

# INTERPRETING OIL AND GAS INSTRUMENTS

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## I. INTRODUCTION

Most oil and gas disputes are over the “meaning” of a contract or conveyance. Ostensibly, the court’s goal when deciding a “meaning” dispute is to ascertain the intent of the parties.<sup>1</sup> The process by which intent is ascertained frequently determines the meaning of the instrument. Manipulating *process* can manipulate *meaning*.<sup>2</sup> This is not a new phenomenon, it has been the case since the parol evidence rule and the doctrine of merger<sup>3</sup> became part of the common law. The important question in the jurisprudential scheme of things is, “When should process override meaning?” For example, courts uniformly determine that process should override intent when the evidence of intent concerns conflicting terms revealed by negotiations leading up to an integrated unambiguous contract. This is more commonly known as the parol evidence rule.<sup>4</sup>

The public interest issue in all process versus intent analyses is deciding when to sacrifice freedom of contract—the free will of the parties—in favor of a frequently ill-defined competing policy. When the instrument to be interpreted is characterized as a “conveyance,” the competing policy is often the ability to look at a recorded document, apply a rule of interpretation, and make a reasonable prediction about ownership. However, in most cases this is expressed as a benefit of the outcome instead of the driving force for selecting a process.

This article evaluates Texas jurisprudence governing the process by

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1. When the transaction is a gift, the focus will be solely on the intent of the grantor, whether a donor, settlor of a trust, or testator of a will. When the transaction is not a gift, the focus will be on the intent of all parties to the transaction: buyer, seller, grantor, and grantee. For example, the *Restatement (Third) of Property* notes that some conveyances are not donative but instead are made pursuant to contract. RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 10.1 cmt. e (2003) (“Although these [contractual transfers] are not donative transfers, and although the transferor is not a donor, various rules stated in this Division, such as the rules regarding the use of extrinsic evidence and the use of constructional preferences in resolving ambiguities, can help determine the meaning and effect of contractual transfers of this type.”).

2. This has been aptly noted in Professor Kramer’s revealing and influential work on canons of construction used to interpret mineral deeds and oil and gas leases. Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 TEX. TECH L. REV. 1, 6 (1993) (“There may be an inverse relationship between the liberality of a court’s acceptance of extrinsic or parol evidence and a court’s use of canons of construction in cases involving the interpretation of a written instrument.”).

3. The doctrine of merger serves the same function in property law that the parol evidence rule serves in contract law. The issue in each case is whether a writing was intended by the parties to be their final statement regarding a transaction. See *GXG, Inc. v. Texacal Oil & Gas*, 977 S.W.2d 403, 415-16 (Tex. App.—Corpus Christi 1998, pet. denied) (discussing the doctrine of merger and its relationship to the parol evidence rule).

4. See generally Mark K. Glasser & Keith A. Rowley, *On Parol: The Construction and Interpretation of Written Agreements and The Role of Extrinsic Evidence in Contract Litigation*, 49 BAYLOR L. REV. 657 (1997).

which courts purport to ascertain the intent of parties to an instrument. The false analytical tool of “ambiguity” is examined as one of the many tautological platitudes that masquerade as analysis in the interpretive process. The use of surrounding circumstances evidence, as it relates to the historical context of the transaction in which the instrument was created, is examined as a frequently overlooked, but potentially determinative, adjunct to any interpretive process that seeks the intent of the parties at the time the conveyance or contract was created. The goal of this article is to demonstrate why parties and the courts should move beyond the tautological platitudes traditionally used to evaluate interpretive issues.

Any useful analysis of jurisprudence governing instrument interpretation must account for underlying public policy. Therefore, we will begin, and end, our study by analyzing the competing policies of instrument interpretation.

## II. THE COMPETING POLICIES OF INSTRUMENT INTERPRETATION: FREE WILL V. PREDICTABILITY

### A. *The Parties’ Free Will to Contract and Convey*

The most explicit and frequently articulated public policy impacting instrument interpretation is the desire to give effect to the free will of the parties to an instrument by recognizing and protecting “freedom of contract.” In the property law context we can call this “freedom of conveyance,” recognizing that the legal effect of most instruments, whether “oil and gas” or otherwise, is the product of contract and property law. The oil and gas “lease” is the best example. Although the instrument constitutes a “conveyance” of the oil and gas, and associated easements to develop the oil and gas, it is also a “contract” which imposes many continuing obligations on the parties to the lease.<sup>5</sup>

“Freedom of contract” and “freedom of conveyance” describe the basic policy of a free society which allows the parties to an instrument to impose, and in turn, consent to whatever terms they may objectively construct for themselves. The exceptions to this freedom concern situations where free will has not in fact been allowed to operate. These include instances of misrepresentation, mistake, duress, undue influence, unconscionability, and lack of capacity.<sup>6</sup> The other exceptions concern

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5. Professor Sullivan notes in his treatise that the oil and gas lease is “a conveyance replete with contractual provisions indicative of an executory bilateral contract” and therefore, “[t]he oil and gas lease partakes of both a contract and a conveyance.” ROBERT E. SULLIVAN, HANDBOOK OF OIL AND GAS LAW § 21, at 69, § 22, at 70 (1955).

6. Professor Farnsworth addresses these issues in his treatise as matters of “behavior” and “status.” E. ALLAN FARNSWORTH, CONTRACTS 217 (4th ed. 2004) (Chapter 4 “Policing the

the exercise of free will which conflicts with a recognized public policy.<sup>7</sup> For example, in the contract law context the resulting agreement may authorize an activity, such as a restraint of trade, that creates unacceptable public impacts that transcend the parties to the agreement.<sup>8</sup> In the property law context the best examples of public policy limitations on free will are the rule against perpetuities and the rule prohibiting unreasonable restraints on alienation.<sup>9</sup>

Promotion of the parties' free will is often tied to interpretation. To give effect to the parties' free will, it is necessary for the court to ascertain their "will." The linkage between free will and interpretation is often made shortly after the court declares the contract or conveyance "unambiguous." Once this is done, the court that just decided the language in the instrument was perfectly clear (unambiguous) simply gives effect to the language chosen by the parties. This purportedly gives effect to the intent of the parties and, in turn, to their free will. Rejecting a contrary interpretation becomes a matter of protecting freedom of contract. For example, the court in *Wood Motor Co. v. Nebel*,<sup>10</sup> interprets a termination clause in a franchise agreement by first noting, "We can discover no ambiguity whatever in the language . . ."<sup>11</sup> The court rejects the other party's interpretation stating, "Under our view, to support that [other party's] theory would be to make a contract for the parties and deny to them the valuable right to contract for themselves."<sup>12</sup> Of course, this process will accurately reflect the parties' free will only to the extent the judge's perceptions of what is "unambiguous" and what the language in the instrument "means" coincide with those of the parties.

This makes ascertainment of the parties' intent to a contract or conveyance a matter of public policy. The court articulates these principles in *Wood Motor* as follows:

Long ago Sir George Jessel wrote: ". . . if there is one thing which

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Agreement").

7. *Id.* at 313 (Chapter 5 "Unenforceability on Grounds of Public Policy").

8. The court in *Singer Manufacturing Co. v. Rios*, 71 S.W. 275 (Tex. 1903) observed that "[f]reedom of contract is the rule, subject to the exception that a party cannot bind himself to do that which is by law prohibited or declared to be illegal, or which is manifestly detrimental to public morals or the public good." *Id.* at 276. In *Singer*, the court upheld the provisions of a mortgage authorizing the creditor to peacefully retake possession of a sewing machine upon the debtor's default. The court framed the issue before it in the following manner: "The stipulation is valid unless it is contrary to public policy." *Id.*

9. This public policy may come from the common law, statute, or constitutional provisions. For example, in Texas the rule against perpetuities is a matter of state constitutional law. TEX. CONST. art. I, § 26 ("Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.").

10. 238 S.W.2d 181 (Tex. 1951).

11. *Id.* at 185.

12. *Id.*

more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.” *Printing and Numerical Registering Co. v. Sampson*, 19 L.R., Equity, 462, 465.<sup>13</sup>

Early Texas cases elevate freedom of contract to a natural law principle: “The citizen has the liberty of contract as a natural right which is beyond the power of the government to take from him.”<sup>14</sup>

### B. *The Title Examiner’s Quest for Predictability*

The competing policy is the desire for predictability that can be obtained by adopting bright-line objective rules of interpretation. This policy is typically mentioned when the interpretation problem can be classified as a “title” issue. For example, in *J. Hiram Moore, Ltd. v. Greer*,<sup>15</sup> the court held a deed ambiguous which purported to convey an interest in a described tract of land followed by a general grant of “all of grantors [sic] royalty and overriding royalty interest in all oil, gas and other minerals in the above named county . . . .”<sup>16</sup> Usually the ambiguous or unambiguous “analysis”<sup>17</sup> primarily impacts the types of evidence that can be considered to define the terms of the conveyance and its meaning. In this case, however, it has a much larger impact on substantive property law principles.<sup>18</sup>

By declaring the conveyance “ambiguous” the meaning of the

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13. *Id.*

14. *St. Louis Sw. Ry. Co. v. Griffin*, 171 S.W. 703, 704 (Tex. 1914); *Wood Motor*, 238 S.W.2d at 186 (quoting *Griffin*).

15. 172 S.W.3d 609 (Tex. 2005).

16. *Id.* at 615. The court was influenced by the grantor’s lack of any ownership in the described tract: “The deed in effect states Greer conveys nothing, and that she conveys everything. We cannot construe this deed as a matter of law.” *Id.* at 614.

17. Addressing whether something is ambiguous is often more “conclusion” than “analysis.” As in *Greer* the process consists of a justice looking at the language and concluding it is “ambiguous,” as four justices concluded, *Greer*, 172 S.W.3d at 614, or it is “unambiguous,” as the two dissenting justices concluded, *id.* at 616 (Owen, J. and Medina, J., dissenting), or that “hard cases make bad law,” as concurring Justice Hecht observed, *id.* at 614 (Hecht, J., concurring).

18. This case would not have attracted much attention had the trial court been able to avoid severing the interpretation issue from the rescission and reformation claims. If the trial court had found a defect in the bargaining process (justifying rescission), or a mistake in the statement of their resulting bargain (justifying reformation), the impact of the case would have been limited to its unique facts. Normally this is also the impact of declaring an instrument “ambiguous” because you can seldom predict, from one case to another, the extrinsic evidence that will be available to resolve the ambiguity. The difference in this case is that similar general conveyance language had already been given a particular meaning, in prior cases, after being declared “unambiguous.” Those holdings then became the basis for title examiners making predictions regarding the impact of similar “unambiguous” language in other conveyances.

conveyance becomes an issue of fact for a jury to decide.<sup>19</sup> This means that the general granting language, covering any interest the grantor owns in Wharton County, Texas, may be limited by the interpretive process. As noted by the dissent, prior cases gave effect to such general grants.<sup>20</sup> As noted by the amici title examiners, they relied upon these prior cases when passing on titles containing general granting language.<sup>21</sup> These are actually two separate issues. The first issue is the determination of whether doubtful cases should be resolved against finding an ambiguity so the title issue can be resolved as an issue of law. The second issue, which is not the focus of this article, is when should courts be willing to alter an interpretive rule that has been legitimately and properly relied upon by the practicing bar to advise their clients and plan their affairs.<sup>22</sup> This second rule goes to the “stability” of titles once established by an analysis of the applicable rules. Although the two are interrelated – because stability aids predictability – predictability is an issue that influences the sort of “rule” that is selected in the first instance.

### C. *The Practical Impact of the Competing Policies*

Maximizing a predictability policy requires that an instrument be declared “completely integrated” and “unambiguous”<sup>23</sup> so it can be interpreted by applying an established set of interpretive rules to the language contained within the instrument. Consideration of any evidence other than the words of the instrument would thwart predictability. Uniform outcomes become the goal as opposed to any real attempt to ascertain the intent of the parties.

The basic problem with the competing policies of predictability and free will is that one can only be maximized at the expense of the other. When pressed to select among these competing policies, courts opt for a policy favoring the free will of the parties. This is perhaps best illustrated by the Texas Supreme Court’s rejection of its mechanical, rule-oriented approach to “interpretation” in *Alford v. Krum* in favor of a more holistic, less “predictable” approach in *Luckel v. White*.<sup>24</sup> It is also

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19. The court in *Greer* holds, “Given the deed’s ambiguity, the trial court erred in granting summary judgment. A jury should therefore hear evidence and determine the parties’ intent.” *Greer*, 172 S.W.3d at 614. This assumes, however, there will be additional extrinsic evidence to consider which the parties dispute.

20. “Our jurisprudence has given effect to geographic grants for more than 100 years.” *Id.* at 618 (Owen, J., dissenting).

21. “[Amici] tell us that the failure to give effect to the plain meaning of the deed before us will lead to severe adverse consequences including the failure of previously certain titles and security interests and a proliferation of litigation that can only be resolved by a trial to determine the meaning of ‘ambiguous’ instruments.” *Id.*

22. This is where I would apply a principle I routinely share with my property students: “The only thing worse than a bad rule of property is one that changes.”

23. Even when it may, in fact, be “ambiguous.”

24. *Alford v. Krum*, 671 S.W.2d 870 (Tex. 1984), *overruled by Luckel v. White*, 819 S.W.2d

illustrated by the Texas Supreme Court's rejection of the San Antonio Court of Appeals' more mechanical, rule-oriented "two-grant" approach in *Concord Oil Co. v. Pennzoil*.<sup>25</sup> The court of appeals was adamant that its two-grant approach be applied to promote "[t]he public interest in certainty in land titles . . . ."<sup>26</sup> This was a predictability policy the court of appeals found to be "overriding and paramount."<sup>27</sup> The Texas Supreme Court did not agree and reversed; a plurality of the court rejected the two-grant analysis, and the court instead promoted a free will policy built around "a unifying principle: the entire document must be examined to glean the parties' intent."<sup>28</sup>

When urged by amici title examiners in *Concord* to adopt "firm" or "bright-line" rules to resolve interpretive issues, the Texas Supreme Court rejected their invitation:

Bright-line tests that focus only on the predominance of one clause over another or that strictly construe each provision in a conveyance as a separate, independent grant, or that choose the larger of conflicting fractions are arbitrary. They will not always give effect to what the conveyance provides as a whole. The principles set out in *Luckel* and the approach taken in *Garrett* are designed to give effect to the intent of the parties as actually expressed within the four corners of the conveyance and to harmonize provisions that appear to conflict.<sup>29</sup>

The only acknowledged compromise between predictability and free will has been the rule that the search for intent is a search for the "objective" intent of the parties as opposed to their "subjective" intent.<sup>30</sup> This too was acknowledged by the court in *Concord*: "the intent of the

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459 (Tex. 1991). These cases are discussed fully in subsequent sections of this article.

25. *Concord Oil Co. v. Pennzoil Exploration & Prod. Co.*, 878 S.W.2d 191 (Tex. App.—San Antonio 1994), *rev'd*, 966 S.W.2d 451 (Tex. 1998). The *Concord* case is discussed fully in subsequent sections of this article.

26. *Id.* at 195.

27. *Id.*

28. *Concord*, 966 S.W.2d at 454.

29. *Id.* at 460-61.

30. Professor Farnsworth notes, "[I]f the parties attached different meanings to that language, the court's task is the more complex one of applying a standard of reasonableness to determine which party's intention is to be carried out at the expense of the other's." E. ALLAN FARNSWORTH, *CONTRACTS* § 7.9, at 452 (4th ed. 2004). Therefore, the goal will be to offer whatever evidence is available and relevant to establish the "standard of reasonableness" that should be used to define what will become the objective intent of the parties. This assumes there is no fault-based reason to give effect to an "innocent" party's subjective intent that was known by the other party, or which, under the facts, the other party should have known. *Id.* at 449 ("a party that makes a contract knowing of a misunderstanding is sufficiently at fault to justify that party's being subjected to the other party's understanding."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 201(2) (1981) (stating that terms in an agreement should be interpreted in accordance with the meaning attached by a party if that party had no reason to know of a different meaning and the other party knew or should have known the first party attached a different meaning to the terms).

parties must be determined from what they expressed in the instrument, read as a whole, and that the actual, subjective intent of the parties will not always be given effect even if we were able to discern that subjective intent.”<sup>31</sup> As the following sections will demonstrate, perhaps the best guide for ascertaining the parties’ intent to an instrument is the consideration of all relevant evidence which assists in defining the *objective* intent of the parties. This would reflect the proper balance struck between the predictability and free will policies and eliminate the temptation to further tip the scales through artificial “ambiguity” determinations designed to exclude relevant evidence of objective intent.

### III. FROM *ALFORD V. KRUM* TO *CONCORD OIL V. PENNZOIL*

#### A. *Alford v. Krum: The Price of Predictability*

If predictability were the main concern of courts and the practicing bar,<sup>32</sup> then *Alford v. Krum*<sup>33</sup> would still be good law.<sup>34</sup> In *Alford*, a 1929 mineral deed granted a “one-half of one-eighth interest in and to all the oil, gas and other minerals . . . .”<sup>35</sup> This “granting clause” was followed by a “present lease” clause noting the conveyance “covers and includes 1/16 of all the oil royalty and gas rental or royalty due to be paid under the terms of said lease.”<sup>36</sup> This was followed by a “future lease” clause which acknowledged the grantor and grantee would each own “a one-half interest in all oil, gas and other minerals in and upon said land, together with one-half interest in all future rents.”<sup>37</sup> The interpretive dispute concerned whether the grantee received a one-sixteenth mineral interest (“one-half of one-eighth”) or a one-half mineral interest. The court held, “We must resolve the conflict and lack of clarity in favor of the clear and unambiguous language of the granting clause and hold that the deed

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31. *Concord*, 966 S.W.2d at 454.

32. In a survey conducted by the Oil, Gas and Mineral Law Section of the Texas Bar, *Alford v. Krum* was identified as one of the “most regrettable” oil and gas law decisions of the Texas Supreme Court. Robert Bledsoe & John Scott, *The Ten Most Regrettable Oil and Gas Decisions Ever Issued by the Texas Supreme Court—and the “Winner”—Based on a Survey*, EIGHTH ANNUAL ADVANCED OIL, GAS AND MINERAL LAW COURSE, STATE BAR OF TEXAS (1990).

33. 671 S.W.2d 870 (Tex. 1984), *overruled by* Luckel v. White, 819 S.W.2d 459 (Tex. 1991).

34. In a recent developments article presented in 1995, where I reported on the court of appeals opinion in *Concord*, I commented on the “predictability” issue as follows:

Members of the Texas oil and gas bar should be careful what they wish for—their wish might come true! The author predicts that in the years to come Texas oil and gas attorneys, at least those who examine titles, may actually long for the days of *Alford v. Krum*.

David E. Pierce, *Developments in Nonregulatory Oil and Gas Law: The Continuing Search for Analytical Foundations*, 57 INST. ON OIL & GAS L. & TAX’N 1-1, 1-22 (1996).

35. *Alford*, 671 S.W.2d at 871.

36. *Id.* at 872.

37. *Id.*

conveyed only a perpetual one-sixteenth mineral interest to Mang [grantee].”<sup>38</sup> The court arrived at this conclusion by applying the following interpretive rule:

In cases involving the construction of mineral deeds, the “controlling language” and the “key expression of intent” is to be found in the granting clause, as it defines the nature of the permanent mineral estate conveyed. It logically follows that when there is an irreconcilable conflict between clauses of a deed, the granting clause prevails over all other provisions.<sup>39</sup>

The *Alford* rule promotes predictability by ignoring language in other parts of the deed that appear to conflict with the terms of the granting clause. This means the practicing bar, seeking title certainty, could resolve the thousands of mineral deed interpretive problems by simply ignoring language in the present lease and future lease clauses of the deed. The three dissenting justices in *Alford* objected to the majority’s failure to give effect to all the language in the deed, and thereby give effect to what they felt was the obvious intent of the parties to the deed.<sup>40</sup> The majority held the present and future lease clauses must be ignored because otherwise they muddle “the clear and unambiguous language of the granting clause.”<sup>41</sup> This allows the court to apply the *Alford* rule as a matter of law to the “unambiguous” deed. Without the *Alford* rule, the deed contains a future lease clause which “as a whole, is unclear . . . .”<sup>42</sup> Because it conflicts with the granting clause, a judge might be inclined to declare the conveyance “ambiguous” to allow the court to conduct a wider search of the facts for the parties’ meaning. However, this result is avoided by declaring the present and future lease clauses “repugnant” to the granting clause and then, in effect, striking them out of the deed. Once they are eliminated from the analysis, we are left with “the clear

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38. *Id.* at 874.

39. *Id.* at 872 (citations omitted).

40. The dissenting justices, like the majority, thought the conveyance was unambiguous: “There is no ambiguity in the deed that grants a one-sixteenth mineral estate so long as there is an outstanding lease and a one-half mineral estate upon the lease’s termination.” *Id.* at 875 (Pope, C.J., dissenting). They avoid ambiguity by applying a two-grant analysis with the first grant apparently being a defeasible interest “so long as there is an outstanding lease” and then a new interest vesting, through the future lease clause, once the lease terminated. If this analysis was accepted, and the future lease clause was not held to be a present conveyance of the lessor’s possibility of reverter, the interest would violate the rule against perpetuities. See generally *Peveto v. Starkey*, 645 S.W.2d 770 (Tex. 1982) (holding a deed granting a non-participating royalty, to take effect when production ceased in paying quantities, created a springing executory interest that was not certain to vest within the limits of the rule). However, in *Luckel v. White*, 819 S.W.2d 459, 464 (Tex. 1991), the court suggests: “Since the deed makes a present conveyance [in the future lease clause] of the possibility of reverter, there is no violation of the rule against perpetuities.”

41. *Alford v. Krum*, 671 S.W.2d 870, 874 (Tex. 1984), *overruled by Luckel v. White*, 819 S.W.2d 459 (Tex. 1991).

42. *Id.* at 873-74.

and unambiguous language of the granting clause . . . .”<sup>43</sup> This allows the court to remove conflicting language from the express terms of the deed *before* it considers whether it is ambiguous.

All of this should have pleased even the most hard core title examiner looking for predictability in the recorded document. The court applied a rule to ensure the document remained “unambiguous” and then used the same rule to assign a generic meaning to the language in the document. Apparently even title examiners flinched at a rule that would so readily discount the objective expressions of the parties found within the four corners of their deed.

*B. Luckel v. White: Alford, and Predictability, Take a Hit*

The court in *Luckel v. White* refused to apply the *Alford* analysis to a conveyance with present and future lease language that could be construed as repugnant to the granting, habendum, and warranty clauses.<sup>44</sup> Instead, four justices of the court stated, “We reverse the court of appeals, overrule *Alford v. Krum*, and hold that the so-called ‘future lease’ clause was effective to convey a one-fourth interest in all royalties as to future leases.”<sup>45</sup> Four dissenting justices believed the issue was proper “harmonization” of the conveyance which would avoid an *Alford* “repugnant to the grant” showdown.<sup>46</sup> What we ended up with were eight justices looking at the same “unambiguous” deed<sup>47</sup> with four concluding it meant “x” and four concluding it meant “y.” The deciding vote of concurring Justice Mauzy reflected a concern that the court should give effect to the free will of the parties. Ultimately, Justice Mauzy joined in overruling *Alford* because the holding limited consideration of all language in the deed. Because Justice Mauzy also concluded that the unambiguous document meant “x,” when his opinion is joined with that of the plurality, we learn that this document has always clearly and unambiguously meant “x,” not “y.” *Alford* is dead. Harmony, or at least harmonization, prevails.

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43. *Id.* at 874.

44. *Luckel v. White*, 819 S.W.2d 459, 464 (Tex. 1991) (“Upon further consideration, we have concluded that the majority in *Alford* incorrectly failed to harmonize the provisions under the four corners rule and then erred in applying the ‘repugnant to the grant’ rule in disregard of the future lease clause.”).

45. *Id.* at 461.

46. *Id.* at 466 (Phillips, C.J., dissenting).

47. The plurality opinion notes, “There is no contention that the deed is ambiguous.” *Id.* at 461. The dissenting opinion notes, “Rather than interpreting the future-lease clause as an additional grant, I would give effect to the clear and unambiguous language of the granting, habendum, and warranty clauses, all of which express the intent to grant a permanent 1/32nd interest.” *Id.* at 466.

*C. Concord Oil v. Pennzoil: Is Alford Looking Good Yet?*

The Texas Supreme Court's opinion in *Concord Oil Co. v. Pennzoil Exploration and Production Co.*<sup>48</sup> is another 4-1-4 decision interpreting language in a deed that was determined to be an "unambiguous" conveyance. The deed granted "an undivided one-ninety sixth (1/96) interest in and to all the oil, gas and other minerals in and under, and that may be produced from" described land.<sup>49</sup> A subsequent portion of the deed provided the following:

While the estate hereby conveyed does not depend upon the validity thereof, neither shall it be affected by the termination thereof, this conveyance is made subject to the terms of any valid subsisting oil, gas and/or mineral lease or mineral lease or leases on above described land or any part thereof, but covers and includes one-twelfth (1/12) of all rentals and royalty of every kind and character that may be payable by the terms of such lease or leases insofar as the same pertain to the above described land, or any part thereof.<sup>50</sup>

The issue was whether the reference to a one-twelfth "of all rental and royalty" indicated something more than a one ninety-sixth mineral interest was intended by the parties.

The trial court and court of appeals applied a "two-grant" analysis and concluded a one ninety-sixth mineral interest (grant #1) was conveyed along with a right to one-twelfth of the rental and royalty (grant #2), giving literal effect to all the language as separate conveyances.<sup>51</sup> The supreme court, in a 4-1-4 split, rejected a two-grant analysis and instead sought to harmonize the varying fractions by concluding the parties intended one ninety-sixth to really mean one-twelfth.<sup>52</sup> As discussed in the section that follows, apparently the only thing that everyone agreed upon in the *Alford* and *Concord* cases was that the conveyances at issue were *not* ambiguous.

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48. 966 S.W.2d 451 (Tex. 1998).

49. *Id.* at 453.

50. *Id.* at 451.

51. *Concord Oil Co. v. Pennzoil Exploration & Prod. Co.*, 878 S.W.2d 191, 196 (Tex. App. 1994), *rev'd*, 966 S.W.2d 451 (Tex. 1998) ("We hold that the deed conveyed only a 1/96 mineral interest, in addition to the 1/12 interest in the existing lease which expired when the lease terminated."). The court of appeals was particularly influenced by the absence of a "future lease" clause that would typically contain language supporting a right to one-twelfth of the production in the future. This would have provided further evidence of intent regarding the quantity of mineral interest the parties intended and would have aligned the conveyance with several prior holdings of the Texas Supreme Court. *Id.* at 195 ("The case before us is entirely different because the 1937 Crosby-Southland deed does not contain a future-lease clause.").

52. *Concord*, 966 S.W.2d at 459.

## IV. TAUTOLOGICAL PLATTITUDES V. REASONED ANALYSIS

A. *The Artificial Role of an “Ambiguity Analysis”*

Is it not odd that under the current state of the law in Texas the only time there is any real attempt to give effect to the intent of the parties is when their instruments are so poorly drafted as to be deemed “ambiguous”? Does this mean the better drafted instruments are not worthy of a court’s efforts to ascertain the intent of the parties? Apparently the better drafted instruments merely serve the function of triggering the court’s conclusion they are “unambiguous” so they can be processed through whatever the current 4-1-4 split in the court says they “mean.” Oil and gas lawyers who are truly concerned that their documents will be “interpreted” instead of “processed” will begin each document with the following recitation: “THE PARTIES INTEND THIS INSTRUMENT TO BE **AMBIGUOUS**.”

The problem with the current jurisprudence in Texas is the instrument merely provides the background for the current litigants to argue for a judicial pronouncement of its meaning as a matter of law. The goal of each party is to “win” the interpretive “process” war instead of seeking to interpret the instrument. With each party arguing the instrument is “unambiguous” so they can engage in their “matter-of-law” battles, the language of the instrument merely becomes a side-show for triggering the interpretive tautological platitude they hope will ultimately be applied to support their position. The process actually prevents reasoned analysis of what the court always says is the goal: ascertaining the intent of the parties. Although the use of this matter-of-law interpretive charade is demanded by the practicing bar, argued for by litigants, and pronounced by justices (plurality, concurring, and dissenting alike), it has consistently eluded the title certainty which they all purport to seek.

B. *A Functional Alternative: All Relevant Evidence Regarding Objective Intent*

Perhaps it is time to do something that may seem, at least facially, radical: eliminate “ambiguity” from the analysis, and the process, altogether. Eliminating the ambiguity analysis, however, is not as radical as it seems because it has never been an “analysis” but rather a convenient “conclusion.” The process would still apply the parol evidence rule and merger doctrines, and the inquiry would be, as it has always been, whether the parties intended the words in the instrument to be *all the words* they wanted to use to express their agreement. This is the first step of the analysis. There is no need for any sort of ambiguity analysis;

we simply ascertain whether the words used were intended by the parties to be the extent of their agreement.<sup>53</sup>

If we conclude the parties intended the instrument to contain all the terms of their agreement, we proceed to step two to consider all relevant evidence as to what those terms mean. At this stage the parol evidence rule or doctrine of merger will exclude evidence that seeks to contradict the integrated or merged instrument and, if it is deemed to be a completely integrated or merged instrument, the rule or doctrine will limit evidence that seeks to supplement the instrument. Beyond these limitations, however, any relevant evidence, in any acceptable form, should be considered by the court in seeking to ascertain the intent of the parties. This may not promote predictability, but it will at least provide an honest attempt to promote the policy of free will.

Arguably considering all relevant evidence would promote title certainty as much as the current shifting “matter-of-law” approach to these issues. The title examiner could at least read the instrument, ascertain the objective circumstances surrounding the transaction, and make an educated judgment call on how imprecise language is likely to be interpreted. The examiner would not have to anticipate the latest theory, argument, or twist a majority of the court will find convincing to change interpretive issues as a matter of law. The predictability may be less when we seek to interpret the instrument, but the risk associated with the law would be much less, as long as the guiding principle is “consideration of all relevant evidence that assists in ascertaining the intent of the parties.”

To adopt such an approach the court need not engage in a search for the parties’ subjective intent, except in situations where there is objective evidence that one party was aware of the other party’s subjective intent.<sup>54</sup> In the vast majority of cases, the only evidence that will be available to the parties will be objective in nature. Often the original parties to the transactions will not be available; they have long since passed on and all that will be available is the objective historical record of events. Often, the evidence available in these cases will not be disputed; the only issue is the interpretive conclusion that should be drawn from the undisputed evidence.<sup>55</sup> This should allow courts to “interpret” many instruments as a

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53. These are integration and merger issues. Although not addressed in the case, the deed at issue in *J. Hiram Moore, Ltd. v. Greer*, 172 S.W.3d 609 (Tex. 2005) was, at most, a *partial* integration (merger) of the parties’ agreement because it expressly contemplates going outside of the written document to identify what is being conveyed. This means the terms of all other documents that confer on grantor a “royalty and overriding royalty interest in all oil, gas and other minerals” would have to be examined to identify the subject matter of the instrument being interpreted. *Id.* at 612.

54. See *supra* notes 30-31.

55. For example, in *Concord* a “fact” not contained within the four corners of the deed was

matter of law since the issue is not whether a fact exists, but rather the conclusion that should be drawn from the fact, considering its relation to all other undisputed facts. If only one reasonable conclusion can be drawn from the undisputed facts, the issue is a matter of law for the court.<sup>56</sup>

One of the basic problems with the existing analysis is it assumes one piece of evidence will be outcome-determinative. Presumably this is done to support a rule-oriented approach to defining rights in instruments. The true process is usually one of considering the weight of all the evidence. Some evidence will support one conclusion; other evidence may support a different conclusion.<sup>57</sup> It is a matter of judgment. The section that follows addresses the types of relevant extrinsic evidence that will often be useful in ascertaining the objective intent of the parties to an instrument.

#### V. ASCERTAINING THE INTENT OF THE PARTIES

Once the terms of the instrument have been identified applying the parol evidence rule or the doctrine of merger, the next task is to ascertain what the parties meant when they used those terms. Although this process of ascertaining meaning has been influenced heavily by the “ambiguity analysis,” most jurisdictions, including Texas, recognize a role for objective, independently verifiable evidence of the “surrounding circumstances” that may have influenced the parties at the time the instrument was created.

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that on the day before the conveyance the grantor had been conveyed a one-twelfth mineral interest. *Concord*, 966 S.W.2d at 453. Although the “meaning” of this fact was disputed by the parties, the fact itself was not disputed.

56. The *Restatement (Second) of Contracts* provides the following:

A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.

RESTATEMENT (SECOND) OF CONTRACTS § 212(2) (1981). Comment e. expands on the black-letter provisions:

Even though an agreement is not integrated, or even though the meaning of an integrated agreement depends on extrinsic evidence, a question of interpretation is not left to the trier of fact where the evidence is so clear that no reasonable person would determine the issue in any way but one. But if the issue depends on evidence outside the writing, and the possible inferences are conflicting, the choice is for the trier of fact.

*Id.* at cmt. e.

57. These problems arise even though there is no dispute concerning the validity or relevancy of the evidence. Party A interprets facts 1, 2, and 3 to mean “x.” Party B interprets the same exact facts 1, 2, and 3 to mean “y.” The judge is called upon to evaluate the same facts and determine that they mean “x,” “y,” or perhaps “z.” The judge must weigh the evidence to arrive at a reasonable conclusion. This is different from having the judge merely select a rule of law that best coincides with the facts to declare what the parties meant.

### A. “Surrounding Circumstances” Evidence

Surrounding circumstances evidence consists of any relevant fact existing at the time the parties entered into their instrument that may assist in ascertaining what the parties intended the instrument to mean. It is “extrinsic” evidence because its existence is not acknowledged within the four corners of the instrument being interpreted.<sup>58</sup>

#### 1. The *Concord* Deed

Although courts infrequently discuss the role of surrounding circumstances evidence, it is frequently used by the courts in their interpretive processes. For example, nowhere in any of the opinions in the *Concord* case<sup>59</sup> do the courts focus on their use of extrinsic surrounding circumstances evidence to interpret the deed at issue. However, in each opinion, where the court is purporting to interpret an unambiguous deed, references are made to critical facts nowhere to be found in the deed.

In the court of appeals’ opinion it relies on the following surrounding circumstances to support its conclusions:

(1) The day before the August 5, 1937 grant the grantor had been granted a 1/12 mineral interest in the land.<sup>60</sup>

(2) At the time the deed was executed, the minerals were subject to an existing oil and gas lease.<sup>61</sup>

(3) In response to *Caruthers v. Leonard*, lawyers conveying mineral interests that were subject to an existing oil and gas lease developed the three-grant deed which included a granting clause, a present lease clause, and a future lease clause.<sup>62</sup>

(4) *Caruthers* was reversed in 1943 by *Harris v. Currie*;<sup>63</sup> thus, it was still good law in 1937 when the conveyance was made.

(5) The deed does not contain what industry custom and usage would label a “future lease” clause.<sup>64</sup>

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58. See David E. Pierce, “Surrounding Circumstances” Evidence in *Natural Resources Litigation and the Effective Use of Daubert to Manage Expert Testimony*, 51 ROCKY MTN. MIN. L. INST. 13-1 (2005).

59. *Concord Oil Co. v. Pennzoil Exploration & Prod. Co.*, 878 S.W.2d 191 (Tex. App. 1994), *rev’d*, 966 S.W.2d 451 (Tex. 1998).

60. *Id.* at 192. (“All parties trace their title to A.B. Crosby, who received a ½ mineral interest from Emilia T. de la Garza on August 4, 1937. The following day, August 5, Crosby executed a deed to Southland . . .”).

61. *Id.* (“At issue in this oil and gas case is the size of a mineral interest conveyed by a 1937 deed executed while the grantor’s interest was subject to a producing lease.”).

62. *Id.* at 193.

63. *Id.*

64. *Id.* at 195 (“The case before us is entirely different because the 1937 Crosby-Southland deed does not contain a future-lease clause.”).

(6) The “two-grant” doctrine was in existence at the time the deed was executed.<sup>65</sup>

None of these matters were identified in the deed at issue. Is there any doubt that a court would consider in some fashion this sort of independently verifiable information in the chain of title on the date the conveyance was made? Must courts ignore the grantor’s source of title or the existence of an oil and gas lease when interpreting the language within the four corners of the deed at issue?

Also note that the existence, meaning, and status of the *Caruthers* case, and the two-grant doctrine, are not being argued as *legal* principles but rather are presented as matters of *fact*. The parties are not presenting these as *legal conclusions* but rather as *facts* the court should consider to interpret the deed. Therefore, it would be appropriate to receive expert testimony regarding the status of the “law” at the time of the conveyance because it is being presented merely to establish that such law existed as opposed to seeking to apply the law to a set of facts. This could also be done through an appropriate request for judicial notice.<sup>66</sup>

The court also recognizes the industry “usage”<sup>67</sup> that developed in response to the *Caruthers* case: the development and use of a special form of conveyance containing a granting clause, present lease clause, and a future lease clause. Quoting the scholarship of Professor Laura Burney, the court notes: “Thus, the three-grant deed came into vogue, not to provide parties with a mode for making separate conveyances in one deed, but to insure that a single grant of a fractional mineral interest included a proportionate interest in benefits under existing and future leases.”<sup>68</sup> The court relied upon this analysis to distinguish the deed at

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65. *Id.* (“[T]he two-grant doctrine . . . has been part of Texas law for at least half a century.”).

66. When relying upon historical context to interpret an instrument, the necessary information should always be established as a matter of *fact* as opposed to being left to *argument*. For example, assume you have a case concerning the interpretation of a 1942 conveyance and the status of *Caruthers v. Leonard*, as of 1942, is important to your theory. You do not want to leave these matters to mere argument. Instead, you want to establish, *as a matter of fact*, what the “law” was in 1942, including whether *Caruthers* had in fact been overruled 15 years earlier in *Hager v. Stakes*, or would not be overruled until December 15, 1943 in *Harris v. Currie*. Although these topics are proper for the use of expert testimony, in many instances a more efficient, and in some ways more effective, technique will be to establish the necessary historical context through judicial notice. *See generally* Olin Guy Wellborn III, *Judicial Notice Under Article II of the Texas Rules of Evidence*, 19 ST. MARY’S L. J. 1 (1987).

67. The term “usage” is used to describe what is often referred to as “custom and usage” or “custom and practice.” David E. Pierce, *Defining the Role of Industry Custom and Usage in Oil & Gas Litigation*, 57 SMU L. REV. 387, 389-90 (2004).

68. *Concord Oil Co. v. Pennzoil Exploration & Prod. Co.*, 878 S.W.2d 191, 193 (Tex. App.—San Antonio 1994), *rev’d*, 966 S.W.2d 451 (Tex. 1998) (quoting Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S. TEX. L. REV. 73, 86 (1993)).

issue noting that “the 1937 Crosby-Southland deed does not contain a future-lease clause.”<sup>69</sup>

Like the court of appeals, the Texas Supreme Court also relied heavily on surrounding circumstances. The court makes the following observations:

The deed was executed on August 5. The day before, the grantor Crosby had acquired an undivided 1/12 interest in the minerals under a deed identical to the Concord deed in all respects but one: the fraction in the granting clause. The granting clause in the deed to Crosby contained the fraction “one-twelfth (1/12)” rather than 1/96.

The parties have stipulated that at the time each of these deeds was executed, an oil and gas lease that provided for a one-eighth royalty was outstanding. That lease expired before any of the parties to this case entered into leases covering Survey Sixty-four.<sup>70</sup>

The court also notes the possible influence of *Tipps v. Bodine*<sup>71</sup> on the approach taken by the grantor in structuring its deed:

The decision in *Tipps*, which helped to foster this so-called “estate misconception,” went so far as to say that the use of differing fractions was the proper method of conveyance when a mineral lease was outstanding at the time of the grant. . . . The *Tipps* court thus blessed the use of “1/16” in the granting clause and “1/2” in subsequent clauses when the grantor owned the possibility of reverter in the entire mineral estate and wished to convey 1/2 of that interest at a time when the property was subject to a mineral lease providing for a 1/8 royalty. *Tipps* was decided in 1936, and the Concord deed was executed in 1937. Under the rationale of *Tipps*, it would have been appropriate for Crosby to have inserted “1/96” in the granting clause and “1/12” in other provisions of the Concord deed if he intended to convey a 1/12 interest in the minerals.<sup>72</sup>

The court concludes it is “mindful of extant circumstances at the time the Concord and other deeds were executed.”<sup>73</sup> Although the court does not view this evidence as determinative, it is “helpful and instructive . . . .”<sup>74</sup> This would appear to be the appropriate role of surrounding circumstances evidence: the express language of the document is obviously critical and where we begin while surrounding circumstances

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69. *Id.* at 195. The court’s implicit reasoning was that since the deed at issue did not contain a future lease clause, then cases addressing the “three-grant deed” problem noted by Professor Burney should not apply. This set the stage for the court’s focus on the “two-grant doctrine” it ultimately uses to interpret the deed.

70. *Concord*, 966 S.W.2d at 453.

71. 101 S.W.2d 1076 (Tex. Civ. App. 1937).

72. *Concord*, 966 S.W.2d at 460 (citation omitted).

73. *Id.*

74. *Id.*

evidence will often be “helpful and instructive” in determining what the parties meant when they used the express language.

The *Concord* case is particularly instructive concerning the importance of surrounding circumstances evidence. The very outcome of the *Concord* case turned on a single surrounding circumstance which was the deciding factor for Justice Enoch who cast the deciding vote with the plurality as the concurring justice in the 4-1-4 split. The critical fact was that the grantor only owned a one twelfth mineral interest at the time it conveyed the interest in dispute. If the two-grant theory of the dissenting justices is applied,<sup>75</sup> this would result in an over-conveyance which Justice Enoch believed would be an unreasonable interpretation.<sup>76</sup> Nothing within the four corners of the deed being interpreted revealed what the grantor owned at the time the conveyance was made. Therefore, this information was clearly “extrinsic” to the deed and could only become part of the mix of information as a relevant “surrounding circumstance” at the time the deed at issue was granted. As a result, the *Concord* case is an example of how extrinsic evidence proved to be the deciding factor in determining the meaning of an unambiguous deed.

## 2. *Sun Oil Co. v. Madeley* and Surrounding Circumstances

The Texas Supreme Court, in *Sun Oil Co. v. Madeley*,<sup>77</sup> addresses a common state of affairs: “Although Sun and lessors cannot agree on the interpretation of the lease, they do agree that the lease is unambiguous.

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75. This is the approach Justice Enoch supported prior to the rehearing, and the approach he would support but for the fact it could have resulted in an over-conveyance at the time it was made. *Id.* at 463-64 (Enoch, J., concurring).

76. Justice Enoch reasoned as follows:

We cannot give the Crosby deed the reading that the dissent believes is correct—that the deed makes two conveyances—because that reading is unreasonable. Assuming that the deed makes two conveyances, we would have the granting clause conveying a 1/96 mineral interest. But we would also have the “subject to” clause simultaneously conveying an additional 1/12 (or 8/96) interest in rentals and royalties under the then-current lease. This reading produces an over-grant.

At the time of Crosby’s deeds to his grantee, Southland, a mineral lease covered the property. The lessee held title to the mineral estate subject to the possibility that title would revert to Crosby and the other lessors in the future. Crosby, therefore, owned the possibility of a 1/12 mineral interest. Crosby’s reverter interest *included* the right to royalties under the then-current lease, as do all reverter interests in the absence of language to the contrary. . . . Therefore, the Crosby deed’s granting clause transferred to Southland 1/96 of Crosby’s reverter interest, carrying with it a corresponding 1/96 share of the royalties due under the then-current lease. . . . If the “subject to” clause were a separate conveyance, it would transfer to Southland an additional 8/96 interest in the royalties due under the then-current lease. Under the dissent’s construction, the granting clause and the “subject to” clause would convey 1/96 plus 8/96 for a total of 9/96 interest in the royalties, a larger interest than Crosby owned. This construction is not reasonable.

*Id.* at 464.

77. 626 S.W.2d 726 (Tex. 1981).

We also consider the lease unambiguous.”<sup>78</sup> The ultimate issue was whether an oil and gas lease reserved to the lessor, in addition to its royalty and a share of net profits from “oil” production, a share of net profits from “gas” production.<sup>79</sup> The interpretive issue was whether the trial court improperly considered evidence of the “surrounding circumstances” to interpret the unambiguous oil and gas lease. The court appears to have clearly held that surrounding circumstances evidence can be considered “to determine whether or not the contract is ambiguous.”<sup>80</sup>

The role of surrounding circumstances evidence in interpreting the document once it is found to be unambiguous is not as explicitly addressed. The court discusses this issue noting the following:

Lessors state the proper rule. Evidence of surrounding circumstances may be consulted. If, in the light of surrounding circumstances, the language appears to be capable of only a single meaning, the court can then confine itself to the writing. Consideration of the facts and circumstances surrounding the execution of a contract, however, is simply an aid in the construction of the contract’s language. There are limits. For example, when interpreting an integrated writing, the parol evidence rule circumscribes the use of extrinsic evidence.<sup>81</sup>

The court’s statement footnotes section 230 of the *Restatement (First) of Contracts*:

The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean.<sup>82</sup>

This is perhaps the best statement of the law as it in fact operates in most jurisdictions today. It rejects a search for the subjective intent of the parties (“statements by the parties of what they intended it to mean”) in favor of objective intent (“the meaning that would be attached to the integration by a reasonably intelligent person”) as defined by the express terms of the instrument plus objective evidence of the context in which the instrument was created (“with all operative usages and knowing all

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78. *Id.* at 727.

79. *Id.*

80. *Id.* at 731.

81. *Id.* (footnote omitted).

82. RESTATEMENT (FIRST) OF CONTRACTS § 230 (1932).

the circumstances prior to an contemporaneous with the making of the integration”). This is consistent with the court’s observation that “[i]n the usual case, the instrument alone will be deemed to express the intention of the parties for it is objective, not subjective, intent that controls.”<sup>83</sup> Section 230 of the *Restatement* acknowledges that various objective forms of evidence of surrounding circumstances are merely part of the objective intent of the parties as expressed in the instrument being interpreted.

This interpretation is further supported by the court’s quotation from *Williston on Contracts*<sup>84</sup> where Professor Williston states the following:

[T]here must always be an association between words and external objects, and no matter how definite a contract may appear on its face, “words must be translated into things and facts.” Thus . . . the contract in any event had to be appraised in view of the surrounding circumstances known to the parties at the time of its execution and these reasonably could be looked to without violating the parol evidence rule even though the contract were not deemed ambiguous.<sup>85</sup>

### 3. The American Law Institute and Surrounding Circumstances Evidence

The American Law Institute, in its restatement projects, has consistently recognized the necessity of interpreting wills, conveyances, and contracts considering the surrounding circumstances at the time the instrument at issue was created. As noted by the court in the *Sun Oil* case,<sup>86</sup> section 230 of the *Restatement (First) of Contracts* expressly requires the court to interpret the instrument from the perspective of “a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the” instrument.<sup>87</sup> The *Restatement* also provides specific “Rules Aiding Application of Standards of Interpretation” and divides them into two categories: primary<sup>88</sup> and secondary.<sup>89</sup> The primary rules are applied first; secondary rules are resorted to only “where the meaning of words or other manifestations of intention remains doubtful after the

83. *Sun Oil Co. v. Madeley*, 626 S.W.2d at 731 (quoting *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518 (Tex. 1968)).

84. 4 SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 609 (3d ed. 1961).

85. 4 SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 609 (3d ed. 1961).

86. *Sun Oil*, 626 S.W.2d at 731 n.5.

87. RESTATEMENT (FIRST) OF CONTRACTS § 230 (1932). This section is titled, “Standard of Interpretation Where There is Integration.” Comment a. to § 230 notes that “[t]he objective viewpoint of a third person is taken. He is assumed, however, to have knowledge of all operative usages . . . as well as of other accompanying circumstances.”

88. *Id.* § 235.

89. *Id.* § 236.

primary rules stated in sections 230, 233 have been applied, with all the aid that can be derived from the rules stated in section 235.”<sup>90</sup>

The primary rules are familiar and include: giving language its ordinary meaning,<sup>91</sup> unless the context requires that it be given a technical meaning;<sup>92</sup> interpreting the instrument as a whole;<sup>93</sup> and “[a]ll circumstances accompanying the transaction may be taken into consideration”<sup>94</sup> as provided for in section 230. Comment e. to the surrounding circumstances interpretive rule states the following:

The court in interpreting words or other acts of the parties puts itself in the position which they occupied at the time the contract was made. In applying the appropriate standard of interpretation even to an agreement that on its face is free from ambiguity it is permissible to consider the situation of the parties and the accompanying circumstances at the time it was entered into—not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning to be given to the agreement.<sup>95</sup>

These same interpretive principles are carried forward into the *Restatement (Second) of Contracts* at section 212(1): “The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter.”<sup>96</sup> Comment b. to this section addresses the relationship between “plain meaning” and “extrinsic evidence” as follows:

It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in Subsection (1) is not limited to cases where it is determined that the language used is ambiguous. Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.<sup>97</sup>

The *Second Restatement's* equivalent rules to the *First Restatement's*

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90. *Id.* § 236 cmt. a.

91. “The ordinary meaning of language throughout the country is given to words unless circumstances show that a different meaning is applicable.” *Id.* § 235(a).

92. “Technical terms and words of art are given their technical meaning unless the context or a usage is applicable indicates a different meaning.” *Id.* § 235(b).

93. “A writing is interpreted as a whole and all writings forming part of the same transaction may be taken into consideration subject in case of integrations to the qualifications stated in § 230.” *Id.* § 235(c).

94. *Id.* § 235(d).

95. *Id.* § 235 cmt. e.

96. RESTATEMENT (SECOND) OF CONTRACTS § 212(1) (1981).

97. *Id.* at cmt. b.

primary rules of interpretation are found in section 202(1): “Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.”<sup>98</sup> Often the surrounding circumstances assist in identifying the “principal purpose” of the parties.

Moving from interpretation of contracts to the interpretation of conveyances, section 242 of the *Restatement (First) of Property* provides that “[t]he judicially ascertained intent of a conveyor is normally determined by the language employed in his conveyance, read as an entirety and in the light of the circumstances of its formulation.”<sup>99</sup> Comment a. describes the “rationale” for this rule as follows:

The language employed in a conveyance, read as an entirety and in the light of the circumstances of its formation, constitutes the objectively observable manifestation of the conveyor’s intent and hence is necessarily assumed to evidence his subjective intent. Thus the stress upon such language and circumstances, embodied in the rule stated in this Section, tends to attain the dominant objective of the process of construction . . . .<sup>100</sup>

The other comments to section 242 focus on specific types and uses of surrounding circumstances evidence, to include:

- d. Circumstances of the instrument’s formulation–Vocabulary peculiar to the conveyor.  
    . . . .
- e. Circumstances of the instrument’s formulation–Utilization of a drafting agent.  
    . . . .
- f. Circumstances of the instrument’s formulation–Skill in use of language or of legal phraseology.

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98. *Id.* § 202(1). In comment a. it is noted that the ability to consider surrounding circumstances does not “depend upon any determination that there is an ambiguity, but are used in determining what meanings are reasonably possible as well as in choosing among possible meanings.” Comment b. to § 202 adds the following:

In interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position they occupied at the time the contract was made. When the parties have adopted a writing as a final expression of their agreement, interpretation is directed to the meaning of that writing in the light of the circumstances. . . . The circumstances for this purpose include the entire situation, as it appeared to the parties, and in appropriate cases may include facts known to one party of which the other had reason to know.

99. RESTATEMENT (FIRST) OF PROP.: FUTURE INTERESTS § 242 (1940). Comment d. of *Restatement (First) of Prop.: Future Interests* § 241 notes that often conveyances will be donative and the focus will be upon the intent of the grantor, testator, or settlor. However, non-donative conveyances have a “contractual or bilateral aspect” which affects the construction of the instrument by requiring “that a conveyor is bound by the meaning which he reasonably should have anticipated that the conveyee would derive from the language employed.” RESTATEMENT (FIRST) OF PROP.: FUTURE INTERESTS § 241 cmt. d (1940).

100. RESTATEMENT (FIRST) OF PROP.: FUTURE INTERESTS § 242 cmt. a (1940).

- ....
- g. Circumstances of the instrument's formulation—Prevailing manners of expression.
- ....
- h. Circumstances of the instrument's formulation—Knowledge or belief of conveyor concerning the claimants upon his bounty.
- ....
- i. Other circumstances of the instrument's formulation.<sup>101</sup>

The importance of surrounding circumstances evidence continues into the *Restatement (Third) of Property* which provides, at section 10.2: "In seeking to determine the donor's intention, all relevant evidence, whether direct or circumstantial, may be considered, including the text of the donative document and relevant extrinsic evidence."<sup>102</sup> Comment d. to section 10.2 explains that "all relevant evidence" includes "[e]xtrinsic evidence of the circumstances surrounding the execution of the donative document that might bear on the donor's intention . . . ."<sup>103</sup> Similarly, the *Third Restatement's* provisions on the interpretation of servitudes states, at section 4.1: "A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created."<sup>104</sup>

Surrounding circumstances evidence has been a recognized interpretive tool, inextricably tied to the express terms of the instrument, beginning with the *First Restatement of Contracts* in 1932 and continuing through to the present with the most recent *Third Restatement of Property*. The Restatements have consistently recognized the necessity of interpreting instruments in context to place the court in the position of the parties at the time the instrument was created. One of the most important roles served by surrounding circumstances evidence is to ensure that the intent of the parties is sought by applying the proper historical context.

### B. *The Importance of Historical Context*

Is it possible for a conveyance or contract to grant more, or less, merely because of the passage of time or subsequent changes in ownership? What principle of property law states that the grantee in a conveyance of land will end up with a fundamentally different title with the mere passage of time? What principle of contract law states that an

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101. *Id.* § 242 cmts. d.-i.

102. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.2 (2003).

103. *Id.* at cmt. d.

104. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.1(1) (2000).

assignee of the contract can receive fundamentally different rights than those held by their assignor? The law presumes the basic rights of the parties to a conveyance or contract will not change as time passes and grantees or assignees come and go. Therefore, there is typically only one relevant time for determining what a contract or conveyance means: the time of its creation. For example, the meaning of a deed in 1930 should be evaluated as of 1930, not some different point in time. This fundamental principle of contract and property law is often inadvertently overlooked in the interpretive process.

### 1. Historical Context: The Law

Among the “surrounding circumstances” under which all parties to an instrument must operate is the “law.” If the instrument is being entered into in 1930, the relevant “law” is the existing law as of 1930, not 2006, or some other moment in time. Although the law can change with time, if the issue is the intent of the parties *at the time of the conveyance or contract*, the only relevant evidence for interpreting the instrument is the law at the time it was created. This rule of interpretation is actually more formalized because the courts impute knowledge of existing law to all the parties to a transaction, regardless of their knowledge in fact. All parties are presumed to know the law and the law is incorporated as part of their transaction.<sup>105</sup>

Consider the impact this analysis could have had in *Alford v. Krum*.<sup>106</sup> The conclusion in *Alford* that triggered the court’s repugnant-to-the-grant rule arose out of the court’s finding of an “irreconcilable conflict” between the one-sixteenth mineral interest conveyed by the granting clause and the one-half mineral interest contemplated by the existing and future lease clauses.<sup>107</sup> These conflicts were “irreconcilable” because, as the majority concludes, “it is impossible to harmonize” these “internally inconsistent expressions of intent . . . .”<sup>108</sup> However, placing this 1929 deed in the proper historical context makes the varying fractions easily reconcilable and provides the harmonization needed to avoid triggering the repugnant-to-the-grant rule.

To identify the irreconcilable conflict the court applied post-1929 law instead of the law as it existed when the conveyance was made. Instead of trying to explain the reason for the differing fractions, the court relies

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105. *E.g.*, *Winder Bros. v. Sterling*, 12 S.W.2d 127, 128 (Tex. 1929) (“The laws which subsist at the time and place of the making of the contract and where it is to be performed . . . enter into and form a part of it, as if they were expressly referred to, or incorporated in its terms.”) (quoting *Smith v. Elliott & Deats*, 39 Tex. 201 (1873)).

106. 671 S.W.2d 870 (Tex. 1984), *overruled by* *Luckel v. White*, 819 S.W.2d 459 (Tex. 1991).

107. *Id.* at 872-73.

108. *Id.* at 872.

upon characterizations of the law in treatises which examine the law as it existed in 1984, instead of 1929. For example, the court relies upon the treatises of Professors Hemingway and Summers for the proposition that “commentators have noted that these [present lease and future lease] clauses are ‘redundant,’ ‘unnecessary,’ and useful only when the meaning of the granting clause is not clearly apparent.”<sup>109</sup> But this is improperly viewing the clauses in light of the law as of 1984.<sup>110</sup> If properly viewed under the law as of 1929, the present lease and future lease clauses were clearly not “redundant” nor were they “unnecessary.” Instead, they were “useful” and arguably absolutely necessary to effectively express the parties’ intent that they desired the proportionate benefits under the oil and gas lease burdening the conveyed minerals to also transfer to the grantee.

Instead of examining the commentary of Professors Hemingway and Summers circa 1984, the court should have been reviewing the commentary of A.W. Walker, Jr. circa 1929.<sup>111</sup> For example, in 1928 Professor Walker wrote, “The Nature of the Property Interests Created by an Oil and Gas Lease in Texas: Part I.”<sup>112</sup> In this article, Professor Walker comments on the state of the law, and industry practices in response to the law, as of 1928:

The customary method of assigning royalties is by an instrument which takes the form of a conveyance of the oil and gas subject to the existing lease. However, if no specific mention is made in such a conveyance of the delay rentals and royalties apparently nothing would pass except the possibility of reverter. . . . It is customary to provide specifically in this form of an assignment for the transfer of the royalties and delay rentals to accrue under the existing lease as well as for the ownership of these minerals in case the existing lease should terminate or be cancelled.<sup>113</sup>

This explains the industry’s response to *Caruthers v. Leonard*<sup>114</sup> which held, in 1923, that a grant of the possibility of reverter in the mineral interest, “subject to the terms” of an oil and gas lease covering the conveyed interest, did not convey any rights in delay rentals payable

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109. *Id.* at 873.

110. There is no way the parties to this 1929 conveyance could have been aware of the case law that would follow, and the treatises that would be written on these topics in the decades to come.

111. A.W. Walker, JR., *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas: Part I*, 7 TEX. L. REV. 1 (1928), reprinted in SELECTED WORKS OF A.W. WALKER, JR. ch.2 (Oil, Gas & Mineral Section, State Bar of Texas ed., 2001).

112. *Id.*

113. *Id.* at 47, reprinted in SELECTED WORKS, *supra* note 111, at 33-34.

114. 254 S.W. 779 (Tex. Comm’n App. 1923, judgm’t adopted), *overruled by Harris v. Currie*, 176 S.W.2d 302 (Tex. 1943).

under the lease.<sup>115</sup> This resulted in the use of deed forms which conveyed the minerals (the possibility of reverter) plus rights under any existing or future oil and gas leases.

When viewed in the proper historical context, the *Alford* deed does not present an irreconcilable conflict because the present and future lease clauses are not “redundant” or “unnecessary” attempts to restate what was conveyed in the granting clause. Instead they are intended to be independent and necessary grants of rights under the existing oil and gas lease in accordance with the law and resulting usages when the conveyance was made. This accurate appreciation of the surrounding circumstances should have allowed the court to more readily harmonize the deed to effectuate the intent of the parties. The holding in *Alford* could have been averted altogether if the court had been operating in the correct temporal context.

Similar revelations could have impacted the outcome in the *Concord* case.<sup>116</sup> In 1995, I prepared an article for the Forty-Seventh Annual Institute on Oil and Gas Law and Taxation in which I commented on the court of appeals’ decision in *Concord*.<sup>117</sup> The court applied a two-grant approach to the deed which granted a one ninety-sixth mineral interest plus one-twelfth of the current lease benefits.<sup>118</sup> This prompted me to make the following observations:

Since the existing lease on the property had terminated, the court did not have to deal with the difficult task of calculating the precise share of production the grantee would receive under an existing lease. For example, assume the existing lease was still in existence and provided for a one-eighth royalty. What would the grantee receive as a share of production? A strong argument could be made that the grantee should receive one-twelfth of the one-eighth royalty, under the existing lease clause, *plus* another one-ninety-sixth of the one-eighth royalty under the granting clause. Although courts applying the two- or multiple-grant approach may assume that only one grant would operate at a time, that is clearly not what the conveyances provide.<sup>119</sup>

This observation was cited by Justice Enoch in his concurring opinion where he decided, following rehearing, to change his support for the four

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115. *Id.* at 783.

116. *Concord Oil Co. v. Pennzoil Exploration & Prod. Co.*, 966 S.W.2d 451 (Tex. 1998).

117. David E. Pierce, *Developments in Nonregulatory Oil and Gas Law: The Continuing Search for Analytical Foundations*, 47 INST. ON OIL & GAS L. & TAX’N 1-1 (1996).

118. *Concord Oil Co. v. Pennzoil Exploration & Prod. Co.*, 878 S.W.2d 191, 196 (Tex. App. 1994), *rev’d*, 966 S.W.2d 451 (Tex. 1998) (“We hold that the deed conveyed only a 1/96 mineral interest, in addition to the 1/12 interest in the existing lease which expired when the lease terminated.”).

119. Pierce, *supra* note 117, at 1-24 to 1-25.

dissenting justices and joined with the four plurality justices.<sup>120</sup> Although he preferred the two-grant analysis of the dissent, he rejected it in this case because it would result in an over-conveyance, an interpretive result he deemed unreasonable.<sup>121</sup> The over-conveyance was based upon both grants operating simultaneously which would entitle the grantee to nine ninety-sixth of production when the grantor only owned a one-twelfth (eight ninety-sixth) interest in the minerals.

However, if we view the conveyance in its proper 1937 context, then *Caruthers v. Leonard* was still the motivating basis for the use of a two-grant conveyancing approach.<sup>122</sup> Under *Caruthers*, the one ninety-sixth mineral interest would *not* be viewed as conveying any interest in the lease benefits.<sup>123</sup> This was the “law” in 1937. Therefore, the grantee’s ownership of a one ninety-sixth mineral interest would not entitle the grantee to any additional royalty under the oil and gas lease—at least that would be the result under the law as it existed in 1937. Because the parties to the conveyance are presumed to know the law, then Justice Enoch would have had no problem siding with the dissenting justices’ two-grant approach because their intent must have been to convey no additional royalty under the lease through the grant of the one ninety-sixth mineral interest. The only royalty that was conveyed was through the one-twelfth of the royalty under the existing oil and gas lease.

Although the courts were well aware of the history regarding the *Caruthers* problem and the form deeds used to respond to the problem, this history was being offered to support a *single* grant interpretation.<sup>124</sup> It would seem to be at least as supportive of a two-grant analysis with the presumed belief under the circumstances (the *Caruthers* “law”) that the

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120. *Concord*, 966 S.W.2d at 464 (“As Professor David Pierce has noted in looking at the court of appeals’ opinion in this case, the dissent’s two-grant conclusion makes sense only if one assumes that only one grant operates at a time.”).

121. *Id.* (“We cannot give the Crosby deed the reading that the dissent believes is correct—that the deed makes two conveyances—because that reading is unreasonable.”). Justice Enoch described his revelation of this two-grant problem as follows:

[T]here is one other, dispositive reason that dictates the actual judgment in this case. A point that destroys the reading the dissent attempts to give the Crosby deed. And a point the plurality merely adds to the Court’s original opinion.

Were the Crosby deed to contain two conveyances rather than one, there would be an unavoidable conflict—a conflict that was, until now, overlooked by us. Even the parties failed to focus on it until oral argument on rehearing. The conflict would arise because, were the granting clause and the “subject to” clause conveying separate estates, they would convey more than Crosby owned. We need only focus on this fact. It is this fact alone that keeps me from joining the dissent, which is otherwise correct. There is nothing inherently wrong with a deed expressing two grants, and where expressed, such grants should be honored. However, the potential for over-grant in the Crosby deed prevents me from concluding that this deed contains two grants.

*Id.* at 463-64.

122. 254 S.W. at 779.

123. *Id.*

124. *See, e.g., Concord*, 966 S.W.2d at 459-60; *Concord*, 878 S.W.2d at 193.

one ninety-sixth grant would not presently convey any additional interest in the royalty—such was the effect of the law at the time the deed was granted.

Actually, two different problems are at work in this case. First, *Caruthers* is arguably more supportive of a two-grant approach. Since the rights to benefits under the existing lease would not transfer under the grant of the mineral interest, a second grant is required to transfer the lease rights. This appears to be the view of at least one scholar examining the cases at the time. When Professor Walker discussed *Caruthers* he noted it is “customary to provide . . . for the transfer of the royalties and delay rentals to accrue under the existing lease as well as for the ownership of these minerals in case the existing lease should terminate or be cancelled.”<sup>125</sup> He footnotes this statement with the direction to “see” several cases, including *Hoffman v. Magnolia Petroleum Co.*,<sup>126</sup> which is best known as the source of the *Hoffman* “two-grant doctrine.”

The second problem concerns the differing fractions. To resolve this issue the plurality addressed the proper historical context when it analyzed the significance of *Tipps v. Bodine*.<sup>127</sup> The court first establishes the temporal relevance of the *Tipps* case: “*Tipps* was decided in 1936, and the Concord deed was executed in 1937.”<sup>128</sup> The plurality’s application of *Tipps* is consistent with its holding: “Under the rationale of *Tipps*, it would have been appropriate for Crosby to have inserted “1/96” in the granting clause and “1/12” in other provisions of the Concord deed if he intended to convey a 1/12 interest in the minerals.”<sup>129</sup> The dissent would not have engaged in this second step, but instead would have given literal effect to the two-grants: one ninety-sixth mineral interest and one-twelfth of the benefits under the existing oil and gas lease.<sup>130</sup>

The court of appeals, citing *Harris v. Currie*,<sup>131</sup> explained its two-grant approach noting the effect of the *Caruthers* decision on conveyancing practices and that *Caruthers* was not overruled until 1943.<sup>132</sup> However, the plurality of the Texas Supreme Court, citing *Hager v. Stakes*,<sup>133</sup> stated that *Caruthers* was overruled in 1927.<sup>134</sup> Nothing in the 1927 *Hager*

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125. Walker, *supra* note 111, at 48, reprinted in SELECTED WORKS, *supra* note 111, at 34.

126. 273 S.W. 828 (Tex. Comm’n App. 1925, holding approved).

127. 101 S.W.2d 1076 (Tex. App. 1937).

128. *Concord*, 966 S.W.2d at 460.

129. *Id.*

130. *Id.* at 465 (“We agree with both the trial court and the court of appeals that the deed in question unambiguously conveyed two estates of different sizes and duration: a 1/96 perpetual interest in the minerals, and a 1/12 interest in rentals and royalties which ended with the existing lease.”).

131. 176 S.W.2d 302 (Tex. 1943).

132. *Concord*, 878 S.W.2d at 193.

133. 294 S.W. 835 (Tex. 1927).

134. *Concord*, 966 S.W.2d at 460.

decision indicated it is in any way reversing the separate grant requirement of *Caruthers*. The issue in *Hager* was whether an in-kind oil royalty under an oil and gas lease could be taxed as real property.<sup>135</sup> The only aspect of *Caruthers* that the court takes issue with is the statement that once an oil and gas lease is granted, then all the lessor has remaining is a possibility of reverter. The issue in *Hager* concerns the ownership interest of a lessor when the oil and gas lease provides for an in-kind royalty. The court in *Hager* holds the lessor—under the specific leases at issue—retained a real property interest in what was designated oil “royalty” under the leases.<sup>136</sup> The court merely notes that it did not adopt the *Caruthers* opinion as its own, but did adopt it “as to the determination to be made of the cause.”<sup>137</sup> Any doubt regarding the status of the *Caruthers* case, following the *Hager* decision, is dispelled by the following statement by the *Hager* court:

The *Caruthers* Case was rightly determined, regardless of the legal effect of the lease in reserving a mineral estate to the lessor; for Leonard was not entitled to recover any part of the rentals for which he sued, because the writing under which he claimed expressly stipulated that, if the lease under which the rentals accrued was valid, that he (Leonard) bought subject to all the terms of such lease, and the lease was valid and one of its terms provided for the payment of such rentals.<sup>138</sup>

This is an express reaffirmation of the *Caruthers* holding.

Although the Texas Supreme Court, in its 1943 *Harris* decision, says it reversed *Caruthers* with its 1927 *Hager* decision, I doubt that any lawyer reading *Hager* would have come to that conclusion; at least not until the Supreme Court told them in 1943. This is a good example of a situation where the party seeking to rely upon *Caruthers* as good law in 1937 (when the conveyance was made) would need to offer expert testimony as to the surrounding legal circumstances at the time of the conveyance. *Caruthers* was not overruled by *Hager* in 1927; *Caruthers* was still the “law” in 1937 when the *Concord* conveyance was made and was not overruled until six years after the *Concord* conveyance in *Harris v. Currie*.<sup>139</sup>

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135. *Hager*, 294 S.W. at 836.

136. *Id.* at 838.

137. *Id.*

138. *Id.*

139. 176 S.W.2d 302, 306 (Tex. 1943). Commenting on the *Caruthers* case, the court stated the following:

This holding [in *Caruthers v. Leonard*] was clearly erroneous, as Leonard had every right to the surface of this land necessary to enforce and enjoy his mineral title that *Caruthers* had for the same purpose. In our opinion, the holding above indicated, in *Caruthers v. Leonard*, was expressly overruled by this court in *Hager v. Stakes*, 116

## 2. Historical Context: The Original Parties

Another important historical context concerns the original parties to the instrument being interpreted. For example, assume the original parties to the conveyance or contract were both sophisticated participants in the oil and gas industry.<sup>140</sup> This could impact the interpretive process by making both parties subject to industry usages and the assumption that oil and gas terms were being used employing a technical as opposed to a common meaning.<sup>141</sup> Should this situation change because the property is now owned by an unsophisticated individual as opposed to the original industry participant? Clearly the rights of the parties should not change merely because the interest has been transferred. However, this is often the effect when courts fail to consider the situation of the original parties at the time the instrument was created.

An example of this temporal party context problem is illustrated by the Colorado Supreme Court's actions in *Garman v. Conoco, Inc.*<sup>142</sup> The issue was whether the oil and gas lessee, Conoco, could deduct various post-production costs to calculate Garman's overriding royalty. Conoco argued that "industry practice allows proportionate allocation of post-production costs . . . ."<sup>143</sup> The court refused to consider this argument by suggesting Garman was not bound by industry customs which Conoco could only rely upon when dealing with "other oil exploration companies."<sup>144</sup> At the time the instrument creating the overriding royalty at issue was created, however, Garman's predecessor-in-interest was one of those "other oil exploration companies."<sup>145</sup> The original party to the assignment that created the interest, Monarch Oil & Uranium Co., was Garman's source of title. It was Monarch that reserved the 4.00% overriding royalty when it conveyed its oil and gas leases covering 10,742 acres.<sup>146</sup>

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Tex. 453, 294 S.W. 835. In that opinion Judge Greenwood points out that the opinion in *Caruthers v. Leonard* was not approved by this court, but only the judgment recommended.

*Id.*

140. The same issues are presented when one or more of the current parties are sophisticated industry participants but one or more of the original parties were not.

141. See generally David E. Pierce, *Defining the Role of Industry Custom and Usage in Oil & Gas Litigation*, 57 SMU L. REV. 387, 455-61 (knowledge and usage), 461-67 (technical terms) (2004).

142. 886 P.2d 652 (Colo. 1994).

143. *Id.* at 660.

144. *Id.* The court cited *Pletchas v. Von Poppenheim*, 365 P.2d 261, 263 (Colo. 1961), for the proposition that parties engaged in the same occupation are presumed to have knowledge of business usages.

145. *Id.*

146. *Garman*, 886 P.2d at 654-55 n.5.

It also appears Monarch, and not Conoco's predecessor-in-interest (an individual), may have been the party that drafted the instrument.<sup>147</sup>

Supreme Court proceeded to interpret the instrument and apply the law as though this were a transaction between a giant, sophisticated oil company and the little unsophisticated, indeed helpless, individual.<sup>148</sup> In reality, at the time the deal was struck, the relationships were just the opposite: Garman's predecessor was the oil company and Conoco's predecessor was the individual. The court should have interpreted this instrument considering the true circumstances and the true parties at the time it was created.

### 3. Historical Context: The World

Counsel and courts should always be attuned to the situation of the parties at the time the instrument at issue was created. What must they have known? What would have been impossible for them to have known?<sup>149</sup> The potential for useful, relevant evidence is limited only by the ability to place ourselves in the shoes of the original parties to the instrument. Any information that can assist in understanding how the parties viewed the world when they entered into the instrument at issue should be collected and evaluated.

It is important to remember that we are not trying to ascertain what was actually perceived or "in the minds" of the parties to the instrument. Instead, the goal is to establish what a reasonable person in the position of the parties would have perceived, known, and thought.<sup>150</sup>

## VI. CONCLUSION

Recognition of free will to enter into contracts and conveyances means little if the rights of the parties under the instruments they adopt are defined by processes which fail to seek their objective intent. As Professor Farnsworth notes in his treatise: "The principle of freedom of contract rests on the premise that it is in the public interest to accord individuals broad powers to order their affairs through legally enforceable agreements."<sup>151</sup> This basic freedom is realized only when courts are willing to ascertain what the parties intended by their

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147. *Id.*

148. David E. Pierce, *Defining the Role of Industry Custom and Usage in Oil & Gas Litigation*, 57 SMU L. REV. 387, 407-09 (2004).

149. Because it would not occur until sometime after the instrument was created.

150. Recall that the *Restatement of Contracts* expressly requires courts to interpret instruments from the perspective of "a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the [instrument]." RESTATEMENT (FIRST) OF CONTRACTS § 230 (1932).

151. E. ALLAN FARNSWORTH, CONTRACTS § 5.1, at 313 (4th ed. 2004).

manifestations. Any policy based upon freedom of contract must be activated by giving effect to the intent of the parties so their free will is realized.

Texas instrument interpretation jurisprudence reveals strong support for freedom of contract as a guiding principle.<sup>152</sup> Competing interests in predictability of outcome have not been elevated to the level of public policy and are frequently sacrificed to give effect to the free will of the parties to an instrument.<sup>153</sup> However, the Texas Supreme Court's use of an ambiguity analysis in its interpretive process will often prevent the Court from achieving its consistently-stated goal of ascertaining the intent of the parties. The interpretive process often adheres to a formalism that may result in predictable outcomes, but contributes nothing towards accurately identifying the likely intent of the parties.

The 4-1-4 split decisions regarding the meaning of "unambiguous" documents suggest that the "ambiguity analysis" is nothing more than a conclusory label used to ensure that interpretation remains the province of courts instead of juries.<sup>154</sup> It appears that courts could eliminate the ambiguity analysis altogether without damaging the parol evidence rule, the doctrine of merger, or existing law regarding interpretation.<sup>155</sup> Nor would it necessarily result in more issues for juries to resolve. The parol evidence rule and the doctrine of merger would continue to focus on whether the instrument at issue was intended to be the final and complete statement of the transaction. Instead of using an all-or-nothing ambiguity analysis, courts can simply consider, based upon the state of the parties' agreements found within their instrument, whether it was intended as an integration or as a merger.<sup>156</sup> Once this is decided, the terms of the parties' instrument will be identified. It will be these terms that become the focus of interpretation to ascertain the intent of the parties who selected those terms.<sup>157</sup>

When interpreting the terms, instead of seeking testimony as to what a party meant, the focus should be on evidence that will assist the court in determining what a reasonable person would have thought upon learning of the evidence being offered.<sup>158</sup> The search is not for what a party says

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152. See *supra* text accompanying notes 8-14.

153. See *supra* text accompanying notes 24-31.

154. See *supra* text accompanying notes 44-52.

155. See *supra* text accompanying notes 53-57.

156. For example, under the existing ambiguity analysis, something is either "unambiguous" or it must be "ambiguous." This results in many situations where an instrument is anything but "clear" but it is still legally unambiguous. *E.g.*, *Mobil Exploration and Prod. U.S., Inc. v. Dover Energy Exploration, L.L.C.*, 56 S.W.3d 772, 776 (Tex. App. 2001) ("At the outset, we note that conflicting interpretations of a contract and unclear and uncertain language do not necessarily mean a contract is ambiguous.").

157. See *supra* text accompanying note 53.

158. This does not seem like an unreasonable limitation on the search for intent since the

they meant, but rather for what a reasonable person, placed in the situation of the parties, would have meant. This perhaps elevates objective contract theory to heights only Professor Williston or Leonard Hand would take it, but it seems to be a compromise that in fact has been made by Texas courts that have struggled with the use of extrinsic evidence to interpret unambiguous, completely integrated, instruments.<sup>159</sup>

The mixed messages provided by case law in this area can be sorted out by acknowledging the following: (1) courts routinely consider certain types of extrinsic evidence to interpret unambiguous instruments; (2) there is a wide range of extrinsic evidence, such as testimony by the parties as to what they intended, which is rarely allowed to interpret unambiguous instruments, and evidence of the law, usages, and objective circumstances of the parties at the time the instrument was created, which are frequently allowed to interpret unambiguous instruments; and (3) courts seldom make an effort in their opinions to explain these obvious gradations of extrinsic evidence.

The proposals offered in this article can be implemented without overruling prior case law or adopting new principles. District courts presently have it within their power to implement the suggested improvements without additional appellate court direction. The legal groundwork, although a patchwork, already exists, and has existed for over a century. The primary adjustment will be the introduction of a clarity as to how the interpretive rules operate, and then to clearly articulate their application to the facts.

The ultimate jurisprudential goal is clear: to ascertain the intent of the parties to the instrument. "Intent" in this context means objective intent.<sup>160</sup> Frequently, this objective intent can be ascertained only by taking a trip back in history and placing the court in the shoes of the

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parties who adopt a writing as an integration of their transaction should be aware that its objective effect will govern their rights instead of their unexpressed, subjective desires.

159. Professor Williston noted, "It is even conceivable that a contract shall be formed which is in accordance with the intention of neither party." 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 95, at 181 (1<sup>st</sup> ed. 1920). Judge Hand observed in *Hotchkiss v. National City Bank*:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. . . .

. . . [T]he question always remains for the court to interpret the reasonable meaning to the acts of the parties, by word or deed, and no characterization of its effect by either party thereafter, however truthful, is material.

*Hotchkiss v. National City Bank*, 200 F. 287, 293-94 (S.D.N.Y. 1911), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913).

160. *See supra* text accompanying notes 30-31.

parties at the time the instrument was made. Unless this is done, the court will often be allowing the rights of the parties to change with the mere passage of time, or with the substitution of the original parties.<sup>161</sup>

After considering the various decisions of the Texas courts regarding instrument interpretation, it appears the current state of the law is best captured by the portion of *Restatement (First) of Contracts* § 230, which instructs courts to apply “the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean.”<sup>162</sup> This provides the framework for a workable, and if consistently applied, a predictable process for fulfilling the underlying goal and policy of oil and gas instrument interpretation: giving effect to the free will of the parties.

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161. See *supra* text accompanying notes 105-139.

162. RESTATEMENT (FIRST) OF CONTRACTS § 230 (1932).