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CONCORD OIL CO V. PENNZOIL

BURNEY: May it please the court. The sole issue in this case today is the interpretation of this 1937 mineral deed. But I think we are here for another reason as well. Because with this case this court has an opportunity to clear up decades of confusion and litigation we've had over deed forms just like this one for decades.

GONZALEZ: What's wrong with the CA opinion that needs clarifying?

BURNEY: The problem with the CA opinion is first of all it doesn't follow this court's opinion in Luckel v. White. In Luckel v. White this court was construing another one of these multi-clause deeds with conflicting fractions. And in that case the conflicting fractions were 1/32nd and 1/4. In Luckel this court harmonized those fractions and it interpreted the deed as conveying a single 1/4 royalty interest. Here where the 4th CA erred to begin with is not applying Luckel. In this case we've got another one of these multi-fraction deed forms. It's a deed form well known in the oil and gas industry that's developed for a single purpose; and that is conveying single fractional mineral interests. We know that not only from the history behind these deed forms but from the language of these deed forms as well.

When you look at this deed it has 1 granting clause. When you look at this deed it refers to a single conveyance. The word conveyance is singular. When you look at this deed it refers to the word "estate" two times in the singular. This deed was intended to convey a single interest. This deed did convey a single interest. So where the CA erred was holding that this deed instead conveyed 2 separate estates rather than a single 1/12 mineral interest.

Now we've had problems as this court knows all too well with interpreting these deed forms for decades. But this court also gave us the solution in Luckel. And I think that's really why we are here today to clarify that Luckel is the solution, and that deed forms like this should be interpreted under the four corners rule as this court said in Luckel to carry out the intention of the parties, to use these deed forms to convey single fractional mineral interests that carry with them, that cover and include, a like amount of rents and royalties.

ENOCH: If Luckel is determined to be predicated on the future leases provision, is there anything in just this existing lease provision that indicates that this was also supposed to be a future lease provision?

BURNEY: Absolutely your honor. And this is another area where the 4th CA erred. The CA erred on the future lease clause issue in 2 ways. First of all just with the conclusory statement at the top of the opinion the court held there was no future lease clause in this lease. But right there the court's

violated the four corners rule because the court didn't make any effort to read the language in this deed. In fact that's the mistake that all the to-grant cases make. They don't read the language in the deeds.

ENOCH: Are there any to-grant cases that say that the grant clause has been expanded by the second subject-to?

BURNEY: There's not a case that says that subject-to expands. In a case handed down the same day as Luckel, Jupiter Oil Co. v. Snow, that's what this court held. In Jupiter this court held that the single estate conveyed expanded. That's part of the problem we have today. Luckel v. White seemed to give us a reliable rule of interpretation one that could be applied to virtually everyone of these deed forms that are in the deed records across Texas. One that would explain reconcile and harmonize all of the deeds that this court has seen litigated for decades.

PHILLIPS: I don't mean to dig up old problems, but doesn't the Jupiter deed read different than all these others? I mean _____ we _____ specifically about when this particular lease is over then what will happen?

BURNEY: No your honor, the Jupiter deed like all of these deeds is a form deed. It's a form deed that's well known in the industry. And what it says is it's got a future lease clause in a separate paragraph. Now this deed right here has a future lease clause. The only difference is it's not in a separate paragraph. But surely we don't want a rule of interpretation that says you've got to decide whether or not a deed makes one conveyance or two based on the number of paragraphs it has.

So Jupiter had a similar type of deed form. It had the granting clause; and then what it didn't have is the subject-to clause, or at least the subject-to clause that's more typically known in the industry. So the question in Jupiter was the same as the one in Luckel, and that is what was the intent of the parties under the four corners rule. And in the Jupiter deed like the Luckel deed you have language like this one: references, repeated references to a single estate.

ENOCH: Following up on my question. Is it critical to your position that that's subject-to clause be interpreted to be a future leases clause?

BURNEY: No, it isn't your honor for two reasons.

ENOCH: If it does not convey a future lease then what rationale is there available to say that the real interest that was conveyed was 1/12 and not 1/96?

BURNEY: Your honor you bring up the very point we need to clarify today. And that is why emphasize the future lease clause. If we do that then we are going back a long time in bringing up old misconceptions about the estates owned by mineral owners. Future lease clauses were never intended to make future conveyances. We know that from the history behind the development of these deed forms.

We also know that just from the language of future lease clauses, if you read them they do not have words of conveyance. Basic property rules require words such as "grant, sell and convey." All the future lease clause was ever intended to do was to clarify the party's intent about the single estate intended to be conveyed. So for example in deed forms Professor Hemmingway's comment to deed forms...

ENOCH: Maybe I can narrow down your response. I'm not implying that the future lease clause conveyed anything. It seems to me the rationale for the reliance on the future lease was as an expression of the intent of the parties. Here they are saying: this larger interest is really intended to be forever, is what this future lease provision does. So I come back to my question: if you don't have this expression of forever out there, what basis do you have for simply taking a second provision that says for the terms of this one lease you get this larger deal, for then saying that's an expression if they really intended to forever grant a larger interest?

BURNEY: Here's the answer to your question. First of all I would like to point out that this does have a future lease clause.

ENOCH: I understand that's your position. I am asking if we don't conclude that...

BURNEY: Certainly. Alright let's assume that we did have a deed that absolutely clearly on its face didn't have a future lease clause. The SC of Kansas has dealt with a deed like that in a case called Hinan(?) v. Hartnett(?). And that case is going to answer your question. In that case we had another one of these multi-fraction deeds - 1/16 in the granting clause, 1/2 in the subject-to clause. In other words in that subject-to clause, the explanatory clause, it said: The grantee herein is to get 1/2 of rents and royalties. Much like some of the language you see here. This conveyance of a single estate covers and includes. In that case it was 1/2. In this case it is 1/12. What Hinan(?) said is: we have a conflict on the face of the deed, even though it only had a subject-to clause, and we've got to interpret this deed to figure out what's the size of the single estate intended to be conveyed. And this is what Hinan(?) said. The court said: we've got to give effect to the intent as it is expressed in that subject-to clause. The reason is the subject-to clause expresses your intent about the size of your bargain. The subject-to clause says: This single conveyance of this one estate covers and includes in this case a 1/12 of rents and royalty. Well what's the estate that entitles someone as a matter of law to 1/12 of rents and royalties? That's a 1/12 mineral interest. So on its face that's what the Hinan(?) court did. The court said: so as to carry out the party's intention as expressed in the subject-to clause. They interpreted that deed as conveying a single 1/2 interest. What they did is they harmonized the fractions and they explained the 1/16th _____ granting.

ENOCH: The Kansas case seems to be predicated on the assumption that a 1/8th royalty is standard.

BURNEY: Yes, your right.

ENOCH: So the expression of the rule if we say we are going to follow Kansas, the

expression of the rule would be something to the effect if we find...I mean is the rule confined to 1920-1940, or is the rule confined to multiples of a commonly understood fraction? Say if this field, the common fraction was a 1/4 as long as all of these fractions are some sort of function of that 1/4, then we are going to assume it's the larger fraction, and they did it; is that the rule you are seeking?

BURNEY: Right. No I understand your concern. Because if Luckel stands for the proposition that we harmonize fractions in all these deeds, because generally the larger fraction times 1/8 explains the smaller fraction in the granting clause. I think first of all it's important to point out if you look at virtually every one of the deeds that have been litigated in Texas courts for decades, the statement of the rule I just suggested will work. So I think that is important to point out. I know of one case from doing lots of research where this pattern didn't fit. Otherwise you always run across this pattern. You've got multi-clause deeds, and by that I mean a deed with a granting clause and subsequent explanatory language, whether it be a subject-to clause, a future lease clause, one or the other. You have that subsequent explanatory language. Always you have the same pattern. You've got a larger fraction in the subsequent clause and the fractions are always multiples of 1/8; 1/8 times the larger fraction equals the smaller fraction in the granting clause. And that explains what the parties were trying to do.

CORNYN: Would the outcomes of any of those cases that you say could be explained by this unifying theory of the state misconception, would the outcomes of those cases be different?

BURNEY: Yes, some of the ones that this court has already decided.

CORNYN: Respondent says for example that your theory in this case would require the overruling or disapproval of 16 appellate opinions. Can you respond to that?

BURNEY: Yes. I received that brief in the mail yesterday. And with this court's permission we obviously plan to respond to that late filed brief. But I've obviously read the brief; I'm familiar with every case in there, and the answer is, that's absolutely incorrect.

CORNYN: So under your theory the outcome of all those cases would be exactly the same?

BURNEY: No, that's not what I am saying your honor. The question is by adopting the rule that I'm suggesting that this court adopted in Luckel which gives us a reliable rule that does not hinge on the particular label of a clause, by adopting that rule a question is are we going to upset title stability? And I understand that that's certainly the assertion in that brief and that's your question. And the answer is no. So if you want me to address the cases on that list.

CORNYN: Well if the outcome of the cases would be different under your theory of the state misconception we would not need to disapprove or overrule those cases?

BURNEY: No, your honor, and this is why. First of all of that list there are...I haven't counted

up but a large number of them you just take out because they have absolutely nothing to do with this issue. So the list is padded. Secondly, we've got to remember the course of the litigation we've had here. All those cases have already been affected by court decisions. You know we started with this decision in Luckel in 1991, which gives us a reliable rule where we harmonize these conflicting fractions and we interpret all of these deeds as making a single conveyance. But then we have to remember to bring up old cases. In 1984 we had Alfred v. Crum(?), and Alfred v. Crum gave us a rule that the granting clause prevails. So right there in 1984 Alfred obviously had affect on those cases.

Now we know since this court overruled Alfred and Luckel, we know we can no longer stop reading at the granting clause. That was the point of Luckel I think. And then we go back beyond Alfred and prior to that we had Garrett v. Dills Co. in 1957. Garrett adopted an approach similar to what this court did in Luckel. So my point is your honor we've had such varying rules, but since 1957 we've had Garrett. And Garrett was another one of these deed forms, exact same pattern, conflicting fractions, smaller fraction in the granting clause just like we've got up here. We had 1/64 in the granting clause, and 1/8 in subsequent clauses. And what Garrett did is Garrett held that that deed conveyed a single 1/8 mineral interest.

PHILLIPS: What you say is an explanation of what was in people's heads in the 1920s and '30s is attractive, but this court wrote a lot of opinions as did the courts of appeals in 1920s and '30s and had the reputation at that time of being the leading oil and gas court in the world. Why aren't cases like Tipps consistent...that were written right there at the time with the benefit of counsel who were drafting these very leases consistent with your theory?

BURNEY: Well your honor I think Tipps is very significant to this case. Under the four corners rule we know that we are supposed to start with the language in the deed. But then according to the restatement of property 242, a rule that this court has adopted and noted many, many times, you can always construe the language in light of the circumstances in which it was formulated. That's straight out of the restatement of property. Tipps was handed down a year before the deed in this case was executed. This is what the Tipps court did. We had another one of these deeds, same pattern, 1/16 in the granting clause, 1/2 in the subsequent explanatory clauses.

What the Tipps court said was in affirming a lower court's question about whether or not the deed needed to be reformed, the appellate court affirmed saying this: That the fraction 1/16 was proper to express the conveyance of a 1/2 mineral interest because the land was already under lease. So what the Tipps court did in 1936 is it sent the message that filling out deed forms in this manner is the proper way to express the intent to convey a single fractional mineral interest. The court was sending the message that a lot of early court decisions had said that you need to multiply the intended fraction by 1/8 before you insert it in the granting clause or you are in danger of being in breach of the general warranty clause down here. So a year later it was proper for the parties in this deed to put 1/96 in the granting clause, and 1/12 in the explanatory clause when they were intending to convey a single 1/12 mineral interest.

PHILLIPS: We would have to go back and re-examine a lot of _____ in the 20s and 30s?

BURNEY: No your honor.

HECHT: One of the difficult things in this case it seems to me is you have 2 deeds on 2 days with a common party that are word-for-word identical except for the fractional interest in the granting clause. And while it would be nice to have a grand unification theory of mineral deed language it is very difficult to say that the intent of an August 5 deed is the same as an intent of an Aug. 4 deed when the language in one has a very important particular different. What's your response to that?

BURNEY: You pointed it out broader. The only change in the deeds and of course what you're referring to is that the grantor in this deed received his 1/12 interest the day before with this exact same form except the only change was the fraction in the granting clause. Now why is it that that prior deed conveyed a single 1/12 interest? There's no words of dual grant there. Why is it if you change only the fraction in the granting clause all of a sudden a deed goes from conveying one interest to two? We are violating the four corners rule we all realize by even really looking at that deed. The four corners rule says we are supposed to construe the language in this deed. But the point is it doesn't change a thing. The only difference between those two deeds is the first one does not need to be interpreted and the second one does. It's a good thing there are some mineral deeds that don't need interpretation.

HECHT: But the question is why would the grantee turn around and convey the same mistake that he received using different language?

BURNEY: I think the answer comes from Tipps again. Tipps had said operating under the understanding at the time, which was that if my land was leased all I owned was 1/8 because that's the usual royalty, the royalty in the lease. We know of course today that that's not right, that when my land is leased I own a possibility of reverter in all the minerals. But back then what Tipps had said is: using the conflicting fraction in the granting clause was proper to convey the single larger estate.

HECHT: So Mr. Crosby must just have thought that this grantor the day before had been an error?

BURNEY: The second deed is actually in light of the circumstances of the formulation, which is a proper inquiry, in fact a required inquiry under the four corners rule, the second deed was the better deed.

CORNYN: I do have one other question. In Luckel we held that the actual intent, subjective intent, does not govern but what the parties expressed in writing. Isn't your estate misconception theory premise on the notion that the parties made a mistake in expressing their intent in the written deed when in fact they subjectively had in mind something else?

BURNEY: No, not at all your honor. Of course we can't look for subjective intent. That is not at all what we're after. That's why what we need is a rule which seems to interpret these deeds in a manner that probably complies with objective intent. And the way we do that to start with..the estate misconception isn't necessarily crucial to this. What is is the notion of the 1/8 royalty. And this is what I mean by that. We start with, we're construing these deed from the four corners and you see the conflicting fractions. You also see the language that makes it clear they intended one estate. Right there we've got a deed that needs interpretation, so we've got to harmonize it. If, under this rule, you look at the larger fraction, its because of the usual 1/8 royalty which this Court has taken judicial notice of several times. In Luckel you made note of it and Garret v. Dils. Its the 1/8 that explains it so 1/8 times the larger fraction explains the smaller fraction in the granting clause. Now, then, it is proper, under the four corners rule, under Section 242 as I quoted it to you, to then also look at the language in this deed as 242 says "symbols in this deed in light of the circumstances of its formulation" which would make the inquiry into Tipps appropriate. We are interpreting a deed as a matter of law. It is certainly appropriate to look at the law at the time the deed was granted.

CHIEF: Any other questions? Thank you counsel. The Court is ready to hear argument from respondent.

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RESPONDENT

LAWYER: May it please the Court, Mr. Frank Douglass will present argument for respondents.

DOUGLASS: May it please the Court. I am Frank Douglass speaking on behalf of the respondents in this matter. The petitioners want to change a fraction in a deed from 1/96 to 1/12 in order to obtain seven times more the production from my client than they are entitled to under a 1937 deed. Alternatively, they want you rewrite the law and say that this deed had a future lease clause in it which it does not.

GONZALEZ: As I understand the argument counsel, they're not asking us to rewrite the law, they are asking us to follow Luckel v. White.

DOUGLASS: Well, if this Court follows Luckel, if it follows Jupiter, if it follows French it will not rewrite the law and it will hold that the deed grants a 1/96 mineral interest and a 1/12 royalty interest under valid, subsisting oil and gas leases.

JUDGE: All the grantor had was a 1/12 royalty interest.

DOUGLASS: No, the grantor had, in this case, a 1/12 mineral interest.

ENOCH: But, he conveyed away all of the royalty he was entitled to under the lease that with then subsisting was a possibility that if that lease ever ended he would have 7/96 of the mineral interest to play with on any future leases.

DOUGLASS: And the grantee would have 1/96 of the reverter and the 1/96 could be leased for as much as a 100% royalty and the petitioners would get exactly what they're asking for in this case.

ENOCH: Mr. Douglass, do you agree that if the significance of the future leases clause is that it is an expression of the grantor that they intended forever to be shipping(?) on the larger fraction interest. Would, if this subject-to clause was interpreted to be an expression of that future notion that that would end the inquiry and Luckel v. White would control and the larger fraction would be what was conveyed. Do you understand my question?

DOUGLASS: I think I do. If you're saying that this Court should interpret this language to be a future lease clause would it convey a 1/12, _____. If you follow all the other cases that you have decided based on future lease clauses, yes. But, I don't see how this Court would ever arrive under the four corners rule that this clause is a future lease clause. This clause is a subject-to an existing lease clause and that's been the situation in Texas law many years prior to this deed. We cited 15 mineral deed cases. Of those 15 mineral deed cases, 13 of them were pre-1937 deeds and of those 13, 10 had future lease clauses in them, is the situation.

HECHT: Well, to suggest to you a way that it can be read, it says "any valid subsisting oil and gas and/or mineral lease or mineral lease or leases" why does it repeat the word "or mineral lease or leases" if it doesn't mean other than a subsisting lease?

DOUGLASS: My suggestion on that is they just wanted to be ultra careful to make sure they said any lease or valid lease that was existing at the time there may have been more than one lease that was in existence on this tract, this is only a 1/12 interest, that lease may have been subdivided. It was a large tract of land. There could have been leases on part and not on other parts, so I suggest to you that...

HECHT: Looks to me if you were gonna say that you'd say "any valid, subsisting lease or leases" instead of "any valid subsisting lease or lease or leases". That's kind of clumsy language to stick it in there twice if you didn't mean it.

DOUGLASS: Well, it seems to me your honor, that in reading this particular provision, its clear that there could be a 1/12 of all minerals and royalty _____ under the terms of such lease or leases. And such lease or leases are the valid and subsisting leases. That's the difference in the Kansas case. It said valid leases and the Court interpreted that to be valid and future leases. This says subsisting leases. Existing leases at that time.

CHIEF: So, subsisting modifies oil and mineral lease and it also modifies oil and mineral

leases.

DOUGLASS: Yes, it says any valid subsisting oil, gas, and or mineral lease or mineral lease or leases. It modifies all these.

CHIEF: But again, on my question, just want to make it clear to my own mind, you're contending that the grantor was deeding any right to receive money on leases that were in effect at that time? I mean the net effect would be zero for them, but there would be...

DOUGLASS: He was in effect selling his royalty, which is not unusual or unique to selling his royalty at that time. To me he clearly knew what he was doing as pointed out by Justice Hecht. The day before he got a 1/2 mineral interest and 1/12 of the royalties; the next day he conveyed a 1/96 mineral interest. And the explanation the petitioners give you is well we have this Tipps v. Bodine...

OWEN: But under your interpretation he's not just conveying his royalty interest, he's conveying the royalty interest plus 1/96 mineral interest?

DOUGLASS: Yes. Actually the 1/96 mineral interest is 1/96 of the possibility of reverter. The courts and we lawyers have put a short term on that and says he's conveyed 1/96 of the minerals.

OWEN: You're saying the granting clause is a future grant in essence. It doesn't presently grant 1/96 mineral interest to the grantee; is that your position?

DOUGLASS: I think the cases hold that when you give an oil and gas lease technically you no longer have any of the minerals. You have the royalty left that you have retained in that lease, and you have conveyed in effect a determinable fee in the minerals to the lessee. So when you convey a 1/96 of the minerals and it's under lease, you in effect have conveyed 1/96 of the possibility of the reverter of the minerals by virtue of this oil and gas lease.

Shorthandedly we always say the granting clause conveys a mineral interest, the subject-to or existing lease law clause conveys a royalty interest under.

OWEN: Under your construction there at the end of this lease he would have gotten two things, two different grants: he would have gotten currently the right to receive royalties from the existing lease; plus, in the future a 1/96 mineral interest?

DOUGLASS: At the end of the lease all this grantee would have gotten was the 1/96 possibility of reverter.

OWEN: There were 2 separate grants under your interpretation ?

DOUGLASS: That's right. And under this court's interpretation for...

OWEN: But my point is he wasn't simply just granting his royalty. Under your interpretation in addition to that he granted a 1/96 mineral interest?

DOUGLASS: That's right in the granting clause. There are 3 clauses, 3 basic clauses: the granting clause; the subject-to clause; and the future lease clause. There is no future lease clause in this deed. And I respectfully ask the court to look and see if there is.

OWEN: If we hold otherwise would you agree that what was conveyed was a 1/2 mineral interest?

DOUGLASS: If you interpret this deed to convey a 1/12 future lease under a future lease clause yes, that would be consistent with your previous opinion.

OWEN: So your argument basically turns on whether that's a future lease clause or not?

DOUGLASS: Well that's what their argument I think turns on rather than mine. I say just read the instrument itself and you will see it conveyed a 1/96 mineral interest and 1/12 in the valid and subsisting oil and gas lease at that time of the royalty. In support of that let me go back to what the petitioners say about the 1/12, 1 day, 1/96. Thirteen months later well within the time that this middle deed could be reformed, these same petitioners and their predecessor in title received a 1/16 mineral interest and a 1/16 royalty. So they knew at that time if there were mutual mistake or there was a misconception of the estate doctrine problem. They knew then that they had gotten a deed that didn't give them the full 1/12 mineral interest as set forth in the middle deed.

ENOCH: I don't understand your point that...

DOUGLASS: Well the explanation that the petitioners give for the middle deed that Mr. Crosby didn't intend to convey we say he didn't intend to convey his entire interest; they say he did. He made a mistake on that middle deed there in not putting 1/12 in the blank. If there was a blank there. What we say is they knew 13 months later. They got another deed that had the same fractions in there, that had the 1/16 and the 1/16. Under that circumstance why didn't they realize that the previous deed they've got only said 1/96. Did they know then he made a mistake? If they did, they should have sought reformation.

HECHT: The other difficulty with the language is in the subject-to clause it said: This conveyance covers and includes 1/12. But a 1/96 mineral interest doesn't include 1/12. It's more than you would get otherwise.

DOUGLASS: I don't understand your question.

HECHT: The subject-to clause, the second paragraph that you are looking at says: The conveyance "covers and includes 1/12." But that's more than you would get with a 1/96 mineral interest.

DOUGLASS: That's right. He conveyed all of his royalty under the existing lease at that time. And that would not be unusual and unique. Somebody would probably buy it more for the royalty than they would for some future mineral interest. They want the royalty under the existing lease. Let me further point out when the petitioner's say well there is no words of grant, sell, and convey in a future lease clause, you're not going to be able to find any words of grant, sell or convey for this 1/12 of this royalty that's in the subject-to clause. And this court for years has held that that still is a second grant under that. And the way you read that of course is that it covers and includes 1/12. In other words this deed covers and includes a 1/12 interest that's granted and sold there.

PHILLIPS: You were going to address the Tips case.

DOUGLASS: I don't think this chart refers to it. I modified that and had passed out to show that those case which include the Tips case they had fraction 1 and fraction 2. What's not pointed out on this is that all of these cases down through the Tips case, the fraction 2 is found that was inconsistent is found in the future lease clause. Each of those deeds had a future lease clause. There are 2 cases that do not have future lease clauses: Pam Am v. Texas Pacific Coal and Oil, that's a 1925 deed that was construed in 1960 by the El Paso court; it came just 3 years after Garrett v. Dills, that case is 4 square on this one. It had only 2 clauses: the granting clause, and the subject-to clause. And the El Paso court held that it was 2 separate in effect grants and they were not inconsistent with each other. The grants in this deed that we are dealing with here today are not inconsistent with each other.

PHILLIPS: Do you admit that your case is on all 4s with the Hinan(?) case and the Kansas court just got it wrong?

DOUGLASS: No in the Hinan case it just said valid leases, and that court said that's valid in future leases. Ours says valid and subsisting or valid and existing leases is what this clause says. That's the difference with reference to the Kansas case.

You asked me to address the Tipps v. _____, that had a future lease clause, and that was where the inconsistency or the irreconcilable conflict occurred was by virtue of that future lease clause. And this court has addressed in each one of these future lease clauses. It's addressed the four corners rule. It's seen what is in the deed itself. And when this court does that in this case it will come to the same conclusion as the San Antonio court: 1/96 granted in the granting clause, 1/96 mineral interest there; and 1/12 of the royalties will be granted on valid and subsisting leases.

And I think the reason that the petitioners did not raise in the San Antonio court, the future lease argument, is they realized after reading the San Antonio CA's opinion, they were out unless there were future lease clauses in this. And they raised it on their motion for rehearing in the San Antonio

CA. It was not one of the points of error from the TC.

Let me talk a little bit about the four corners rule. This court knows it well. Our case is controlled by Luckel, and by Jupiter, and by French. And if you look at those 3 opinions that this court and a number of the members of this court...

GONZALEZ: Before you go on there's a mini amicus here and one of the amicus says that you cannot reconcile the 3 cases: Jupiter, Luckel, or French.

DOUGLASS: I would suggest that maybe that lawyer needed to read a little bit more. And they are reconcilable. Of course Luckel was a royalty case; involved a royalty deed but the principal is the same. It had 5 clauses that this court had to look at. And I think that is one of the things that caused the problem. When you get 5 clauses involved at least this court at that time interpreted within the four corners a different opinion with reference to what is said within that four corners.

GONZALEZ: How do you explain the fact that we've go so many amicus briefs in this case asking the court to revisit the opinion of the CA?

DOUGLASS: I would suggest 2 things: energetic counsel on the other side; and 2) that there are some folks that are generally concerned about this area. Some of these amicus briefs don't say that you should rule in petitioner's favor. They just say you should grant the application for writ of error, which you have done. And we've got a number of professors right here in this room, and I think those professors are smart enough to teach their law students that you can grant in a mineral deed 1 fraction in the mineral in the granting clause, and another fraction of the royalty. That's something that's been done for over 50 years. There are 4 very fine oil and gas professors in this audience right here, including the one at counsel's table. And I suggest to you that you can follow your mandates as you have yourself in these cases on the four corners rule and arrive at exactly the same conclusion that the San Antonio court did.

To arrive at the position the petitioner's want, you've got to change the fraction. You got to change the fraction between the mineral interest granted and the royalty interest that's granted.

HECHT: Some amici have argued that we should have more of a general rule to take the biggest fractions in the deed or some more of a routine rule applied to these cases that would have the virtue of course of being given more certainty to this area of the law. What's your view of that?

DOUGLASS: Well my response to that first is that the formula that they propose I don't think works in every situation and obviously would not work in a number of the situations that's already been considered by this court. But I would say that the better position to take with reference to the to-grant theory is one that has been advocated by the very attorney that you've heard argue this case today in her law review article. She said this: The to-grant doctrine does have a positive aspect; it is easy to apply (that takes care of what you are talking about there) since fractions are taken at face value (and I emphasize

face) which would aid title certainty. If fractions are taken at face value, that's the four corners rule. That's exactly what this court has said. And in addition, the four corners rule takes into consideration the intent that's set forth in the document itself: not some subjective intent; not some misconception of the estate doctrine, but what is actually said. And when this court reads this deed, which is the first thing it's required to do under the four corners rule, it will harmonize it, you will find there's no irreconcilable conflict, it will find that there is no inconsistency, and that this deed you should not strike down a part of it, the 1/96 which they ask you to strike down, because it does not conflict with any other part of the deed; and it is a good deed with it in there.

ENOCH: If as you say, and I think it's probably correct, that the value of this transaction was in the royalty and not in the mineral interest, why would the person who wanted to receive this deed be at all interested in any sort of mineral interest?

DOUGLASS: Well I think minerals have a longer time consistency and somebody who's been in the oil and gas business likes to own minerals because some day it may become productive, deeper, something else may take place, and you can sell the royalty because it's got income coming in and people are not as interested in long-term minerals as far as that's concerned if it's under lease and producing...

ENOCH: Which is my question. Why would this person who would be paying the bulk of the money for really the royalty be interested in merely a 1/96 of a mineral interest? Why would he even bother with buying that small of a fraction as opposed to buying all of the fraction?

DOUGLASS: All I can say is that was probably their deal. He bought more 13 months later. I would just say that was part of the deal that they made.

OWEN: On the stipulated damages can you tell me how you account...what accounts for the disparity in damages between a 1/12 mineral interest and a 1/12 royalty?

DOUGLASS: Basically if it becomes a 1/12 mineral interest they are entitled to 7 times more money than what they receive under the operation of an oil and gas lease. And that's basically what the damage calculation in the record is. And the stipulation there was a damage calculation under various theories that the petitioners had in the TC.

OWEN: How many years does this cover?

DOUGLASS: Pennzoill took its lease in 1979. I don't think the record shows when production occurred. But it could have been as long as from 1979 to when the case was tried, which I believe was in 1992. So it could have been in production as long as 13 years. I don't think the record reflects when the first well or wells were drilled on this tract.

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REBUTTAL

BURNEY: May it please the court. I would like the court to listen to the rule that the respondents would have this court adopt for interpreting these deed forms. The respondents would suggest first we violate the four corners rule by ignoring the language in this deed. Then they would suggest that we violate the four corners rule by reading language into this deed. Then they suggest that we continue that process by looking at documents other than the deed at issue: deeds granted before; deeds that aren't even in the chain of title. In their brief they ask that you look at documents executed decades after this deed was executed. If I convey to you my house on Monday, and then I convey my house to somebody else on Friday, doesn't that still mean I conveyed away everything I owned on Monday? And what would that mean about the state of the title on Wednesday? We can't have a rule that requires that we look at all this outside evidence. And that's not what this court did in Luckel.

ENOCH: Aren't you though to create the conflict between the 1/96 and the 1/12 aren't you requiring us to look outside the record to what people were doing in 1920, and that was assuming you have a 1/8 royalty?

BURNEY: No your honor.

ENOCH: There is no conflict on the face of this deed as written unless you assume that the royalty is 1/8?

BURNEY: No your honor I disagree. There is a conflict on the face of this deed.

ENOCH: How is the transferring of 1/96 mineral interest in conflict with the transferring of one's royalty interest?

BURNEY: Because this deed says: I am conveying a single estate (and it says a 1/96 estate - mineral interest) and then it says that single estate covers and includes 1/12 of rents and royalty. There is your conflict right there on the face of the deed. A 1/96 mineral interest does not entitle, does not include 1/12 of rents and royalty.

ENOCH: Do you disagree with the cases that say that that second clause is a granting clause?

BURNEY: Absolutely. That's incorrect. Those clauses are not granting clauses. The case that led the development of these clauses only required clauses like this as explanatory. That's the Caruthers v. Leonards case. Caruthers said that grantors ought to put in subsequent explanatory language to make it clear about the single estate they intended. And it's obvious from the face of this deed that it's intended to make a single conveyance.

ENOCH: And it's your view that we don't end up overruling a number of cases on that issue?

BURNEY: That's right your honor. I think this is what you probably would have to do. To give us the clarity that we need I believe that Jupiter needs to be probably overruled at least to the extent that it conflicts with this court's analysis in Luckel. But it doesn't change the result.

ENOCH: Didn't Luckel acknowledge that the subject-to is a form of a grant?

BURNEY: I don't believe so. There is this statement I know in Luckel. And this is again why I think we need some clarity about what did Luckel actually do, and that's why this case is appropriate for it. Obviously in that case no one disagreed about whether or not there was a future lease clause. So the issue seemed to be framed and focused on a future lease clause. But a future lease clause was not intended to make a separate conveyance. There is a statement like that in Luckel and then the court cites Sun Oil v. Burns a support for that. Sun Oil doesn't support that statement. Sun Oil doesn't even involve a deed. It involves a lease. It doesn't involve conflicting fractions. It involves a habendum clause. These clauses weren't intended to make conveyances. That's why there's no words of grant. The subject-to clarifies the party's intent about the single estate intended to be conveyed.

OWEN: You've asked in the alternative that we either hold that this is a 1/12 mineral interest, or 1/12 royalty in perpetuity. From the standpoint of conformity in title how would that...which way would that cut?

BURNEY: Our point on that is that the 4th CA made absolutely no effort to read the language in this deed and that this language, there is language in this deed as Justice Hecht pointed out that refers to additional or future leases.

OWEN: No that's not my point. Let's talk about Luckel for a moment. Luckel was simply a royalty interest. There was no grant to the mineral rights.

BURNEY: That's right it was a royalty deed.

OWEN: And you have asked us alternatively to construe this as either a 1/12 royalty in perpetuity, or a 1/12 mineral interest. And I am asking in terms of uniformity in construing deeds what's the effect if we were to hold either of those things on being able with some certainty to go to a courthouse and determine what's _____?

BURNEY: The preferable holding would be that this language first of all is a future lease clause. And then that's where we fit right into Luckel then. And the reason this language is a future lease clause is because we know that this land was subject-to a lease providing for a 1/8 royalty on all the land. So why bother to refer to additional or future leases in the plural...

OWEN: My specific question: Mineral interests or royalty interest?

BURNEY: That this deed conveyed a single 1/12 mineral interest.

OWEN: I want you to address both of those. How would that effect uniformity in construing deeds if we were to hold one way or the other?

BURNEY: It would be preferable and would give us better certainty if this court holds that this deed conveyed a single 1/12 mineral interest. That's going to be more consistent with all the cases and Luckel holding that this deed conveyed a perpetual royalty interest. That plays into the to-grant doctrine, which I would prefer that this court reject.

I think we need to look at the to-grant doctrine. We haven't had the chance to focus on the to-grant doctrine. None of the to-grant doctrine cases do. This is what the 4th CA held. The 4th CA held that this deed conveyed two separate estates. It said that the grantee got a 1/96 mineral interest and an additional 1/12 of royalty under an existing lease. Now if I get two interest I am entitled to be paid according to two interest. If I get a 1/96 mineral interest that entitles me, that covers and includes as a matter of law, the right to 1/96 of rents and royalty. So if we take the court at its word and the grantee in this deed got 2 grants, and is entitled to be paid twice, then that means the grantor just conveyed more than he owned.

PHILLIPS: But you didn't try to get a judgment on the basis of that reading?

BURNEY: Yes we did try to show that that's what's wrong with this interpretation, that's exactly what we tried to show.

PHILLIPS: Do you have any case where a court has held that there is a future lease clause, that does not use either the word "future" in it, or have words about termination or expiration of current leases? This hasn't either. What this has is it uses the word "mineral" lease twice, and uses the word "in" and uses "lease" as plural. That's your argument that it's a future lease clause?

BURNEY: That's true.

PHILLIPS: Is there any case that you have where a court has held that that's enough to be a future lease clause? Because the ones I've seen either say on the expiration of the current lease or leases, or they actually use the word "future" or may hereinafter, something like that?

BURNEY: It's important to point out what those cases also do is they also specifically name the existing lease. For example if you look at Luckel it specifically names the co-lease. And that's how we distinguish a subject-to clause from a future lease clause. What this lease does is they were trying to respond to Caruthers v. Leonard and give the required explanatory language and they shouldn't be punished because they didn't follow a different form.

PHILLIPS: My question is much simpler. In the jurisprudence when do you have a holding that language like this is a future lease clause?

BURNEY: The only other case I know of is Pan American, the 1960 case, and that case they held there was no future lease clause. And that's the one that the 4th CA relied on. But that deed is totally different from this one. That deed did have some specific references to leases. It named the leases. It called them the more(?) lease. So my point it that why do we want to even get tied up with trying to interpret whether or not we've got a future lease clause. That just creates more guess work and title instability for title _____.

HECHT: It troubles me that your argument relies so heavily on this court's overruling a unanimous opinion that's 4 years old. I take it if we don't decide to overrule Jupiter Oil Co., then your position becomes un_____?

BURNEY: I don't believe so because we still do have Luckel v. White. My point is that if we wanted clarity, if the court decided we needed to go that far, that the problem is that Jupiter used a different approach. It's not that Jupiter got to a different result, it's just simply that the approach was different. And so that creates confusion among title examiners about what rule applies to basically the same deed form.

CORNYN: You don't think the result in Jupiter was wrong?

BURNEY: No the result in Jupiter was not wrong because Jupiter ultimately goes with the larger fraction. If you would have applied the Luckel approach to Jupiter you would get the same result. That's why we are not endangering title stability in any way. What we're doing is we are injecting clarity and stability.

HECHT: But if we decide to adhere to our unanimous decision that was only 4 years old in Jupier Oil Co., then you would lose in this case or not?

BURNEY: No, I don't think so, because we still have Luckel. My point is that additional clarity could be provided by making it clear that we have now one approach for interpreting these multi-clause deeds with conflicting fractions.

CORNYN: You can still win without our settling all these title problems that go back 150 years; you could still win without us doing that?

BURNEY: Absolutely. For one reason because this deed has a future lease clause. Secondly...

PHILLIPS: But you tell us not to worry about that.

BURNEY: Well secondly because the result in Luckel should not turn on a future lease clause. Luckel should turn on harmonizing the fractions to carry out the intent. And the subject-to clause is equally important. In fact it's more important. That's the clause that expresses the party's bargain about the single estate intended to be conveyed.

ENOCH: And that depends on your position that that subject-to is not a conveyance of an interest?

BURNEY: Yes and also that this deed conveys only 1 estate, and the question in interpreting it is which fraction is correct.