



McGINNIS LOCHRIDGE

# SISYPHUS REDUX: ALICE IN WONDERLAND MEETS PETER PAN

HOUSTON BAR ASSOCIATION  
SECTION ON MINERAL LAW

MAY 28, 2020



we're in it together®

Texas  
Supreme  
Court

Prof.  
Kramer



A photograph of a cannon firing in a field. The cannon is mounted on a carriage with large spoked wheels. A bright, glowing muzzle flash is visible at the end of the barrel. The background consists of a line of trees under a clear blue sky. A semi-transparent dark grey horizontal bar is overlaid across the middle of the image, and a thin red vertical bar is on the right edge.

# Canons



# CANONS, RULES, PRINCIPLES

“Canons of construction can be useful in assisting a court in making ‘good sense’ of in artful drafting. They should not be used as a substitute for common sense and an understanding of the English language. When used consistently they assist those in the conveyancing industry trying to carry out the intent of the individuals who seek to transfer real property. That should be the guiding principle for the use of canons.”

— Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 *Tex. Tech L. Rev.* 1, 128-29 (1993)



# CANONS, RULES, PRINCIPLES

- Judicial Clarification of Kramer Common Sense Guidance
  - “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.” Hysaw v. Dawkins, 483 S.W.3d 1, 11 (2016)
  - OF COURSE, this quote is preceded by, and followed by, a listing of canons of construction and the surrounding circumstances rule.



# CANONS, RULES, PRINCIPLES

## *PIRANHA PARTNERS v. NEUHOFF*, 2020 Tex LEXIS 136, 63 Tex. Sup. Ct. J. 474

- “Courts do NOT resort to ARBITRARY rules of construction where the intention of the parties is CLEARLY expressed in unambiguous language.”
- Quoted from reasonably rarely cited *Citizens National Bank v. Texas & Pacific R. Co.*, 150 S.W.2d 1003, 1006 (Tex. 1941)
- BUT *Citizens National Bank* also lays out “rules of law which we consider germane to the decision.”
- What are the rules of law??? CANONS of Construction such as 1: Rules of construction aid a court to ascertain parties’ intent; 2. CARDINAL rule is to ascertain intent from language of instrument, 3. Contract must be construed



# CANONS, RULES, PRINCIPLES

## *Piranha (Cont.)*

- in accordance with its language, 4. Court must look at entire instrument (4 corners), 5. All provisions must be considered and construed together (harmonizing); 6. Not proper to consider single paragraph, clause or provision by themselves.
- “In [construing this contract] we apply the rules of construction above announced.” 150 S.W.2d at 1006.
- DID ANYONE ON THE COURT ACTUALLY READ CITIZENS BANK?



# CANONS, RULES, PRINCIPLES

## *Piranha (Cont.)*

- Did the court answer the question as to whether “canons” “rules” apply to unambiguous documents? NO
- Footnote citation to *Stewman Ranch v. Double M Ranch*, 192 S.W.3d 808, 811 (Tex. App.—Eastland 2006, pet. denied) – Canons do not apply where deed is unambiguous????
- Contrary to GAZILLION Texas Supreme Court opinions, including *PIRANHA*, *CITIZENS BANK* where court applies canons? rules? as part of its decision-making process; *Wenske v. Ealy*, 521 S.W.3d 791 (2017);





# CANONS, RULES, PRINCIPLES

## *Piranha (Cont.)*

- Split of authority in Texas Court of Appeals

1. Eastland – No canons;
2. Corpus Christi – No canons; *Ellison v. Three Rivers Acquisition*, 2019 Tex. App. LEXIS 1062;
3. Tyler – Yes canons; *Elder v. Anadarko E & P Co.*, 2011 Tex. App LEXIS 5273;
4. Houston [1<sup>st</sup> Dist.] – No canons; *Philipello v. Nelson Family Farming Trust*, 349 S.W.3d 692, 695 (2011); Yes canons *Boulanger v. Waste Mgmt of Texas*, 403 S.W.3d 1;
5. Houston [14<sup>th</sup> Circ.] – Yes canons; *Hunsaker v. Brown Distributing Co.*, 373 S.W.3d 153;
6. Amarillo – Yes canons; *Moore v. Noble Energy*, 374 S.W.3d 644;
7. San Antonio – Yes/No/Maybe Canons????,
8. El Paso – Yes canons; *BNSF Railway v. Chevron Midcontinent LP*, 2017 Tex. App. LEXIS 2421





# Know the Rules

# CANONS, RULES, PRINCIPLES

## *Piranha* (Cont.)

### BAD RULES

- Arbitrary rules – *Citizens Bank; Wenske v. Daly*;
- Bright-line rules – *Hysaw v. Dawkins*, 483 S.W.3d 1 (2016); *Wenske; Concord Oil v. Pennzoil*, 966 S.W.2d 451, 460-61 (Tex. 1998);
- Default rules – *Wenske v. Ealy*, 521 S.W.3d 791 (2017); *Hysaw v. Dawkins; Luckel v. White*
- Mechanical rules – *Luckel v. White*, 819 S.W.2d 459 (1991); *Wenske; Piranha*
- Rigid rules – *Piranha*;



# CANONS, RULES, PRINCIPLES

## *Piranha (Cont.)*

Technicalities – *Piranha, Luckel*

### GOOD RULES/PRINCIPLES

Courts “must rely on ‘well-settled contract construction principles’ to determine whether a contract is ambiguous AND to interpret the contract if it is not.” 2020 Tex. LEXIS 136 at \*10.

TO ME that appears to reject the view that “principles” or “canons” should not be used where instrument is UNAMBIGUOUS.



# CANONS, RULES, PRINCIPLES

## *Piranha (Cont.)*

- Does the court provide any guidance to distinguish between good rules and arbitrary rules?
- Does the court explain the difference between canons, rules and “principles?”
- In the court’s own words:
  - “We have not YET endeavored to clearly distinguish between the ‘arbitrary, ‘mechanical,’ ‘default,’ rules we have “CAST OFF” and the ‘well-settled contract-construction principles’ on which we continue to rely when construing deeds and other categories

BUT then the court does a case-by-case analysis of some of its earlier opinions where certain rules were NOT followed:



# CANONS, RULES, PRINCIPLES

## *Piranha (Cont.)*

- List of the BAD RULES
- Source of royalty interest carved proportionately from multiple mineral owners – *Wenske*;
- Mathematical approach to double/multiple fraction deeds – *Hysaw*;
- Granting clause prevails – *Luckel*;
- Any singular clause prevails over other clauses – *Luckel*;

### List of GOOD PRINCIPLES

Plain, ordinary and generally accepted meaning;  
Words interpreted in context of their use;



A wooden gavel with a dark handle and a light-colored head rests on an open book. The book is open to a page with some text. In the background, there are several books on a shelf, slightly out of focus. The overall scene is lit with warm, golden light, suggesting a library or a study. A semi-transparent dark blue banner is overlaid on the right side of the image, containing the word "Principles" in white text.

# Principles



# CANONS, RULES PRINCIPLES

## *Piranha (Cont.)*

### List of GOOD PRINCIPLES

- Avoid rendering language meaningless
- Construe all of a contract's provisions together
- Undecided List
  - Greatest estate permissible;
  - Do not imply reservations, exceptions or limitations
  - Construe against the scrivener





# CANONS, RULES, PRINCIPLES

## *Piranha (Cont.)*

- WHY isn't the deed AMBIGUOUS?
- Justice Bland (Dissent) – “. . . The Court's construction is the LEAST REASONABLE of three readings.”
- I thought a written instrument was AMBIGUOUS if it had two reasonable interpretations????

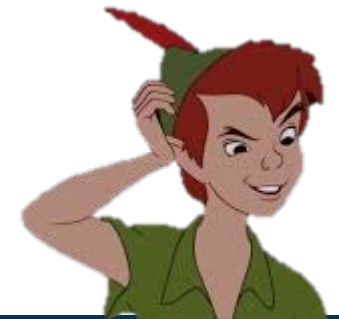


# PETER PAN AND NEVER-NEVER LAND

## Surrounding Circumstances or Parol Evidence

### General Principles

- Both involve evidence outside of the written instrument
- Surrounding circumstances – Admissible under certain undefined guidelines
- Parol Evidence – Inadmissible unless court, as a matter of law, determines instrument to be legally ambiguous



# NEVER-NEVER LAND

- Drawing a line between INADMISSIBLE parol evidence and ADMISSIBLE surrounding circumstances is a longstanding problem
- ***Hunt v. White*, 24 Tex. 643 (1860)** – “[i]t is competent to admit parol evidence. . . To explain a will ‘or other written instrument’ by showing the situation of the testator. . . or as it is often expressed, by proof of the surrounding circumstances; in order that his will may be read in the light of the circumstances in which he was placed at the time of making it.”



# NEVER-NEVER LAND

## *Hunt v. White* (Cont.)

- BUT: “His intent must be ascertained from the meaning of the words in the instrument, and from those words alone. But as he may be supposed to have used language, with reference to the situation in which he was placed. . . The law admits extrinsic evidence
- Hunt was not an outlier. See *Self v. King*, 28 Tex. 552, 554 (1866); *Faulk v. Dashiell*, 62 Tex. 642, 646 (1884); *Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co.*, 157 S.W. 737, 739 (1913)



# NEVER-NEVER LAND

- Can canons and surrounding circumstances co-exist?
- ***Smith v. Brown*, 1 S.W. 573 (1886)** – Cites the four corners canon and admits surrounding circumstances evidence to determine if deed conveyed the land to the grantee as trustee or for the trustee’s own use.
- Definition: “objectively determinable facts and circumstances that contextualize the parties’ transaction” *URI, Inc. v. Kleberg County*, 543 S.W.3d 755, 757-58 (Tex. 2018)



# NEVER-NEVER LAND

- As had Peter Pan, the law of surrounding circumstances has not aged over time
- In other words, the line drawing between surrounding circumstances and parol evidence has remained much as it did in the 19<sup>th</sup> Century
- Pre-execution vs. Post-execution evidence



# DOWN ALICE'S RABBIT HOLE

*Barrow-Shaver Resources v. Carrizo Oil & Gas*, 590 S.W.3d 471 (Tex. 2019)  
(5-4 decision)

- CAVEAT – If you read the opinion you will note that I provided the custom and practice evidence at trial which was later excluded by the Supreme Court and criticized by my good friends Owen Anderson and Ernest Smith
  - Does evidence of custom and practice (custom and usage) fall into the surrounding circumstances or parol evidence rabbit hole?



# DOWN ALICE'S RABBIT HOLE

## *Barrow-Shaver (Cont.)*

- Custom and practice evidence is surrounding circumstances evidence where it:
  - Aids the understanding of an UNAMBIGUOUS contract's language – *Piranha, URI, Murphy Exploration*
  - Clarifies – *URI, Piranha*
  - Informs – *Barrow-Shaver; URI*
  - Provides context that ELUCIDATES the meaning of the words used – *Piranha, URI*





# DOWN ALICE'S RABBIT HOLE

## *Barrow-Shaver (Cont.)*

- One example of INFORMING is where industry-specific terms of art are used
- BUT CF. *Murphy Exploration v. Adams*, 560 S.W.3d 105 (Tex. 2018)
  - Industry-specific meanings are not as important as other surrounding circumstances – When is an offset well not an offset well? When the Texas Supreme Court says so



# DOWN ALICE'S RABBIT HOLE

## *Barrow-Shaver* (Cont.)

- Custom and practice CANNOT
  - Add – *Barrow-Shaver*
  - Alter – *Barrow-Shaver*
  - Augment – *URI, Inc. v. Kleberg County*, 543 S.W.3d 755, 758 (Tex. 2018)
  - Change – *Barrow-Shaver*
  - Contradict – *URI*
  - Create ambiguity – *Community Health Sys. v. Hansen*, 525 S.W.3d 671, 688 (Tex. 2017)



# DOWN ALICE'S RABBIT HOLE

## *Barrow-Shaver (Cont.)*

Make language say what it unambiguously does not say – *Piranha*;  
*First Bank v. Brumitt*, 519 S.W.3d 95, 110 (Tex. 2017)



# DOWN ALICE'S RABBIT HOLE

- What does it all mean???
- Battle of the Titans – Freedom of contract versus title certainty  
Which is? should be? More important?





# RULE AGAINST PERPETUITIES



# RULE AGAINST PERPETUITIES

- Three years – three RAP decisions – RAP is no longer taught in most first-year Property courses
  - *BP America Prod. Co. v. Laddex*, 513 S.W.3d 476 (Tex. 2017);
  - *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858 (Tex. 2018);
  - *Yowell v. Granite Operating Co.*, 2020 Tex. LEXIS 425



# RULE AGAINST PERPETUITIES

## Yowell – Preliminary Musings

1. If majority opinion was an answer to the RAP question on one of my Property or Oil and Gas exams it would have gotten an “A.”
2. Supreme Court applies a canon? Rule? Principle? in interpreting the “anti-washout” provision, to wit: “If an instrument is open to two constructions, we do not declare the interest void because it can assumed safely that the grantor intended to make a legal conveyance.” Subset of canon that you interpret instrument so as to give it effect. Kramer, *Sisyphean Task*, 24 Tex. Tech L. Rev. at 62-65.



# RULE AGAINST PERPETUITIES

## Yowell (Cont.)

3. ORRI is a property interest.
4. ORRI as to “new” leases did NOT vest at time of execution/not a conveyance of part of the possibility of reverter (Koopmann)
5. ORRI in new leases = executory interest
6. ORRI NOT the same as Lessor’s royalty or freestanding royalty
7. Does NOT define lease extensions or renewals
8. ORRI in new leases will neither vest or fail to vest within life in being plus 21 years





# RULE AGAINST PERPETUITIES

## Yowell (Cont.)

9. Distinguishes Koopmann – Owner not ascertainable and preceding estate not certain to terminate
10. What the right hand giveth, the left hand taketh away – Effect of Tex. Prop. Code 5.043. – Statutory cy pres doctrine
11. Court gives NO guidance as to how to reform ORRI instrument to comply with RAP – 21 years? Commercially reasonable period? Court of appeals or trial court decision?
12. Statute of limitations – Why should it not apply?



# FURTHER MUSINGS

## *ConocoPhillips v. Ramirez*, 2020 Tex. LEXIS 44

- Interpretation of a will (*Hysaw v. Dawkins*)
- Devise of surface estate only or surface and mineral estate
- Canons? Rules? Principles of Interpretation
  - Four corners
  - Surrounding circumstances evidence admissible
  - Capitalized terms critical
    - Impact of contemporaneously executed documents



# FURTHER MUSINGS

## *Energy Transfer Partners v. Enterprise Products*, 2020 Tex. LEXIS 49

- Was a partnership created?
- Statutory test versus consensual agreement
- Freedom of contract – important public policy objective
- Agreements not to create a partnership – See JOA language
- Conditions precedent to partnership creation allowed and will be enforced



# FURTHER MUSINGS

## *Copano Energy v. Bujnoch*, 2020 Tex. LEXIS 49

- Contract Formation
- Statute of Frauds
- Agreements to Agree
- Future looking statements



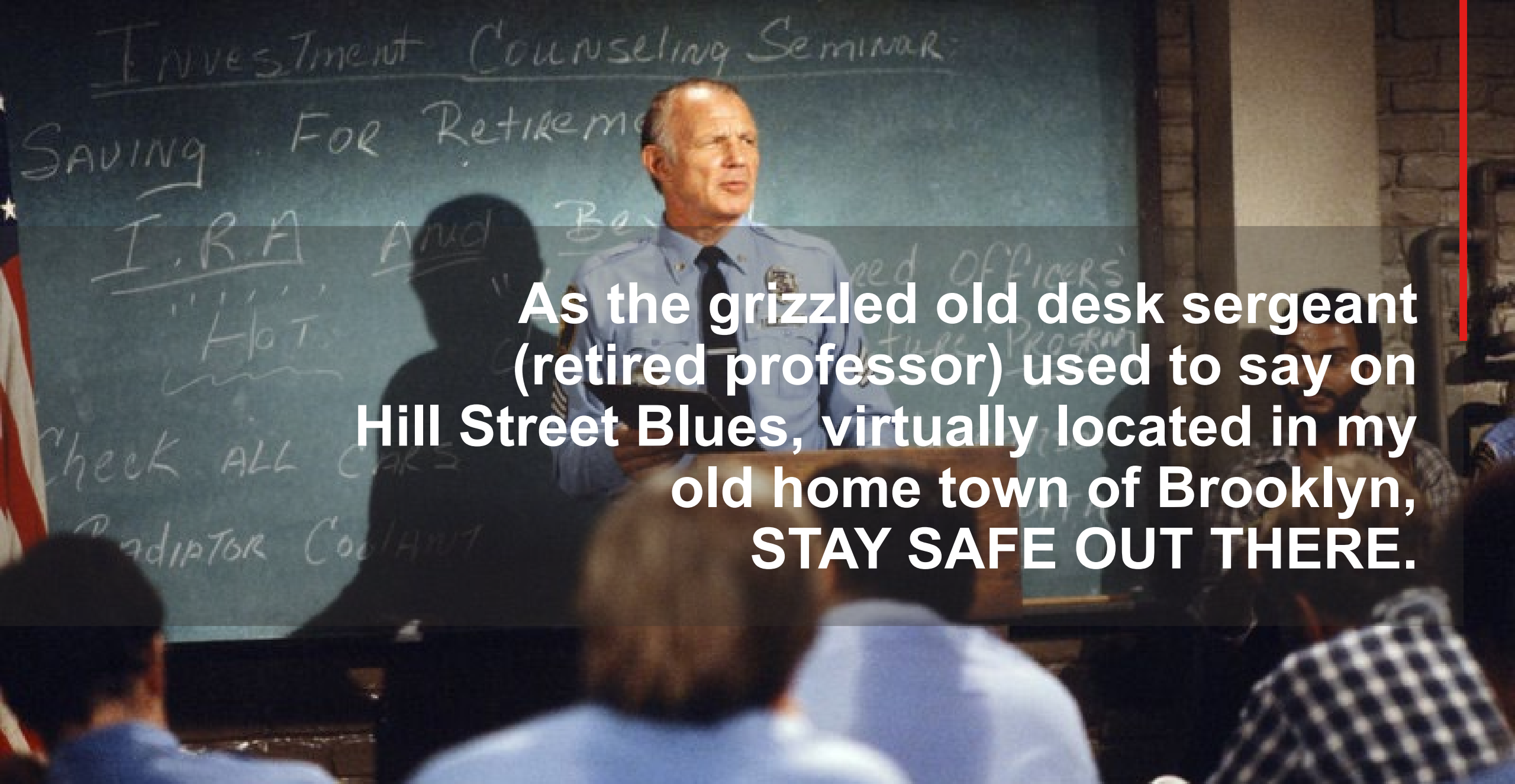
# FURTHER MUSINGS

- Use of secondary sources – Compare use of Laura Burney’s outstanding work on estate misconception as an “explanation” of the use of double fractions, including multi-clause deeds and the fixed versus floating royalty issue with disdain for Williams & Meyers as shown in *Hysaw v. Dawkins* and *Murphy Exploration*.
- Has the estate misconception “legal fiction” or substitute for surrounding circumstances evidence become a canon? A rule? A principle?





# Questions?



**As the grizzled old desk sergeant (retired professor) used to say on Hill Street Blues, virtually located in my old home town of Brooklyn, STAY SAFE OUT THERE.**





# Thank You



**Bruce M. Kramer**

Of Counsel  
(713) 615-8508

[bkramer@mcginnislaw.com](mailto:bkramer@mcginnislaw.com)