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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 Bass Enterprises Production Co.

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 M. 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 BASS ENTERPRISES PRODUCTION CO.

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT FOR SUMMIT COUNTY, HONORABLE ERNEST F. BALDWIN, JR., DISTRICT JUDGE

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TABLE OF CONTENTS

Nature of the case 1

Disposition of the case in the district court 2

Relief sought on appeal 2

Statement of the case 2

Argument 8

I. Bass is entitled to one-half of the proceeds of the 2 1/2% payment 8

A. A share in the proceeds of the 2 1/2% payment is inherently assignable 9

B. The right to the proceeds of the 2 1/2% payment is separable from the ownership of the railroad lands 10

C. The Surface Owner's Agreement does not preclude an assignment of a share in the proceeds of the 2 1/2% payment 11

D. The Newton's deed to Bass was effective to assign a one-half share in the proceeds of the 2 1/2% payment 14

II. Flying diamond is estopped to deny that it has only a one-fourth interest in the proceeds of the 2 1/2 percent payment 15

Conclusion 20

TABLE OF AUTHORITIES

Cases:

Allhusen v. Caristo, 303 N.Y 446, 103 N.E. 2d 891 (1952) 12

Callahan v. Martin, 43 P. 2d 788 (Cal. 1935) 9

Dillon Inv. Co. v. Kiniken, 241 P. 2d 493 (Kan. 1952) 17

Hartman v. Potter, 596 P. 2d 653 (Utah 1979) 16

Johnston v. Landucci, 130 P. 2d 405 (Cal. 1942) 13

Martin v. National Surety, 300 U.S. 588, 596 (1937) 13

Picard v. Richards, 366 P. 2d 119, 122-123 (Wyo. 1961) 9

Portuguese-American Bank of San Francisco v. Welles, 242 U.S. 7 (1916) 13

Radke v. Union Pacific Railroad Co., 334 P. 2d 1077 (Colo. 1959) 7

Russell v. Texas Company, 238 F. 2d 636 (9th Cir. 1957), cert. den. 354 U.S. 938 18

Stark v. National Research & Design Corp., 110 A. 2d 143 (N.J. 1954) 12

Time Finance Corporation v. Johnson Trucking Co., 23 U. 2d 115, 458 P. 2d 873, 875 (1969) 10

Trubowitch v. Riverbank Canning Co., 182 P. 2d 182, 185 (Cal. 1947) 10

Western Union Telegraph Co. v. Shepard, 62 N.E. 154 (N.Y. 1901) 10

Miscellaneous:

17 Am. Jur. 2d, Contracts § 259 17

17 Am. Jur. 2d, Evidence § 1040 ..... 14, 16

28 Am. Jur. 2d, Estoppel And Waiver § 9 19

28 Am. Jur. 2d, Estoppel And Waiver § 10 19

28 Am. Jur. 2d, Estoppel And Waiver § 13 17

49 Am. Jur. 2d, Landlord And Tenant,
§§ 515, 528 9

4 Corbin on Contracts, § 873, p. 494
(1951 ed.) 12

Jones, Exercise of Executive Rights In Connection
With Non-Participating Royalty And Non-Executive
Mineral Interests, 15 S.W. Inst. Oil and Gas L. &
Tax., pp. 35, 38, 52, 54, (1964) 9

Restatement (Second) Of Contracts,
§ 317 (2) (a) 12

Restatement (Second) Of Contracts,
§ 317 (2) (c) 12

Restatement (Second) Of Contracts,
§ 320 15

Restatement (Second) Of Contracts,
§ 322 (2) (b) (1981) 12

2 Williams and Meyers, Oil And Gas Law,
§§ 324.4, 338 p. 56, 195 (1981) 9

Williams and Meyers, Oil And Gas Terms,
p. 213 (1957) 9

3 Williston, Law of Contracts, § 422 at
pp. 140-41 (1960) 12, 13

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 M. NEWTON and SCOTT F. NEWTON, general partners; and EUGENE B. NEWTON, individually, and EDNA ELLIOTT NEWTON, his wife,	:	Case No. 19178
Defendants-Respondents.	:	
and	:	
BASS ENTERPRISES PRODUCTION CO., a Texas corporation,	:	
Intervenor Defendant-Respondent.	:	

BRIEF OF BASS ENTERPRISES PRODUCTION CO.

NATURE OF THE CASE

This case involves the conflicting claims of the parties to moneys paid on the production of oil and gas from certain lands in Summit County, Utah.

DISPOSITION OF THE CASE IN THE DISTRICT COURT

The case was tried to the district court with out a jury and judgment was entered dividing the moneys paid on production: one-fourth to the plaintiff Flying Diamond Oil Corporation, one-fourth to the Newton defendants and one-half to the defendant Bass Enterprises Production Co.

RELIEF SOUGHT ON APPEAL

Respondent Bass seeks affirmance of the judgment of the district court.

STATEMENT OF THE CASE

The lands involved in this lawsuit were part of a grant to the Union Pacific Railroad. In 1971 the Newtons owned the railroad lands and the railroad's subsidiary, Champlin Petroleum Corporation, owned the oil and gas in those lands. The Newtons and Champlin entered into an agreement, hereinafter the "Surface Owners Agreement", by which Champlin was given an easement to enter upon the surface of the railroad lands, to drill for oil and gas and to construct and maintain facilities for the production of oil and gas from the lands. (Section 1 of the Surface Owner's Agreement. A copy of the agreement is attached to the pretrial order (R. 276, 285) and is an exhibit to the Flying Diamond brief.)

Champlin agreed to pay to the Newtons, with certain exceptions that are not material, the value of 2 1/2% "of all the oil and gas and associated liquid hydrocarbons hereinafter produced, saved and marketed" from the railroad lands,

hereinafter the "2 1/2% payment", "so long as Champlin is receiving" production or royalties from the lands. (Section 2 of the Surface Owner's Agreement; R. 289.)

Sections 3 and 5 of the Surface Owner's Agreement provide for payments to be made by an operator under a unitization agreement for the construction and maintenance of certain facilities and payments for damage to land, buildings and growing crops. Moneys received under Sections 3 and 5 of the agreement are not involved in this lawsuit.

Section 7 of the Surface Owner's Agreement contains the following provision with respect to the payments to be made by Champlin (R. 290-291):

> 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.

Section 9 of the Surface Owner's Agreement provides for the continuation of the agreement in force and effect so long as there is production of oil and gas from the railroad lands. (R. 291.)

The Champlin agreement was recorded on October 1, 1971. (R. 285.)

The following year, the Newtons executed a warranty deed, dated February 1, 1972, purporting to convey and assign to Bass, in paragraph 1. B. of the deed:

> One-half of the royalty (of any type) from production of minerals that the Grantor actually receives or is entitled to receive until February 1, 2072, from the following described land:
> SEE EXHIBIT "B" ATTACHED, * * *

(A copy of the Newton deed is attached to the pretrial order (R. 293-294) and is an exhibit to the Flying Diamond brief.)

The land described in Exhibit B to the Newton deed includes all of the railroad lands involved in this lawsuit and in the Champlin agreement. The deed also deals with other lands in which the Newtons owned the minerals (Paragraph I. A and Exhibit A to the deed) which lands and minerals are not involved in this lawsuit.

The Newtons' deed to Bass was recorded on March 20, 1972. (R. 293.)

Later, in 1974, the Newtons were approached by Flying Diamond who wanted to buy the ranch and their mineral rights. As to the mineral rights, the then principals of Flying Diamond were told by the Newtons that they had sold to Bass "50 per cent of the two and a half per cent that the railroad paid on their sections." (Tr. 64.)* Scott Newton testified that "we come to the agreement that they would take a quarter of what was left of the half, and we would keep a quarter." (Tr. 65.)

Ralph Newton testified of the negotiations with the principals of Flying Diamond as follows (Tr. 80, 81):

> * * * that when we first started negotiating with Flying Diamond we were going to keep all the mineral interests,

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* References to "Tr." are to the reporter's transcript of the trial, the first page of which is numbered as R. 526.

> railroad included, but they said they wouldn't buy the property without 50 per cent of our interests in both categories there and so if we had to let it all go we wouldn't have sold and they said if they didn't get a fourth of it, why, they wouldn't buy, so we came to, we thought, a happy medium there.
>
> * * * * *
>
> Well, we just pointed out that the two and a half per cent would be cut three ways, Bass Enterprises had 50 per cent of it and we had 50 per cent, Flying Diamond would get a fourth of it and we would get a fourth and they were satisfied with that.

On or about April 24, 1974, Flying Diamond agreed to buy from the Newtons their lands including the railroad land involved in this lawsuit and also "one-half of their oil, gas and other mineral rights and estates." (Paragraph 6 at page 4 of the contract, hereinafter the "Ranch Purchase Contract," a copy of which is attached to the pretrial order; R. 298.)

The "mineral rights and estates" purchased by Flying Diamond are also referred to, in paragraph 6 of the Ranch Purchase contract as a "mineral interest" which includes, in subparagraph 6 (a) (2), in the same language used in paragraph I. B of the Newton deed (supra p. 4):

> 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. * * *

The property referred to in subparagraph 6 (a) (2) of the Ranch Purchase Contract is four of the six sections of railroad land involved in the Surface Owner's Agreement and in the Newtons' deed to Bass. Flying Diamond obtained an option to purchase the other two sections of railroad land. The Newtons' interest

in the 2 1/2% payment was the only mineral interest of any type that the Newtons had in the railroad lands. (Tr. 75-76.)

After the Ranch Purchase Contract was executed, oil was discovered on the railroad lands. Since the beginning of production, Champlin has remitted to Flying Diamond and the latter has retained all of the proceeds of the 2 1/2% payment. (R. 279.)

When the Newtons claimed a share in the proceeds of the 2 1/2% payment, Flying Diamond filed this lawsuit to obtain, among other things, a determination under Count I of its complaint that Flying Diamond could keep all of the proceeds of the payment. (R. 1.) Bass intervened to assert its claim to one-half of the moneys received. (R. 147.) In response to a request for admissions, the Newtons admitted that the effect of their deed was to assign to Bass one-half of the 2 1/2% payment. (R. 270-272.)

Champlin, although it knew of the lawsuit, did not intervene.

At the trial on the issue in Count I, Flying Diamond stated its general objection "to any testimony being received with respect to the surface owners agreement on the grounds it violates the parole evidence rule." (Tr. 59; and see Tr. 33.) No objection was made to the receipt of evidence regarding the Newton's deed or the Ranch Purchase Contract.

Despite its general objection, Flying Diamond introduced (Tr. 90) the deposition testimony of Robert Lagerstrom, Champlin's land manager. In addition to Mr. Lagerstrom's testimony about the purpose of the agreement, quoted at pages 9 and 10 of Flying Diamond's brief, his testimony on the following points was received

without objection (Tr. 94): (1) that it would not matter to Champlin if a landowner entered into an agreement with somebody else to share the 2 1/2% payment with them after it was received from Champlin (deposition p. 30); (2) that in his opinion a judgment creditor of the landowner could reach the landowner's interest in the 2 1/2% payment (deposition p. 39); (3) that the business purpose for Section 7 in the Surface Owner's Agreement was to avoid difficulties in making payments to surface owners in situations where there are "many, many town lots (deposition p. 53); and (4) if the current landowner were to agree to share the 2 1/2% payment with someone else after receiving it from Champlin, Champlin would have no objection (deposition pp. 55-56).

Counsel for the Newtons and for Bass offered certain pages of the deposition-testimony of William B. Collister and Flying Diamond's counsel asked the court to read additional pages from the deposition. (R. 88-89.) Mr. Collister testified in his deposition that he drafted the Newtons' deed to Bass to cover the 2 1/2% payment, which he referred to as a "royalty", and, in addition, to cover other mineral rights that might be involved in possible future litigation in Utah based upon the decision in Radke v. Union Pacific Railroad Co., 334 P. 2d 1077 (Colo. 1959). (Collister deposition pp. 21-22.) Mr. Collister said that by the words "entitled to receive," used in paragraph 1. B of the deed, he had intended to anticipate a situation where the railroad might not recognize rights to which the surface owner would be entitled (Collister deposition p. 51.)

The only witnesses at the trial were Scott and Ralph Newton who testified, supra, pp. 4-5, that the Flying Diamond principals had agreed to a one-fourth share of the 2 1/2% payment.

No one testified for Flying Diamond. No evidence was offered that Flying Diamond intended to acquire a greater interest in the "mineral rights and estates" on the railroad lands than the one-fourth interest provided for in paragraph 6 of the Ranch Purchase Contract.

The district court entered findings of fact and conclusions of law (R. 526) including findings of fact Nos. 6 and 9 that it was the intent of the Newtons and Bass that Bass acquire one-half of the 2 1/2% payment and that it was the intent of the Newtons and Flying Diamond that Flying Diamond acquire one-fourth of the 2 1/2% payment (R. 428). A final judgment was entered that Flying Diamond is entitled to one-fourth, the Newtons to one-fourth and Bass to one-half of the 2 1/2% payment. (R. 460.)

ARGUMENT

I

BASS IS ENTITLED TO ONE-HALF OF THE PROCEEDS OF THE 2 1/2% PAYMENT

This lawsuit is an effort by Flying Diamond to keep all of the proceeds of the 2 1/2% payment after it agreed with the Newtons, with knowledge of the prior assignment to Bass, to take a one-fourth interest. There are several reasons why this effort must fail.

A. A share in the proceeds of the 2 1/2% payment is inherently assignable:--Champlin promised to pay the Newtons the value of 2 1/2% of all the oil and gas "produced, saved and marketed," from the railroad lands. (Section 2 of the Surface Owner's Agreement.) The Newtons, in effect, were granted a share in the benefit that Champlin would receive from the production of its minerals. That share, the 2 1/2% payment, while not an estate in the minerals, is a share of production of minerals and, therefore, by definition, a royalty. Williams and Meyers, Oil And Gas Terms, p. 213 (1957). See also the discussions in Picard v. Richards, 366 P. 2d 119, 122-123 (Wyo. 1961), and in Jones, Exercise of Executive Rights In Connection With Non-Participating Royalty And Non-Executive Mineral Interests, 15 S.W. Inst. Oil and Gas L. & Tax., pp. 35, 38, 52, 54, (1964), from which it appears that the Newtons' share was analogous to, if it was not, a "nonparticipating" royalty interest. As with other property interests, a royalty is assignable. Callahan v. Martin, 43 P. 2d 788 (Cal. 1935); Oil And Gas Terms, p. 213, supra.

"The grant of a royalty interest leaves in the grantor [Champlin] a mineral estate burdened by an incorporeal hereditament in the nature of common-law rent." 2 Williams and Meyers, Oil And Gas Law, §§ 324.4, 338 pp. 56, 195 (1981). Unaccrued rents are assignable and may be assigned to someone other than the transferee of the reversion. Such an assignment would prevent the transfer of the unaccrued rent to a purchaser of the reversion who has knowledge of the assignment. 49 Am. Jur. 2d, Landlord And Tenant, §§ 515, 528.

The 2 1/2% payment is to be made in money. The right to money due or to become due in the future is assignable, Time Finance Corporation v. Johnson Trucking Co., 23 U. 2d 115, 458 P. 2d 873, 875 (1969), even when the contract itself is not, Trubowitch v. Riverbank Canning Co., 182 P. 2d 182, 185 (Cal. 1947).

B. The right to the proceeds of the 2 1/2% payment is separable from the ownership of the railroad lands:—Flying Diamond's argument (Br. 17-24) that the right to the proceeds of the 2 1/2% payment is inseparable from the surface ownership of the railroad lands was rejected in an analogous situation in Western Union Telegraph Co. v. Shepard, 62 N.E. 154 (N.Y. 1901). In that case, Western Union owned and later sold certain property which, through mesne conveyances, came to be owned by the defendant Shepard. The original grant by Western Union to Shephard's predecessor in title had contained the following reservation of claims for damage to the property:

> * * * [Western Union] reserves all claim or right of action against the Metropolitan and Manhattan Elevated Railroad Companies, or either of them, for any and all injury or damage done to the aforesaid property, or to the value or uses thereof, in the past, present, or future, by reason of the construction and operation of the elevated railroad in front of the said premises, and as they are now constructed and operated.

The defendant Shephard was aware of the reservation, but nevertheless sued the railroad and obtained a judgment for damages to the property. (See 62 N.E. at p. 151.) In an action by Western Union to recover the damages received by Shephard, he argued that he should keep the damages because they were inseparable from the fee which he owned and were, in effect, a payment for an easement over his land. The Supreme Court of New York rejected the argument as follows (62 N.E. at p. 156):

> The inseparability of land from its easements is therefore immaterial. We are not now dealing with the nonassignability of the easement apart from the land, but with the money about to be handed over—proceeds of the damages done to the land by a trespass upon its easements. The distinction is clear between the equitable right to the proceeds of the injury and the legal title to the thing or right injured. Thus it was competent for the grantor and grantee to agree that a part of the consideration of the land conveyed should consist of the money damages thereafter to be recovered from the trespassers.

To paraphrase the Western Union Telegraph opinion, we are not now dealing with the nonassignability of Champlin's easement apart from the railroad lands. We are here dealing with money that Champlin has handed over for its use of the land. Flying Diamond has ignored the distinction between the equitable right to the proceeds of the use of the land and the legal title to the land itself. Thus it was competent for Flying Diamond, as part of its consideration for the railroad lands, to agree to take less than all of Champlin's payment for the use of those lands.

C. The Surface Owner's Agreement does not preclude an assignment of a share in the proceeds of the 2 1/2% payment:—Much is said by Flying Diamond about covenants running with the land in an effort to argue Champlin's alleged concerns in the Surface Owner's Agreement. (Br. 17-18) A covenant is a promise and the only covenant or promise in the agreement so far as the 2 1/2% payment is concerned is the promise of Champlin to make the payment to whoever happens to be the surface owner, according to Champlin's records, when the oil and gas is marketed, as spelled out in Section 7 of the agreement. The judgment of the district court that each of the parties may share in the proceeds of the payment does not alter Champlin's "burden" of payment in any way.

By Section 1 of the Surface Owner's Agreement Champlin obtained the right to go upon the railroad lands and nothing in the judgment diminishes that right or "benefit" in any way.

The burden and the benefit of Champlin in relation to the surface owner, whoever that may be at any given time, are simply not altered by any sharing in the proceeds of the 2 1/2% payment.

Turning to Flying Diamond's argument regarding Restatement (Second) Of Contracts, § 317 (2) (a), (Br. 23-24), there is no evidence to support its argument that "a diversion of remittances"—actually a sharing in the proceeds—would materially impair Champlin's chance of obtaining return performance [right to go on the land] or reduce the value of the Surface Owner's Agreement to Champlin.

There being no words in the Surface Owner's Agreement precluding an assignment of a share in the proceeds, Flying Diamond's argument (Br. 23) based upon the Restatement (Second) of Contracts, § 317 (2) (c), is not in point. An unexpressed intention on Champlin's part to preclude any assignment of a share in the proceeds of the 2 1/2% payment would not be recognized. 4 Corbin on Contracts, § 873, p. 494 (1951); 3 Williston, Law of Contracts, § 422, (1981); Allhusen v. Caristo, 303 N.Y 446, 103 N.E. 2d 891 (1952).

Even if the Surface Owner's Agreement had been written to preclude assignment of a share in the proceeds of the 2 1/2% payment, such a provision, after Champlin has made the payment, would not affect the rights and obligations of the Newtons, Bass and Flying Diamond. Restatement (Second) Of Contracts, § 322 (2) (b) (1981); 3 Williston, Law of Contracts, § 422 at pp. 140-41 (1960); Stark v.

National Research & Design Corp., 110 A. 2d 143 (N.J. 1954); Johnston v. Landucci, 130 P. 2d 405 (Cal. 1942).

In Stark, supra, the plaintiff was the lessee of an office under a lease which contained a covenant against an assignment of the lease. The plaintiff assigned her interest in the lease to the defendant who subsequently refused to pay rent to the plaintiff. The defendant argued that since an assignment to him was precluded by the lease, the plaintiff could not recover rent from him. The court noted that the benefit of the covenant ran only to the lessor and that the defendant, as an assignee of the lessee, gained no benefit from the covenant.

In the context of government contracts, wherein contractors are specifically precluded by statute from assigning moneys to become due under a contract, it has been consistently held that the restriction on assignment is solely for the benefit of the government and does not affect the legal rights of the assignor and the assignee as between themselves. If a prohibition against assignment had been placed in the Surface Owner's Agreement, that prohibition would have to "be interpreted in the light of its purpose to give protection to" Champlin. "After payments have been collected and are in the hands of the" surface owner "with notice, assignments may be heeded, at all events, in equity if they will not frustrate the ends to which the prohibition was directed." Martin v. National Surety, 300 U.S. 588, 596 (1937); Portuguese-American Bank of San Francisco v. Welles, 242 U.S. 7 (1916).

The point of law involved here is summarized in, 3 Williston, Law of Contracts, § 422 at p. 140, (1960) as follows:

> A prohibition of assignment or a condition restricting performance of the debtor's obligation to the original promisee is intended for the benefit of the debtor and cannot affect the legal or equitable rights of the assignor and assignee as between themselves.

There being no expressed prohibition of assignment in the Surface Owner's Agreement, Flying Diamond's allegations of a detriment to Champlin (Br. 14, 23) are beside the point. We would only note the testimony of Champlin's land manager, Mr. Lagerstrom, who said as to Section 7 of the agreement, that in his view, Champlin would have no objection if a landowner agreed to share the 2 1/2% payment with someone else after receiving the money from Champlin. (Lagerstrom deposition, pp. 55-56.)

D. The Newton's deed to Bass was effective to assign a one-half share in the proceeds of the 2 1/2% payment:—Whether the 2 1/2% payment is "a property interest in the oil and gas"—and Flying Diamond says it is not (Br. 31)—is not an issue in this lawsuit. The Newtons have admitted that they intended the deed to cover the 2 1/2% payment. (R. 426, Fdg. No. 6; R. 270-272.) The 2 1/2% payment was the only interest the Newtons had in the railroad lands apart from their ownership of the surface. (Tr. 75-76.) Mr. Collister testified that the 2 1/2% payment was a subject of the "royalty (of any type)" language in part I. B of the deed. (Collister deposition, p. 48.) This evidence is admissible to identify the subject matter of paragraph I. B of the Newtons' deed. 17 Am. Jur. 2d, Evidence § 1040. When the time came for Flying Diamond to acquire a share of the payment, the same words "a royalty (of any type) from production of minerals" were used in the Ranch Purchase Contract.

The payment is certainly a royalty of some type, supra, p. 9, and the reference in the Newtons' deed to a "royalty (of any type) from the production of

minerals" is adequate to describe the payment. Clearly, the district court's Conclusion of Law No. 3 (R. 426) that the Newtons' deed accomplished the intended assignment is correct.

Flying Diamond argues (Br. 24, 26) that the assignment to Bass of a share in the 2 1/2% payment must fail because the Newtons are no longer "entitled" to the 2 1/2% payment. The evidence as to the meaning of the word "entitled", is Collister's testimony that the word was used in paragraph I. B of the Newton's deed to cover other additional mineral rights that the railroad might not recognize. (Supra, p. 7.) The part of the Newtons' deed quoted (Br. 26), rather than being a recognition of the "severability problem", is a clear indication that the Newtons and Bass believed that shares in the proceeds of the 2 1/2% payment were assignable and wished to make certain that future assignments would be recognized.

Flying Diamond's argument based upon Restatement (Second) Of Contracts, § 320, presumes the ultimate issue in the lawsuit. Since the Newtons' right to the 2 1/2% payment arose upon the execution of the Surface Owner's Agreement, there was nothing conditional about that right which would preclude an assignment to Bass.

II

FLYING DIAMOND IS ESTOPPED TO DENY
THAT IT HAS ONLY A ONE-FOURTH INTEREST
IN THE PROCEEDS OF THE 2 1/2 PERCENT PAYMENT

The Newtons testified (Tr. 75) that the only mineral interest which they had in the railroad land when they contracted with Flying Diamond, was a one-half

interest in the 2 1/2% payment. (Tr. 64, 65, 80, 81.) The testimony of Scott and Ralph Newton (Tr. 64) shows that Flying Diamond was told of the Newtons' deed to Bass and agreed to a one-fourth share of the proceeds of the 2 1/2% payment. This evidence is admissible to identify the subject matter of paragraph 6 (a) (2) of the Ranch Purchase Contract. 17 Am. Jur. 2d., Evidence § 1040. The deed had been recorded. (R. 293.) It is obvious that the language used in the Ranch Purchase Contract to describe the interest Flying Diamond was purchasing from the Newtons is virtually identical to the language used in the Newtons' deed to describe the share in the 2 1/2% payment assigned to Bass. The deed to Bass contains the following language:

> One-half of the royalty (of any type) from production of minerals that Grantor actually receives or is entitled to receive until February 1, 2072, * * *

which is tracked in paragraph 6 (a) (2) of the Ranch Purchase Contract as follows:

> 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. * * *

No evidence was offered that Flying Diamond intended to acquire more than a one-fourth share in the 2 1/2% payment. Flying Diamond's argument (Brief, p. 37) that Finding of Fact No. 9 is unsupported because there is no extrinsic evidence of Flying Diamond's subjective intent ignores the rule that subjective intent is not relevant. Hartman v. Potter, 596 P. 2d 653 (Utah 1979).

The district court's Finding of Fact is that (R. 526):

> 9. It was the intent of Newtons to transfer to Flying Diamond and the intent of Flying Diamond to acquire one-fourth of the 2 1/2% payment.

Clearly, the Finding of Fact is supported by the evidence.

Flying Diamond argues that paragraph 6 (a) (2) of the Ranch Purchase Contract was mere surplusage at the time it was drafted and has no significance in this lawsuit. The district court, however, was obligated, so far as possible, to give effect to all of the language of the contract. 17 Am. Jur. 2d, Contracts § 259. Consistent with that obligation the district court's Conclusion of Law No. 7 states as follows (R. 426):

> 7. Flying Diamond is estopped to deny that it has only a one-fourth interest in the 2 1/2% payment.

This conclusion of law is based upon principles of equitable estoppel. Those considerations estop Flying Diamond from now asserting that it acquired the right to all of the proceeds of the 2 1/2% payment. Dillon Inv. Co. v. Kiniken, 241 P. 2d 493 (Kan. 1952). The equitable considerations involved in this case are reviewed in 28 Am. Jur. 2d, Estoppel And Waiver, § 13, where the following is stated:

> Strictly speaking, estoppel by deed does not ordinarily apply to the grantee. A grantee who accepts a deed is, however, estopped in certain respects. Estoppel of the grantee of a deed, viewed generally, is of the nature of equitable estoppel rather than technical estoppel by deed, since the estoppel is not predicated primarily on the execution of a formal written instrument which cannot be denied or rebutted, but rather on the inability of a person, in the eyes of the law, to acquiesce in, and enjoy the benefits of, a transaction, and at the same time reject the accompanying burdens. A person cannot claim under an instrument without confirming it. He must found his claim on the whole, and cannot adopt that feature or operation which makes it in his favor, and at the same time repudiate or contradict another which is counter or adverse to it. * * *

These equitable considerations, will not permit Flying Diamond to claim all of the proceeds of the 2 1/2% payment when the Ranch Purchase Contract, upon

which Flying Diamond relies for its title to the railroad lands, granted less than all of the proceeds. Russell v. Texas Company, 238 F. 2d 636 (9th Cir. 1957), cert. den. 354 U.S. 938.

In the Russell case, the Northern Pacific Railroad Company had conveyed certain lands to plaintiff Russell's grantor with a reservation of the minerals. Russell claimed the minerals on the theory that, because of an Act of Congress, the railroad lacked the power to reserve the minerals to itself when it conveyed the land. The Ninth Circuit disposed of Russell's claim in the following language (238 F. 2d at 640):

> Appellant in the case at bar would have us declare void a mineral reservation which appears expressly in the very deed through which he, himself, claims title. He asserts no independent source of title. On the contrary, he insists that the express recitals in the deed to his predecessor in title (of which he had notice) were ineffective irrespective of the intentions of the parties to the conveyance or the bargain into which they entered. Even if we were to resort to hypothesizing, it would, indeed, be difficult for us to imagine a more obvious case of estoppel.
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> * * * * *
>
> The law is clear that where the grantee of surface rights or his successors in interest seek to remove the cloud of the grantor's mineral reservation, it must be established that the grantee's rights to the interest reserved flow from an independent source of title, See 31 C.J.S., Estoppel, § 38 (f), p. 218. Where, however, the surface owner claims title to the mineral rights, which his grantor expressly reserved to himself on the theory that his grantor had no right to make such a reservation, the owner of the surface is estopped from asserting that the mineral rights thereby passed to him in the instrument of conveyance, Morse v. Smyth, D.C. 1918, 255 F. 981; Wier v. The Texas Co., 5 Cir., 1950, 180 F. 2d 465. This doctrine has been enunciated in as many ways as there are individual factual situations to justify its application. Estoppel, in the nature of an equitable concept,

> is designed to protect the reliances and expectations of innocent persons from detrimental devastation by those who by assent and recognition have induced those reliances and expectations. Whenever the invocation of a rule results in the denial of a remedy, caution implicitly governs discretion. Caution must give way to reasoned judgment, however, where, as in the case at bar, the facts so overwhelmingly justify the application of the doctrine. To disregard its applicability in this case would be to invite a miscarriage of justice.

Flying Diamond would avoid an estoppel by the assertion that the grant under the Ranch Purchase Contract was a quitclaim of any royalty from the railroad lands. (R. 37.) This assertion ignores the provision at the beginning of paragraph 6 of the contract that "the seller [Newton] will execute a Warranty Deed for the" interest granted in subparagraph 6 (a) (2).

More importantly, this case does not involve the technical concept of estoppel by deed involved in Flying Diamond's citation, 28 Am. Jur. 2d, Estoppel And Waiver, § 9. (Br. 37.) Estoppel by deed is concerned with the denial of solemn assertions in a deed. The estoppel involved in this case is of the nature of equitable estoppel and is concerned with the effort of Flying Diamond to enjoy a benefit of the Ranch Purchase Contract—ownership of the railroad lands—and avoid the burden of the contract—only a one-fourth interest in the proceeds of production from those lands. Of course, Flying Diamond may deny that any estate or interest passed to it by the Ranch Purchase Contract but such a denial would leave Flying Diamond with no interest in the railroad lands or in the 2 1/2% payment.

As to Flying Diamond's claim of an estoppel by deed (Br. 34), the rule is that one who claims an estoppel must have been misled by the deed. 28 Am. Jur. 2d.,

Estoppel And Waiver, § 10. There is no evidence of innocent reliance and expectations on Flying Diamond's part.

As to the "practical construction" of the Surface Owner's Agreement (Br. 24-27) all of the parties viewed the proceeds of the 2 1/2% payment as assignable, as evidenced by paragraph I. B of the Newtons' deed and paragraph 6 (a) (2) of the Ranch Purchase Contract. There was no construction to the contrary until Flying Diamond refused to distribute the proceeds.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing brief were mailed to each of the following this 5th day of December, 1983:

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