



TEXAS A&M UNIVERSITY
SCHOOL OF LAW

EIGHTH ENERGY LAW SYMPOSIUM: THE FUTURE OF ENERGY



CANONS REDUX

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MCGINNIS LOCHRIDGE

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SELF-PROMOTION

Bruce M. Kramer, The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction, 24 Tex. Tech L. Rev. 1 (1993)

- State Bar of Texas Oil, Gas and Mineral Law Section Research Grant





IRRATIONAL EXUBERANCE

- ***Kachina Pipeline Co. v. Lillis***, 471 S.W.2d 445 (Tex. 2015)
 1. In construing a contract, a court must ascertain the true intentions of the parties as express in the writing itself. *Sisyphian*, 43-46
 2. We may consider the facts and circumstances surrounding a contract, including the commercial or other setting in which the contract was negotiated and other objectively determinable factors that give context to the parties' transaction. *Sisyphian* 14-18





IRRATIONAL EXUBERANCE

- ***Kachina Pipeline***

3. But while evidence of circumstances can be used to inform the contract text and render it capable of only one meaning, extrinsic evidence can be considered only to interpret an ambiguous writing, not to create an ambiguity.
4. A contract is not ambiguous simply because the parties disagree over its meaning.
5. Rather, if a written contract is so worded that it can be given a definite or certain legal meaning, then it is not ambiguous.





IRRATIONAL EXUBERANCE

- *Kachina Pipeline*

6. When discerning the contracting parties intent, courts must examine the entire agreement and give effect to each provision so that none is rendered meaningless. *Sisyphian* 72-80
7. We give contract terms their plain and ordinary meaning unless the instrument indicates the parties intended a different meaning. **(2 canons)**





IRRATIONAL EXUBERANCE

- ***Kachina Pipeline***

8. Moreover, we have stated that a court should construe a contract from a utilitarian standpoint, bearing in mind the particular business activity sought to be served.
9. No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument. *Sisyphian* 72-80





RATIONAL EXUBERANCE

- ***BP America Prod. Co. v. Laddex, Ltd.***, 60 Tex. Sup. Ct. J. 542, 2017 Tex. LEXIS 232 (3/3/17)
 - Rule Against Perpetuities/Top Leases
 - Top Lease is “not a model of clarity”
 - CANON – Where an instrument is equally open to two constructions, the one will be accepted which renders it valid rather than void, it being assumed that a grantor would intend to create a legal instrument rather than one which is illegal. *Kelly v. Womack*, 268 S.W.2d 903 (Tex. 1954). *Sisyphian*, 62-64





A NEW CANON

Hysaw v. Dawkins, 483 S.W.3d 1 (Tex. 2016)

- Fractional Versus Fraction of Royalty Problem
- Last Will and Testament (not an inter vivos conveyance)
 1. Our objective in construing a will is to discern and effectuate the testatrix's intent as reflected in the instrument as a whole.
 2. The intent must be drawn from the will, not the will from the intent. (???)





A NEW CANON

- ***Hysaw v. Dawkins***

3. We focus not on what the testatrix intended to write, but the meaning of the words she actually used.
4. Ascertaining intent from the four corners of a will requires careful examination of the words the testatrix chose and the sense in which the words were used by the testator is the ultimate criterion.





A NEW CANON

- ***Hysaw v. Dawkins***

5. If the terms of a will are ambiguous, extrinsic evidence is admissible to determine the testatrix's intent.
6. A presumption arises that she intended to treat heirs of the same class equally.
7. When a term in a will is open to more than one construction a court can consider the circumstances existing when the will was executed. (**surrounding circumstances rule**)





A NEW CANON

- *Hysaw v. Dawkins*

8. There are many rules of law surrounding the construction of a will but there is one over-all rule, which is to the effect that there is no set rule that will fit the construction of every will, and therefore each case must stand under its own facts. (DUH)

9-15. Canons of construction relating to non-testamentary instruments (RELEVANCE??)





A NEW CANON

- ***Hysaw v. Dawkins***

- “IN SUCH CASES, WE HAVE FAVORED A HOLISTIC AND HARMONIZING APPROACH AND REJECTED MECHANICAL RULES OF CONSTRUCTION. . . .”
- HOLISTIC VERSUS HARMONIZING
- Criticizes Williams & Meyers approach to Fraction of Versus Fractional Royalty interpretational issue
- Misreads W&M
- Key Point – Inter vivos deeds not likely to have other provisions allowing holistic view





SURROUNDING CIRCUMSTANCES

- Not a new problem
- ***Hunt v. White***, 24 Tex. 643 (1860)
 - Extrinsic evidence is inadmissible to interpret last will and testament but “parol evidence. . . to explain a will (or other written instrument) by showing the situation of the testator, in his relation to persons and things around him; or as it is often expressed, by proof of the surrounding circumstances. . . .” 24 Tex. At 652





SURROUNDING CIRCUMSTANCES

- ***Hunt v. White***

- Notwithstanding the above quote court later added: “His intent must be ascertained from the meaning of the words in the instrument, and from those words alone.”





SURROUNDING CIRCUMSTANCES

- ***Anderson & Kerr Drilling Co. v. Bruhlmeier*, 136 S.W.2d 800 (1940)**
 - “it is plainly implied, however, . . . That when the instrument by its terms plainly and clearly discloses the intention of the parties, or is phrased in language not fairly susceptible of more than one interpretation, the intention of the parties is to be ascertained by the court as a matter of law from the language used in the writing and without aid from evidence as to the attending circumstances.





SURROUNDING CIRCUMSTANCES

- Restatement of Property 241-242 (1940)
- Legal Ambiguity versus Grammatical Ambiguity
- Use of canons of construction





SURROUNDING CIRCUMSTANCES

- ***Houston Exploration Co. v. Wellington***
Underwriting Agencies, Ltd., 352 S.W.3d 462
(Tex. 2011)
 - “The [parol evidence] rule does not prohibit consideration of surrounding circumstances that inform, rather than vary from or contradict, the contract text.”
 - “the commercial or other setting in which the contract was negotiated and other objectively determinable factors that give a context to the transaction between the parties.” *Id.* at 469





SURROUNDING CIRCUMSTANCES

- Court does not define when surrounding circumstances evidence **INFORMS**, rather than **VARIES** or **CONTRADICTS** the terms of the written agreement.
- Chief Justice Jefferson and Justices Willett and Lerhmann dissent due to their understanding of the parol evidence rule. “To consider deleted language or other previous drafts or negotiations would destroy the parol evidence rule without easing interpretations.” [352 S.W.3d at 475](#)





SURROUNDING CIRCUMSTANCES

Texas Supreme Court has tilted the scales in favor of the admission of surrounding circumstances evidence.

- ***Plains Expl. & Prod. Co. v. Torch Energy Advisors***, 473 S.W.3d 296 (Tex. 2015)
- ***Kachina Pipeline Co. v. Lillis***, 471 S.W.3d 445 (Tex. 2015)
- ***Anglo-Dutch Petroleum International, Inc. v. Greenberg Peden, P.C.***, 352 S.W.3d 445 (Tex. 2011)





PRACTICAL ISSUES

- Lind v. International Paper Co., 2014 U.S. Dist. LEXIS 116412 (W.D. Tex. Aug. 21, 2014)
 - Confronts tension between parol evidence rule and surrounding circumstances canon
 - Prior negotiations; prior drafts; redlined versions
 - Rejects broad view of surrounding circumstances canon adopted in PNP Petroleum I, LP, 438 S.W.3d 723 (Tex. App.— San Antonio 2014) and BP Amer. Prod. Co. v. Zaffirini, 419 S.W.3d 485 (Tex. App.— San Antonio 2013)





PRACTICAL ISSUES

- Lind
 - NEW CANON – Deletions in printed form should be afforded “special” weight in construing the instrument. Offshoot of handwritten/typewritten?? prevails over printed form – Sisyphean 96-100





TWO-CENTS PLAIN

“When understood not to be a substitute for rational thought and common sense, canons of construction are very useful and provide a degree of certainty to the conveyancing industry. However, when abused, the battle of the ‘canons’ replaces rational thought and common sense and leads to obfuscation and uncertainty.” [Kramer, Sisyphian Task, 24 Tex. Tech L. Rev. at 5.](#)





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