 percent payment right to Bass or any other persons separate from the surface interest because the provisions of Sections 2 and 7 constitute covenants running with the land. Newton respectfully submits that Flying Diamond misconstrues the concept of covenants running with the land and that the payments provision in paragraph 2 of the Surface Agreement does not constitute a covenant running with the land nor does Section 7 make it so, but rather the provision of Section 2 grants to the landowner the right to receive a payment based on production equal to 2 1/2 percent of the value of the production. The Surface Agreement does not grant Newton a specific right in any mineral but only a right to receive payment. Nor does Section 2 obligate Newton to do anything with the payment. It need not be used on the land to improve it, but may be used in any way the landowner wants. The grant under Section 2 is therefore not something about the land or a reserved interest that Newton once had in the mineral estate. The interest here should be compared with a right to a specific

mineral interest which could improve a covenant running with the land because it would directly effect the land. See, Restatement of Property, §§ 543 and 544. Here, Newton's right to any part of the 2 1/2 percent payment is not based on any previous interest in the land that Newton had. Rather, it is a contractual right to receive a personal payment. This is not such an interest as will run with the land. Newton or the surface owners had no obligation to the land that involved or involves the 2 1/2 percent payment. The criteria for determining whether a covenant runs with the land are spelled out in 20 Am. Jur. 2d, Covenants, Conditions, Etc. § 30:

> The primary test whether the covenant runs with the land or is merely personal is whether it concerns the thing granted and the occupation or enjoyment thereof, or is a collateral or a personal covenant not immediately concerning the thing granted. In order that a covenant may run with the land it must have relation to the land or the interest or estate conveyed, and the thing required to be done must be somethig which touches such land, interest, or estate and the occupation, use, or enjoyment thereof. Whether a particular covenant is sufficiently connected with the use of land to run with the land must be in many cases a question of degree. There must also be privity of estate between the parties to the covenant, and the covenant must be consistent with the estate to which it adheres and of such character that the estate will not be defeated or changed by the performance thereof. A covenant in a deed is not made one running with the land merely by the fact that it is a part of the consideration expressed in the deed.

* * * *

> In the event that the act to be performed is merely collateral to the land and does not relate to the property demised, then the assignee is not charged, though named in the covenant. The covenant is merely personal, and does not affect the land demised. The fundamental principle that only those covenants which touch and concern the land, even though the assignee is named in the covenant, can run with the land and charge the assignee, is enunciated in Spencer's Case, a leading English case on the law of covenants.

In appellant's brief appellant places great emphasis on the language of Section 7 of the Surface Agreement. However, the mere fact that Section 7 of the Surface Agreement characterizes the 2 1/2 percent payment as a covenant running with the land does not make it such. In 20 Am. Jur. 2d, Covenants, Conditions, Etc., § 30, it is noted:

> If a covenant is not in its nature and kind a real covenant, the declaration of the parties in the instrument that it shall run with the land cannot create a real covenant. If no interest passes and no possession attends the conveyance, the convenant obviously does not run with the land.

In H.T.C. v. Whitehouse, 47 Utah 323, 154 P.2d 950 (1916), this Court observed that a covenant of warranty by one neither having possession nor title does not run with the land. The 2 1/2 percent payment, therefore, must be measured against the legal criteria for covenants running with the land to determine whether it is a covenant real or a personal covenant. If the criteria are not met for a covenant running with the land Section 7 of the Surface Agreement cannot make it such.

It is submitted that when the substance of the Surface Agreement is actually analyzed against the relevant legal criteria that the only conclusion that can be legitimately drawn is that the 2 1/2 percent payment is not a covenant running with the land. First, it is submitted that the 2 1/2 percent payment does not directly relate to the land or touch and concern the land. Second, it is submitted that the relationship between Flying Diamond, Champlin and Newton is such that there is no privity of estate but at best privity at contract, and third, it is submitted that the intention standard is at best ambiguous.

In The City of Tucson v. Superior Court of Pima County, 116 Ariz. 322, 569 P.2d 264 (App. 1977), suit was brought relating to a conveyance of a ten-foot strip of land to the defendant county. One of the counts alleged that the property was conveyed to Pima County in consideration for a promise that Pima County would not assess the retained portion of plaintiff's property for the proposed widening and improvement of a road. Plaintiff's understandings constituted covenants running with the land.

> The only theory on which the city could be liable is if the county's promise were a covenant running with the land. To create such a covenant at law, four prerequisites must be met: (1) there must be a writing which satisfies the

> statute of frauds; (2) the parties must intend that the covenant run with the land; (3) the covenant must touch and concern the land; and (4) privity of estate must exist between the original grantor and the grantee at the time the covenant is made.

The court found the interest involved was not a covenant running with the land. The court concluded:

> Since the complaint alleged conveyance of the ten-foot strip to the county and its subsequent acquisition by the city by annexation, and failed to allege facts burdening the property with an equitable servitude in favor of the plaintiffs, no claim for breach of covenant lay against the city.

The court's assessment of the case was that there was not any imposition against the land and, therefore, since the property was not burdened there could be no covenant running with the land, since the touch and concern criteria was not met. A case relevant to the issue before the court is Choisser v. Eyman, 22 Ariz.App. 587, 529 P.2d 741 (1974). The case involved an action to determine the ownership of refund rights under a water extension agreement to service property. A contention was made that the refund payments were covenants running with the land. The court observed:

> To create a covenant at law, four prerequisites must be met: (1) there must be a writing which satisfies the Statute of Frauds; (2) th parties must intend that the covenant run with the land; (3) the covenant must touch and concern the land, i.e. make the land itself more

> useful or valuable to the benefited party; and (4) privity of estate must exist between the original grantor and the grantee at the time the covenant is made. C. Smith and R. Boyer, Survey of the Law of Property, 356 (2d Ed. 1971). In determining whether the entire agreement, including the rights to refunds, runs with the land, it is important to differentiate between the agreement to supply water and the consideration given to effectuate that supply.

The court then went on to say that an agreement to supply water to property can be a covenant running with the land citing the Restatement of Property, § 548, but then went on to say:

> However, the right to receive the refunds, the subject of this appeal, does not touch and concern the land. By Clause 7 itself, the right to receive the refunds, is a personal right enforceable by appellant alone. Restatement of Property § 544 (1944). Being a personal right, it cannot, by definition, be a covenant running with the land.

The case is analagous to the instant case since the right under Section 2 of the Surface Agreement is a right to receive payment which is not a matter that touches and concerns the land especially when the payment is not obligated for the benefit of the land. The requirement that a covenant running with the land actually relate to the land is a part of the element of touch and concern. Updegrave v. Agee, 258 Ore. 599, 484 P.2d 821 (1971). In Johnson v. State By and Through The Highway Division, 27 Ore.App. 581, 556 P.2d 724 (1976), a declaratory judgment was sought contending that a covenant given by the predecessors in interest to the plaintiffs ran

with the land and was binding upon the plaintiffs. The covenant provided that the state would not be required to pay for removal or destruction of a house on the property in the event the state required additional right of way for a highway. The court held that the covenant did not run with the land because the benefit to the state contained in the covenant was in no way tied to the land owned. One of the elements that the court referred to for a covenant running with the land was that the promisee must benefit in the use of some land possessed by him as the result of the performance of the promise. The court held that was lacking in the covenant. Essentially, there was an insufficient connection to the land to justify finding a covenant running with the land. In California Packing Corporation v. Grove, 57 Cal.App. 253, 196 P. 891 (1921), the court held that a covenant running with the land requires a direct grant of the property and is the direct benefit of the property. Neither factor is present in the instant case, since the grant by Champlin to Newton was of a right to receive money and there is no direct benefit to the property in question. In Colonia Verdi Homeowners Ass'n v. Kaufman, 122 Ariz. 574, 596 P.2d 712 (App. 1979), the court observed that a covenant running with the land is something that involves "a general plan of development and improvement of the property." Such an interest would be one of quiet

enjoyment. Van Cott v. Jacklin, 63 Utah 412, 226 Pac. 460 (1924). If the agreement is merely collateral to the land and not an integral part of the property, no covenant running with the land can be found.

A decision from this Court, Lundeberg v. Dastrup, 28 Utah 2d 28 (1972), is directly relevant to this issue. There the question arose as to whether a provision for the payment of attorneys' fees necessary for enforcement of the terms of an agreement was a covenant running with the land. This Court held that such a provision could not be a covenant running with the land.

> In regard to the plaintiffs' further argument that the contract provision for attorney's fees, assumed by successive assignees, and/or combined with the judgment, constitutes a covenant running with the land and is therefore binding on Alyce Husgands and Nick Caravelli against whom the execution was directed, this is to be said: In order for a covenant to run with the land it must be of such character that its performance or nonperformance will so affect the use, value, or enjoyment of the land itself that it must be regarded as an integral part of the property. Examples are the covenants of seizin, the right to convey, freedom from encumbrances, and of quiet and peaceable possession. Contrasted to these are covenants to perform personal obligations under the contract, which ordinarily do not so run. Under the concept just stated a provision in a purchase contract to pay attorney's fees necessary for enforcement of its terms does not meet the qualification for a covenant which runs with the land.

In Latses v. Nick Floor, Inc., 99 Utah 214, 104 P.2d 619 (1940), the court also stated that attorneys' fees in an agreement were matters of personal payment and did not constitute covenants running with the land. The case law, therefore, seems to support the proposition that generally the right to receive a payment is not necessarily a covenant running with the land especially where it is not dependent upon any obligation towards the land itself. In the instant case, Champlin was otherwise obligated independent of the 2 1/2 percent payment to protect the surface estate. Champlin already had a right to the use of the surface estate in pursuit of its mineral interests. Flying Diamond Corporation v. Rust, 551 P.2d 509 (Utah 1976). Newton was not obligated to employ the 2 1/2 percent in any way to the betterment of the land. Thus, the touch and concern element of a covenant running with the land is not present. Contrast this court's position in Ruffinego v. Miller, 579 P.2d 342 (Utah 1978), where the court held a covenant running with the land existed where the covenant was one that directly benefited and protected the land. Therefore, the touch and concern element required for a covenant running with the land is not present in the instant case.

It is further submitted that the privity of estate requirement for a covenant running with the land is not present

in the instant situation. No interest in the land was conveyed by Champlin to Newton nor by Newton to Champlin and then in turn to Flying Diamond. Champlin's interest in mineral estate existed separate and apart from Newton's surface ownership right. The Surface Agreement was merely a contractual concern. The surface of the land and mineral estates were separately owned. Although the agreement between Newton and Champlin creates a contractual privity, there is no privity in the estate as distinct from the privity to receive a payment from the oil and gas production. Thus, it is submitted that the classic requirement of privity of estate is missing. In 20 Am. Jur. 2d, Covenants, Conditions, Etc., § 34, it is stated:

> The term 'privity of estate' connotes a mutual or successive relationship to the same rights of property, and not privity in estate or mutuality with the meaning of the feudal law. Therefore, unless privity of estate exists, as thus defined, the covenant is purely a personal obligation, neither binding nor benefiting the land in the hands of heirs, devisees, or assigns.
>
> A distinction is made between privity of contract and privity of estate, and the rule is that privity of contract alone is insufficient to carry the benefit of a covenant to subsequent owners of the property.

Finally, it is submitted that the intention requirement for a covenant running with the land is not present in this case in the sense of an intent to create a legal interest in property, but, rather, merely a covenant or

warranty to accommodate Champlin's willingness to pay the revenue from 2 1/2 percent of production for its protection. It should also be roted that Champlin agrees to make payment to a transferee only on notice of transfer. Champlin has no interest in making the payment to any particular person except to satisfy its contractual obligations in accordance with the Surface Agreement. Champlin has no concern as to any assignment of any interest in the payment as to third person except that it not be obligated to any third person. Its concern is one of accounting to insure that the payment be made to an identified individual. Roger D. Lagerstrom , an employee of Champlin Oil Company, gave a deposition which was offered into evidence by Flying Diamond that Champlin had no interest and wouldn't care what happened so far as an assignment between the surface owner and a third person as to the proceeds of the Champlin payment. (Lagerstrom Deposition, 35-37). It is submitted, therefore, that the type of intention required for a covenant running with the land is lacking or at least ambiguous. In First Western Fidelity v. Gibbons & Reed Company, 27 Utah 1, 492 P.2d 132 (1971), this court dealt with a claim that a covenant running with the land was created by an agreement to leave the tract of property contoured for residential supervision purposes after removing sand, gravel and fill materials thereform. The court found that the

requisite requirement of "some permanent effect of a physical nature upon the land itself" was present but that the language of the contract was ambiguous as to whether the parties intended a covenant for a definite improvement of the land which would inure to the benefit of subsequent transferees. In the absence of a clear intention the court would not find a covenant running with the land. See also, Metropolitan Investment Co. v. Sine, 14 Utah 2d 36, 376 P.2d 940 (1962). In the instant case, what was actually intended so far as benefiting the land is not clear and, therefore, the intention element of a covenant running with the land is not present.

It must be concluded that the trial court was correct in refusing to find that the Surface Agreement created a covenant real running with the land.

POINT II

THE 2 1/2 PERCENT PAYMENT IN THE SURFACE AGREEMENT WAS SUBJECT TO ASSIGNMENT TO THIRD PERSONS WITHOUT PREJUDICE TO CHAMPLIN'S LIABILITY.

If the 2 1/2 percent payment is not a covenant running with the land the question arises as to whether it may be conveyed in whole or part by the surface owner at a time that the surface owner has the contractual interest to the 2 1/2 percent payment. In this case, Newton, as the surface owner, having a right to the 2 1/2 percent payment transferred a one-half interest in the 2 1/2 payment to Bass pursuant to a

deed. The appellants contend that the 2 1/2 percent payment, under the Surface Agreement, is not a "royalty" and, therefore, could not be conveyed by Newton to Bass under the deed between the parties. A deed that meets the Statute of Frauds and otherwise comports with law can transfer whatever interest it purports to convey and if ambiguous the subject of the conveyance can be established by extrinsic evidence. Flying Diamond not being a party or privity to the deed could not object to parol evidence as to the intent of the parties. Green v. Grant, 635 P.2d 236 (Colo.App. 1981). The record in the instant case is clear that both Newton and Bass intended that a one-half interest in the 2 1/2 percent payment be transferred from Newton to Bass. The only question is whether that was a transferable interest. The argument that it was not a "royalty" and, therefore, could not be transferred under the deed is an argument in semantics not in legal substance. It may be that the 2 1/2 percent payment is not a royalty in the traditional sense of something reserved by the land owner who otherwise alienated the surface interest from a mineral interest. It is, however, recognized that a severed mineral and a right to receive payment is a fully transferable interest and one well recognized under oil and gas law. in 8 Williams & Meyers Oil and Gas Law (Manual of Terms), p. 661, the definition of royalty interest is stated:

> The property interest created in oil and gas after a SEVERANCY (q.v.) by ROYALTY DEED (q.v.). Its duration is like that of common law estates, namely, in fee simple, in fee simply determinable, for life or for a fixed term of years. It is distinguished from a MINERAL INTEREST (q.v.) by the absence of operating rights. The owner of a royalty interest is entitled to a share of production.

The definition clearly fits the 2 1/2 percent payment in the instant case. On page 660 of the same work, a royalty deed is defined as:

> An instrument in writing conveying a ROYALTY INTEREST (q.v.). The instrument must name the grantor and the grantee, describe the land, give the size of the interest, and contain the signature of the grantor.

Thus, the instrument between Newton and Bass was a royalty deed conveying a royalty interest, to-wit: one-half of the 2 1/2 percent right to payment from the production of oil and gas. In 1 Williams & Meyers Oil and Gas Law, § 301, the authors discuss the various definitional terms applicable to oil and gas matters. With reference to a royalty interest, it is said that it is "a right only to receive a certain part of the oil produced * * * free of exploration and production costs." p. 440. On page 445, the term "royalty interest" is explained:

> Owner has right to receive a certain part of the oil or gas, as, if and when produced, free of costs of production; has no rights to develop or lease.

Further, in 8 Williams & Meyers Oil and Gas Manual of Terms, p. 473, the definition of non-participating royalty is equally applicable to the 2 1/2 percent interest in this case. Recently, this court in Bennion v. Utah State Board of Oil, Gas and Mining, ___ P.2d ___ (Utah, Nov. 4, 1983), considered the interest of the plaintiff as a non-consenting mineral owner under the pooling provisions of the Oil and Gas Conservation Act. In discussing the interests at one point the court notes that Shell Oil Company characterized its payment concession as a "voluntary payment" and at another point the term royalty inerest is utilized and payment from production. The implication from the case is that the terminology is not settled and what is important is the substance that is conveyed. See also, Martin v. Glass, 571 F.Supp. 1406 (D.C. N.D. Tex. 1983). The deed contained all the necessary legal prerequisites to transfer one-half of the 2 1/2 percent interest and, therefore, accomplished the intention of the parties. Nor can Flying Diamond, as a stranger to the contract, attack its terms and effect if the interest conveyed was otherwise alienable. § 70A-2-107(1), Utah Code Ann. 1953, is relevant to this issue.

> (1) A contract for the sale of minerals or the like (including oil or gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this chapter if they are to be severed by the seller but until

> severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

This definition highlights the distinction between mineral interests and royalty interest and further emphasizes the fact that a production payment of royalty interest after severance is personalty and fully transferable. In Hartman v. Potter, 596 P.2d 653, 656 (Utah 1979), this Court observed: "Minerals in place may be severed from the land, and when so severed they become separate and distinct estates, held in separate and distinct titles." Therefore, there was no prohibition in the transfer of one-half of the 2 1/2 percent Newton made to Bass simply because of the definition of terms or the characterization of the interest was a "royalty".

The real question is whether the provisions of Section 7 of the Surface Agreement would act to, in any way, prevent Newton from transferring to Bass Newton's right to receive payment. The Restatement of Contracts, 2d, § 322, deals with a contractual prohibition against assignment. It states:

> (1) Unless the circumstances indicate the contrary, a contract term prohibiting assignment of 'the contract' bars only the delegation to an assignee of the performance by the assignor of a duty or condition.
> (2) A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested, . . .
> (b) gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective;

> (c) is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor or the obligor from discharging his duty as if there were no such prohibition.

Further, Section 321 of the same work recognizes that an assignment of future rights is effective in the same way as an assignment of an existing writing. Applying these sections to the facts of the instant case it is apparent that the transfer from Newton to Bass was a proper and legal transfer. The transfer to Bass in no way increased the burden of obligation on Champlin. It did not by delegation impose on Bass any duty or condition that was due to Champlin by Newton. There was nothing personal that either Newton or Bass had to perform with reference to Champlin. The assignment was simply an assignment of a right to future payment and under such circumstances could be validly assigned to the assignee without impairing the position of the obligor. The legality of the assignment is not affected and the only person who can complain would be Champlin who would have a right for damages if any were incurred. Since it has not been affected by the assignment it has incurred no damages and the transfer of one-half in the 2 1/2 percent payment from Newton to Bass cannot be challenged. The trial court, therefore, acted properly in finding a legitimate assignment of a one-half interest in the 2 1/2 percent from Newton to Bass.

Finally, it should be noted that the trial court's construction and interpretation of the Newton/Bass transfer and the Newton/Flying Diamond contract was in keeping with the only practical construction of the various instruments. In the Newton/Bass transfer Newton, which possessed the 2 1/2 percent interest gave up one-half of that amount. This left a one-half interest in the 2 1/2 percent interest remaining in Newton. The effect of the transfer under the Newton/Flying Diamond Ranch Contract was to transfer one-half of the remaining one-half leaving Newton with a one-quarter interest in the 2 1/2 percent and Flying Diamond receiving the same. In Hartman v. Potter, supra, this Court gave a similar construction to various deeds transferring interests in oil, gas and minerals.

POINT III

APPELLANTS ARE ESTOPPED FROM CONTENDING THAT THEY ARE ENTITLED TO THE FULL 2 1/2 PERCENT PAYMENT.

When Newton entered into the Ranch Purchase Contract with Flying Diamond on April 12, 1974 (R. 489), the Surface Agreement with Champlin and Newton was on file as was the Newton/Bass deed (R. 484). Further, Flying Diamond was expressly made aware of both the purpose of the Bass/Newton deed and the desire of Newton to retain 1/2 of their remaining entitlement to the 2 1/2 percent royalty interest (T. 61-65).

Flying Diamond then drafted the Ranch Purchase Contract. The contract expressly referenced the intention of Newton in paragraph 2 (R. 493) by providing "one half of the royalty (of any type) from the production of minerals that the seller actually received or is entitled to receive from the property . . . until January 1, 2073" was conveyed leaving Newton the remaining 1/2 or 1/4 of 2 1/2 percent. That language is virtually identical with the language in the Bass/Newton deed (R. 485). Thus, the clear purpose of the Flying Diamond contract was to accommodate the interests of all concerned to the 2 1/2 percent as divided. The trial court so found (R. 478) and concluded as a matter of law that Flying Diamond "is estopped to deny that it has only a one-fourth interest in the 2 1/2 percent payment." (R. 429).

It is submitted that this conclusion is clearly correct for three reasons:

First: Flying Diamond drafted the Ranch Purchase Contract. Under such circumstances the instrument is to be construed against Flying Diamond as the party drafting the instrument. Wells Fargo Bank N.A. v. Midwest Realty & Finance, Inc., 544 P.2d 882 (Utah 1975); Wingets, Inc. v. Bitters, 28 Utah 2d 231, 500 P.2d 1007 (1972); Matter of Orr's Estate, 622 P.2d 337 (Utah 1980). Further, such a construction comports with the intention of the parties when all documents are

construed together. Hartman v. Potter, 596 P.2d 653 (Utah 1979); Chourros v. D'Agnillo, 642 P.2d 710 (Utah 1982).

Second: Flying Diamond may not by its action both claim under the contract and at the same time claim it is not bound by its terms. It is recognized that a grantee (Flying Diamond) may be estopped by equitable considerations. 28 Am. Jur. 2d, Estoppel & Waiver § 13. It was recognized in Page v. Fees-Kreg, Inc., 617 P.2d 1188 (Colo. 1980); Hess v. Seeger, 55 Or. App. 746, 641 P.2d 23 (1981); that ordinarily a party (or contract purchaser) cannot claim under an instrument without affirming it. A party may, by his subsequent conduct, be estopped to claim estoppel or other prior benefit. Utah State Building & Loan Assn. v. Perkins, 53 Utah 474, 173 P. 950 (Utah 1918). Flying Diamond being fully aware of the circumstances cannot now claim the 2 1/2 percent. Flying Diamond drafted the contract to accommodate Newton who insisted on retaining their 1/4 percent. Without the specific terms in the Ranch Contract Newton would not close the deal, and most probably would have required a more direct novation or release from Flying Diamond of any claim to the 2 1/2 percent payment beyond that specifically contained in the Ranch Contract. The evidence supports the conclusion that Newton relied on Flying Diamond for the express recognition of their interest as well as that of Bass. As this court noted in Rodgers v. Hansen, 580 P.2d

?33 (Utah 1978) generally one is not permitted in a court of justice to take advantage of or claim protection by reason of his own wrong. See Provo City v. Cropper, 28 Utah 2d 1, 497 P.2d 629 (1972); McFarland's Estate v. Holt, 18 Utah 2d 127, 417 P.2d 244 (1966); Feese v. Siegel's Estate, 534 P.2d 85 (Utah 1975); Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369 (Utah 1980). The circumstances fully support the application of equitable estoppel against Flying Diamond.

Third, whatever claims that Flying Diamond may have been entitled to assert to the 2 1/2 percent payment provided for in the Surface Agreement have now merged into the Ranch Purchase Contract to which Flying Diamond agreed. Flying Diamond was aware of the Surface Agreement and claims of Newton & Bass in regard to the 2 1/2 percent interest. Still Flying Diamond entered into negotiations with Newton for the Ranch property and a limited mineral interest. Therefore, whatever claims they had to the 2 1/2 percent, because of any prior instrument, they compromised such claim and merged all terms of their interest into the Ranch Contract. Rasmussen v. Olsen, 583 P.2d 50 (Utah 1978); Bowen v. Olsen, 576 P.2d 862 (Utah 1978); Stubbs v. Hemmert, 567 P.2d 168 (Utah 1977); Neely v. Kelsch, 600 P.2d 979 (Utah 1979). This estops Flying Diamond from now attempting to claim the full 2 1/2 percent payment contained in the Surface Agreement (Exhibit 1).

The trial court was clearly correct in concluding that Flying Diamond was estopped to deny the Newton/Bass interests and to claim the full 2 1/2 percent payment.

POINT IV

APPELLANTS MAY NOT CLAIM ESTOPPEL BY DEED TO CLAIM THE FULL 2 1/2 PERCENT PAYMENT INTEREST.

The appellants, Flying Diamond, attempt to invoke the concept of estoppel by deed in their favor by asserting that Newton may not deny the Surface Agreement. The doctrine has no application in the context of this case. The Surface Agreement (Exhibit 1, R. 476) goes no further than its own terms. It applies only to insure the respective signatories obtain that for which they bargained. It grants no further rights or interests than are contained within its provisions. Newton has always maintained the 2 1/2 percent payment was one it held personally and had the privilege to alienate. Indeed, Flying Diamond was aware of the Surface Agreement, the deed from Newton to Bass, and the fact that Newton and Bass believed that one-half of the 2 1/2 percent had been transferred by Newton to Bass (T. 61-65). Flying Diamond was also aware of the fact that Newton believed they retained a one-half interest in the 2 1/2 percent payment and that Newton wanted to retain one-half of the interest they held when Newton transferred the surface and some royalty interest to Flying Diamond. The same language

on the royalty interest was used in the Flying Diamond contract as was used in the Newton/Bass deed thus showing that Flying Diamond recognized the Newton/Bass interest. Newton does not deny Champlin's right to use the surface, nor does it deny Champlin may make the royalty interest payment in accord with the Surface Agreement. What is at issue is the relationship and claims of ownership to the 2 1/2 percent proceeds after paid, as between Bass/Newton and Flying Diamond. Thus, the facts raise no issue for the doctrine of estoppel by deed. It is well established that estoppel by deed is not applicable where the parties are aware of all the facts. Ketchum Coal Co. v. Pleasant Valley Const. Co., 50 Utah 395, 168 P. 86 (1917); Rogers v. Donnellan, 11 Utah 108, 39 P. 474 (1975); Arizona Central Credit Union v. Holden, 6 Ariz.App. 310, 432 P.2d 276 (1967). 28 Am Jur. 2d, Estoppel and Waiver, § 5 notes:

> Moreover, it has been held that if the party claiming the benefit of the estoppel has not been misled by the other party's deed, or recital therein, no estoppel exists.

Further, the appellant appears to be claiming estoppel against Newton and its privy Bass (although Flying Diamond is also in privy with Newton on the Ranch Contract but not with Bass). The contract between Flying Diamond and Newton conveyed what Flying Diamond bargained for. It did not purport to convey more than what Flying Diamond actually received. Thus, Newton

is not estopped to deny it conveyed more than it did. Flying Diamond is trying to use estoppel to exceed the terms of the Ranch Contract. This it cannot do.

As to any claim of estoppel drawn from the Surface Agreement, there is no basis for estoppel by deed. Estoppel is not applicable where the deed is unclear as to the actual conveyance. Colman v. Butkovich, 556 P.2d 503 (Utah 1976). The doctrine of estoppel by deed cannot enlarge the conveyance itself. "To constitute an estoppel by deed, a distinct precise assertion or admission of a fact is necessary. Hence, estoppel by deed or similar instrument can arise only where a party has conveyed a precise or definite legal estate or right by a solemn assurance which he will not be permitted to vary or to deny. Such estoppel should be certain to every intent." 28 Am. Jur. 2d, Estoppel and Waiver, § 5. See Dowse v. Kammerman, 122 Utah 85, 246 P.2d 381 (1952). It is also submitted that the Surface Agreement between Newton and Champlin is not a deed but a contract and the concept of estoppel by deed is not strictly applicable. Under the circumstances of this case, estoppel by deed is not applicable. Here the actual relationship is as to the interests of each party to the 2 1/2 percent payment arising after the Surface Agreement. The doctrine of estoppel by deed applies to one who is in direct legal relationship to the grantor. Flying Diamond's

relationship is direct only to Newton not Champlin. The contract from Newton to Flying Diamond, drafted by Flying Diamond, expressly acknowledged the respondent's interests. The concept of estoppel by deed in favor of Flying Diamond is not conceptually compatible with the facts of this case.

POINT V

THE TRIAL COURT DID NOT USE PAROL EVIDENCE TO ALTER THE TERMS OF ANY INTEGRATED AGREEMENT RELEVANT TO THE LITIGATION AND APPELLANTS HAVE WAIVED ANY CHALLENGE TO THE RECEIPT OF PAROL EVIDENCE BY AFFIRMATIVELY USING SUCH EVIDENCE.

Newton submits that the appellant's contention that the trial court erred in admitting extrinsic evidence on the intent of the parties is not well taken. First, it should be noted that appellant does not identify the objectionable evidence or show how the trial court misused the evidence. Indeed, there is no evidence that the trial court gave any consideration to extrinsic evidence to alter any integrated writing. The appellant asserts extrinsic evidence was admitted on the Surface Owner's Agreement (App. Brief p. 27). An examination of the trial court's findings of fact show that the court did not consider any such evidence or reference such evidence in the findings of fact. The only reference to intent in the findings of fact refers to the intention in the Newton/Bass agreement and the Flying Diamond/Newton Ranch contract (R. 428 ¶6, 9). Therefore, appellants have not raised a true issue.

Second, Judge Baldwin was sensitive to the parol evidence problem. At the time of trial, on January 19, 1982, the court ruled (T. 66) that parol evidence on discussions incorporated in the Flying Diamond/Newton agreement would not be received. The court also stated that it would not allow the evidence to vary the terms of the Surface Contract (T. 54. See also T. 67; T. 83; T. 92). The court never received any evidence in violation of the parol evidence rule with reference to the Champlin/Newton Surface Agreement. The court sustained objections even to the Newton/Bass Newton/Flying Diamond documents. The only reference to "intent" in the findings does not purport to be based on extrinsic evidence, but is the conclusion clearly to be drawn from the identical wording of the Bass/Newton Deed and the Flying Diamond/Newton Ranch contract. Since parol evidence was not relied on by the court to alter the writings or to base its findings on the meaning of any agreement no issue exists on the point. The parol evidence rule only prohibits extrinsic evidence to add to, subtract from, vary or contradict the terms of a complete and unambiguous contract. Combs v. Lufkin, 123 Ariz. 210, 598 P.2d 1029 (App. 1979); Neely v. Kelsch, 600 P.2d 979 (Utah 1979); Lamb v. Bangart, 525 P.2d 602 (Utah 1974). It is a rule of substantive law. Tahoe Nat. Bank v. Phillips, 4 Cal.3d 11, 92 Cal.Rptr. 704, 480 P.2d 320 (1971); Loppe v. Breed, 504 P.2d

1077 (Wyo. 1973); Gulotta v. Triano, 125 Ariz. 144, 608 P.2d 81 (App. 1980). In the absence of any finding violating the rule by applying such evidence in a substantive fashion to alter or contradict a fully integrated unambiguous written agreement no error has been committed.

Third, the appellants have been the only party to offer and use extrinsic evidence and have gone beyond any proffer by respondents. At the time of trial, counsel for appellants insisted that all of the depositions offered into evidence be read and even made an offer beyond that of Newton or Bass (T. 89, 90, 91, 92). The Lagerstrom deposition and Callister deposition are cited and relied upon by the appellants in their brief (App. Brief, 8, 9). It is well settled that a party cannot complain of the court's ruling where the party thereafter affirmatively adopts or uses the evidence. United States v. Silvers, 374 F.2d 828 (7th Cir. 1967); United States v. Bramson, 139 F.2d 598, 600 (2nd Cir. 1943); Jarabo v. United States, 158 F.2d 509, 514 (1st Cir. 1946); Williams Bros. Grocery v. Blanton, 105 Ga.App. 314, 12 S.E.2d 479, 481 (1962); 1 Wigmore on Evidence, 3d Ed. 1940 § 18(D), pp. 344-346. The actions of appellant went beyond self-defense and constitute a waiver of this issue.

Newton agrees with the holding in Hartman v. Potter, 596 P.2d 653 (Utah 1979), that in the absence of ambiguity the

terms of the written deed or integrated contract govern. See also, Utah Valley Bank v. Tanner, 636 P.2d 1060 (Utah 1981). In this case, the real ambiguity that the court could have used extrinsic evidence for was the Newton/Bass Deed and the Flying Diamond/Newton Contract which appeared ambiguous in light of all the circumstances. The same could be said of the Champlin/Newton Surface Agreement. See First Western v. Gibbons & Reed, supra, where the court took extraneous evidence on a claim of a covenant running with the land. Also, Metropolitan Inv. Co. v. Sine, 14 Utah 2d 36, 376 P.2d 940 (1962). The circumstances in this case are equally as ambiguous. Therefore, extrinsic evidence could be considered, if it was, without violating the parol evidence rule. Such being the case, the trial court committed no error, and certainly not prejudicial error. Rule 4, Utah Rules of Evidence (1971).

CONCLUSION

It is respectfully submitted that the trial court should be affirmed. The court clearly recognized that appellant's contention that the Surface Agreement created a covenant running with the land could not be sustained. That the trial court rejected the contention of a covenant running with the land is manifested from the notations the trial court made on the plaintiff's trial memorandum (R. 377). The legal

elements necessary to creating a covenant to run with the land do not exist in this case. The court was further correct in finding that there had been a valid legal transfer from Bass to Newton of a portion of the 2 1/2 percent right to receive payment. Further, the findings of fact and conclusions of law of the trial court support the contention that Flying Diamond is clearly estopped by its own Ranch Contract, which it prepared from claiming more than the one-quarter of the 2 1/2 percent interest which the trial court awarded Flying Diamond. No error was committed in the trial court. The law was properly applied and the judgment should be affirmed.

Respectfully submitted,

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