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INTRODUCCIÓN

El presente libro nace del trabajo conjunto de dos profesores de derecho privado que, en los últimos años, se han dedicado a enseñar, en Estados Unidos y en México —en la maestría de Derecho Estadounidense impartido conjuntamente por el Instituto de Investigaciones Jurídicas de la UNAM y el Ilustre y Nacional Colegio de Abogados de México—, la materia de Contracts o Obligaciones Contractuales.

El propósito del libro es muy preciso: contar con un número relevante de fallos de los tribunales de apelación de Estados Unidos, debidamente seleccionados, que permita a los profesores explicar la materia y a los alumnos acceder a un material que no es fácil de conseguir en México.

Algunas precisiones son necesarias:

- Todos los casos han sido tomados de las fuentes directas tal como se publican en EE.UU. No hay, por tanto, una uniformidad en la forma cómo son transcritos los fallos porque las publicaciones originales no son uniformes. No se olvide que la materia de Contracts en EE.UU., al igual que en México, es una materia local que depende de la regulación y fallos de cada Estado de la Unión Americana.
- En el sistema norteamericano toda contratación es atípica. Esto se explica por razones históricas del sistema de obligaciones contractuales del *common law* que evolucionó del derecho canónico en vez del derecho romano.
- El material ha sido ordenado siguiendo lo que suelen ser los manuales con los que se enseña esta materia en Estados Unidos (los llamados *case books*). En ellos se suelen colocar, en primer término, aquella doctrina teóricamente fundamental —aunque poco aplicada en la práctica—, de la razón del contrato. Después, abordamos el perfeccionamiento de los contratos mediante el

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concurso de la oferta y de la aceptación, marcando, eso si, las diferencias con el derecho civil. A continuación, exponemos la ejecución de prestaciones ante la falta de un nexo contractual por medio de recursos equitativos cuando no existen recursos jurídicos adecuados, característica de este sistema jurídico hibrido, en el que coexisten dos jurisdicciones y dos lógicas jurídicas independientes e inconexas: *common law* y *equity* Esta misma característica significa que existe una pluralidad de medidas cautelares y definitivas al interior de este derecho adjetivo. Pasamos a considerar instituciones *sui generis* de las obligaciones contractuales, como los requisitos formales y las normas probatorias del *common law*. Por último, observamos la recepción que hubo del *rebus sic stantibus* en el Derecho Estadounidense.

Los autores

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LA VINCULACIÓN CONTRACTUAL
I. EL PERFECCIONAMIENTO DEL CONTRATO
A. CONSIDERATION O CAUSA DEL CONTRATO

LA JUSTICIA CONMUTATIVA, JUNTO A LA LIBERALIDAD

LOUISA W. HAMER, Appellant, v. FRANKLIN SIDWAY, as Executor, etc., Respondent COURT OF APPEALS OF NEW YORK 124 N.Y. 538; 27 N.E. 256 February 24, 1891, Argued April 14, 1891, Decided

OPINIÓN POR: PARKER

[*544] [**256] The question which provoked the most discussion by counsel on this appeal, [**257] and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator William E. Story became indebted to his nephew William E. Story, 2d, on his twenty-first birthday in the sum of five thousand dollars. The trial court found as a fact that "on the 20th day of March, 1869, * * * William E. Story agreed to and with William E. [*545] Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of $ 5,000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement."

The defendant contends that the contract was without consideration to support it, and, therefore, invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited, the contract was without consideration. A contention, which if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was, in fact, of such benefit to him as to leave no consideration to support

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the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber, in 1875, defined consideration as follows: "A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him." (Anson's Prin. of Con. 63.)

"In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." (Parsons on Contracts, 444.)

"Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." (Kent, vol. 2, 465, 12th ed.)

Pollock, in his work on contracts, page 166, after citing the definition given by the Exchequer Chamber already quoted, [*546] says: "The second branch of this judicial description is really the most important one. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $ 5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance

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actually proved a benefit to the promisor, and the court will not inquire into it, but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken.

In Shadwell v. Shadwell (9 C. B. [N. S.] 159), an uncle wrote to his nephew as follows:

"My Dear Lancey -- I am so glad to hear of your intended marriage with Ellen Nicholl, and as I promised to assist you at starting, I am happy to tell you that I will pay to you 150 pounds yearly during my life and until your annual income derived from your profession of a chancery barrister shall amount to 600 guineas, of which your own admission will be the only evidence that I shall require.

"Your affectionate uncle,

"CHARLES SHADWELL."

It was held that the promise was binding and made upon good consideration.

[*547] In Lakota v. Newton, an unreported case in the Superior Court of Worcester, Mass., the complaint averred defendant's promise that "if you (meaning plaintiff) will leave off drinking for a year I will give you $ 100," plaintiff's assent thereto, performance of the condition by him, and demanded judment therefor. Defendant demurred on the ground, among others, that the plaintiff's declaration did not allege a valid and sufficient consideration for the agreement of the defendant. The demurrer was overruled.

In Talbott v. Stemmons (a Kentucky case not yet reported), the step-grandmother of the plaintiff made with him the following agreement: "I do promise and bind myself to give my grandson, Albert R. Talbott, $ 500 at my death, if he will never take another chew of tobacco or smoke another cigar during my life from this date up to my death, and if he breaks this pledge he is to refund double the amount to his mother." The executor of Mrs. Stemmons demurred to the complaint on the ground that the agreement was not based on a sufficient consideration. The

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demurrer was sustained and an appeal taken therefrom to the Court of Appeals, where the decision of the court below was reversed. In the opinion of the court it is said that "the right to use and enjoy the use of tobacco was a right that belonged to the plaintiff and not forbidden by law. The abandonment of its use may have saved him money or contributed to his health, nevertheless, the surrender of that right caused the promise, and having the right to contract with reference to the subject-matter, the abandonment of the use was a sufficient consideration to uphold the [**258] promise." Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in Lindell v. Rokes (60 Mo. 249).

The cases cited by the defendant on this question are not in point. In Mallory v. Gillett (21 N. Y. 412); Belknap v. Bender (75 id. 446), and Berry v. Brown (107 id. 659), the promise was in contravention of that provision of the Statute of Frauds, which declares void all promises to answer for the debts of third persons unless reduced to writing. In Beaumont [*548] v. Reeve (Shirley's L. C. 6), and Porterfield v. Butler (47 Miss. 165), the question was whether a moral obligation furnishes sufficient consideration to uphold a subsequent express promise. In Duvoll v. Wilson (9 Barb. 487), and In re Wilber v. Warren (104 N. Y. 192), the proposition involved was whether an executory covenant against incumbrances in a deed given in consideration of natural love and affection could be enforced. In Vanderbilt v. Schreyer (91 N. Y. 392), the plaintiff contracted with defendant to build a house, agreeing to accept in part payment therefor a specific bond and mortgage. Afterwards he refused to finish his contract unless the defendant would guarantee its payment, which was done. It was held that the guarantee could not be enforced for want of consideration. For in building the house the plaintiff only did that which he had contracted to do. And in Robinson v. Jewett (116 N. Y. 40), the court simply held that "The performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract." It will be

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observed that the agreement which we have been considering was within the condemnation of the Statute of Frauds, because not to be performed within a year, and not in writing. But this defense the promisor could waive, and his letter and oral statements subsequent to the date of final performance on the part of the promisee must be held to amount to a waiver. Were it otherwise, the statute could not now be invoked in aid of the defendant. It does not appear on the face of the complaint that the agreement is one prohibited by the Statute of Frauds, and, therefore, such defense could not be made available unless set up in the answer. (Porter v. Wormser, 94 N. Y. 431, 450.) This was not done.

In further consideration of the questions presented, then, it must be deemed established for the purposes of this appeal, that on the 31st day of January, 1875, defendant's testator was indebted to William E. Story, 2d, in the sum of $ 5,000, and if this action were founded on that contract it would be barred by the Statute of Limitations which has been pleaded, but on that date the nephew wrote to his uncle as follows:

[*549] "Dear Uncle -- I am now 21 years old to-day, and I am now my own boss, and I believe, according to agreement, that there is due me $ 5,000. I have lived up to the contract to the letter in every sense of the word."

A few days later, and on February sixth, the uncle replied, and, so far as it is material to this controversy, the reply is as follows:

"Dear Nephew -- Your letter of the 31st ult. came to hand all right saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have $ 5,000 as I promised you. I had the money in the bank the day you was 21 years old that I intended for you, and you shall have the money certain. Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this

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money in one year. * * * This money you have earned much easier than I did, besides acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it. * * *

W. E. STORY.

"P. S. -- You can consider this money on interest."

The trial court found as a fact that "said letter was received by said William E. Story, 2d, who thereafter consented that said money should remain with the said William E. Story in accordance with the terms and conditions of said letter." And further, "That afterwards, on the first day of March, 1877, with the knowledge and consent of his said uncle, he duly sold, transferred and assigned all his right, title and interest in and to said sum of $ 5,000 to his wife Libbie H. Story, who thereafter duly sold, transferred and assigned the same to the plaintiff in this action."

We must now consider the effect of the letter, and the nephew's assent thereto. Were the relations of the parties thereafter that of debtor and creditor simply, or that of trustee [*550] and cestui que trust? If the former, then this action is not maintainable, because barred by lapse of time. If the latter, the result must be otherwise. No particular expressions are necessary to create a trust. Any language clearly showing the settler's intention is sufficient if the property and disposition of it are definitely stated. (Lewin on Trusts, 55.)

A person in the legal possession of money or property acknowledging a trust with the assent of the cestui que trust, becomes from that time a trustee if the acknowledgment be founded on a valuable consideration. His antecedent relation to the subject, whatever it may have been, no longer controls. (2 Story's Eq. § 972.) If before a declaration of trust a party be a mere debtor, a subsequent agreement recognizing the fund as already in his hands and stipulating for its investment on the creditor's account will have the effect to create a trust. (Day v. Roth, 18 N. Y. 448.)

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It is essential that the letter interpreted in the light of surrounding circumstances must show an intention on the part of the uncle to become a trustee before he will be held to have become such; but in an effort to ascertain the construction which should be given to it, we are also to observe the rule that the language of the promisor is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee. (White v. Hoyt, 73 N. Y. 505, 511.) At the time the uncle wrote the letter he was indebted to his nephew in the sum of $ 5,000, and payment [**259] had been requested. The uncle recognizing the indebtedness, wrote the nephew that he would keep the money until he deemed him capable of taking care of it. He did not say "I will pay you at some other time," or use language that would indicate that the relation of debtor and creditor would continue. On the contrary, his language indicated that he had set apart the money the nephew had "earned" for him so that when he should be capable of taking care of it he should receive it with interest. He said: "I had the money in the bank the day you were 21 years old that I intended for you and you shall have the money certain." That he had set apart the money is further [*551] evidenced by the next sentence: "Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it." Certainly, the uncle must have intended that his nephew should understand that the promise not "to interfere with this money" referred to the money in the bank which he declared was not only there when the nephew became 21 years old, but was intended for him. True, he did not use the word "trust," or state that the money was deposited in the name of William E. Story, 2d, or in his own name in trust for him, but the language used must have been intended to assure the nephew that his money had been set apart for him, to be kept without interference until he should be capable of taking care of it, for the uncle said in substance and in effect: "This money you have earned much easier than I did * * * you are quite welcome to. I had it in the bank the day you were 21 years old and don't intend to interfere with it

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in any way until I think you are capable of taking care of it and the sooner that time comes the better it will please me." In this declaration there is not lacking a single element necessary for the creation of a valid trust, and to that declaration the nephew assented.

The learned judge who wrote the opinion of the General Term, seems to have taken the view that the trust was executed during the life-time of defendant's testator by payment to the nephew, but as it does not appear from the order that the judgment was reversed on the facts, we must assume the facts to be as found by the trial court, and those facts support its judgment.

The order appealed from should be reversed and the judgment of the Special Term affirmed, with costs payable out of the estate.

JOHNSON v. OTTERBEIN UNIVERSITY
SUPREME COURT OF OHIO 41 Ohio St. 527 January, 1885 (Term)

OPINIÓN POR: MARTIN

[*530] The writing sued on contains a distinct promise to pay one hundred dollars at a fixed time, a direction as to the application of the fund, and a provision that it shall be refunded in case of misapplication. The parties supposed that the writing provided for a donation to be made to the institution. It is an elementary principle that an executory contract to give is without consideration, and that a promise to pay money as a gift may be revoked at any time before payment. "The gift of the maker's own note is the delivery of a promise only, and not of the thing promised, and the gift therefore fails." Kent's Com. 438; Hamor v. Moore, 8 Ohio St., 243; Ohio Wesleyan Female College v. Love's Ex'r, 16 Id., 20. This doctrine is not disputed. But several claims are variously stated on behalf of the university which may be reduced to two heads. 1st. That there is a valid consideration: In this, that by acceptance the institution agreed to pay over the money, and thus there arose a case of mutual promises; and in this, that the promise and the liabilities incurred on the faith of it serve as [**6] considerations each for the other. 2d. That by force

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of the charter provisions, the promise is binding though it be without a consideration in law. It will be remembered that the closing paragraph of section 6 of the charter requires that donations shall be applied in accordance with the designs expressed by the donors. From this it would seem that the duty of paying as directed in the note is cast upon the institution by the superior force of the statute which operates as a command; and that its [*531] duty is Johnson's right by statute, for which he stipulated, but which can only arise when the gift is executed.

But grant, that by acceptance of the note, the university impliedly agreed to comply with the direction, that is to apply the proceeds to the payment of its indebtedness. Is that a promise to do an act of advantage to Johnson, or of detriment to the institution in the sense requisite to constitute it a legal consideration? We think it is not. If the writing had been in form a promissory note, or a mere promise to make a donation without any qualification, a necessary implication of duty to apply its proceeds to proper corporate objects would arise upon acceptance. [**7] In the absence of special circumstances we fail to see how a duty to apply the fund to a particular corporate purpose, can better serve as a consideration than a duty to apply it to corporate purposes not specified. The duty in either case is implied. The claim made involves the proposition that a promise in writing to make a gift to an educational institution is valid on acceptance. This is denied in Ohio Wesleyan Female College v. Love's Ex'r, supra. It, however, finds some support in the authorities.

The liabilities incurred by the institution on the faith, as it is said, of the promise, are not alluded to in the pleadings. The only reference to them in the record is found in the deposition of Mr. Bender, which was taken in August, 1878, some 19 months after Johnson's answer was filed. He testifies that $ 15,150 "has been paid by borrowing money from other parties, which money is still owing by the institution." He does not state when it was borowed. Non constat, but that it was borowed after the answer was filed when, if not before, the promise was revoked. In this state

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of the testimony we need not comment on the claims made by counsel as to the effect of these [**8] loans.

Do the terms of the charter render the promise binding and dispense with the necessity for a consideration in law? The section quoted in the statement is relied on in argument. It authorizes the trustees to procure funds for specified purposes, and requires them to apply what they [*532] may receive by donation or otherwise to those purposes. It also requires that all donations, bequests, &c., be applied in accordance with the designs expressed by the donors. It names no subject of gift; and of course all things that can pass by gift are included. Gratuitous promises are not named, and not being subjects of gift, are not included. They are left to the control of the law.

Counsel on both sides rely on the case of Ohio Wesleyan Female College v. Love's Ex'r, supra, which should be noticed far enough to be distinguished. In that case the plaintiff was an incorporated educational institution, and counted on an instrument which reads:

"I, Robert Love, agree to give * * * two hundred and fifty dollars to the Ohio Wesleyan Female College, said sum to be paid out of my estate as provided in my will." The will contained no provision for its payment. The petition [**9] stated that before suit and relying on the agreements of Love and others, the plaintiff made large disbursements and incurred liabilities in the erection of buildings and purchase of apparatus, &c. A demurrer was sustained in the common pleas; and on error the cause was reserved in the district court. In the supreme court the judgment of the common pleas was reversed and the demurrer overruled. In the opinion, Judge Scott remarks on the conflict in the authorities, and intimates that in the absence of statutory enactments the weight of authority is to the effect that the facts stated in the petition do not show a consideration sufficient in law to support the promise. He then says:

"The acts under which the present plaintiff was incorporated are, that of April 19th, 1852, 'to enable the trustees of colleges, academies, universities and other

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institutions for the purpose of promoting education to become bodies corporate,' and the act to amend the same passed March 11, 1853 (S. & C. stats. 266, 269). These acts divide the institutions provided for into two classes: one class consisting of those institutions of which the property is owned by individuals in the shape of stock subscribed [**10] or taken, and the other embracing such as hold their property in trust, or [*533] derive it from donation, gift, devise or gratuitous subscription. The plaintiff belongs to the latter class, which is clearly authorized by necessary implication arising from various provisions of the statute to procure funds for carrying out the purposes of their several organizations by voluntary subscriptions. And that the statute refers not merely to subscriptions which have been in fact paid, appears, as we think, from the second section of the amendatory act, above referred to, which provides, among other things, for the appraisement at their true value in money of such subscriptions as may be exhibited to the appraisers. This subscription then was authorized by law."

The decision in that case is placed on two propositions: first, that the college was by statute authorized to receive voluntary subscriptions, and second, that the subscription was accepted and liabilities incurred on the faith of it. As we have seen, neither of these grounds is available to the university in the present case.

It follows, from what has been said, that the judgments below are erroneous. We place the [**11] reversal on these legal propositions; that the creation of a fund with which to pay the previously incurred indebtedness of the institution was not a consideration in law for the promise; and that the acceptance of the writing containing the direction to apply the fund, does not, in a legal sense, give rise to a case of mutual promises.

Judgment reversed.

¿Es la consideration diferente de la doctrina medieval del ius commune de la causa del contrato, que fue elaborada sobre las virtudes teologales de la justicia conmutativa y de la liberalidad?

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ALLEGHENY COLLEGE, Appellant, v. THE NATIONAL CHAUTAUQUA COUNTY BANK OF JAMESTOWN, as Executor of Mary Y. Johnston, Deceased, Respondent. COURT OF APPEALS OF NEW YORK 246 N.Y. 369; 159 N.E. 173; 57 A.L.R. 980 October 18, 1927, Argued November 22, 1927, Decided

OPINIÓN POR: CARDOZO

[*371] [**173] The plaintiff, Allegheny College, is an institution of liberal learning at Meadville, Pennsylvania. In June 1921, a "drive" was in progress to secure for it an additional [**174] endowment of $ 1,250,000. An appeal to contribute to this fund was made to Mary Yates Johnston of Jamestown, New York. In response thereto, she signed and delivered on June 15, 1921, the following writing:

"Estate Pledge,

"Allegheny College Second Century Endowment

"Jamestown, N. Y., June 15, 1921.

"In consideration of my interest in Christian Education, and in consideration of others subscribing, I hereby subscribe and will pay to the order of the Treasurer of Allegheny College, Meadville, Pennsylvania, the sum of Five Thousand Dollars; $ 5,000.

"This obligation shall become due thirty days after my death, and I hereby instruct my Executor, or Administrator, to pay the same out of my estate. This pledge shall bear interest at the rate of . . . . per cent per annum, payable annually, from . . . . till paid. The proceeds of this obligation shall be added to the Endowment of said Institution, or expended in accordance with instructions on reverse side of this pledge.

"Name MARY YATES JOHNSTON,

"Address 306 East 6th Street,

"Jamestown, N. Y.

"Dayton E. McClain Witness

"T. R. Courtis Witness

"to authentic signature."

[*372] On the reverse side of the writing is the following indorsement: "In loving memory this gift shall be known as the Mary Yates Johnston Memorial Fund, the

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proceeds from which shall be used to educate students preparing for the Ministry, either in the United States or in the Foreign Field.

"This pledge shall be valid only on the condition that the provisions of my Will, now extant, shall be first met.

"MARY YATES JOHNSTON."

The subscription was not payable by its terms until thirty days after the death of the promisor. The sum of $ 1,000 was paid, however, upon account in December, 1923, while the promisor was alive. The college set the money aside to be held as a scholarship fund for the benefit of students preparing for the ministry. Later, in July, 1924, the promisor gave notice to the college that she repudiated the promise. Upon the expiration of thirty days following her death, this action was brought against the executor of her will to recover the unpaid balance.

The law of charitable subscriptions has been a prolific source of controversy in this State and elsewhere. We have held that a promise of that order is unenforcible like any other if made without consideration (Hamilton College v. Stewart, 1 N. Y. 581; Presb. Church v. Cooper, 112 N. Y. 517; 23rd St. Bap. Church v. Cornell, 117 N. Y. 601). On the other hand, though professing to apply to such subscriptions the general law of contract, we have found consideration present where the general law of contract, at least as then declared, would have said that it was absent (Barnes v. Perine, 12 N. Y. 18; Presb. Soc. v. Beach, 74 N. Y. 72; Keuka College v. Ray, 167 N. Y. 96; cf. Eastern States League v. Vail, 97 Vt. 495, 508, and cases cited; Y. M. C. A. v. Estill, 140 Ga. 291; Amherest Academy v. Cowls, 6 Pick. 427; Ladies Collegiate Inst. v. French, 16 Gray, 196; Martin v. Meles, 179 Mass. 114; [*373] Robinson v. Nutt, 185 Mass. 345; U. of Pa. v. Coxe, 277 Penn. St. 512; Williston, Contracts, § 116).

A classic form of statement identifies consideration with detriment to the promisee sustained by virtue of the promise (Hamer v. Sidway, 124 N. Y. 538; Anson, Contracts [Corbin's ed.], p. 116; 8 Holdsworth, History of English Law, 10). So compendious a formula is little more

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than a half truth. There is need of many a supplementary gloss before the outline can be so filled in as to depict the classic doctrine. "The promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting" (Wisc. & Mich. Ry. Co. v. Powers, 191 U.S. 379, 386; McGovern v. City of N. Y., 234 N. Y. 377, 389; Walton Water Co. v. Village of Walton, 238 N. Y. 46, 51; 1 Williston, Contracts, § 139; Langdell, Summary of the Law of Contracts, pp. 82-88). If A promises B to make him a gift, consideration may be lacking, though B has renounced other opportunities for betterment in the faith that the promise will be kept.

The half truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten. The doctrine of consideration has not escaped the common lot. As far back as 1881, Judge Holmes in his lectures on the Common Law (p. 292), separated the detriment which is merely a consequence of the promise from the detriment which is in truth the motive or inducement, and yet added that the courts "have gone far in obliterating this distinction." The tendency toward effacement has not lessened with the years. On the contrary, [**175] there has grown up of recent days a doctrine that a substitute for consideration or an exception to its ordinary requirements can be found in [*374] what is styled "a promissory estoppel" (Williston, Contracts, §§ 139, 116). Whether the exception has made its way in this State to such an extent as to permit us to say that the general law of consideration has been modified accordingly, we do not now attempt to say. Cases such as Siegel v. Spear & Co. (234 N. Y. 479) and DeCicco v. Schweizer (221 N. Y. 431) may be signposts on the road. Certain, at least, it is that we have adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscriptions. So

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long as those decisions stand, the question is not merely whether the enforcement of a charitable subscription can be squared with the doctrine of consideration in all its ancient rigor. The question may also be whether it can be squared with the doctrine of consideration as qualified by the doctrine of promissory estoppel.

We have said that the cases in this State have recognized this exception, if exception it is thought to be. Thus, in Barnes v. Perine (12 N. Y. 18) the subscription was made without request, express or implied, that the church do anything on the faith of it. Later, the church did incur expense to the knowledge of the promisor, and in the reasonable belief that the promise would be kept. We held the promise binding, though consideration there was none except upon the theory of a promissory estoppel. In Presbyterian Society v. Beach (74 N. Y. 72) a situation substantially the same became the basis for a like ruling. So in Roberts v. Cobb (103 N. Y. 600) and Keuka College v. Ray (167 N. Y. 96) the moulds of consideration as fixed by the old doctrine were subjected to a like expansion. Very likely, conceptions of public policy have shaped, more or less subconsciously, the rulings thus made. Judges have been affected by the thought that "defences of that character" are "breaches of faith toward the public, and especially toward those engaged in the same enterprise, and an unwarrantable disappointment of the reasonable expectations of those interested" (W. F. [*375] Allen, J., in Barnes v. Perine, supra, page 24; and cf. Eastern States League v. Vail, 97 Vt. 495, 505, and cases there cited). The result speaks for itself irrespective of the motive. Decisions which have stood so long, and which are supported by so many considerations of public policy and reason, will not be overruled to save the symmetry of a concept which itself came into our law, not so much from any reasoned conviction of its justice, as from historical accidents of practice and procedure (8 Holdsworth, History of English Law, 7 et seq.). The concept survives as one of the distinctive features of our legal system. We have no thought to suggest that it is obsolete or on the way to be

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abandoned. As in the case of other concepts, however, the pressure of exceptions has led to irregularities of form.

It is in this background of precedent that we are to view the problem now before us. The background helps to an understanding of the implications inherent in subscription and acceptance. This is so though we may find in the end that without recourse to the innovation of promissory estoppel the transaction can be fitted within the mould of consideration as established by tradition.

The promisor wished to have a memorial to perpetuate her name. She imposed a condition that the "gift" should "be known as the Mary Yates Johnston Memorial Fund." The moment that the college accepted $ 1,000 as a payment on account, there was an assumption of a duty to do whatever acts were customary or reasonably necessary to maintain the memorial fairly and justly in the spirit of its creation. The college could not accept the money, and hold itself free thereafter from personal responsibility to give effect to the condition (Dinan v. Coneys, 143 N. Y. 544, 547; Brown v. Knapp, 79 N. Y. 136; Gridley v. Gridley, 24 N. Y. 130; Grossman v. Schenker, 206 N. Y. 466, 469; 1 Williston, Contracts, §§ 90, 370). More is involved in the receipt of such a fund than a mere acceptance of money to be held to a corporate use [*376] (cf. Martin v. Meles, 179 Mass. 114, citing Johnson v. Otterbein University, 41 Ohio St. 527, 531, and Presb. Church v. Cooper, 112 N. Y. 517). The purpose of the founder would be unfairly thwarted or at least inadequately served if the college failed to communicate to the world, or in any event to applicants for the scholarship, the title of the memorial. By implication it undertook, when it accepted a portion of the "gift," that in its circulars of information and in other customary ways, when making announcement of this scholarship, it would couple with the announcement the name of the donor. The donor was not at liberty to gain the benefit of such an undertaking upon the payment of a part and disappoint the expectation that there would be payment of the residue. If the college had stated after receiving $ 1,000 upon account of the subscription that it would apply the money to the

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prescribed use, but that in its circulars [**176] of information and when responding to prospective applicants it would deal with the fund as an anonymous donation, there is little doubt that the subscriber would have been at liberty to treat this statement as the repudiation of a duty impliedly assumed, a repudiation justifying a refusal to make payments in the future. Obligation in such circumstances is correlative and mutual. A case much in point is N. J. Hospital v. Wright (95 N. J. L. 462, 464), where a subscription for the maintenance of a bed in a hospital was held to be enforcible by virtue of an implied promise by the hospital that the bed should be maintained in the name of the subscriber (cf. Bd. of Foreign Missions v. Smith, 209 Penn. St. 361). A parallel situation might arise upon the endowment of a chair or a fellowship in a university by the aid of annual payments with the condition that it should commemorate the name of the founder or that of a member of his family. The university would fail to live up to the fair meaning of its promise if it were to publish in its circulars of information and elsewhere the [*377] existence of a chair or a fellowship in the prescribed subject, and omit the benefactor's name. A duty to act in ways beneficial to the promisor and beyond the application of the fund to the mere uses of the trust would be cast upon the promisee by the acceptance of the money. We do not need to measure the extent either of benefit to the promisor or of detriment to the promisee implicit in this duty. "If a person chooses to make an extravagant promise for an inadequate consideration it is his own affair" (8 Holdsworth, History of English Law, p. 17). It was long ago said that "when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action" (Sturlyn v. Albany, 1587, Cro. Eliz. 67, quoted by Holdsworth, supra; cf. Walton Water Co. v. Village of Walton, 238 N. Y. 46, 51). The longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good.

We think the duty assumed by the plaintiff to perpetuate the name of the founder of the memorial is

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sufficient in itself to give validity to the subscription within the rules that define consideration for a promise of that order. When the promisee subjected itself to such a duty at the implied request of the promisor, the result was the creation of a bilateral agreement (Williston, Contracts, §§ 60-a, 68, 90, 370; Brown v. Knapp, supra; Grossman v. Schenker, supra; Williams College v. Danforth, 12 Pick. 541, 544; Ladies Collegiate Inst. v. French, 16 Gray, 196, 200). There was a promise on the one side and on the other a return promise, made, it is true, by implication, but expressing an obligation that had been exacted as a condition of the payment. A bilateral agreement may exist though one of the mutual promises be a promise "implied in fact," an inference from conduct as opposed to an inference from words (Williston, Contracts, §§ 90, 22-a; Pettibone v. Moore, 75 Hun, 461, 464). We think the fair inference to be drawn from the [*378] acceptance of a payment on account of the subscription is a promise by the college to do what may be necessary on its part to make the scholarship effective. The plan conceived by the subscriber will be mutilated and distorted unless the sum to be accepted is adequate to the end in view. Moreover, the time to affix her name to the memorial will not arrive until the entire fund has been collected. The college may thus thwart the purpose of the payment on account if at liberty to reject a tender of the residue. It is no answer to say that a duty would then arise to make restitution of the money. If such a duty may be imposed, the only reason for its existence must be that there is then a failure of "consideration." To say that there is a failure of consideration is to concede that a consideration has been promised since otherwise it could not fail. No doubt there are times and situations in which limitations laid upon a promisee in connection with the use of what is paid by a subscriber lack the quality of a consideration, and are to be classed merely as conditions (Williston, Contracts, § 112; Page, Contracts, § 523). "It is often difficult to determine whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a

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conclusive test in determining which construction of the promise is more reasonable is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration" (Williston, supra, § 112). Such must be the meaning of this transaction unless we are prepared to hold that the college may keep the payment on account, and thereafter nullify the scholarship which is to preserve the memory of the subscriber. The fair implication to be gathered from the whole transaction is assent to the condition and the assumption of a duty to go forward with performance (DeWolf Co. v. Harvey, 161 Wis. 535; Pullman Co. v. Meyer, 195 Ala. 397, 401; Braniff v. Baier, [*379] 101 Kan. 117; cf. Corbin, Offer & Acceptance, 26 Yale L. J. 169, 177, 193; McGovney, Irrevocable Offers, 27 Harv. L. R. 644; Sir Frederick Pollock, 28 L. Q. R. 100, 101). The subscriber does not say: I hand [**177] you $ 1,000, and you may make up your mind later, after my death, whether you will undertake to commemorate my name. What she says in effect is this: I hand you $ 1,000, and if you are unwilling to commemorate me, the time to speak is now.

The conclusion thus reached makes it needless to consider whether, aside from the feature of a memorial, a promissory estoppel may result from the assumption of a duty to apply the fund, so far as already paid, to special purposes not mandatory under the provisions of the college charter (the support and education of students preparing for the ministry), an assumption induced by the belief that other payments sufficient in amount to make the scholarship effective would be added to the fund thereafter upon the death of the subscriber (Ladies Collegiate Inst. v. French, 16 Gray, 196; Barnes v. Perine, 12 N. Y. 18, and cases there cited).

The judgment of the Appellate Division and that of the Trial Term should be reversed, and judgment ordered for the plaintiff as prayed for in the complaint, with costs in all courts.

DISCREPA DEL FUNDAMENTO: KELLOGG

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The Chief Judge finds in the expression "In loving memory this gift shall be known as the Mary Yates Johnston Memorial Fund" an offer on the part of Mary Yates Johnston to contract with Allegheny College. The expression makes no such appeal to me. Allegheny College was not requested to perform any act through which the sum offered might bear the title by which the offeror states that it shall be known. The sum offered was termed a "gift" by the offeror. Consequently, I can see no reason why we should strain ourselves to make it, not a gift, but a trade. [*380] Moreover, since the donor specified that the gift was made "In consideration of my interest in Christian education, and in consideration of others subscribing," considerations not adequate in law, I can see no excuse for asserting that it was otherwise made in consideration of an act or promise on the part of the donee, constituting a sufficient quid quo pro to convert the gift into a contract obligation. To me the words used merely expressed an expectation or wish on the part of the donor and failed to exact the return of an adequate consideration. But if an offer indeed was present, then clearly it was an offer to enter into a unilateral contract. The offeror was to be bound provided the offeree performed such acts as might be necessary to make the gift offered become known under the proposed name. This is evidently the thought of the Chief Judge, for he says: "She imposed a condition that the 'gift' should be known as the Mary Yates Johnston Memorial Fund." In other words, she proposed to exchange her offer of a donation in return for acts to be performed. Even so there was never any acceptance of the offer and, therefore, no contract, for the acts requested have never been performed. The gift has never been made known as demanded. Indeed, the requested acts, under the very terms of the assumed offer, could never have been performed at a time to convert the offer into a promise. This is so for the reason that the donation was not to take effect until after the death of the donor, and by her death her offer was withdrawn. (Williston on Contracts, sec. 62.) Clearly, although a promise of the college to make the gift known,

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as requested, may be implied, that promise was not the acceptance of an offer which gave rise to a contract. The donor stipulated for acts, not promises. "In order to make a bargain it is necessary that the acceptor shall give in return for the offer or the promise exactly the consideration which the offeror requests. If an act is requested, that very act and no other must be [*381] given. If a promise is requested, that promise must be made absolutely and unqualifiedly." (Williston on Contracts, sec. 73.) "It does not follow that an offer becomes a promise because it is accepted; it may be, and frequently is, conditional, and then it does not become a promise until the conditions are satisfied; and in case of offers for a consideration, the performance of the consideration is always deemed a condition." (Langdell, Summary of the Law of Contracts, sec. 4.) It seems clear to me that there was here no offer, no acceptance of an offer, and no contract. Neither do I agree with the Chief Judge that this court "found consideration present where the general law of contract, at least as then declared, would have said that it was absent" in the cases of Barnes v. Perine (12 N. Y. 18), Presbyterian Society v. Beach (74 N. Y. 72) and Keuka College v. Ray (167 N. Y. 96). In the Keuka College case an offer to contract, in consideration of the performance of certain acts by the offeree, was converted into a promise by the actual performance of those acts. This form of contract has been known to the law from time immemorial (Langdell, sec. 46) and for at least a century longer than the other type, a bilateral contract. (Williston, sec. 13.) It may be that the basis of the decisions in Barnes v. Perine and Presbyterian Society v. Beach (supra) was the same as in the Keuka College case. (See Presbyterian Church of Albany v. Cooper, 112 N. Y. 517.) However, even if the basis of the decisions be a so-called "promisory estoppel," nevertheless they initiated [**178] no new doctrine. A so-called "promisory estoppel," although not so termed, was held sufficient by Lord Mansfield and his fellow judges as far back as the year 1765. (Pillans v. Van Mierop, 3 Burr. 1663.) Such a doctrine may be an anomaly; it is not a novelty. Therefore,

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I can see no ground for the suggestion that the ancient rule which makes consideration necessary to the formation of every contract is in danger of effacement through any decisions [*382] of this court. To me that is a cause for gratulation rather than regret. However, the discussion may be beside the mark, for I do not understand that the holding about to be made in this case is other than a holding that consideration was given to convert the offer into a promise. With that result I cannot agree and, accordingly, must dissent.

¿La causa del contrato, acaso, no es efectuar una liberalidad?

DANIEL MILLS versus SETH WYMAN.
SUPREME COURT OF MASSACHUSETTS,
WORCESTER 20 Mass. 207 October, 1825, Decided

OPINIÓN POR: Parker

[*208] The opinion of the Court was read, as drawn up by.

Parker C. J. General rules of law established for the protection and security of honest and fair-minded men, who [*209] may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in foro conscientioe to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any [**4] consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services towards the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father,

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on being informed of this event, influenced by a transient feeling of gratitude, promises in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down [**5] the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some preexisting obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such preexisting equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a quid pro quo; and according to the [*210] principles of natural justice the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable [**6] consideration. These promises therefore have a sound legal basis. They are not promises to pay something for nothing; not naked pacts; but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a

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man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the interior forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he [**7] dwells, to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity.

Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, [*211] not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party [**8] making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the statute of limitations or bankruptcy, the principle is preserved by looking back to

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the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value: though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application, to cases where at some time or other a good or valuable consideration has existed. 1

1 Cook v. Bradley, 7 Conn. 57; Littlefield v. Shee, 2 Barnw. & Adol. 811; Yelv. (Metcalf's ed.) 4 a, note 1; Parker v. Carter, 4 Munf. 273; M'Pherson v. Rees, 2 Penrose & Watts, 521; Pennington v. Gittings, 2 Gill & Johns. 208; Smith v. Ware, 13 Johns. R. 259; Edwards v. Davis, 16 Johns. R. 281, 283, note; Greeves v. M'Allister, 2 Binn. 591; Chandler v. Hill, 2 Hen. & Munf. 124; Fonbl. on Eq. by Laussat, 273, note; 2 Kent's Comm. (2nd ed.) 465.

Contra, Glass v. Beach, 5 Vt. 172; Barlow v. Smith, 4 Vt. 139; Commissioners of the Canal Fund v. Perry, 5 Ohio 56.

See also Seago v. Deane, 4 Bingh. 459; Welles v. Horton, 2 Carr. & Payne, 383; Davis v. Morgan, 6 Dowl. & Ryl. 42.

[**9] A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessaries, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent in the world's business, the debts he in curs, whatever may be their nature, create no obligation upon the father; and it seems to follow, that his promise founded upon such a debt has no legally binding force.

The cases of instruments under seal and certain mercantile contracts, in which considerations need not be

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proved, do not contradict the principles above suggested. The first import a consideration in themselves, and the second belong to a [*212] branch of the mercantile law, which has found it necessary to disregard the point of consideration in respect to instruments negotiable in their nature and essential to the interests of commerce.

Instead of citing a multiplicity of cases to support the positions I have taken, I will only refer to a very able review of all the cases in the note in 3 Bos. & Pul. 249. The opinions of the judges had been variant for [**10] a long course of years upon this subject, but there seems to be no case in which it was nakedly decided, that a promise to pay the debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

It has been attempted to show a legal obligation on the part of the defendant by virtue of our statute, which compels lineal kindred in the ascending or descending line to support such of their poor relations as are likely to become chargeable to the town where they have their settlement. But it is a sufficient answer to this position, that such legal obligation does not exist except in the very cases provided for in the statute, and never until the party charged has been adjudged to be of sufficient ability thereto. We do not know from the report any of the facts which are necessary to create such an obligation. Whether the deceased had a legal settlement in this commonwealth at the time of his death, whether he was likely to become chargeable had he lived, whether the defendant was of sufficient ability, are essential facts to be [**11] adjudicated by the court to which is given jurisdiction on this subject. The legal liability does not arise until these facts have all been ascertained by judgment, after hearing the party intended to be charged. 2

2 See Cook v. Bradley, 7 Conn. 57; Wethersfield v. Montague, 3 Conn. 507; Dover v. McMurphy, 4 N.H. 158.

For the foregoing reasons we are all of opinion that the nonsuit directed by the Court of Common Pleas was right,

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and that judgment be entered thereon for costs for the defendant.

DEWEY BURPO AND BEVERLY BURP0, Plaintiffs-Appellees, CORPORATE SERVICE, INC.; PORTEC, INC., Plaintiffs-Intervenors, v. ALGOMA STEEL CORPORATION, LTD., Defendant/Third-Party Appellant, COMMERCIAL WIRE ROPE AND SUPPLY COMPANY, INC., and the CHESAPEAKE AND OHIO RAILWAY COMPANY, Third-Party Defendants/Appellees. UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT 772 F.2d 905 August 29, 1985

PER CURIAM.

BEFORE: CONTIE and WELLFORD, Circuit Judges; and PHILLIPS*, Senior Circuit Judge.

UNKNOWN *Judge Phillips participated in the argument but died (August 3, 1985) before the decision was reached.

Defendant Algoma Steel Corporation (Algoma), a Canadian corporation, appeals from a jury verdict of $303,000 in favor of plaintiffs' diversity claims for personal injuries and from the trial court's grant of summary judgment dismissing third-party co-defendants whom Algoma Steel impleaded for the purposes of contribution.

Plaintiff Burpo, an employee of the Michigan corporation, Portec, Inc., was injured on August 23, 1977, while unloading steel from a railway car. Defendant Algoma had loaded the steel on a railroad car owned by the Chesapeake and Ohio Railway Company [*2] (C & O), a Virginia corporation. During the unloading of the steel, a cable sling securing the steel broke. The cable was apparently manufactured by Commercial Wire Rope and Supply, Inc. (Wire and Supply), a Michigan corporation. The unloosed steel fell on plaintiff Burpo's hand, causing partial amputation.

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Suit was originally brought against C & O for negligence in the transportation of the steel shipment. Burpo then amended his complaint to include Algoma for negligence in the loading of the steel shipment. Burpo did not add Wire and Supply, a Michigan corporation, as a defendant, thus preserving complete diversity between plaintiffs and defendants.

After discovery, Burpo entered into a stipulation for a voluntary dismissal settlement with prejudice as to co-defendant C & O. Trial Judge Ralph B. Guy accepted the voluntary dismissal with prejudice of Burpo's claim against C & O, no objection being made by Algoma.

Six months later, before trial, Algoma filed a third party complaint impleading both C & O and Wire and Supply for purposes of contribution. On July 29, 1983, as trial approached, the newly impleaded Wire and Supply entered into a settlement agreement paying $5,000 to [*3] plaintiff Burpo for his promise not to sue. At the time of this release the normal statutory period for Burpo to bring a claim against Wire and Supply had expired. 1

1 For discussion of applicable Michigan statute, see infra pgs. 6-7.

Both C & O and Wire and Supply then moved for summary judgment on Algoma's contribution complaint against them. C & O argued that the court's prior dismissal with prejudice from Burpo's original claim served as a final adjudication establishing no tort liability on its part. Alternatively, C & O also argued that Burpo's voluntary action served as a release absolving C & O of any liability. Wire and Supply argued similarly that its release or agreement with Burpo insulated it from any tort contribution liability.

Judge Guy granted summary judgment to both C & O and Wire and Supply after hearing oral arguments on the motions. Algoma now on appeal challenges the legal basis for this summary judgment, and argues that the ruling was prejudicial because these dismissed defendants had

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participated in the selection of the jury. Plaintiff Burpo was thus allowed more peremptory challenges because Algoma had to share the defendant challenges with [*4] these antagonistic co-defendants.

Algoma's challenge to the dismissal of C & O and Wire and Supply will be addressed before proceeding with its legal challenges to the $303,000 jury verdict. 2

2 The jury awarded Dewey Burpo $300,000 in damages for the injury to his hand. Beverly Burpo, his wife, received $3,000 for loss of consortium. The court reduced the amount to $298,000 due to the Burpos' $5,000 settlement with Wire and Supply.

I. Algoma's Challenge to Court's Dismissal of C & O

The Michigan contribution statute, which is controlling, states in pertinent part:

(1) Except as otherwise provided in this act, when 2 or more persons become jointly or severally liable in tort for the same injury to a person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

M.C.L. § 600.2925a(1); M.S.A. § 27A.2925(a)(1) (emphasis added).

The trial court held that C & O was not responsible for contribution to Algoma because it did not fall in the statutorily-required class of persons who were "jointly or severally liable in tort." The court ruled that the [*5] court's previous dismissal with prejudice of the Burpo claim against C & O represented a full adjudication of not tort liability. Thus, according to the trial court, Algoma could not claim contribution because of C & O's conclusive affirmative defense of no original tort liability to the plaintiff.

We have held that a dismissal with prejudice represents a full adjudication of party liability. 3 In Smoot v. Fox, 340 F.2d 301, 303 (6th Cir. 1965), this court stated:

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Dismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties. An adjudication in favor of the defendants, by court or jury, can rise no higher than this.

3 On appeal Algoma emphasizes that C & O gained a voluntary dismissal by stipulation from Burpo and argues that an initial voluntary dismissal should not be treated as with prejudice. Algoma cites language from Cabrera v. Municipality of Bayamon, 622 F.2d 204, 206 (1st Cir. 1980), to the effect that "[t]he complaint against . . . [defendant] was voluntarily dismissed and the first such dismissal must be without prejudice [emphasis added]." There is no mention in Cabrera, however, that the dismissal was explicitly with prejudice as here. The Cabrera court was asserting the view that a first voluntary dismissal not explicitly labeled as "with prejudice" will always be construed as "without prejudice." See Fed. R. Civ. P. 41 ("Dismissal of Actions").

[*6] (Emphasis added). See also Cream Top Creamery v. Dean Milk Co., 383 F.2d 358, 362 (6th Cir. 1967).

It is true that Smoot characterizes a dismissal with prejudice as a bar to further action "between the parties" only. 340 F.2d at 303. Yet Smoot also unequivocally states that dismissal with prejudice is a "complete adjudication of the issues presented." Id. We thus believe that a proper dismissal of C & O with prejudice has the effect of precluding Algoma from establishing C & O's necessary predicate liability as a joint tortfeasor for contribution.

Algoma unfortunately failed to challenge this dismissal of C & O by Burpo in a timely fashion. 4 We decline to reverse on appeal this dismissal as improperly granted, and hold that its effect insulates C & O from Algoma's contribution claim.

4 Algoma now suggests that the voluntary dismissal of C & O by plaintiff Burpo was collusive in nature. This

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allegation, however, should have been made in objection to the trial court's original dismissal of C & O.

II. Algoma's Challenge to Court's Dismissal of Wire and Supply

Wire and Supply, never joined as a defendant party by Burpo, [*7] gave $5,000 for plaintiffs' release of possible claims against it. 5 It is undisputed that an effective release from tort liability by Burpo insulates Wire and Supply from a subsequent contribution claim by Algoma. See M.C.L. § 600.2925(d); M.S.A. § 27A.2925 (" good faith" release "discharges the tort-feasor . . . for contribution to any other tort-feasor.") Algoma, however, argues that the release is ineffective because of a failure of consideration flowing from the Burpos. In this regard, Algoma relies upon a three-year Michigan statute of limitations, M.C. L. Mich. § 600.5805(7); M.S.A. § 27A 5805(7), covering tort actions.

5 The key part of the release states as follows:

B. DEWEY BURPO and BEVERLY BURPO, do hereby release and forever discharge THE COMMERCIAL WIRE ROPE & SUPPLY COMPANY, INC., only, from all consequences of the accident which took place on August 23, 1977 wherein DEWEY BURPO suffered personal injuries.

* * *

D. That this Release and Covenant will operate to satisfy the Pro Rata share of the COMMERCIAL WIRE ROPE & SUPPLY COMPANY, INC.

Wire and Supply admits that the statutory period had expired at the time of its settlement and release. It [*8] asserts, nevertheless, that the agreement was based upon sufficient consideration flowing from plaintiffs. Wire and Supply acknowledges that the agreement was negotiated primarily to insulate it from a claim by Algoma of possible contribution liability. Algoma was free to pursue such a claim because a joint-tortfeasor contribution action represents a separate equitable action independent from the

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underlying tort suit. Sziber v. Stout, 419 Mich. 514, 358 N.W.2d 330, 335 (1984). Thus the statute of limitations on Algoma's contribution action did not expire until one year after an unfavorable final judgment against it had been rendered. Sziber, supra, 358 N.W.2d at 338; M.C.L. § 600.2925(c)(3); M.S.A. § 27A.2925(3)(3).

The trial court agreed with Wire and Supply that the Burpo release represented sufficient legal consideration. The court held that the statute of limitations did not operate in a per se fashion to prevent a suit by the Burpos against Wire and Supply. 6 The statute of limitations is instead an affirmative defense that must be specifically pled by a defendant and can be avoided by a plaintiff under certain circumstances. 7

6 The trial court stated:

[T]he statute of limitations doesn't operate automatically. It is an affirmative defense. And it's up to the defendant who has the potential liability to weigh and determine whether that would be a complete bar or not, and not for somebody else to substitute their judgment. Therefore, when a defendant such as Commercial Wire and Supply Company here enters into a goodfaith settlement with the plaintiff, the fact that arguably there could be an assertion of the statute of limitations against the plaintiff with whom he has settled would not keep the contribution statute from operating. [*9]

7 Under Michigan law there are a number of exceptions to operation of a statute of limitations defense:

1. if plaintiff was a minor or insane during statutory period (M.C.L. § 600.5851; M.S.A. § 27A.5851).

2. If plaintiff died before expiration of or thirty days after statutory period (M.C.L. § 600.5852; M.S.A. § 27A-5852).

3. If defendant was absent from state during statutory period (M.C.L. § 600.5853; M.S.A. § 27A-5853).

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4. If plaintiff could not file suit due to war during statutory period (M.C.L. § 600.5854; M.S.A. § 27A.5854); or

5. If defendant had fraudulently cancelled basis of claim from plaintiff during statutory period (M.C.L. § 600.5855; M.S.A. § 27A.5855).

Wire and supply acknowledges that none of these exceptions apply here. It mentions the possibility of number 5 above, but we do not understand it to be seriously asserting its own fraudulent concealment of a basis for suit during the statutory period.

Very little modern Michigan case law directly addresses the question whether the release of an apparently expired claim can represent sufficient consideration. In Taylor v. Weeks, 129 Mich. 233, 88 N.W. 466 (1901), [*10] however, the Michigan Supreme Court took a contrary view from the trial court here and held that a promise not to bring claim "barred by the statute of limitations" represents a promise "without sufficient consideration." 129 Mich. at 233, 88 N.W. at 466 (citing from case headnote in both volumes). Weeks has apparently not been cited in Michigan case law for almost the last half-century. 8 Yet it has also never been overruled by the Michigan Supreme Court.

8 But see Steep v. Harham, 241 Mich. 652, 217 N.W. 787, 788 (1928) (stating that the Weeks case "would control" in the case if note exchanged as consideration had been "outlawed" due to expiration of statutory period for the bringing of a claim in the note); see also Kirchhoff v. Morris, 282 Mich. 90, 275 N.W. 778, 780 (1937) (citing Weeks as authoritative on general principle of consideration); Newman & Snell's State Bank v. Hunter, 243 Mich. 331, 220 N.W. 665, 666 (1928) (dicta recognizing holding in Weeks case); Wierman v. Bay City-Michigan Sugar Co., 142 Mich. 422, 106 N.W. 75, 82 (1905) (citing Weeks as analogous support for proposition that forbearance to bring alleged attachment suit does not

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constitute sufficient consideration if no ground existed for attachment).

[*11] Weeks could possibly be distinguished from the instant case, because of "circumstances [showing] . . . prima facie that there was no valid claim in the first instance." 88 N.W. at 467. 9 Weeks involved a suit against a deceased widow's estate by a former apprentice worker of her previously deceased husband. The worker had agreed not to press a supposed claim (for services performed) against the husband's estate in exchange for the wife's belatedly written promise to pay him out of her own estate. Thus Weeks presented a case of a party possessing only a false claim against an apparently unsophisticated and newly deceased widow. The trustee of the widow's estate acting as party to the alleged contract, moreover, moved to void the contract. In the instant case, Algoma, as a third party, attacks the sufficiency of consideration, particularly as it relates to its substantial claim for contribution.

9 The lack of a bona fide claim, however, was clearly not the sole grounds stated by the court. The Weeks court stated that "the circumstances under which these services were rendered, as well as the time of the rendition of the services, establish prima facie that there was no validity to the claim, and that it could not be enforced against the estate." 129 Mich. at 236; 88 N.W. at 467.

[*12] We are nevertheless reluctant to ignore established Michigan case law precedent on this question. 10 More important, a rejection of the Weeks rationale would not result in an affirmance. Even if it were assumed that the agreement between the Burpos and Wire and Supply is legally sufficient to bar any subsequent action by the Burpos against Wire and Supply, it does not follow that this agreement between the plaintiffs and Wire and Supply bars Algoma as a third non-contractual party from making an equitable claim of contribution against Wire and Supply. We conclude that it is unfair and unreasonable to hold that an agreement for such questionable consideration paid by

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Wire and Supply necessarily bars the claim of Algoma for equitable relief from another potential join tortfeasor.

10 We note the following contrary advice: "In some cases it has been held that forebearance to press a claim that is barred by statute of limitations . . . is not sufficient as consideration. These cases should not be followed." Corbin on Contracts, Vol. I, 602 (1963) ed.).

We recognize, on the other hand, that Wire and Supply should not be completely precluded from protecting a potentially [*13] exposed legal interest by negotiating a settlement. The Final Pretrial Order entered by the trial court noted that defendant Algoma "has repeatedly stated that it will offer only a nuisance value in settlement of said claim, and such offer is totally unacceptable to Plaintiff." Algoma's apparent reluctance to settle obviously kept Wire and Supply open to liability due to the potentiality of an equitable contribution action by Algoma in the event of its loss of trial (which, of course, did occur). If the trial court had relied on this evidence to rule that Algoma's anti-negotiation stance was unreasonable and constituted a waiver of any objections to Wire and Supply's settlement, we would be faced with a different question. We now remand for reconsideration to the district court the sufficiency of consideration of the purported release and its effect on Algoma in light of the equities found to be present at the time.

III. Algoma's Challenge to the Jury Selection Process

Algoma also claims that it was unduly prejudiced by C & O and Wire and Supply's participation in the jury selection process before their summary judgment dismissals. 11 While Burpo received six peremptory [*14] challenges, Algoma received three and C & O shared three with Commercial Wire.

11 Algoma also adds the assertion that it was unfairly surprised by the summary judgment motions of C & O and Wire and Supply. Algoma, however, fails to raise this

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charge as an independent issue. We find no basis for reversal in this assertion by Algoma.

This question about improper jury selection in multi-party suits involves whether the trial judge engaged in an abuse of his undeniably broad discretionary powers. 28 U.S.C. § 1870; Fedorchick v. Massey-Ferguson, Inc., 577 F.2d 856 (3d Cir. 1978). Algoma is able to establish no clear ground of prejudice with respect to this issue. The other two parties were then involved in the suit only for purposes of contribution to Algoma. If Algoma were found not liable, they would not be liable in contribution. They thus had strong reason not to be antagonistic during the trial proceedings. We accordingly find no merit in Algoma's position in this respect.

IV. The Burpo's Negligence Claim Against Algoma

Many of the facts are in dispute in this controversy. The following outline of events, however, would [*15] seem to be undisputed:

1. Portec, Inc. employee, Dewey Burpo, was injured while trying to place a chain or holding device under a package of steel that was being temporarily lifted by a cable sling device; the cable broke and his hand was crushed by the falling package of steel.

2. Officials of Portec thought it necessary to lift up the package because the package had arrived resting on only one 4" x 4" x 8" piece of timber; this apparently left not enough space between the floor and the package to wrap the chain around the bottom side of the package.

3. Portec had specified as usual to steel manufacturer and loader Algoma that all such packages should have at least three such timber supports between a package and the floor;

4. Five other steel packages in this shipment had three such timber supports underneath them.

5. The apparently missing timber supports were found somewhere else in the transport car.

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Algoma essentially argues that the trial court should have granted a directed verdict or judgment notwithstanding the verdict under the above-related set of circumstances. In such a situation it is clear that this court must evaluate the evidence in the light [*16] most favorable to Burpo as the non-moving party who received the jury verdict. Gillham v. Admiral Corporation, 523 F.2d 102 (6th Cir. 1975); Teti v. Firestone Tire and Rubber Co., 392 F.2d 294 (6th Cir. 1968). In order to avoid a directed verdict or judgment notwithstanding the verdict, the only burden on the plaintiff was to establish some credible proof of the four necessary elements in a negligence action: (a) that defendant owed a duty to the plaintiff; (b) that defendant violated the duty; (c) that defendant's violation of duty was a proximate cause of incident involving plaintiff; and (d) that plaintiff actually suffered damages. Falkner v. Fetzer, Inc., 113 Mich. App. 500, 317 N.W.2d 337, 339 (1982).

A. Duty

It appears that Michigan law would impose a duty of care on Algoma stemming from its undertaking of the activity in question and in view of its contractual relationship with Portec. See Clark v. Dalman, 379 Mich. 251, 150 N.W.2d 955, 960 (1967) (affirming the theory that "accompanying every contract is a common law duty to perform with ordinary care the thing agreed to be done"). Algoma [*17] and Portec enjoyed an on-going contractual relationship for a number of years. Portec specifically requested how it wanted the steel packaged. Algoma's package and loading supervisor, Mr. Joseph Nadeau, also acknowledged that Algoma was required to meet specific loading regulations of the American Association of Railroads.

B. Breach of Duty

Burpo presented circumstantial evidence from which a reasonable inference might be drawn that Algoma was responsible for a bad packing job. Plaintiffs pointed to the testimony of Portec employees who said that they had

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previously witnessed the arrival of steel packages with only one supporting timber block. A Portec official also stated that he had complained to Algoma about faulty loading. On cross-examination an Algoma foreman appeared to contradict a previous statement that he had never known of such one-piece support loading.

Perhaps the strongest circumstantial evidence came from third parties involved. Plaintiffs point in the record to a document submitted by Algoma in which a railroad official had previously disclaimed any responsibility for Algoma shipments due to "poor loading practices" [emphasis added]. An expert witness [*18] in mechanical engineering, Professor Thomas Manos of the University of Detroit, also testified that 1) it was possible for the steel package to be effectively loaded with one timber block and 2) it was doubtful that any physical force during transportation could cause such significant shifting of the steel and the support blockage as suggested by Algoma. An Algoma foreman, George Glemnitz, also admitted that he had never heard of a situation where such massive shifting occurred in transportation.

Defendant Algoma essentially attacks the circumstantial nature of this evidence. We find this to be sufficient evidence, although indirect, under the circumstances of this case to support a jury verdict.

C. Proximate Cause

Defendant Algoma especially emphasizes that fault on the part of the railroad transporter C & O and Burpo's employer, Portec, may have been indicated. It is not enough, however, for Algoma to show that negligence by the railroad or employer could have been contributing causes to his injury. Algoma must show that these parties are the sole proximate or superseding causes of his injury. But in our view of the record, Algoma provided no strong evidentiary grounds [*19] to establish that the rail transportation provided by C & O caused significant shifting of the blocks.

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Algoma is this primarily relegated to the argument either that the employer Portec was guilty of superseding negligence or employee Burpo guilty of contributory negligence in the attempt to unload the package. Algoma concludes that Portec's and Burpo's attempted unloading of the package was "in violation of Federal OSHA and state MIOSHA safety standards." This charge is supported by no discussion of the standards involved nor any reference to the record. Algoma then goes on to assert that these supposed unloading violations should have formed a presumption of negligence per se which the Burpos failed to rebut.

We cannot agree with Algoma's claim that either Portec's and/or Burpos' violation of federal regulations was so strongly established beyond dispute in the record. We cannot find error in the trial court's judgment that a reasonable jury might have found Algoma liable for proximately causing the injury. In such complicated factual situations, the issue of negligent liability is a question for the jury rather than a question of law for the court. The jury was specifically [*20] instructed on and rejected the defense of contributory negligence. The function of an appellate court is not to try de novo these contested fact issues, even those closely related to ultimate findings of fact and related conclusions of liability.

D. Damages

On appeal the question of damages is governed by an "abuse of discretion" standard regarding the trial court's refusal to reject the jury's determination. See Fed. R. Civ. P. 59. It is not disputed that four of Burpo's fingers have been amputated on his right working hand. Dr. Alexander Kelly, a plastic surgeon, testified that Burpo was now necessarily limited to one-hand jobs. The personnel director at Portec also gave specific testimony regarding Burpo's approximate $14,060.80 salary. Even if our view of adequate damages would have differed from those of the factfinders, we cannot conclude that the trial court abused its discretion in refusing to adjust this particular award. We

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rather hold that the jury's verdict was within reasonable limits under the evidence.

Algoma also challenges the court's award of pre-judgment interest. Federal law explicitly grants post-judgment interest but is silent on the question of [*21] pre-judgment interest. See 28 U.S.C. § 1961(a). This court has held that the awarding of pre-judgment interest in diversity cases is controlled by state law. See American Anodco, Inc. v. Reynolds Metal Co., 743 F.2d 417, 425 (6th Cir. 1984); Clissold v. St. Louis-Francisco Railway, 600 F.2d 35, 39 n.3 (6th Cir. 1979). The awarding of pre-judgment interest dating from the filing of a complaint in a successful civil action is mandatory under Michigan law. See MSA § 27A.6013, MCL § 600.6013; McGrath v. Clark, 89 Mich. App. 194, 280 N.W.2d 480, 482 (1979). Thus the trial court did not err in granting prejudgment interest dating from the filing of the complaint.

The court, however, additionally computed interest from date of injury until the filing of the complaint into the judgment award. Plaintiff Burpo's complaint requested judgment only beginning with "the filing of the complaint." This court has held that an "award of interest should be restricted to the amount specifically prayed for in the complaint." Steffen v. United States, 213 F.2d 266, 272 (6th Cir. 1954). The trial [*22] court therefore erred in awarding this precomplaint interest as part of the judgment.

The district court's order dismissing Wire and Supply is vacated and remanded for reconsideration consistent with this opinion, and, the district court's award of precomplaint interest is vacated and set aside. In all other respects, we affirm the judgment of the district court.

En esta transacción judicial, ha prescrito la acción del demandante. Así se rompe la lógica de la justicia comunicativa, frecuentemente basada en el principio de «do ut des» (te doy para que me des).

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NEWMAN AND SNELL'S STATE BANK v. HUNTER. SUPREME COURT OF MICHIGAN 243 Mich. 331; 220 N.W. 665; 59 A.L.R. 311 April 12, 1928, Submitted July 24, 1928, Decided

OPINIÓN POR: FELLOWS

[*332] [**665] FELLOWS, J. Defendant is the widow of Lee C. Hunter, who died intestate January 25, 1926. His estate was insufficient to pay his funeral expenses and the widow's allowance. At the time of his death plaintiff bank held his note for $3,700, with 50 shares of the capital stock of the Hunter Company as collateral. This company was insolvent but was still doing business when the note was given; afterwards it was placed in the hands of a receiver and its assets were insufficient to pay its debts. The facts were agreed upon on the trial in the court below. We quote from the agreed statement of facts:

"On March 1, 1926, the defendant gave the plaintiff the note described in the plaintiff's declaration in this cause and the plaintiff surrendered to her therefor, and in consideration thereof, the note of said Lee C. Hunter. The defendant also paid the plaintiff the earned interest due on the deceased's note."

Defendant pleaded want of consideration. We shall presently consider the effect of what was done about the stock of the Hunter Company, and for the present will [**666] consider whether the surrender of the note of her [*333] deceased husband who left no estate was a sufficient consideration for the note sued upon. Counsel for both parties have furnished able briefs and their arguments have been helpful. They have doubtless brought to our attention all the cases which would be of assistance to us in reaching a conclusion. While all the authorities cited have been examined, we shall not take up each one of them and discuss them, nor shall we cite them all, nor shall we attempt a reconciliation of the decisions of those States whose own decisions are claimed to be out of accord with each other. There is a definite conflict in the decisions from other States, and it is possible there is a conflict between cases from the same court.

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Nowlin v. Wesson, 93 Ala. 509 (8 South. 800), unequivocally sustains the plaintiff's contention. It was there held (quoting the syllabus):

"The surrender to a widow of a claim against the estate of her deceased husband, treating it as no longer binding on his estate, is a sufficient consideration to support her promissory note for the amount, although the husband's estate is in fact insolvent."

We likewise quote the syllabus of Wilton v. Eaton, 127 Mass. 174:

"The surrender to an administrator of a promissory note made by his intestate, whether the note, at the time of the surrender, is capable or incapable of being enforced at law, is a sufficient consideration for the giving of a new note by the administrator, and he is personally liable thereon; although, when the new note is given, his final account has been allowed, and no new assets have since come into his hands."

The decision sustains the syllabus and attempts to distinguish the case of Williams v. Nichols, 10 Gray (Mass.), 83, a case relied upon by defendant. Doubtless plaintiff's strongest case is Judy v. Louderman, 48 Ohio St 562 (29 N.E. 181). The father of an insolvent decedent took up decedent's note with his [*334] own. Although the note taken up was worthless, it was held that the consideration was adequate. The opinion largely rests on the desire of the father to acquire his son's note, and in part on the question of moral obligation. The Maryland court of appeals had substantially the same question before it in Schroeder v. Fink, 60 Md. 436. There the deceased likewise left no estate. His two sons promised to pay $500 for the surrender of the $500 note of their father. It was held that the sons' promise was without consideration and was nudum pactum. Mohn v. Mohn, 181 Iowa, 119 (164 N.W. 341); York v. Pearson, 63 Me. 587, and Corbett v. Cochran, 3 Hill (S.C.), 41 (30 Am. Dec. 348), tend to support plaintiff's contention, as does some of the language used in Bissinger v. Lawson, 57 Miss. 36. But in the later case of Sykes v.

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Moore, 115 Miss. 508 (76 South. 538, L.R.A. 1918B, 491), that court held unequivocally:

"A note by a widow in settlement of her deceased husband's debt, where the husband left no estate, was without consideration and void."

We now take up some of the cases relied upon by defendant. In Paxon v. Nields, 137 Pa. St. 385 (20 Atl. 106), it was held (quoting the syllabus):

"A note given by a widow for the payment of a debt due from her deceased husband's estate, which estate is insolvent, is void in law without a new consideration; and such consideration will not be raised by an agreement on the part of the creditor that the note will be renewed from time to time after maturity."

We quote from the syllabus in Ferrell v. Scott, 2 Speers (S.C.), 344 (42 Am. Dec. 371):

"It is no sufficient consideration to support the promise of the surviving widow of a pauper in a promissory note, given by her shortly after her husband's death, to one of his creditors, that such demand should be discharged against the estate of her husband by virtue of her undertaking to pay it."

[*335] Likewise we quote from the syllabus in Gilbert v. Brown, 29 Ky. L. Rep. 1248 (97 S.W. 40, 7 L.R.A. [N.S.] 1053):

"The execution, by a woman, of a note to take up one of her deceased husband, is without consideration if she received nothing from his estate."

In Home State Bank v. DeWitt, 121 Kan. 29 (245 Pac. 1036), that court pointed out that while the note of a living person who was presently without means would furnish a consideration, one of a deceased insolvent would not. Defendant's contention likewise finds support in the following cases: William v. Nichols, supra; Sponhaur v. Malloy, 21 Ind. App. 287 (52 N.E. 245); Kircher v. Sprenger, 4 Pa. Dist. Rep. 144; Jones v. Ashburnham, 4 East, 455; Hanway v. Robertshaw, 49 Miss. 758; Coward v. Hughes, 1 Kay & J. 443; Maull v. Vaughn, 45 Ala. 134.

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This court in one case (Taylor v. Weeks, 129 Mich. 233) has held that the widow's note given for the discharge of an unenforceable claim against the estate of her deceased husband, one outlawed under the statute of limitations, was one that was unenforceable as without sufficient consideration, and in two cases (Cawthorpe v. Clark, 173 Mich. 267, and Steep v. Harpham, 241 Mich. 652), this court has held that the widow's note given for the discharge of obligations of her husband were enforceable in the absence of any testimony showing that the estate was insolvent. In the more recent of these cases it was stressed that there was no evidence of insolvency of the estate, and that while the duty of showing consideration rested on the plaintiff through the case, the recitals in the [**667] note made a prima facie case and the duty of going forward with the testimony rested on the defendant. Here we have the widow's note given to take up the note of her insolvent husband, a worthless piece of paper. When plaintiff surrendered this worthless piece of [*336] paper to the defendant, it parted with nothing of value and defendant received nothing of value, the plaintiff suffered no loss or inconvenience and defendant received no benefit. The weight of authority sustains defendant's contention, but going back to fundamentals it seems clear to me that the transaction was without consideration. It is urged that plaintiff's right as a creditor to administer the estate was valuable and was waived. Had there been assets or prospective undisclosed assets there might be some force to this contention. But the agreed statements of facts negative any such situation. Under the agreement of facts there was not enough in the estate to pay the funeral expenses or the widow's support.

We have now reached the question of whether the manner of handling the stock of the Hunter Company furnished a consideration. So far as the record discloses this stock was retained by the bank and was treated as collateral to defendant's note, and it was so stated in that instrument. The bank, so far as the record discloses, never surrendered it to the defendant but kept it and has it today. But

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plaintiff's counsel insist that as matter of law it was transferred to defendant. They insist that whatever interest the bank had in the stock passed to defendant when her husband's note was surrendered to her, even though it was not as matter of fact given to her. But if we accept this theory and thus create a legal fiction, we must have in mind that she at once and in the same transaction re-hypothecated the stock to the bank. Stripped of all legal fiction, the cold facts are that when the negotiations opened plaintiff had this stock and the worthless note of defendant's husband. When they ended the bank still had the stock and defendant's note. Defendant had her husband's worthless note and she had nothing more. But this discussion is largely academic. The agreed statement of facts [*337] shows that the company was insolvent. The stock then had no book value. There is no statement that it had a market value, and in the absence of anything showing or tending to show a market value, we cannot assume it had such value or what it was. It was suggested on the argument that even though the company was insolvent, it might have been revived by the infusion of new money in the enterprise. But no one has come along with any infusion of such new blood, and value based on such a possibility is altogether too problematical to form a fixed basis of property rights. The record shows the affairs of the company have been wound up, and that creditors were not paid in full. Upon this record the stock was worthless.

The case of Monroe State Savings Bank v. Orloff, 232 Mich. 486, is clearly distinguishable. In that case the bank had an attachment levied on a considerable amount of property. The testimony offered in behalf of plaintiff, which was accepted by the jury, showed or tended to show that all the parties understood that defendant, a married woman, could not become security for the payment of the debt of the corporation, but that she could purchase the note with the rights which went with it. And that the transaction was a sale and nothing more. The defense was coverture, not failure of consideration. There the defendant received the notes of the corporation, which were at least secured in

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part by an attachment, while here defendant only received the note of a deceased person who left nothing but debts and an insolvent estate. We are satisfied that the defense of failure of consideration was sustained.

The judgment will be reversed, without a new trial.

OLD AMERICAN LIFE INS. CO. v. BIGGERS. UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT 172 F.2d 495; 8 A.L.R.2d 781 February 2, 1949

OPINIÓN POR: PHILLIPS

[*496] The Old American Life Insurance Company 1 instituted this action against Biggers seeking a decree adjudging a contract to be void, or, in the alternative, that it be adjudged to terminate when Biggers had received the amount of $ 22,443.26 thereunder.

The Insurance Company was organized under an Act known as the Mutual Benefit Act of the State of Oklahoma, 36 Okl.St. 1941 Secs. 691-712, under the name of the Duncan Life and Accident Association, Duncan, Oklahoma. From the date of its organization until March, 1929, it operated on a post-mortem assessment plan. In March, 1929, its charter was amended so as to adopt the level rate plan.

Companies organized under such Act operate on a mutual plan. Their premium rates are less than those charged by old line legal reserve insurance companies. No dividends are made by such companies.

On August 1, 1935, the Insurance Company entered [**2] into a reinsurance contract whereby all of its members, except those composing its board of directors, were reinsured in the Republic Life Insurance Company of Oklahoma City, Oklahoma. This left the Insurance Company with nothing but its charter. In September, 1935, by amendments to the charter, the [*497] name was changed to Old American Life Insurance Company, and new officers and directors were elected and installed.

In accordance with a general practice with respect to members of such insurance companies, each member of the Insurance Company, at the time of his application for

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membership, executed a continuing proxy to the president of the Insurance Company. This gave the president and succeeding presidents the power to elect the boards of directors and thereby control the election of officers. Until such an insurance company had accumulated a reserve, it was the practice of the organizers and promoters to make advances to meet its financial requirements. An insurance company could not obligate itself to repay such advances, because so to do would render it insolvent. But the practice was for the president and other officers, through the control effected as above stated, [**3] to reimburse themselves for advances so made, indirectly through salaries and commissions.

In November or December, 1935, Biggers initiated negotiations with R. W. Dockray which resulted in an agreement that Dockray should become sales manager of the Insurance Company; that he should receive a salary of $ 250 per month and traveling expenses; that he should develop and build up the business of the Insurance Company, and that when he had succeeded in so doing, the benefits flowing from proxy control should go one-third to Dockray, one-third to Biggers, and one-third to D. W. Womack, who was secretary-treasurer of the Insurance Company.

From July, 1935, to September, 1938, H. H. Sharp was the president of the Insurance Company. He was at all times the alter ego of Biggers. Sharp resigned as president in September, 1938. Dockray was vice-president and, as such, apparently performed the duties of president until February, 1940. Biggers' domination of the Insurance Company did not cease with the resignation of Sharp. Until February 13, 1940, he continued his domination through its directors, all of whom, except Dockray, were employees of Biggers. Sometime during February, 1940, probably [**4] on February 13, 1940, Dockray was elected president of the Insurance Company.

Dockray told Biggers that considerable funds would have to be advanced to the Insurance Company, and Biggers agreed to make such advances. From time to time,

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Biggers made advances to the Insurance Company, aggregating $ 22,443.26. All of such advances were made in the name of Sharp except one of $ 750.

On January 11, 1938, Sharp signed and delivered a letter to the Insurance Commissioner which stated that the donations made by Sharp to the Insurance Company in the amount of $ 11,431.67 were, in fact, donations and that the Insurance Company was not liable to repay or reimburse Sharp therefor. On September 15, 1936, Sharp had signed and delivered a letter to the Insurance Commissioner in which he made a like statement with respect to $ 6,300 advanced by him to the Insurance Company.

Early in 1940, Biggers advised Dockray that he would not advance any more money to the Insurance Company and proposed that its policies be reinsured in the Republic Life Insurance Company. After some discussion of the effect of such action on Biggers and Dockray, Biggers proposed that the Insurance Company enter into a contract [**5] whereby it would agree to pay him 10 per cent of the gross premiums received on business then in force, and thereafter written by the Insurance Company, until he had received the amount of $ 22,443.26. Dockray suggested that the commission on premiums should be 5 per cent. Biggers insisted on 10 per cent and stated he would cause the directors of the Insurance Company to reinsure its policies unless the Insurance Company entered into the contract as demanded by him. Biggers stated that, should the policies be reinsured, he would lose the $ 22,443.26 he had advanced and Dockray would lose all but the $ 250 per month he had received as salary. Dockray requested Biggers to recite in the contract the amount of the Insurance Company's liability but stated that the contract would terminate when he had received $ 22,443.26 under it.

[*498] On February 1, 1940, the Insurance Company entered into a contract with C. J. Bozeman. The contract recited that Bozeman had contributed a large amount of money to the Insurance Company to assist in promoting it and building up its agency force and had made it possible for the Insurance Company to write a substantial amount of

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business; that Bozeman [**6] was willing to release any and all claims he had against the Insurance Company because of such contributions, and was willing to use his influence in securing new business for the Insurance Company and to assist it in retaining business then in force, and that the Insurance Company desired to secure the cooperation of Bozeman in continuing in force the business then on its books, and desired to be relieved of all obligations of whatsoever kind and character which Bozeman might have against it because of such contributions.

It provided that, for and in consideration of $ 1 paid by Bozeman and the mutual covenant set forth in the contract, Bozeman released the Insurance Company of any and all claims he might have against it because of such contributions; that Bozeman should cooperate with the Insurance Company in writing new business and assist it wherever possible in continuing in force, business then on its books; that the Insurance Company transferred, assigned, and agreed to pay Bozeman 10 per cent of the gross premiums received by it on all business then in force and which might thereafter be written by it; and that, should the Insurance Company discontinue writing new business [**7] or should it be merged with, or reinsure its policies in, another company, it should continue to pay such percentage of premiums upon all insurance in force at the time of the reinsurance or merger.

When Dockray became president in 1940, he made substantial reduction in salaries of officers and in operating expenses. The Insurance Company prospered. Its net assets increased from $ 1,101.37 in 1939 to $ 27,024.87 in 1946.

The Insurance Company paid Biggers $ 15,460.19 between January 10, 1940, and February 15, 1946.

On March 8, 1946, the Insurance Company made a written offer to pay Biggers $ 6,983.07, which, with the payments theretofore made, would equal the $ 22,443.26 donated to the Insurance Company by Biggers, on condition that Biggers return the original of the contract and an assignment thereof to the Insurance Company.

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Biggers declined so to do and, thereupon, the Insurance Company brought this action.

At the hearing below, Dockray testified that the advances made by Biggers to the Insurance Company were, in fact, donations and did not create any legal liability on the part of the Insurance Company to make repayment thereof. He further testified that before the contract [**8] of February 1, 1940, was entered into, Biggers unequivocably agreed that the liability of the Insurance Company under the contract should be $ 22,443.26, and that when that amount had been paid to Biggers thereunder, the contract would terminate. That testimony was not denied.

One ground set up in the complaint for the relief sought was that the consideration moving from Biggers was insufficient to support an agreement by the Insurance Company to pay Biggers 10 per cent of the gross premiums received by the Insurance Company throughout its life.

The trial court denied the plaintiffs any relief and awarded Biggers judgment on his counterclaim for the amount of commission which had accrued under the contract, with interest. The Insurance Company has appealed.

It is clear that Bozeman did not render to the Insurance Company any of the personal services provided for in the contract. We think it may be reasonably inferred from the evidence that Biggers did not render the Insurance Company any personal service under the contract. In fact, counsel for Biggers states in his brief that the parties did not contemplate that any of such services would be rendered.

The Insurance Company [**9] contends that, since no limitation as to time is expressed in the contract, either it is terminable at the will of either party, or it will terminate at the time when the parties intended it should cease to operate.

[*499] We do not think the contract should be regarded as one for personal services and, therefore, terminable by either party on reasonable notice. 2

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The parties did not contemplate that either Biggers or Bozeman would render any personal services under the contract. The advances which Biggers had made to the Insurance Company were donations and created no express or implied legal obligation of the Insurance Company to repay them. The release by Biggers of any claim which Biggers had against the Insurance Company for such donations did not constitute a legal consideration for the contract, because the relinquishment of a claim which is wholly without merit or foundation does not constitute a legal consideration. 3 The giving up by Biggers of the control he had exercised over the Insurance Company was not a lawful consideration. Control vested in the president of the Company because he held the proxies of all of its members and could cast a controlling vote [**10] at annual meetings and in the election of boards of directors. But one acting as president occupied the relation of a fiduciary to the Insurance Company, 4 and a president, in voting as the proxy for members, occupies the relation of a fiduciary to such members. 5 Surely, the fiduciary powers vested in a president of a corporation and in one authorized to act as proxy for a member cannot be bartered or sold. Neither can they be transferred as the consideration for a contract. The control and domination of the Insurance Company by Biggers, up to the time the contract was entered into, does not enhance his position with respect to his rights to enforce the contract. It follows that the contract must be supported, if at all, by the moral obligation which arose from the donations made by Biggers. We think it may be said that, while it was not intended that such donations should create a legal obligation on the part of the Insurance Company to repay them, Biggers expected that, if the Insurance Company prospered, through the control he was able to exercise over it, he would eventually be indirectly repaid through the payment of salaries or commissions. Made under those circumstances, [**11] we think the donations created a moral obligation on the part of the Insurance Company sufficient to support a future executory promise.

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While the authorities are not in agreement, the trend of modern authorities is to the effect that where services or other consideration moving from the promisee conferred an actual, material, or pecuniary benefit on the promisor, and not merely a detriment to the promisee, and the promisee expected to be compensated therefor and did not intend it as mere gift or gratuity, and the benefit received had not constituted the consideration for another promise already performed or still legally enforceable, a moral obligation arises which will support a subsequent executory promise where there was originally no contract, perfect or imperfect, obligating the promisor. 6

By statute, Oklahoma has recognized, without defining, a moral obligation as a consideration for a promise and has limited the extent to which it can constitute a consideration for a promise. 15 Okl.St.Ann. § 107 provides: 'An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the [**12] promisee, is also a [*500] good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise.'

We, therefore, conclude that the donation made by Biggers to the Insurance Company constituted a consideration in the nature of a moral obligation for the promise of the Insurance Company to pay Biggers 10 per cent of its gross premiums, but only to the extent of such obligation and no further, 7 and that, when payments made under the contract equal the amount of the donations, the contract will terminate.

The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

1. Hereinafter called the Insurance Company.

2. Cf. Dunn v. Birmingham Stove & Range Co., 170 Okl. 452, 44 P.2d 88.

3. Hulen v. Truitt, 188 Okl. 296, 108 P.2d 170, 173.

4. Dunnett v. Arn, 10 Cir., 71 F.2d 912, 918; Fletcher Cyc. Corp. Perm. Ed. Vol. 3, Sec. 838, pp. 142, 144.

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5. Carcaba v. McNair, 5 Cir., 68 F.2d 795, 797; Cliffs Corporation v. United States, 6 Cir., 103 F.2d 77, 80; Wolcott & Lincoln v. Butler, 155 Kan. 105, 122 P.2d 720, 723, 141 A.L.R. 356.

[**13]

6. Park Falls State Bank v. Fordyce, 206 Wis. 628, 238 N.W. 516, 518, 519, 79 A.L.R. 1339; Holland v. Martinson, 119 Kan. 43, 237 P. 902, 903; Webb v. McGowin, 27 Ala.App. 82, 168 So. 196, 198; Id., 232 Ala. 374, 168 So. 199; Edson v. Poppe, 24 S.D. 466, 124 N.W. 441, 26 L.R.A., N.S., 534; Notes 17 A.L.R.pp. 1359, et sequi, and 1317, et sequi; 25 AL.R.p. 635; 79 A.L.R.pp. 1353 and 1350; 12 Am.Jur.p. 601, § 107; 17 C.J.S., Contracts, § 118, p. 471.

7. Kennedy v. Marshall, 195 Okl. 617, 160 P.2d 397, is not to the contrary. There, the donations were naked gifts with no expectation that there would be reimbursement therefor in the future.

WEBB v. McGOWIN et al. COURT OF APPEALS OF ALABAMA 27 Ala. App. 82; 168 So. 196 November 12, 1935, Decided

OPINIÓN POR: BRICKEN

[*84] [**196] BRICKEN, Presiding Judge.

This action is in assumpsit. The complaint as originally filed was amended. The demurrers to the complaint as amended were sustained, and because of this adverse ruling by the court the plaintiff took a nonsuit, and the assignment of errors on this appeal are predicated upon said action or ruling of the court.

A fair statement of the case presenting the questions for decision is set out in appellant's brief, which we adopt.

"On the 3d day of August, 1925, appellant while in the employ of the W. T. Smith Lumber Company, a corporation, and acting within the scope of his employment, was engaged in clearing the upper floor of mill No. 2 of the company. While so engaged he was in the act of dropping a pine block from the upper floor of the mill to the ground below; this being the usual and ordinary way of clearing the floor, and it being the duty of the

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plaintiff in the course of his employment to so drop it. The block weighed about 75 pounds.

"As appellant was in the act of dropping the block to the ground below, he was on the edge of the upper floor of the mill. As he started to turn the block loose so that it would drop to the ground, he saw J. Greeley McGowin, testator of the defendants, on the ground below and directly under where the block would have fallen had appellant turned it loose. Had he turned it loose it would have struck McGowin with such force as to have caused him serious bodily harm or death. Appellant could have remained safely on the upper floor of the mill by turning the block loose and allowing it to drop, but had he done this the block would have fallen on McGowin and caused him serious injuries or death. The only safe and reasonable way to prevent this was for appellant to hold to the block and divert its direction in falling from the place where McGowin was standing and the only safe way to divert it so as to prevent its coming into contact with McGowin was for [**197] appellant to fall with it to the ground below. Appellant did this, and by holding to the block and falling with it to the ground below, he diverted the course of its fall in such way that McGowin was not injured. In thus preventing the injuries to McGowin appellant himself received serious bodily injuries, resulting in his right leg being broken, the heel of his right foot torn off and his right arm broken. He was badly crippled for life and rendered unable to do physical or mental labor.

"On September 1, 1925, in consideration of appellant having prevented him from sustaining death or serious bodily harm and in consideration of the injuries appellant had received, McGowin agreed with him to care for and maintain him for the remainder of appellant's life at the rate of $ 15 every two weeks from the time he sustained his injuries to and during the remainder of appellant's life; it being agreed that McGowin would pay this sum to appellant for his maintenance. Under the agreement McGowin paid or caused to be paid to appellant the sum so agreed on up until McGowin's death on January 1, 1934.

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After his death the payments were continued to and including January 27, 1934, at which time they were discontinued. Thereupon plaintiff brought suit to recover the unpaid installments accruing up to the time of the bringing of the suit.

"The material averments of the different counts of the original complaint and the amended complaint are predicated upon the foregoing statement of facts."

In other words, the complaint as amended averred in substance: (1) That on August 3, 1925, appellant saved J. Greeley McGowin, appellee's testator, from death or grievous bodily harm; (2) that in doing so appellant sustained bodily injury crippling him for life; (3) that in consideration of the services rendered and the injuries received by appellant, McGowin agreed to care for him the remainder of appellant's life, the amount to be paid being $ 15 every two weeks; (4) that McGowin complied with this agreement until he died on January 1, 1934, and the payments were kept up to January 27, 1934, after which they were discontinued.

The action was for the unpaid installments accruing after January 27, 1934, to the time of the suit.

[*85] The principal grounds of demurrer to the original and amended complaint are: (1) It states no cause of action; (2) its averments show the contract was without consideration; (3) it fails to allege that McGowin had, at or before the services were rendered, agreed to pay appellant for them; (4) the contract declared on is void under the statute of frauds.

1. The averments of the complaint show that appellant saved McGowin from death or grievous bodily harm. This was a material benefit to him of infinitely more value than any financial aid he could have received. Receiving this benefit, McGowin became morally bound to compensate appellant for the services rendered. Recognizing his moral obligation, he expressly agreed to pay appellant as alleged in the complaint and complied with this agreement up to the time of his death; a period of more than 8 years.

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Had McGowin been accidentally poisoned and a physician, without his knowledge or request, had administered an antidote, thus saving his ife, a subsequent promise by McGowin to pay the physician would have been valid. Likewise, McGowin's agreement as disclosed by the complaint to compensate appellant for saving him from death or grievous bodily injury is valid and enforceable.

Where the promisee cares for, improves, and preserves the property of the promisor, though done without his request, it is sufficient consideration for the promisor's subsequent agreement to pay for the service, because of the material benefit received. Pittsburg Vitrified Paving & Building Brick Co. v. Cerebus Oil Co., 79 Kan. 603, 100 P. 631; Edson v. Poppe, 24 S.D. 466, 124 N.W. 441, 26 L.R.A.(N.S.) 534; Drake v. Bell, 26 Misc. 237, 55 N.Y.S. 945.

In Boothe v. Fitzpatrick, 36 Vt. 681, the court held that a promise by defendant to pay for the past keeping of a bull which had escaped from defendant's premises and been cared for by plaintiff was valid, although there was no previous request, because the subsequent promise obviated that objection; it being equivalent to a previous request. On the same principle, had the promisee saved the promisor's life or his body from grievous harm, his subsequent promise to pay for the services rendered would have been valid. Such service would have been far more material than caring for his bull. Any holding that saving a man from death or grievous bodily harm is not a material benefit sufficient to uphold a subsequent promise to [**198] pay for the service, necessarily rests on the assumption that saving life and preservation of the body from harm have only a sentimental value. The converse of this is true. Life and preservation of the body have material, pecuniary values, measurable in dollars and cents. Because of this, physicians practice their profession charging for services rendered in saving life and curing the body of its ills, and surgeons perform operations. The same is true as to the law of negligence, authorizing the assessment of damages in

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personal injury cases based upon the extent of the injuries, earnings, and life expectancies of those injured.

In the business of life insurance, the value of a man's life is measured in dollars and cents according to his expectancy, the soundness of his body, and his ability to pay premiums. The same is true as to health and accident insurance.

It follows that if, as alleged in the complaint, appellant saved J. Greeley McGowin from death or grievous bodily harm, and McGowin subsequently agreed to pay him for the service rendered, it became a valid and enforceable contract.

2. It is well settled that a moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor. Lycoming County v. Union County, 15 Pa. 166, 53 Am.Dec. 575, 579, 580; Ferguson v. Harris, 39 S.C. 323, 17 S.E. 782, 39 Am.St.Rep. 731, 734; Muir v. Kane, 55 Wash. 131, 104 P. 153, 26 L.R.A.(N.S.) 519, 19 Ann.Cas. 1180; State ex rel. Bayer v. Funk, 105 Ore. 134, 199 P. 592, 209 P. 113, 25 A.L.R. 625, 634; Hawkes v. Saunders, 1 Cowper 290; In re Sutch's Estate, 201 Pa. 305, 50 A. 943; Edson v. Poppe, 24 S.D. 466, 124 N.W. 441, 26 L.R.A.(N. S.) 534; Park Falls State Bank v. Fordyce, 206 Wis. 628, 238 N.W. 516, 79 A.L. R. 1339; Baker v. Gregory, 28 Ala. 544, 65 Am.Dec. 366. In the case of State ex rel. Bayer v. Funk, supra, the court held that a moral obligation is a sufficient consideration to support an executory promise where the promisor has received an actual pecuniary or material benefit for [*86] which he subsequently expressly promised to pay.

The case at bar is clearly distinguishable from that class of cases where the consideration is a mere moral obligation or conscientious duty unconnected with receipt by promisor of benefits of a material or pecuniary nature. Park Falls State Bank v. Fordyce, supra. Here the promisor received a material benefit constituting a valid consideration for his promise.

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3. Some authorities hold that, for a moral obligation to support a subsequent promise to pay, there must have existed a prior legal or equitable obligation, which for some reason had become unenforceable, but for which the promisor was still morally bound. This rule, however, is subject to qualification in those cases where the promisor, having received a material benefit from the promisee, is morally bound to compensate him for the services rendered and in consideration of this obligation promises to pay. In such cases the subsequent promise to pay is an affirmance or ratification of the services rendered carrying with it the presumption that a previous request for the service was made. McMorris v. Herndon, 2 Bail. 56, 21 Am.Dec. 515; Chadwick v. Knox, 31 N.H. 226, 64 Am.Dec. 329; Kenan v. Holloway, 16 Ala. 53, 50 Am.Dec. 162; Ross v. Pearson, 21 Ala. 473.

Under the decisions above cited, McGowin's express promise to pay appellant for the services rendered was an affirmance or ratification of what appellant had done raising the presumption that the services had been rendered at McGowin's request.

4. The averments of the complaint show that in saving McGowin from death or grievous bodily harm, appellant was crippled for life. This was part of the consideration of the contract declared on. McGowin was benefited. Appellant was injured. Benefit to the promisor or injury to the promisee is a sufficient legal consideration for the promisor's agreement to pay. Fisher v. Bartlett, 8 Greenl. 122, 22 Am. Dec. 225; State ex rel. Bayer v. Funk, supra.

5. Under the averments of the complaint the services rendered by appellant were not gratuitous. The agreement of McGowin to pay and the acceptance of payment by appellant conclusively shows the contrary.

6. The contract declared on was not void under the statute of frauds (Code 1923, § 8034). The demurrer on this ground was not well taken, 25 R.C.L. 456, 457 and 470, § 49.

[**199] The cases of Shaw v. Boyd, 1 Stew. & P. 83, and Duncan v. Hall, 9 Ala. 128, are not in conflict with the

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principles here announced. In those cases the lands were owned by the United States at the time the alleged improvements were made, for which subsequent purchasers from the government agreed to pay. These subsequent purchasers were not the owners of the lands at the time the improvements were made. Consequently, they could not have been made for their benefit.

From what has been said, we are of the opinion that the court below erred in the ruling complained of; that is to say, in sustaining the demurrer, and for this error the case is reversed and remanded.

Reversed and remanded.

CONCUERDA CON ESTA OPINIÓN: SAMFORD

The questions involved in this case are not free from doubt, and perhaps the strict letter of the rule, as stated by judges, though not always in accord, would bar a recovery by plaintiff, but following the principle announced by Chief Justice Marshall in Hoffman v. Porter, Fed. Cas. No. 6,577, 2 Brock. 156, 159, where he says, "I do not think that law ought to be separated from justice, where it is at most doubtful," I concur in the conclusions reached by the court.

OTIS F. WOOD, Appellant, v. LUCY, LADY DUFF-GORDON, Respondent. COURT OF APPEALS OF NEW YORK 222 N.Y. 88; 118 N.E. 214 November 14, 1917, Argued December 4, 1917, Decided

OPINIÓN POR: CARDOZO

[*90] [**214] The defendant styles herself "a creator of fashions." Her favor helps a sale. Manufacturers of dresses, millinery and like articles are glad to pay for a certificate of her approval. The things which she designs, fabrics, parasols and what not, have a new value in the public mind when issued in her name. She employed the plaintiff to help her to turn this vogue into money. He was to have the exclusive right, subject always to her approval, to place her indorsements on the designs of others. He was also to have the exclusive right to place her own designs on sale, or to license others to market them. In return, she was to have one-half of "all profits and revenues" derived from any contracts he might make. The exclusive right was to last at

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least one year from April 1, 1915, and thereafter from year to year unless terminated by notice of ninety days. The plaintiff says that he kept the contract on his part, and that the defendant broke it. She placed her indorsement on fabrics, dresses and millinery without his knowledge, and withheld the profits. He sues her for the damages, and the case comes here on demurrer.

The agreement of employment is signed by both parties. It has a wealth of recitals. The defendant insists, however, that it lacks the elements of a contract. She says that the plaintiff does not bind himself to anything. It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. [*91] We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day. A promise may be lacking, and yet the whole writing may be "instinct with an obligation," imperfectly expressed (Scott, J., in McCall Co. v. Wright, 133 App. Div. 62; Moran v. Standard Oil Co., 211 N. Y. 187, 198). If that is so, there is a contract.

The implication of a promise here finds support in many circumstances. The defendant gave an exclusive privilege. She was to have no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff. The acceptance of the exclusive agency was an assumption of its duties (Phoenix Hermetic Co. v. Filtrine Mfg. Co., 164 App. Div. 424; W. G. Taylor Co. v. Bannerman, 120 Wis. 189; Mueller v. Bethesda Mineral Spring Co., 88 Mich. 390). We are not to suppose that one party was to be placed at the mercy of the other (Hearn v. Stevens & Bro., 111 App. Div. 101, 106; Russell v. Allerton, 108 N. Y. 288). Many other terms of the agreement point the same way. We are told at the outset by way of recital that "the said Otis F. Wood possesses a business organization adapted to the placing of such indorsements as the said Lucy, Lady Duff-Gordon has approved." The implication is that the

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plaintiff's business organization will be used for the purpose for which it is adapted. But the terms of the defendant's compensation are even more significant. Her sole compensation for the grant of an exclusive agency is to be one-half of all the profits resulting from the plaintiff's efforts. Unless he gave his efforts, she could never get anything. Without an implied promise, the transaction cannot have [**215] such business "efficacy as both parties must have intended that at all events it should have" (Bowen, L. J., in The Moorcock, 14 P. D. 64, 68). [*92] But the contract does not stop there. The plaintiff goes on to promise that he will account monthly for all moneys received by him, and that he will take out all such patents and copyrights and trademarks as may in his judgment be necessary to protect the rights and articles affected by the agreement. It is true, of course, as the Appellate Division has said, that if he was under no duty to try to market designs or to place certificates of indorsement, his promise to account for profits or take out copyrights would be valueless. But in determining the intention of the parties, the promise has a value. It helps to enforce the conclusion that the plaintiff had some duties. His promise to pay the defendant one-half of the profits and revenues resulting from the exclusive agency and to render accounts monthly, was a promise to use reasonable efforts to bring profits and revenues into existence. For this conclusion, the authorities are ample (Wilson v. Mechanical Orguinette Co., 170 N. Y. 542; Phoenix Hermetic Co. v. Filtrine Mfg. Co., supra; Jacquin v. Boutard, 89 Hun, 437; 157 N. Y. 686; Moran v. Standard Oil Co., supra; City of N. Y. v. Paoli, 202 N. Y. 18; M'Intyre v. Belcher, 14 C. B. [N. S.] 654; Devonald v. Rosser & Sons, 1906, 2 K. B. 728; W. G. Taylor Co. v. Bannerman, supra; Mueller v. Bethesda Mineral Spring Co., supra; Baker Transfer Co. v. Merchants' R. & I. Mfg. Co., 1 App. Div. 507).

The judgment of the Appellate Division should be reversed, and the order of the Special Term affirmed, with costs in the Appellate Division and in this court.

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SCHNELL v. NELL. SUPREME COURT OF INDIANA 17 Ind. 29 November 25, 1861, Decided

OPINIÓN POR: Perkins

[*29] Perkins, J.--Action by J. B. Nell against Zacharias Schnell, upon the following instrument:

"This agreement, entered into this 13th day of February, 1856, between Zach. Schnell, of Indianapolis, Marion county, State of Indiana, as party of the first part, and J. B. Nell, of the same place, Wendelin Lorenz, of Stilesville, Hendricks county, State of Indiana, and Donata Lorenz, of Frickinger, Grand Duchy of Baden, Germany, as parties of the second part, witnesseth: The said Zacharias Schnell agrees as follows: whereas his wife, Theresa Schnell, now [*30] deceased, has made a last will and testament, in which, among other provisions, it was ordained that every one of the above named second parties, should receive the sum of $ 200; and whereas the said provisions of the will must remain a nullity, for the reason that no property, real or personal, was in the possession of the said [**2] Theresa Schnell, deceased, in her own name, at the time of her death, and all property held by Zacharias and Theresa Schnell jointly, therefore reverts to her husband; and whereas the said Theresa Schnell has also been a dutiful and loving wife to the said Zach. Schnell, and has materially aided him in the acquisition of all property, real and personal, now possessed by him; for, and in consideration of all this, and the love and respect he bears to his wife; and, furthermore, in consideration of one cent, received by him of the second parties, he, the said Zach. Schnell, agrees to pay the above named sums of money to the parties of the second part, to wit: $ 200 to the said J. B. Nell; $ 200 to the said Wendelin Lorenz; and $ 200 to the said Donata Lorenz, in the following installments, viz., $ 200 in one year from the date of these presents; $ 200 in two years, and $ 200 in three years; to be divided between the parties in equal portions of $ 66 2/3 each year, or as they may agree, till each one has received his full sum of $ 200.

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"And the said parties of the second part, for, and in consideration of this, agree to pay the above named sum of money [**3] [one cent], and to deliver up to said Schnell, and abstain from collecting any real or supposed claims upon him or his estate, arising from the said last will and testament of the said Theresa Schnell, deceased.

"In witness whereof, the said parties have, on this 13th day of February, 1856, set hereunto their hands and seals.

"Zacharias Schnell, [seal.]

"J. B. Nell, [seal.]

"Wen. Lorenz." [seal.]

The complaint contained no averment of a consideration for the instrument, outside of those expressed in it; and did [*31] not aver that the one cent agreed to be paid, had been paid or tendered.

A demurrer to the complaint was overruled.

The defendant answered, that the instrument sued on was given for no consideration whatever.

He further answered, that it was given for no consideration, because his said wife, Theresa, at the time she made the will mentioned, and at the time of her death, owned, neither separately, nor jointly with her husband, or any one else (except so far as the law gave her an interest in her husband's property), any property, real or personal, &c.

The will is copied into the record, but need not be into this opinion.

[**4] The Court sustained a demurrer to these answers, evidently on the ground that they were regarded as contradicting the instrument sued on, which particularly set out the considerations upon which it was executed. But the instrument is latently ambiguous on this point. See Ind. Dig., p. 110.

The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against Zacharias Schnell. It specifies three distinct considerations for his promise to pay $ 600:

1. A promise, on the part of the plaintiffs, to pay him one cent.

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2. The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of property.

3. The fact that she had expressed her desire, in the form of an inoperative will, that the persons named therein should have the sums of money specified.

The consideration of one cent will not support the promise of Schnell. It is true, that as a general proposition, inadequacy of consideration will not vitiate an agreement. Baker v. Roberts, 14 Ind. 552. But this doctrine does not apply to a mere exchange of sums [**5] of money, of coin, whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value, for money, or, perhaps, for some other thing of indeterminate value. In this case, had the [*32] one cent mentioned, been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void, at first blush, upon its face, if it be regarded as an earnest one. Hardesty v. Smith, 3 Ind. 39. The consideration of one cent is, plainly, in this case, merely nominal, and intended to be so. As the will and testament of Schnell's wife imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him, on that ground. A moral consideration, only, will not support a promise. Ind. Dig., p. 13. And for the same reason, a valid consideration for his promise can not be found [**6] in the fact of a compromise of a disputed claim; for where such claim is legally groundless, a promise upon a compromise of it, or of a suit upon it, is not legally binding. Spahr v. Hollingshead, 8 Blackf. 415. There was no mistake of law or fact in this case, as the agreement admits the will inoperative and void. The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal

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considerations for Schnell's promise, on two grounds: 1. They are past considerations. Ind. Dig., p. 13. 2. The fact that Schnell loved his wife, and that she had been industrious, constituted no consideration for his promise to pay J. B. Nell, and the Lorenzes, a sum of money. Whether, if his wife, in her lifetime, had made a bargain with Schnell, that, in consideration of his promising to pay, after her death, to the persons named, a sum of money, she would be industrious, and worthy of his affection, such a promise would have been valid and consistent with public policy, we need not decide. Nor is the fact that Schnell now venerates the memory of his deceased wife, a legal consideration for a [**7] promise to pay any third person money.

The instrument sued on, interpreted in the light of the [*33] facts alleged in the second paragraph of the answer, will not support an action. The demurrer to the answer should have been overruled. See Stevenson v. Druley, 4 Ind. 519.

Per Curiam.--The judgment is reversed, with costs. Cause remanded &c.

LA PROMESA ILUSORIA

ROBERT W. SPOONER et al., Respondents, v. RESERVE LIFE INSURANCE COMPANY, Appellant. SUPREME COURT OF WASHINGTON, DEPARTMENT TWO 47 Wn.2d 454; 287 P.2d 735 September 15, 1955

OPINIÓN POR: HILL

[*455] [**736] This appeal is from a judgment in favor of the plaintiff-respondents for the amount of bonuses to which they claim they are entitled for the period from February 29, 1952, through February 28, 1953. The respondents were, during that time, agents of the appellant insurance company.

The following bulletin was issued by the appellant on February 29, 1952, to the respondents and other agents. (The italicized portions herein appear as underscored words in the bulletin as issued.)

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"Bulletin # 160

"To: All Staff Members in Oregon, Washington, Colorado, Nebraska, Florida & North Carolina:

Extra Earnings Agreement

"Your Company has grown in size -- premium wise -- in the industry from 421st place to 4th of its kind in five short years.

"That all-time record, we believe, speaks for itself. But what does it mean to You?

"It means that you offer a 'preferred' product. Because of the values your product provides, and because of the promotional effort behind it, people tend to select your Company.

"Your Home Office folks are well aware, however, that you in the field must enjoy a sense of real security and see the road of the future stretching clearly ahead. Our association must be mutually profitable and pleasant. We hope to make your job more interesting and that you will earn more money than you could anywhere else.

"Now, in addition to present substantial commissions, we are announcing your Renewal Bonus Plan which provides extra earnings. This has been a long time in the making. It is, we believe, superior to anything of its kind ever introduced.

"Reserve wants career men -- men who are as much concerned about next year as next month. To attract such workers, and inspire their best efforts, your Company now puts into effect a schedule of Bonus Payments.

"Your Renewal Bonus earnings will depend upon the Quality of your business as well as the amount. If you do a good job, you will earn a substantial income. If you do an outstanding job, you will be very handsomely rewarded.

"You will receive at the end of each 12 month period, a bonus in accordance with the following schedule: [*456]

0 to 10%	Receive	150%
10 to 20%	Receive	125%
20 to 30%	Receive	100%
30 to 40%	Receive	80%
40 to 50%	Receive	60%

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50 to 60%	Receive	50%
60 to 70%	Receive	40%
over 70%	Receive	none

" [**737] This renewal bonus is a voluntary contribution on the part of the Company. It is agreed by you and by us that it may be withheld, increased, decreased or discontinued, individually or collectively, with or without notice. Further, this Renewal Bonus is contingent upon you actually writing business for this Company as a licensed agent at the time such Bonus is paid.

"It will be paid once a year -- on the mean amount of your business in force. This annual method of payment cuts down the cost of keeping records. Also -- and most important -- during the year the boys are separated from the men. The boys will get no bonus. That Leaves More for the Men.

"In return, I ask only that you give me your best efforts. That means that you will sell your business cleanly and strictly on the merits of the policy itself, and follow the letter and spirit of the Company's rules and practices.

"Twelve months from now the Accounting Department will get busy and tote up the amount of business you have in force which is produced by you from the date of this agreement. They must get out the lapses and put the reinstatements back in. All that takes time. But your first Renewal Bonus check will be sent to you as quickly as humanly possible after the 12 months is up.

"If you welcome these Extra Earnings, and I know you will, and to avoid any possible future misunderstanding, sign the enclosed copy of this agreement and hand it to your Manager who will send it to me.

"Remember: Nothing succeeds like Success!

"C. C. Bradley [signed]

C. C. Bradley

Vice President

"CCB: jl Signature of Staff Member"

If this bulletin was a promise to pay a bonus under certain conditions, it must be found that the respondents met [*457] those conditions by remaining with the

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appellant and selling insurance, maintaining a lapse ratio of twenty to thirty per cent. The pivotal question here is whether this bulletin contains an enforcible promise of a bonus if its conditions are met or, by reason of the following paragraph, presents only an illusion of a promise:

"This renewal bonus is a voluntary contribution on the part of the Company. It is agreed by you and by us that it may be withheld, increased, decreased or discontinued, individually or collectively, with or without notice. Further, this Renewal Bonus is contingent upon you actually writing business for this Company as a licensed agent at the time such Bonus is paid." (Italics ours.)

[1] We are not here concerned with a conventional bonus case such as Scott v. J. F. Duthie & Co. (1923), 125 Wash. 470, 216 Pac. 853. In that case, it was held that the offer and the performance of the conditions of the offer constituted an enforcible contract, the employer having procured, in addition to the faithful and efficient service to which he was entitled under the employment of the employee for an indefinite term of service, continuity of service for the period designated in his offer. Extensive annotations covering bonus cases of this character are found in 28 A. L. R. 331, 346.

[2] Nor are we here concerned with the rarer but still enforcible bonus cases in which there is a purely gratuitous promise by the employer which induces action of a definite and substantial character on the part of the employee. The applicable rule in such cases is well stated in 1 Restatement, Contracts 110, § 90, which reads as follows:

"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

[**738] We recognized and discussed this rule in Luther v. National Bank of Commerce (1940), 2 Wn. (2d) 470, 98 P. (2d) 667; Hazlett v. First Fed. Sav. & Loan Ass'n (1942), 14 Wn. (2d) 124, 127 P. (2d) 273; State v.

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Northwest Magnesite Co. [*458] (1947), 28 Wn. (2d) 1, 182 P. (2d) 643; Hill v. Corbett (1949), 33 Wn. (2d) 219, 204 P. (2d) 845. For application or discussion in employer-employee cases, see Hunter v. Sparling (1948), 87 Cal. App. (2d) 711, 197 P. (2d) 807; West v. Hunt Foods, Inc. (1951), 101 Cal. App. (2d) 597, 225 P. (2d) 978; Hughes v. Encyclopaedia Britannica (1954), 1 Ill. App (2d) 514, 117 N. E. (2d) 880; Langer v. Superior Steel Corp. (1932), 105 Pa. Super. 579, 161 Atl. 571.

[3] But before this rule can be applied, there must be a real promise to be enforced. Action in reliance upon a supposed promise creates no obligation on an individual or corporation whose only promise is wholly illusory. 1 Corbin on Contracts 658, § 201. Appellant insists that no enforcible promise to pay a bonus is contained in the bulletin. Our problem, as we have heretofore indicated, is whether the paragraph referred to, and particularly the portion reserving a right to decrease or withhold the bonus, makes an illusory promise of what would otherwise be an enforcible one.

[4] A supposed promise may be illusory because it is so indefinite that it cannot be enforced (Ford Motor Co. v. Kirkmyer Motor Co. (1933), 65 F. (2d) (C. C. A. 4th) 1001), or by reason of provisions contained in the promise which in effect make its performance optional or entirely discretionary on the part of the promisor. Fontius Shoe Co. v. Lamberton (1925), 78 Colo. 250, 241 Pac. 542; Fickling v. Pollard (1935), 51 Ga. App. 54, 179 S. E. 582; Hughes v. Encyclopaedia Britannica, supra; Johnson v. Schenley Distillers Corp. (1942), 181 Md. 31, 28 A. (2d) 606; Muir v. Leonard Refrigerator Co. (1934), 269 Mich. 406, 257 N. W. 723; McNevin v. Solvay Process Co. (1898), 32 App. Div. 610, 53 N. Y. S. 98; Dolge v. Dolge (1902), 70 App. Div. 517, 75 N. Y. S. 386; Harding v. Montgomery Ward Co. (1944) (Ohio App.), 58 N. E. (2d) 75; Webster v. Southwestern Bell Tel. Co. (1941) (Tex. Civ. App.), 153 S. W. (2d) 498; 1 Williston on Contracts (Rev. ed.) 123, § 43.

[5] [6] Respondents here have received their regular commissions. Appellant by its bulletin announced a

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voluntary contribution over and above those commissions. There can [*459] be no question but that the appellant was entitled to impose such conditions and terms on the payment of this voluntary bonus as it desired. The bulletin told the respondents in plain English that the company could withhold or decrease the bonus, with or without notice. The usual and ordinary meaning of "withhold" is "to refrain from paying that which is due." Dupuy v. Board of Education (1930), 106 Cal. App. 533, 537, 289 Pac. 689. "Withhold" cannot be construed to apply only to future, unearned bonus payments.

We do not defend what the appellant has done here. We think the trial court correctly applied the formula set out in the bulletin, and that the respondents have reason to be dissatisfied with what appellant has paid them. Nevertheless, it cannot be said that there has been a breach of a binding contract to pay a bonus. Appellant, while perilously near the perpetration of a fraud in the position it takes here, is still acting within the terms of its bulletin, in which it incorporated language that permitted it to withhold the bonus which it seemed to promise. We cannot disregard or suppress any of those terms. Bernard v. Triangle Music Co. (1939), 1 Wn. (2d) 41, 48, 95 P. (2d) 43, 126 A. L. R. 558. The agents of the appellant had no choice but to accept the offer of a bonus with all the terms and limitations placed upon it, and if they were in any instance induced to stay with the company until the termination of the bonus period, it was because they were relying on the corporate conscience of the appellant and not upon an enforcible contract. There is a natural aversion to such one-sided propositions, but we cannot delete terms or words from an offer, nor can we ignore them, to make a binding contract for the parties where none exists.

We have given careful consideration to the three cases on which the respondents [**739] place their principal reliance on this phase of the case. Tilbert v. Eagle Lock Co. (1933), 116 Conn. 357, 165 Atl. 205; Psutka v. Michigan Alkali Co. (1936), 274 Mich. 318, 264 N. W. 385; Mabley & Carew Co. v. Borden (1935), 129 Ohio St. 375, 195 N.

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E. 697. To these may be added three other cases in which bonus or pension provisions [*460] were upheld despite language which seemingly excluded contractual liability. Wellington v. Con P. Curran Printing Co. (1925), 216 Mo. App. 358, 268 S. W. 396; Schofield v. Zion's Co-op. Mercantile Institution (1934), 85 Utah 281, 39 P. (2d) 342, 96 A. L. R. 1083; George A. Fuller Co. v. Brown (1926), 15 F. (2d) (C. C. A. 4th) 672. All three cases cited by respondents were death-benefit cases, the actions being not by the employees but by their named beneficiaries. The first two, the Tilbert and Psutka cases, were recently distinguished in Hughes v. Encyclopaedia Britannica, supra (p. 519), the court there pointing out that:

"In these cases employers' death-benefit programs which were unenforceable as contracts by their express terms were treated as contracts in order to avoid the otherwise harsh result of depriving an employee's beneficiary of accrued death benefits. We do not believe that the reasoning of these cases can be applied to the factual situation at bar."

What was said there applies with equal force to the Mabley & Carew Co. case. In other cases, in order to avoid seemingly harsh results and to shape the end result a little nearer to the courts' desire, plain language which made supposed promises illusory was ignored or so interpreted as to import enforcible promises. No case has been cited to us, nor have we discovered any, in which the right to a bonus has been upheld in a situation in which the employer reserved the right to withhold it.

The judgment is reversed, and the trial court is instructed to enter a judgment of dismissal.

PRE-EXISTING DUTY RULE

STILK v. MYRICK. 170 Eng. Rep. 1168 IN THE HIGH COURT OF JUSTICE, KING'S BENCH DIVISION 16th December 1809

OPINIÓN POR: Lord Ellenborough

This was an action for seaman's wages, on a voyage from London to the Baltic and back.

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By the ship's articles, executed before the commencement of the voyage, the plaintiff was to be paid at the rate of £5 a month; and the principal question in the cause was, whether he was entitled to a higher rate of wages? In the course of the voyage two of the men deserted and the captain having in vain attempted to supply their places at Cronstadt, there entered into an agreement with the rest of the crew, that they should have the wages of the two who had deserted equally divided among them, if he could not procure two other hands at Gottenburgh. This was found impossible; and the ship was worked back to London by the plaintiff and eight more of the original crew, with whom the agreement had been made at Cronstadt.

Garrow for the defendant insisted, that this agreement was contrary to public policy, and utterly void. In West India voyages, crews are often thinned greatly by death and desertion; and if a promise of advanced wages were valid, exorbitant claims would be set up on all such occasions. This ground was strongly taken by Lord Kenyon in Harris v. Watson, Peak. Cas. 72, where that learned Judge held, that no action would lie at the suit of a sailor on a promise of a captain to pay him extra wages, in consideration of his doing more than the ordinary share of duty in navigating the ship; and his Lordship said, that if such a promise could be enforced, sailors would in many cases suffer a ship to sink unless the captain would accede to any extravagant demand they might think proper to make.

The Attorney-General, contra, distinguished this case from Harris v. Watson, as the agreement here was made on shore, when there was no danger or pressing emergency, and when the captain could not be supposed to be under any constraint or apprehension. The mariners were not to be permitted on any sudden danger to force concessions from the captain; but why should they be deprived of the compensation he voluntarily offers them in perfect security for their extra labour during the remainder of the voyage?

Lord Ellenborough: I think Harris v. Watson was rightly decided; but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have

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proceeded, be the true principle on which the decision is to be supported. Here, I say, the agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all that they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. If they had been at liberty to quit the vessel at Cronstadt, the case would have been quite different; or if the captain had capriciously discharged the two men who were wanting, the others might not have been compellable to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration, and that the plaintiff can only recover at the rate of £5 a month.

Verdict accordingly.[1]

Note 1 But where a seaman performs some service beyond the scope of his original contract, the case is otherwise. Thus before the ransoming of ships was prohibited, a promise by the captain of a captured ship to pay monthly wages to one of the sailors, in order to induce him to become a hostage, was held binding on the owners, although they abandoned the ship and cargo.Yates v. Hall, 1 T. R. 73. A seaman at monthly wages, who is impressed or inters from a merchant ship into the royal navy during a voyage is not entitled to wages to the time of his quitting the ship, unless the voyage be completed. Anon. coram Lord Ellenborough, at Guildhall, December 11th 1806. Action for seaman's wages: The plaintiff entered on board the defendant's ship at Shields, and was to have the monthly wages of £6, 3s. The ship was bound to Gibraltar with a cargo of coals, and she arrived there in safety. She then sailed for Zante, where she was to take a cargo, with

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which she was to return to England. In the course of this voyage, the plaintiff was impressed; and before it was completed the ship was captured. The defendant had paid into Court the amount of the plaintiff's wages to Gibraltar; and the question was, whether anything more as due? On the part of the plaintiff, it was contended that by virtue of stat. 2 Geo. II. C. 36, s. 13, he was entitled to recover his wages from his leaving Gibraltar to the period of his being impressed. It is thereby enacted "that nothing in that Act contained shall extend, or be construed to extend, to debar any seaman or mariner belonging to any merchant ship or vessel, from entering or being entered into the service of his Majesty, his heirs &c. on board of any of his or their ships or vessels; nor shall such seaman or mariner for such entry forfeit the wages due to him during the term of his service in such merchant ship or vessel." And even before the passing of that statute, it was held by Holt, C. J. (Wiggins v. Ingleton, 2 Ld. Raym. 1211) that an impressed seaman is entitled to his wagespro tanto. It followed, that the plaintiff was entitled to payment at the time when he left the ship, and therefore that he could not be affected by the subsequent casualties of the voyage. But Lord Ellenborough held, that the plaintiff was not placed in a better situation than the other seamen; and was not entitled to any apportionment of wages for his service during a voyage which had not been completed.

ALASKA PACKERS' ASS'N v. DOMENICO et al. CIRCUIT COURT OF APPEALS, NINTH CIRCUIT 117 F. 99 May 26, 1902

OPINIÓN POR: ROSS

[*100] Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The libel in this case was based upon a contract alleged to have been entered into between the libelants and the appellant corporation on the 22d day of May, 1900, at Pyramid Harbor, Alaska, by which it is claimed the appellant promised to pay each of the libelants, among other things, the sum of $100 for services rendered and to be rendered. In its answer the respondent denied the

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execution, on its part, of the contract sued upon, averred that it was without consideration, and for a third defense alleged that the work performed by the libelants for it was performed under other and different contracts than that sued on, and that, prior to the filing of the libel, each of the libelants was paid by the respondent the full amount due him thereunder, in consideration of which each of them executed a full release of all his claims and demands against the respondent.

The [**2] evidence shows without conflict that on March 26, 1900, at the city and county of San Francisco, the libelants entered into a written contract with the appellant, whereby they agreed to go from San Francisco to Pyramid Harbor, Alaska, and return, on board such vessel as might be designated by the appellant, and to work for the appellant during the fishing season of 1900, at Pyramid Harbor, as sailors and fishermen, agreeing to do "regular ship's duty, both up and down, discharging and loading; and to do any other work whatsover when requested to do so by the captain or agent of the Alaska Packers' Association." By the terms of this agreement, the appellant was to pay each of the libelants $50 for the season, and two cents for each red salmon in the catching of which he took part.

On the 15th day of April, 1900, 21 ofthe libelants signed shipping articles by which they shipped as seamen on the Two Brothers, a vessel chartered by the appellant for the voyage between San Francisco and Pyramid Harbor, and also bound themselves to perform the same work for the appellant provided for by the previous contract of March 26th; the appellant agreeing to pay them therefor the sum of $60 for [**3] the season, and two cents each for each red salmon in the catching of which they should respectively take part. Under these contracts, the libelants sailed on board the Two Brothers for Pyramid Harbor, where the appellant had about $150,000 invested in a salmon cannery. The libelants arrived there early in April of the year mentioned, and began [*101] to unload the vessel and fit up the cannery. A few days thereafter, to wit,

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May 19th, they stopped work in a body, and demanded of the company's superintendent there in charge $100 for services in operating the vessel to and from Pyramid Harbor, instead of the sums stipulated for in and by the contracts; stating that unless they were paid this additional wage they would stop work entirely, and return to San Francisco. The evidence showed, and the court below found, that it was impossible for the appellant to get other men to take the places of the libelants, the place being remote, the season short and just opening; so that, after endeavoring for several days without success to induce the libelants to proceed with their work in accordance with their contracts, the company's superintendent, on the 22d day of May, so far yielded [**4] to their demands as to instruct his clerk to copy the contracts executed in San Francisco, including the words "Alaska Packers' Association" at the end, substituting, for the $50 and $60 payments, respectively, of those contracts, the sum of $100, which document, so prepared, was signed by the libelants beforea shipping commissioner whom they had requested to be brought from Northeast Point; the superintendent, however, testifying that he at the time told the libelants that he was without authority to enter into any such contract, or to in any way alter the contracts made between them and the company in San Francisco. Upon the return of the libelants to San Francisco at the close of the fishing season, they demanded pay in accordance with the terms of the alleged contract of May 22d, when the company denied its validity, and refused to pay other than as provided for by the contracts of March 26th and April 5th, respectively. Some of the libelants, at least, consulted counsel, and, after receiving his advice, those of them who had signed the shipping articles before the shipping commissioner at San Francisco went before that officer, and received the amount due them thereunder, executing [**5] in consideration thereof a release in full, and the others being paid at the office of the company, also receipting in full for their demands.

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On the trial in the court below, the libelants undertook to show that the fishing nets provided by the respondent were defective, and that it was on that account that they demanded increased wages. On that point, the evidence was substantially conflicting, and the finding of the court was against the libelants, the court saying:

"The contention of libelants that the nets provided them were rotten and unserviceable is not sustained by the evidence. The defendant's interest required that libelants should be provided with every facility necessary to their success as fishermen, for on such success depended the profits defendant would be able to realize that season from its packing plant, and the large capital invested therein. In view of this self-evident fact, it is highly improbable that the defendant gave libelants rotten and unserviceable nets with which to fish. It follows from this finding that libelants were not justified in refusing performance of their original contract." 112 Fed. 554.

The evidence being sharply conflicting in [**6] respect to these facts, the conclusions of the court, who heard and saw the witnesses, will not be disturbed. The Alijandro, 6 C.C.A. 54, 56 Fed. 621; The Lucy, 20 C.C.A. 660, 74 Fed. 572; The Glendale, 26 C.C.A. 500, 81 Fed. 633; The Coquitlam, 23 C.C.A. 438, 77 Fed. 774; Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co., 43 C.C.A. 511, 104 Fed. 234.

[*102] The real questions in the case as brought here are questions of law, and, in the view that we take of the case, it will be necessary to consider but one of those. Assuming that the appellant's superintendent at Pyramid Harbor was authorized to make the alleged contract of May 22d, and that he executed it on behalf of the appellant, was it supported by a sufficient consideration? From the foregoing statement of the case, it will have been seen that the libelants agreed in writing, for certain stated compensation, to render their services to the appellant in remote waters where the season for conducting fishing operations is extremely short, and in which enterprise the appellant had a large amount of money invested; and, after

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having entered upon the discharge of their contract, and at a time when it was impossible for [**7] the appellant to secure other men in their places, the libelants, without any valid cause, absolutely refused to continue the services they were under contract to perform unless the appellant would consent to pay them more money. Consent to such a demand, under such circumstances, if given, was, in our opinion, without consideration, for the reason that it was based solely upon the libelants' agreement to render the exact services, and none other, that they were already under contract to render. The case shows that they willfully and arbitrarily broke that obligation. As a matter of course, they were liable to the appellant in damages, and it is quite probable, as suggested by the court below in its opinion, that they may have been unable to respond in damages. But we are unable to agree with the conclusions there drawn, from these facts, in these words:

"Under such circumstances, it would be strange, indeed, if the law would not permit the defendant to waive the damages caused by the libelants' breach, and enter into the contract sued upon, -- a contract mutually beneficial to all the parties thereto, in that it gave to the libelants reasonable compensation for their labor, [**8] and enabled the defendant to employ to advantage the large capital it had invested in its canning and fishing plant."

Certainly, it cannot be justly held, upon the record in this case, that there was any voluntary waiver on the part of the appellant of the breach of the original contract. The company itself knew nothing of such breach until the expedition returned to San Francisco, and the testimony is uncontradicted that its superintendent at Pyramid Harbor, who, it is claimed, made on its behalf the contract sued on, distinctly informed the libelants that he had no power to alter the original or to make a new contract; and it would, of course, follow that, if he had no power to change the original, he would have no authority to waive any rights thereunder. The circumstances of the present case bring it, we think, directly within the sound and just observations of

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the supreme court of Minnesota in the case of King v. Railway Co., 61 Minn. 482, 63 N.W. 1105:

"No astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally [**9] bound to do, takes an unjustifiable advantage of the necessities of the other party. Surely it would be a travesty on justice to hold that the party so making the promise for extra pay was estopped from asserting that the promise was without consideration. A party cannot lay the foundation [*103] of an estoppel by his own wrong, where the promise is simply a repetition of a subsisting legal promise. There can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract. The promise cannot be legally enforced, although the other party has completed his contract in reliance upon it."

In Lingenfelder v. Brewing Co., 103 Mo. 578, 15 S.W. 844, the court, in holding void a contract by which the owner of a building agreed to pay its architect an additional sum because of his refusal to otherwise proceed with the contract, said:

"It is urged upon us by respondents that this was a new contract. New in what? Jungenfeld was bound by his contract to design and supervise this building. Under the new promise, he was not to do anything more or anything different. What benefit was [**10] to accrue to Wainwright? He was to receive the same service from Jungenfeld under the new, that Jungenfeld was bound to tender under the original, contract. What loss, trouble, or inconvenience could result to Jungenfeld that he had not already assumed? No amount of metaphysical reasoning can change the plain fact that Jungenfeld took advantage of Wainwright's necessities, and extorted the promise of five per cent. on the refrigerator plant as the condition of his complying with his contract already entered into. Nor had he even the flimsy pretext that Wainwright had violated any of the conditions of the contract on his part. Jungenfeld

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himself put it upon the simple proposition that 'if he, as an architect, put up the brewery, and another company put up the refrigerating machinery, it would be a detriment to the Empire Refrigerating Company,' of which Jungenfeld was president. To permit plaintiff to recover under such circumstances would be to offer a premium upon bad faith, and invite men to violate their most sacred contracts that they may profit by their own wrong. That a promise to pay a man for doing that which he is already under contract to do is without consideration [**11] is conceded by respondents. The rule has been so long imbedded in the common law and decisions of the highest courts of the various states that nothing but the most cogent reasons ought to shake it. [Citing a long list of authorities.] But it is 'carrying coals to Newcastle' to add authorities on a proposition so universally accepted, and so inherently just and right in itself. The learned counsel for respondents do not controvert the general proposition. Their contention is, and the circuit court agreed with them, that, when Jungenfeld declined to go further on his contract, the defendant then had the right to sue for damages, and not having elected to sue Jungenfeld, but having acceded to his demand for the additional compensation, defendant cannot now be heard to say his promise is without consideration. While it is true Jungenfeld became liable in damages for the obvious breach of his contract, we do not think it follows that defendant is estopped from showing its promise was made without consideration. It is true that as eminent a jurist as Judge Cooley, in Goebel v. Linn, 47 Mich. 489, 11 N.W. 284, 41 Am. Rep. 723, held that an ice company which had agreed to furnish [**12] a brewery with all the ice they might need for their business from November 8, 1879, until January 1, 1881, at $1.75 per ton, and afterwards in May, 1880, declined to deliver any more ice unless the brewery would give it $3 per ton, could recover on a promissory note given for the increased price. Profound as is our respect for the distinguished judge who delivered the opinion, we are still of the opinion that his decision is not in accord with the almost universally

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accepted doctrine, and is not convincing; and certainly so much of the opinion as holds that the payment, by a debtor, of a part of his debt then due, would constitute a defense to a suit for the remainder, is not the law of this state, nor, do we think, of any other where the common law prevails. * * * What we hold is that, when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor; and although, by taking advantage of the necessities of his adversary, he obtains a promise for more, the law will regard it as nudum pactum, and will not lend its process to aid in the wrong."

[*104] The case of Goebel v. Linn, 47 Mich. 489, 11 N.W. 284, 41 Am. Rep. [**13] 723, is one of the eight cases relied upon by the court below in support of its judgment in the present case, five of which are by the supreme court of Massachusetts, one by the supreme Court of Vermont, and one other Michigan case, -- that of Moore v. Locomotive Works, 14 Mich. 266. The Vermont case referred to is that of Lawrence v. Davey, 28 Vt. 264, which was one of the three cases cited by the court in Moore v. Locomotive Works, 14 Mich. 272, 273, as authority for its decision. In that case there was a contract to deliver coal at specified terms and rates. A portion of it was delivered, and plaintiff then informed the defendant that he could not deliver at those rates, and, if the latter intended to take advantage of it, he should not deliver any more; and that he should deliver no more unless the defendant would pay for the coal independent of the contract. The defendant agreed to do so, and the coal was delivered. On suit being brought for the price, the court said:

"Although the promise to waive the contract was after some portion of the coal sought to be recovered had been delivered, and so delivered that probably the plaintiff, if the defendant had insisted upon strict [**14] performance of the contract, could not have recovered anything for it, yet, nevertheless, the agreement to waive the contract, and the promise, and, above all, the delivery of coal after this agreement to waive the contract, and upon the faith of it,

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will be a sufficient consideration to bind the defendant to pay for the coal already received."

The doctrine of that case was impliedly overruled by the supreme court of Vermont in the subsequent case of Cobb v. Cowdery, 40 Vt. 25, 94 Am. Dec. 370, where it was held that:

"A promise by a party to do what he is bound in law to do is not an illegal consideration, but is the same as no consideration at all, and is merely void; in other words, it is insufficient, but not illegal. Thus, if the master of a ship promise his crew an addition to their fixed wages in consideration of, and as an incitement to, their extraordinary exertions during a storm, or in any other emergency of the voyage, this promise is nudum pactum; the voluntary performance of an act which it was before legally incumbent on the party to perform being in law an insufficient consideration; and so it would be in any other case where the only consideration for the promise [**15] of one party was the promise of the other party to do, or his actual doing, something which he was previously bound in law to do. Chit. Cont. [10th Am. Ed.] 51; Smith, Cont. 87; 3 Kent, Comm. 185."

The Massachusetts cases cited by the court below in support of its judgment commence with the case of Munroe v. Perkins, 9 Pick. 305, 20 Am. Dec. 475, which really seems to be the foundation of all of the cases in support of that view. In that case, the plaintiff had agreed in writing to erect a building for the defendants. Finding his contract a losing one, he had concluded to abandon it, and resumed work on the oral contract of the defendants that, if he would do so, they would pay him what the work was worth without regard to the terms of the original contract. The court said that whether the oral contract was without consideration

"Depends entirely on the question whether the first contract was waived. The plaintiff having refused to perform that contract, as he might do, subjecting himself to such damages as the other parties might show they were entitled to recover, he afterward went on, upon the faith of

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the new promise, and finished the work. This was a sufficient consideration. [**16] If Payne and [*105] Perkins were willing to accept his relinquishment of the old contract, and proceed on a new agreement, the law, we think, would not prevent it."

The case of Goebel v. Linn, 47 Mich. 489, 11 N.W. 284, 41 Am. Rep. 723, presented some unusual and extraordinary circumstances. But, taking it as establishing the precise rule adopted in the Massachusetts cases, we think it not only contrary to the weight of authority, but wrong on principle.

In addition to the Minnesota and Missouri cases above cited, the following are some of the numerous authorities holding the contrary doctrine: Vanderbilt v. Schreyer, 91 N.Y. 392; Ayres v. Railroad Co., 52 Iowa, 478, 3 N.W. 522; Harris v. Carter, 3 Ellis & B. 559; Frazer v. Hatton, 2 C.B. (N.S.) 512; Conover v. Stillwell, 34 N.J. Law, 54; Reynolds v. Nugent, 25 Ind. 328; Spencer v. McLean (Ind. App.) 50 N.E. 769, 67 Am. St. Rep. 271; Harris v. Harris (Colo. App.) 47 Pac. 841; Moran v. Peace, 72 Ill. App. 139; Carpenter v. Taylor (N.Y.) 58 N.E. 53; Westcott v. Mitchell (Me.) 50 Atl. 21; Robinson v. Jewett, 116 N.Y. 40, 22 N.E. 224; Sullivan v. Sullivan, 99 Cal. 187, 33 Pac. 862; Blyth v. Robinson, 104 Cal. 239, 37 Pac. 904; [**17] Skinner v. Mining Co. (C.C.) 96 Fed. 735; 1 Beach, Cont. § 166; Langd. Cont. § 54; 1 Pars. Cont. (5th Ed.) 457; Ferguson v. Harris (S.C.) 17 S.E. 782, 39 Am. St. Rep. 745.

It results from the views above expressed that the judgment must be reversed, and the cause remanded, with directions to the court below to enter judgment for the respondent, with costs. It is so ordered.

BRIAN CONSTRUCTION AND DEVELOPMENT COMPANY, INC. v. JOHN BRIGHENTI. SUPREME COURT OF CONNECTICUT 176 Conn. 162; 405 A.2d 72 May 12, 1978, Argued September 19, 1978, Decided

OPINIÓN POR: LOISELLE

[*162] [**73] The plaintiff, a contractor, brought this action for damages against the defendant, a subcontractor, alleging that the defendant had breached a contract under

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which he had promised [*163] to perform certain excavation work for the plaintiff. The defendant counterclaimed. The court rendered judgment for the defendant on the plaintiff's claim and for the plaintiff on the defendant's counterclaim. From the judgment for the defendant, the plaintiff has appealed.

The relevant facts as found by the court are as follows: In early 1968, Joseph E. Bennett, doing business as Joseph E. Bennett Company, entered into a contract with Seymour B. Levine (hereinafter the owner) for the construction of a post office building in Bristol. Shortly thereafter, Bennett assigned the contract to the plaintiff, who, on October 10, 1968, entered into a written subcontract with the defendant. Pursuant to that contract, consisting of a standard subcontract agreement plus specifications, the defendant agreed to perform "all Excavation, Grading, Site Work, Asphalt Pavement, Landscaping, and Concrete Work" and "everything requisite and necessary to finish the entire work properly." In return, the defendant was to receive $ 104,326.

The defendant commenced excavation of the premises on October 15, 1968, at which time he discovered considerable debris below the surface, consisting in part of concrete foundation walls, slab floors, underground tanks, twisted metals and various combustible materials. Apparently, the discovered walls and floor had been part of the basement of an old factory which had previously been located on the site. The plaintiff had previously taken test borings of the excavation site, the results of which had been given to the defendant prior to the execution of the subcontract. The defendant had relied upon those results, although they proved [*164] to be grossly inaccurate. Neither party had been aware of the rubble and, consequently, its removal was not specifically called for by the plans and specifications included in the subcontract, nor was the cost of its removal included in the contract price. Nonetheless, the existence of the rubble necessitated excavation beyond the depth anticipated in the plans and

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specifications and the post office building could not be constructed without its removal.

[**74] A provision of the general contract between the owner and Bennett provided that "no extra work or change shall be made unless in pursuance of a written order from the Owner signed or countersigned by the Architect, or a written order from the Architect stating that the Owner has authorized the extra work or change." A separate provision of the contract specified that each subcontractor was to make all claims for extras "to the Contractor in the manner provided in the General Conditions of the Contract . . . for like claims by the Contractor upon the Owner." A provision of the subcontract reiterated this requirement, adding that "no extra work or other change will be commenced by the Sub-Contractor without the Contractor's prior approval in writing." Similarly, both contracts included provisions under which the subcontractor agreed to be bound to the contractor by the terms of the general contract and to assume toward the contractor all those obligations which he, under the contract, assumed towards the owner.

Upon discovery of the unanticipated debris, the plaintiff notified the architect, the attorney for the owner, representatives of the Bristol redevelopment agency, which owned the building site, and representatives of the postal service of the existence [*165] of the rubble. 1 All agreed that removal of the rubble was requisite for completion of the building, yet none would issue written authorization for its removal.

1 The plaintiff sought to notify the owner, but because the owner was ill, the plaintiff was unable to reach him.

On October 21, 1968, the defendant ceased working on the excavation site and notified the plaintiff of his refusal to continue. Subsequently, the defendant offered to complete the subcontract if the plaintiff would have the unsuitable material removed. The plaintiff refused this offer. He then ordered the defendant to remove the rubble as part of "everything requisite and necessary" under the subcontract. The defendant refused. When the plaintiff was confronted with this situation, and no one would take the responsibility

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to authorize the removal of the rubble, although its removal was necessary for the contractor to complete his contract, he chose to enter into a further agreement with the defendant for work not included in the subcontract. The plaintiff and the defendant orally agreed that the defendant would be paid his costs for removing the unanticipated rubble, plus 10 percent. By letter dated November 7, 1968, the plaintiff confirmed this oral agreement. Although requested in the letter to do so, the defendant failed to sign and return a copy of the letter to the plaintiff. Nonetheless, the defendant returned to work, continuing until about November 13, 1968, at which point he left the job, refusing to return despite the plaintiff's request that he complete the work. The plaintiff completed his own contract with the owner, suffering, as a result of the defendant's abandonment, considerable damages.

[*166] On appeal to this court, most of the plaintiff's claims of error focus upon the court's conclusion that, by interpreting the terms of the general contract as being incorporated into the subcontract, the issuance of a written extra work order signed by the architect was a condition precedent to the defendant's obligation to remove the rubble. The plaintiff's final claim, however, raises the issue of whether the oral agreement between it and the defendant constituted a valid agreement obligating the defendant to remove the unexpected rubble. Because we find this issue to be dispositive of the appeal, the other claims need not be specifically addressed.

It is an accepted principle of law in this state that when a party agrees to perform an obligation for another to whom that obligation is already owed, although for lesser remuneration, the second agreement does not constitute a valid, binding contract. See, e.g., Dahl v. Edwin Moss & Son, Inc., 136 Conn. 147, 69 A.2d 562; Gruber v. Klein, 102 Conn. 34, 127 A. 907; Warren v. Skinner, 20 Conn. 559. "The [**75] basis of the rule is generally made to rest upon the proposition that in such a situation he who promises the additional compensation receives nothing more than that to which he is already entitled and he to

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whom the promise is made gives nothing that he was not already under legal obligation to give. 1 Williston on Contracts, § 130." Blakeslee v. Board of Water Commissioners, 106 Conn. 642, 652, 139 A. 106. Where, however, the subsequent agreement imposes upon the one seeking greater compensation an additional obligation or burden not previously assumed, the agreement, supported by consideration, is valid and binding upon the parties. See, e.g., Simone v. Kirschner, 100 Conn. 427, 124 A. 20.

[*167] In Blakeslee v. Board of Water Commissioners, supra, 656, this court, in analyzing these traditional principles, articulated the evolving rule that "'where a contract must be performed under burdensome conditions not anticipated, and not within the contemplation of the parties at the time when the contract was made, and the promisee measures up to the right standard of honesty and fair dealing, and agrees, in view of the changed conditions, to pay what is then reasonable, just, and fair, such new contract is not without consideration within the meaning of that term, either in law or in equity.' United Steel Co. v. Casey, 262 Fed. 889, 893; see also Linz v. Shuck, 106 Md. 220, 67 Atl. 286." See also Sasso v. K.G. & G. Realty & Construction Co., 98 Conn. 571, 120 A. 158; Connelly v. Devoe, 37 Conn. 570, 576.

This principle has received recognition by courts of other jurisdictions confronted with situations comparable to that now before this court. In Evergreen Amusement Corporation v. Milstead, 206 Md. 610, 112 A.2d 901, the Maryland Court of Appeals found a subsequent oral agreement of the parties to a written construction contract valid, relying, in part, upon the theory of unforeseen circumstances. In that case, the plaintiff, operator of a drive-in movie theater, had entered into a written contract with the defendant, a contractor, pursuant to which the latter agreed to supply all the necessary materials and to perform the work needed to clear the theater site of timber, stumps, and waste material, and to grade the site as indicated on the accompanying plans. Once the work was underway, it became apparent that substantial, additional

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fill would be needed to complete the project, although neither party had anticipated this, both relying upon a topographical [*168] map which proved to be of doubtful accuracy. The court found that the parties, upon this discovery, entered into an oral agreement whereby the defendant would bring in the fill for additional compensation. On appeal, the plaintiff claimed that this agreement lacked consideration since the defendant promised only to do that which he had already agreed to do, i.e., to furnish all materials needed to grade the theater site. Relying upon the theory of unforseen circumstances, the court held the agreement to be binding.

In another case involving facts similar to those now before us, a California Court of Appeal in Bailey v. Breetwor, 206 Cal. App. 2d 287, 23 Cal. Rptr. 740, without reference to the theory of unforeseen circumstances, determined that a subsequent oral agreement of parties to a written contract was valid where unanticipated, burdensome conditions, not contemplated by the parties at the time the written contract was executed, were encountered. In that case, the defendant owner had entered into a written contract with a construction company to grade and compact a building site for $ 2600. The work was subcontracted to the plaintiff, who agreed to perform the work in accordance with the general contract. Upon commencing his work, the plaintiff discovered, below the surface, an extensive amount of wet clay. The owner was notified of this and was advised that, although removal of this clay was not included in the subcontract, its removal was necessary for compliance with the city building code. In return for costs plus 10 percent, the plaintiff orally agreed to remove the clay. Determining that the oral agreement constituted a separate, binding contract, the court noted that "[t]his performance was clearly beyond the scope of the original contract. [*169] [**76] Bailey [the plaintiff] thus incurred a new detriment and Breetwor [the owner] received a new benefit constituting sufficient consideration for Breetwor's promise." Id., 292.

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Although the technical terminology apparent in these two cases differs, the underlying reasoning is similar. In each case, an unforeseen, burdensome condition was discovered during the performance of the original contract. The promise of additional compensation in return for the promise that the additional work required would be undertaken was held to constitute a separate, valid agreement. Such reasoning is applicable to the facts of this case. The unchallenged findings of the court reveal that the substantial rubble found beneath the surface of the site was not anticipated by either party, that its presence necessitated excavation beyond the depths required in the plans and specifications, that the cost of removing this rubble was not included in the contract price and that the parties entered into a separate oral agreement for the removal of the rubble. Under these circumstances, the subsequent oral agreement, that the defendant would remove this rubble in return for additional compensation, was binding as a new, distinct contract, supported by valid consideration. See Restatement (Second) Contracts § 89D (Tentative Draft No. 2, 1965). The defendant's failure to comply with this agreement constitutes a breach of contract.

Because of our disposition of this issue, we need not address the question of whether the subcontract incorporated the provision of the contract requiring written authorization by the architect or owner for extra work. Such a provision does not preclude a subsequent agreement pursuant to which an obligation, [*170] not contemplated at the time the original contract was executed, is assumed. Wyandotte & D.R. Ry. v. King Bridge Co., 100 F. 197, 205 (6th Cir.); see also Farm-Rite Implement Co. v. Fenestra, Inc., 340 Mass. 276, 287, 163 N.E.2d 285. The court found that the plaintiff and the defendant entered into an agreement pertaining to the costs for removal of the rubble. Such an agreement is valid. See, e.g., Wagner v. Graziano Construction Co., 390 Pa. 445, 447, 136 A.2d 82.

There is error, the judgment for the defendant on the complaint is set aside and the case is remanded with

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direction to render judgment for the plaintiff to recover such damages as he may prove on a new trial limited to the issue of damages.

B. EL CONCURSO DE LA OFERTA Y LA ACEPTACIÓN

UNA CLARA MANIFESTACIÓN EXTERIORIZADA Y OBJETIVA DE LA OFERTA

W. O. LUCY AND J. C. LUCY v. A. H. ZEHMER AND IDA S. ZEHMER. SUPREME COURT OF VIRGINIA 196 Va. 493; 84 S.E.2d 516 November 22, 1954

OPINIÓN POR: BUCHANAN

[*494] [**517] BUCHANAN, J., delivered the opinion of the court.

This suit was instituted by W. O. Lucy and J. C. Lucy, complainants, against A. H. Zehmer and Ida S. Zehmer, his wife, defendants, to have specific performance of a contract by which it was alleged the Zehmers had sold to W. O. Lucy a tract of land owned by A. H. Zehmer in Dinwiddie county containing 471.6 acres, more or less, known as the Ferguson farm, for $50,000. J. C. Lucy, the other complainant, is a brother of W. O. Lucy, to whom W. O. Lucy transferred a half interest in his alleged purchase.

The instrument sought to be enforced was written by A. H. Zehmer on December 20, 1952, in these words: "We hereby agree to sell to W. O. Lucy the Ferguson Farm complete for $50,000.00, title satisfactory to buyer," and signed by the defendants, A. H. Zehmer and Ida S. Zehmer.

The answer of A. H. Zehmer admitted that at the time mentioned W. O. Lucy offered him $50,000 cash for the farm, but that he, Zehmer, considered that the offer [**518] was made in jest; that so thinking, and both he and Lucy having had several drinks, he wrote out "the memorandum" quoted above and induced his wife to sign it; that he did not deliver [*495] the memorandum to Lucy, but that Lucy picked it up, read it, put it in his pocket, attempted to offer

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Zehmer $5 to bind the bargain, which Zehmer refused to accept, and realizing for the first time that Lucy was serious, Zehmer assured him that he had no intention of selling the farm and that the whole matter was a joke. Lucy left the premises insisting that he had purchased the farm.

Depositions were taken and the decree appealed from was entered holding that the complainants had failed to establish their right to specific performance, and dismissing their bill. The assignment of error is to this action of the court.

W. O. Lucy, a lumberman and farmer, thus testified in substance: He had known Zehmer for fifteen or twenty years and had been familiar with the Ferguson farm for ten years. Seven or eight years ago he had offered Zehmer $20,000 for the farm which Zehmer had accepted, but the agreement was verbal and Zehmer backed out. On the night of December 20, 1952, around eight o'clock, he took an employee to McKenney, where Zehmer lived and operated a restaurant, filling station and motor court. While there he decided to see Zehmer and again try to buy the Ferguson farm. He entered the restaurant and talked to Mrs. Zehmer until Zehmer came in. He asked Zehmer if he had sold the Ferguson farm. Zehmer replied that he had not. Lucy said, "I bet you wouldn't take $50,000.00 for that place." Zehmer replied, "Yes, I would too; you wouldn't give fifty." Lucy said he would and told Zehmer to write up an agreement to that effect. Zehmer took a restaurant check and wrote on the back of it, "I do hereby agree to sell to W. O. Lucy the Ferguson Farm for $50,000 complete." Lucy told him he had better change it to "We" because Mrs. Zehmer would have to sign it too. Zehmer then tore up what he had written, wrote the agreement quoted above and asked Mrs. Zehmer, who was at the other end of the counter ten or twelve feet away, to sign it. Mrs. Zehmer said she would for $50,000 and signed it. Zehmer brought it back and gave it to Lucy, who offered him $5 which Zehmer refused, [*496] saying, "You don't need to give me any money, you got the agreement there signed by both of us."

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The discussion leading to the signing of the agreement, said Lucy, lasted thirty or forty minutes, during which Zehmer seemed to doubt that Lucy could raise $50,000. Lucy suggested the provision for having the title examined and Zehmer made the suggestion that he would sell it "complete, everything there," and stated that all he had on the farm was three heifers.

Lucy took a partly filled bottle of whiskey into the restaurant with him for the purpose of giving Zehmer a drink if he wanted it. Zehmer did, and he and Lucy had one or two drinks together. Lucy said that while he felt the drinks he took he was not intoxicated, and from the way Zehmer handled the transaction he did not think he was either.

December 20 was on Saturday. Next day Lucy telephoned to J. C. Lucy and arranged with the latter to take a half interest in the purchase and pay half of the consideration. On Monday he engaged an attorney to examine the title. The attorney reported favorably on December 31 and on January 2 Lucy wrote Zehmer stating that the title was satisfactory, that he was ready to pay the purchase price in cash and asking when Zehmer would be ready to close the deal. Zehmer replied by letter, mailed on January 13, asserting that he had never agreed or intended to sell.

Mr. and Mrs. Zehmer were called by the complainants as adverse witnesses. Zehmer testified in substance as follows:

He bought this farm more than ten years ago for $11,000. He had had twenty-five offers, more or less, to buy it, including several from Lucy, who had never offered any specific sum of money. He had given them all the same answer, that he was not interested in selling it. On this Saturday night before Christmas it looked like everybody [**519] and his brother came by there to have a drink. He took a good many drinks during the afternoon and had a pint of his own. When he entered the restaurant around eight-thirty [*497] Lucy was there and he could see that he

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was "pretty high." He said to Lucy, "Boy, you got some good liquor, drinking, ain't you?" Lucy then offered him a drink. "I was already high as a Georgia pine, and didn't have any more better sense than to pour another great big slug out and gulp it down, and he took one too."

After they had talked a while Lucy asked whether he still had the Ferguson farm. He replied that he had not sold it and Lucy said, "I bet you wouldn't take $50,000.00 for it." Zehmer asked him if he would give $50,000 and Lucy said yes. Zehmer replied, "You haven't got $50,000 in cash." Lucy said he did and Zehmer replied that he did not believe it. They argued "pro and con for a long time," mainly about "whether he had $50,000 in cash that he could put up right then and buy that farm."

Finally, said Zehmer, Lucy told him if he didn't believe he had $50,000, "you sign that piece of paper here and say you will take $50,000.00 for the farm." He, Zehmer, "just grabbed the back off of a guest check there" and wrote on the back of it. At that point in his testimony Zehmer asked to see what he had written to "see if I recognize my own handwriting." He examined the paper and exclaimed, "Great balls of fire, I got 'Firgerson' for Ferguson. I have got satisfactory spelled wrong. I don't recognize that writing if I would see it, wouldn't know it was mine."

After Zehmer had, as he described it, "scribbled this thing off," Lucy said, "Get your wife to sign it." Zehmer walked over to where she was and she at first refused to sign but did so after he told her that he "was just needling him [Lucy], and didn't mean a thing in the world, that I was not selling the farm." Zehmer then "took it back over there * * * and I was still looking at the dern thing. I had the drink right there by my hand, and I reached over to get a drink, and he said, 'Let me see it.' He reached and picked it up, and when I looked back again he had it in his pocket and he dropped a five dollar bill over there, and he said, 'Here is five dollars payment on it.' * * * I said, 'Hell no, [*498] that is beer and liquor talking. I am not going to sell you the farm. I have told you that too many times before.'"

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Mrs. Zehmer testified that when Lucy came into the restaurant he looked as if he had had a drink. When Zehmer came in he took a drink out of a bottle that Lucy handed him. She went back to help the waitress who was getting things ready for next day. Lucy and Zehmer were talking but she did not pay too much attention to what they were saying. She heard Lucy ask Zehmer if he had sold the Ferguson farm, and Zehmer replied that he had not and did not want to sell it. Lucy said, "I bet you wouldn't take $50,000 cash for that farm," and Zehmer replied, "You haven't got $50,000 cash." Lucy said, "I can get it." Zehmer said he might form a company and get it, "but you haven't got $50,000.00 cash to pay me tonight." Lucy asked him if he would put it in writing that he would sell him this farm. Zehmer then wrote on the back of a pad, "I agree to sell the Ferguson Place to W. O. Lucy for $50,000.00 cash." Lucy said, "All right, get your wife to sign it." Zehmer came back to where she was standing and said, "You want to put your name to this?" She said "No," but he said in an undertone, "It is nothing but a joke," and she signed it.

She said that only one paper was written and it said: "I hereby agree to sell," but the "I" had been changed to "We". However, she said she read what she signed and was then asked, "When you read 'We hereby agree to sell to W. O. Lucy,' what did you interpret that to mean, that particular phrase?" She said she thought that was a cash sale that night; but she also said that when she read that part about "title satisfactory to buyer" she understood that if the title was good Lucy would pay $50,000 but if the title was bad he would have [**520] a right to reject it, and that that was her understanding at the time she signed her name.

On examination by her own counsel she said that her husband laid this piece of paper down after it was signed; that Lucy said to let him see it, took it, folded it and put it [*499] in his wallet, then said to Zehmer, "Let me give you $5.00," but Zehmer said, "No, this is liquor talking. I don't want to sell the farm, I have told you that I want my son to have it. This is all a joke." Lucy then said at least twice,

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"Zehmer, you have sold your farm," wheeled around and started for the door. He paused at the door and said, "I will bring you $50,000.00 tomorrow. * * * No, tomorrow is Sunday. I will bring it to you Monday." She said you could tell definitely that he was drinking and she said to her husband, "You should have taken him home," but he said, "Well, I am just about as bad off as he is."

The waitress referred to by Mrs. Zehmer testified that when Lucy first came in "he was mouthy." When Zehmer came in they were laughing and joking and she thought they took a drink or two. She was sweeping and cleaning up for next day. She said she heard Lucy tell Zehmer, "I will give you so much for the farm," and Zehmer said, "You haven't got that much." Lucy answered, "Oh, yes, I will give you that much." Then "they jotted down something on paper * * * and Mr. Lucy reached over and took it, said let me see it." He looked at it, put it in his pocket and in about a minute he left. She was asked whether she saw Lucy offer Zehmer any money and replied, "He had five dollars laying up there, they didn't take it." She said Zehmer told Lucy he didn't want his money "because he didn't have enough money to pay for his property, and wasn't going to sell his farm." Both of them appeared to be drinking right much, she said.

She repeated on cross-examination that she was busy and paying no attention to what was going on. She was some distance away and did not see either of them sign the paper. She was asked whether she saw Zehmer put the agreement down on the table in front of Lucy, and her answer was this: "Time he got through writing whatever it was on the paper, Mr. Lucy reached over and said, 'Let's see it.' He took it and put it in his pocket," before showing it to Mrs. [*500] Zehmer. Her version was that Lucy kept raising his offer until it got to $50,000.

The defendants insist that the evidence was ample to support their contention that the writing sought to be enforced was prepared as a bluff or dare to force Lucy to admit that he did not have $50,000; that the whole matter

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was a joke; that the writing was not delivered to Lucy and no binding contract was ever made between the parties.

It is an unusual, if not bizarre, defense. When made to the writing admittedly prepared by one of the defendants and signed by both, clear evidence is required to sustain it.

[1] In his testimony Zehmer claimed that he "was high as a Georgia pine," and that the transaction "was just a bunch of two doggoned drunks bluffing to see who could talk the biggest and say the most." That claim is inconsistent with his attempt to testify in great detail as to what was said and what was done. It is contradicted by other evidence as to the condition of both parties, and rendered of no weight by the testimony of his wife that when Lucy left the restaurant she suggested that Zehmer drive him home. The record is convincing that Zehmer was not intoxicated to the extent of being unable to comprehend the nature and consequences of the instrument he executed, and hence that instrument is not to be invalidated on that ground. 17 C.J.S., Contracts, § 133 b., p. 483; *Taliaferro v. Emery, 124 Va. 674, 98 S.E. 627*. It was in fact conceded by defendants' counsel in oral argument that under the evidence Zehmer was not too drunk to make a valid contract.

[2] The evidence is convincing also that Zehmer wrote two agreements, the first one beginning "I hereby agree to sell." Zehmer first said he could not remember about that, [**521] then that "I don't think I wrote but one out." Mrs. Zehmer said that what he wrote was "I hereby agree," but that the "I" was changed to "We" after that night. The agreement that was written and signed is in the record and indicates no such change. Neither are the mistakes in spelling that Zehmer sought to point out readily apparent.

[*501] The appearance of the contract, the fact that it was under discussion for forty minutes or more before it was signed; Lucy's objection to the first draft because it was written in the singular, and he wanted Mrs. Zehmer to sign it also; the rewriting to meet that objection and the signing by Mrs. Zehmer; the discussion of what was to be

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included in the sale, the provision for the examination of the title, the completeness of the instrument that was executed, the taking possession of it by Lucy with no request or suggestion by either of the defendants that he give it back, are facts which furnish persuasive evidence that the execution of the contract was a serious business transaction rather than a casual, jesting matter as defendants now contend.

On Sunday, the day after the instrument was signed on Saturday night, there was a social gathering in a home in the town of McKenney at which there were general comments that the sale had been made. Mrs. Zehmer testified that on that occasion as she passed by a group of people, including Lucy, who were talking about the transaction, $50,000 was mentioned, whereupon she stepped up and said, "Well, with the high-price whiskey you were drinking last night you should have paid more. That was cheap." Lucy testified that at that time Zehmer told him that he did not want to "stick" him or hold him to the agreement because he, Lucy, was too tight and didn't know what he was doing, to which Lucy replied that he was not too tight; that he had been stuck before and was going through with it. Zehmer's version was that he said to Lucy: "I am not trying to claim it wasn't a deal on account of the fact the price was too low. If I had wanted to sell $50,000.00 would be a good price, in fact I think you would get stuck at $50,000.00." A disinterested witness testified that what Zehmer said to Lucy was that "he was going to let him up off the deal, because he thought he was too tight, didn't know what he was doing. Lucy said something to the effect that 'I have been stuck before and I will go through with it.'"

[3] If it be assumed, contrary to what we think the evidence [*502] shows, that Zehmer was jesting about selling his farm to Lucy and that the transaction was intended by him to be a joke, nevertheless the evidence shows that Lucy did not so understand it but considered it to be a serious business transaction and the contract to be

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binding on the Zehmers as well as on himself. The very next day he arranged with his brother to put up half the money and take a half interest in the land. The day after that he employed an attorney to examine the title. The next night, Tuesday, he was back at Zehmer's place and there Zehmer told him for the first time, Lucy said, that he wasn't going to sell and he told Zehmer, "You know you sold that place fair and square." After receiving the report from his attorney that the title was good he wrote to Zehmer that he was ready to close the deal.

Not only did Lucy actually believe, but the evidence shows he was warranted in believing, that the contract represented a serious business transaction and a good faith sale and purchase of the farm.

In the field of contracts, as generally elsewhere, "We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. 'The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.'" *First Nat. Bank v. Roanoke Oil Co., 169 Va. 99, 114, 192 S.E. 764, 770.*

At no time prior to the execution of the contract had Zehmer indicated to Lucy by word or act that he was not in earnest about selling the farm. They had argued about it and discussed its terms, as Zehmer admitted, for a long time. Lucy testified that if there was any jesting it was about [**522] paying $50,000 that night. The contract and the evidence show that he was not expected to pay the money that night. Zehmer said that after the writing was signed he laid it down on the counter in front of Lucy. Lucy said Zehmer handed it to him. In any event there had been what appeared to be a good faith offer and a good faith acceptance, [*503] followed by the execution and apparent delivery of a written contract. Both said that Lucy put the writing in his pocket and then offered Zehmer $5 to seal the bargain. Not until then, even under the defendants' evidence, was anything said or done to indicate that the matter was a joke. Both of the Zehmers testified that when

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Zehmer asked his wife to sign he whispered that it was a joke so Lucy wouldn't hear and that it was not intended that he should hear.

The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party. Restatement of the Law of Contracts, Vol. I, § 71, p. 74.

"* * * The law, therefore, judges of an agreement between two persons exclusively from those expressions of their intentions which are communicated between them. * * *." Clark on Contracts, 4 ed., § 3, p. 4.

An agreement or mutual assent is of course essential to a valid contract but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind. 17 C.J.S., Contracts, § 32, p. 361; 12 Am. Jur., Contracts, § 19, p. 515.

So a person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement, 17 C.J.S., Contracts, § 47, p. 390; Clark on Contracts, 4 ed., § 27, at p. 54.

Whether the writing signed by the defendants and now sought to be enforced by the complainants was the result of a serious offer by Lucy and a serious acceptance by the defendants, or was a serious offer by Lucy and an acceptance in secret jest by the defendants, in either event it constituted a binding contract of sale between the parties.

[4] [*504] Defendants contend further, however, that even though a contract was made, equity should decline to enforce it under the circumstances. These circumstances have been set forth in detail above. They disclose some

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drinking by the two parties but not to an extent that they were unable to understand fully what they were doing. There was no fraud, no misrepresentation, no sharp practice and no dealing between unequal parties. The farm had been bought for $11,000 and was assessed for taxation at $6,300. The purchase price was $50,000. Zehmer admitted that it was a good price. There is in fact present in this case none of the grounds usually urged against specific performance.

Specific performance, it is true, is not a matter of absolute or arbitrary right, but is addressed to the reasonable and sound discretion of the court. *First Nat. Bank v. Roanoke Oil Co., supra, 169 Va. at p. 116, 192 S.E. at p. 771*. But it is likewise true that the discretion which may be exercised is not an arbitrary or capricious one, but one which is controlled by the established doctrines and settled principles of equity; and, generally, where a contract is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree a specific performance of it as it is for a court of law to give damages for a breach of it. *Bond v. Crawford, 193 Va. 437, 444, 69 S.E.(2d) 470, 475*.

The complainants are entitled to have specific performance of the contracts sued on. The decree appealed from is therefore reversed and the cause is remanded for the [**523] entry of a proper decree requiring the defendants to perform the contract in accordance with the prayer of the bill.

Reversed and remanded.

CARLILL v. CARBOLIC SMOKE BALL CO. COURT OF APPEAL 1 QB 256 7 December 1892

OPINIÓN POR: LINDLEY LJ:

This is an appeal by the defendants against a decision of HAWKINS, J, rendering them liable to pay the plaintiff 100 pounds under the circumstances to which I will allude presently. The defendants are interested in selling as largely as possible an article they call the "Carbolic smoke ball." What that is I do not know. But they have great faith in it as an effectual preventive against influenza and colds, or any

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diseases caused by taking cold, and as also useful in a great variety of other complaints. They are so confident in the merits of this thing that they say in one leaflet that the carbolic smoke ball never fails to cure all the diseases therein mentioned when used strictly according to these directions. Like other tradespeople they want to induce the public to have sufficient confidence in their preparation to buy it largely. That being the position they put this advertisement into various newspapers. It is printed in black-faced type, that is to say, the striking parts of it are. It is, therefore, put in a form to attract attention, and they mean that it should attract attention for the purposes to which I have already alluded.

[His LORDSHIP read the advertisement.] The plaintiff is a lady who, upon the faith of one of these advertisements, went and bought at a chemist's in Oxford Street one of these smoke balls. She used it three times daily for two weeks according to the printed directions supplied. But before she had done using it she was unfortunate enough to contract influenza, so that in her case this ball did not produce the desired effect. Whereupon she says to the Carbolic Smoke Ball Co: "Pay me this reward of 100 pounds." "Oh no," they respond, "We will not pay you the 100 pounds." She then brings an action, and HAWKINS, J, has held that the defendants must pay her the 100 pounds. Then they appeal to us and say that that judgment is erroneous. The appeal has been argued with great ingenuity by the defendants' counsel, and his contentions are reduced in substance to this - that, put it as you will, this is not a binding promise.

I will pass, before I proceed further, to some, of the various contentions which were raised for the purpose of disposing of them. I will afterwards return to the serious question which arises. First, it was said no action will lie upon this advertisement because it is a policy of insurance. You have, however, only got to look at it, I think, to dismiss that contention. Then it was said that this is a wager or bet. HAWKINS, J, examined that with his usual skill, and came to the conclusion that nobody ever thought of a

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bet, and that there is nothing whatever in common with a bet. I so entirely agree with him that I propose to pass that over as not worth serious attention.

Having got rid of the question of a policy, and having got rid of the question of a bet, let us see what we have left. The first observation I would make upon this is that we are not dealing with any inference of fact. We are dealing with an express promise to pay 100 pounds in certain events. There can be no mistake about that at all. Read this how you will, and twist it about as you will, here is a distinct promise, expressed in language which is perfectly unmistakeable, that 100 pounds reward will be paid by the Carbolic Smoke Ball Co to any person who contracts influenza after having used the ball three times daily, and so on. One must look a little further and see if this is intended to be a promise at all; whether it is a mere puff - a sort of thing which means nothing. Is that the meaning of it? My answer to that question is "No," and I base my answer upon this passage: "1,000 pounds is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter." What is that money deposited for? What is that passage put in for, except to negative the suggestion that this is a mere puff, and means nothing at all? The deposit is called in aid by the advertisers as proof of their sincerity in the matter. What do they mean? It is to show their intention to pay the 100 pounds in the events which they have specified. I do not know who drew the advertisement, but he has distinctly in words expressed that promise. It is as plain as words can make it.

Then it is said that it is a promise that is not binding. In the first place it is said that it is not made with anybody in particular. The offer is to anybody who performs the conditions named in the advertisement. Anybody who does perform

the conditions accepts the offer. I take it that if you look at this advertisement in point of law, it is an offer to pay 100 pounds to anybody who will perform these conditions, and the performance of these conditions is the acceptance of the offer. That rests upon a string of authorities, the

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earliest of which is that celebrated advertisement case of Williams v Carwardine (1) which has been followed by a good many other cases concerning advertisements of rewards. But then it is said: "Supposing that the performance of the conditions is an acceptance of the offer, that acceptance ought to be notified." Unquestionably as a general proposition when an offer is made, you must have it not only accepted, but the acceptance notified. But is that so in cases of this kind? I apprehend that this is rather an exception to the rule, or, if not an exception, it is open to the observation that the notification of the acceptance need not precede the performance. This offer is a continuing offer. It was never revoked, and if notice of acceptance is required (which I doubt very much, for I rather think the true view is that which is as expressed and explained by LORD BLACKBURN in Brogden v Metropolitan Rail Co (2)) the person who makes the offer receives the notice of acceptance contemporaneously with his notice of the performance of the conditions. Anyhow, if notice is wanted, he gets it before his offer is revoked, which is all you want in principle. But I doubt very much whether the true view is not, in a case of this kind, that the person who makes the offer shows by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance.

We have, therefore, all the elements which are necessary to form a binding contract enforceable in point of law subject to two observations. First of all, it is said that this advertisement is so vague that you cannot construe it as a promise; that the vagueness of the language, to which I will allude presently, shows that a legal promise was never intended nor contemplated. No doubt the language is vague and uncertain in some respects, and particularly in that the 100 pounds is to be paid to any person who contracts influenza after having used the ball three times daily, and so on. It is said, "When are they to be used?" According to the language of the advertisement no time is fixed, and, construing the offer most strongly against the person who

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has made it, one might infer that any time was meant. I doubt whether that was meant, and I doubt whether that would not be pushing too far the doctrine as to construing language most strongly against the person using it. I doubt whether business people, or reasonable people would understand that if you took a smoke ball and used it three times daily for the time specified - two weeks - you were to be guaranteed against influenza for the rest of your life. I do not think the advertisement means that, to do the defendants justice. I think it would be pushing their language a little too far. But if it does not mean that, what does it mean? It is for them to show what it does mean; and it strikes me that there are two reasonable constructions to be put on this advertisement, either of which will answer the purpose of the plaintiff. Possibly there are three.

It may mean that the promise of the reward is limited to persons catching the increasing influenza, or any colds, or diseases caused by taking colds, during the prevalence of the epidemic. That is one suggestion. That does not fascinate me, I confess. I prefer the other two. Another is, that you are warranted free from catching influenza, or cold, or other diseases caused by taking cold, while you are using this preparation. If that is the meaning, then the plaintiff was actually using the preparation when she got influenza. Another meaning - and the one which I rather think I should prefer myself - is becoming diseased within a reasonable time after having used the smoke ball. Then it is asked: "What is a reasonable time?" And one of my brothers suggested that that depended upon the reasonable view of the time taken by a germ in developing? I do not feel pressed by that. It strikes me that a reasonable time may be got at in a business sense, and in a sense to the satisfaction of a lawyer in this way. Find out what the preparation is. A chemist will tell you that. Find out from a skilled physician

how long such a preparation could be reasonably expected to endure so as to protect a person from an epidemic or cold. In that way you will get a standard to be laid before a court by which it might exercise its judgment

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as to what a reasonable time would be. And it strikes me, I confess, that the true construction of this is that 100 pounds will be paid to anybody who uses this smoke ball three times daily, for two weeks according to the printed directions, and who gets influenza, or a cold, or some other disease caused by taking cold, within a reasonable time after so using it. I think that that is the fair and proper business construction of it. If that is the true construction, it is enough for the plaintiff. Therefore, I say no more about the vagueness of the document.

I come now to the last point, which I think requires attention, ie, the question of the consideration. Counsel for the defendants has argued with great skill that this is a nudum pactum - that there is no consideration. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. Counsel says it is no advantage to them how much the ball is used. What is an advantage to them and what benefits them is the sale, and he has put the ingenious case that a lot of these balls might be stolen, and that it would be no advantage to them if the thief or other people used them. The answer to that I think is this. It is quite obvious that, in the view of the defendants, the advertisers, a use of the smoke balls by the public, if they can get the public to have confidence enough to use them, will react and produce a sale which is directly beneficial to them, the defendants. Therefore it appears to me that out of this transaction emerges an advantage to them which is enough to constitute a consideration. But there is another view of it. What about the person who acts upon this and accepts the offer? Does not that person put himself to some inconvenience at the request of the defendants? Is it nothing to use this ball three times daily at the request of the defendants for two weeks according to the directions? Is that to go for nothing? It appears to me that that is a distinct inconvenience, if not a detriment, to any person who uses the smoke ball. When, therefore, you come to analyze this argument of want of consideration, it appears to me that there is ample consideration for the promise.

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We were pressed upon this point with Gerhard v Bates (3) which was the case of a promoter of companies who had promised the bearers of share-warrants that they should have dividends for so many years, and the promise as alleged was held not to show any consideration. LORD CAMPBELL'S judgment upon that is, I take it, unintelligible; and when you come to examine it, I think it is open to the explanation which counsel for the plaintiff gave, that is to say, that the real point in that case was that the promise, if any, was to the original bearer and not to the plaintiff, and, as the plaintiff was not suing in the name of the original bearer, there was no contract with him. LORD CAMPBELL goes on to enforce that view by showing that there was no consideration shown for the promise to him. I cannot help thinking that LORD CAMPBELL'S observations upon consideration would have been very different if the plaintiff in that action had been an original bearer, or if the court had gone on to show what a "societe anonyme" was, and that this promise was, and had been alleged to be, not only to the first bearer, but to anybody who should become the bearer. There was no such allegation, and the court said that, in the absence of such allegation, they did not know what a societe anonyme was - I mean, of course, judicially - and, therefore, there was no consideration. But here I cannot see the slightest difficulty, for the reasons I have given, in coming to the conclusion that there is consideration.

It appears to me, therefore, that these defendants must perform their promise, and if they have been so unguarded and so unwary as to expose themselves to a great many actions, so much the worse for them. For once in a way the advertiser has reckoned too much on the gullibility of the public. It appears to me that it would be very little short of a scandal if we said that no action would lie on such a promise as this, acted upon as it has been. The appeal must be dismissed with costs.

OPINIÓN POR: BOWEN LJ:

I am of the same opinion. We were asked by counsel for the defendants to say that this document was a contract

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too vague to be enforced. The first observation that arises is that the document is not a contract at all. It is an offer made to the public. The terms of the offer, counsel says, are too vague to be treated as a definite offer, the acceptance of which would constitute a binding contract. He relies on his construction of the document, in accordance with which he says there is no limit of time fixed for catching influenza, and that it cannot seriously be meant to promise to pay money to a person who catches influenza at any time after the inhaling of the smoke ball. He says also that, if you look at this document you will find great vagueness in the limitation of the persons with whom the contract was intended to be made - that it does not follow that they do not include persons who may have used the smoke ball before the advertisement was issued, and that at all events, it is a contract with the world in general. He further says, that it is an unreasonable thing to suppose it to be a contract, because nobody in their senses would contract themselves out of the opportunity of checking the experiment which was going to be made at their own expense, and there is no such provision here made for the checking. He says that all that shows that this is rather in the nature of a puff or a proclamation than a promise or an offer intended to mature into a contract when accepted.

Counsel says that the terms are incapable of being consolidated into a contract. But he seems to think that the strength of the position he desires to adopt is rather that the vagueness of the document shows that no contract at all was intended. It seems to me that in order to arrive at this contract we must read it in its plain meaning as the public would understand it. It was intended to be issued to the public and to be read by the public. How would an ordinary person reading this document construe it upon the points which the defendant's counsel has brought to our attention? It was intended unquestionably to have some effect, and I think the effect which it was intended to have was that by means of the use of the carbolic smoke ball the sale of the carbolic smoke ball should be increased. It was designed to make people buy the ball. But it was also designed to make

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them use it, because the suggestions and allegations which it contains are directed immediately to the use of the smoke ball as distinct from the purchase of it. It did not follow that the smoke ball was to be purchased from the defendants directly or even from agents of theirs directly. The intention was that the circulation of the smoke ball should be promoted, and that the usage of it should be increased.

The advertisement begins by saying that a reward will be paid by the Carbolic Smoke Ball Co to any person who contracts influenza, and the defendants say that "contracts" there does not apply only to persons who contract influenza after the publication of the advertisement, but that it might include persons who had contracted influenza before. I cannot so read it. It is written in colloquial and popular language. I think that the expression is equivalent to this, that 100 pounds will be paid to any person who shall contract influenza after having used the carbolic smoke ball three times daily for two weeks. It seems to me that that would be the way in which the public would read it. A plain person who read this advertisement would read it in this plain way, that if anybody after the advertisement was published used three times daily for two weeks the carbolic smoke ball and then caught cold he would be entitled to the reward.

Counsel says: "Within what time is this protection to endure? Is it to go on for ever or what is to be the limit of time?" I confess that I think myself that there are two constructions of this document, each of them contains good sense, and each of them seems to me to satisfy the exigencies of the present action. It may mean that the protection is warranted to last during the epidemic. If so, it was during the epidemic that the plaintiff contracted the disease. I think more probably it means that it is to be a protection while it is in use. That seems to me the way in which an ordinary person would understand an ordinary advertisement about medicine and especially about a specific against influenza. It could not be supposed that after you had left off using it you would still be protected for ever as if there was a stamp set upon your forehead that

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you were never to catch influenza because you had used the carbolic smoke ball. I think it means during the use. It seems to me that the language of the advertisement lends itself to that construction. It says:

"During the last epidemic of influenza many thousand Carbolic Smoke Balls were sold, and in no ascertained case was the disease contracted by those using the Carbolic Smoke Ball."

The advertisement concludes with saying that one smoke ball will last a family several months - which means that it is to be continually used - and that the ball can be refilled at a cost of 5s I, therefore, have no hesitation in saying that I think on the plain construction of this advertisement the protection was to snore during the time that the carbolic smoke ball was being used. LINDLEY, LJ, thinks that the contract would be sufficiently definite if you were to read it in the sense that the protection was to be warranted during a reasonable period after use. I have some difficulty myself on that point, but it is not necessary for me to develop it, because as I read the contract it covered the exact moment during I which the disease here was contracted.

Was the 100 pounds reward intended to be paid? It not only says the reward will be paid, but it says: "We have lodged 1,000 pounds to meet it." Therefore, it cannot be said that it was intended to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon, but counsel for the defendants says that there was no check on the persons who might claim to have used the ball and become entitled to the reward, and that it would be an insensate thing to promise 100 pounds to a person who used the smoke ball unless you could check his using it. The answer to that seems to me to be that, if a person chooses to make these extravagant promises, he probably does so because it pays him to make them, and if he has made them the extravagance of the promises is no reason in law why he should not be bound by them.

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It is said it is made to all the world, i.e., to anybody. It is not a contract made with all the world. There is the fallacy of that argument. It is an offer made to all the world, and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the conditions? It is an offer to become liable to anyone, who before it is retracted performs the conditions. Although the offer is made to all the world the contract is made with that limited portion of the public who come forward and perform the conditions on the faith of the advertisement. This case is not like those cases in which you offer to negotiate, or you issue an advertisement that you have got a stock of books to sell or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate, offers to receive offers, offers "to chaffer," as a learned judge in one of the cases has said; per WILLES, J, in Spencer v Harding (4). If this is an offer to be bound on a condition, then there is a contract the moment the acceptor fulfils the condition. That seems to me to be sense, and it is also the ground on which all these advertisement cases have been decided during the century. It cannot be put better than in WILLES, J.'s judgment in Spencer v Harding (4) where he says (LR 5 CP at p 563): "There never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who, before the offer should be retracted, should be the person to fulfil the contract of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on and we undertake to sell to the highest bidder, the reward cases would have applied, and there would have been a good contract in respect of the persons."

As soon as the highest bidder presents himself - says WILLES, J, in effect - the person who was to hold the vinculum juris on the other side of the contract was ascertained, and it became settled.

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Then it was said that there was no notification of the acceptance of the offer. One cannot doubt that as an ordinary rule of law an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless you do that, the two minds may be apart, and there is not that consensus which is necessary according to the English law to constitute a contract. But the mode of notifying acceptance is for the benefit of the person who makes the offer as well as for the opposite party, and so the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so. I suppose there can be no doubt that where a person in an offer made by him to another person expressly or impliedly intimates that a particular mode of acceptance is sufficient to make the bargain binding, it is only necessary for the person to whom the offer is made to follow the indicated method of acceptance. And if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, and the offer is one which in its character dispenses with notification of the acceptance, then according to the intimation of the very person proposing the contract, performance of the condition is a sufficient acceptance without notification. That seems to me to be the principle which lies at the bottom of the acceptance cases, of which an instance is the well-known judgment of MELLISH, LJ, in Harris v Nickerson (5) and LORD BLACKBURN'S opinion in the House of Lords in Brogden v Metropolitan Rail Co (2) (2 App Cas at p 691). It seems to me that that is exactly the line which he takes.

If that is the law, how are you to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract the answer from the character of the business which is being done. And in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his

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acceptance of the offer before he performs the conditions, but that, if he performs the conditions at once, notification is dispensed with. It seems to me, also, that no other view could be taken from the point of view of common sense. If I advertise to the world that my dog is lost and that anybody who brings him to a particular place will be paid some money, are all the police or other persons whose business is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? Of course they look for the dog, and as soon as they find the dog, they have performed the condition. The very essence of the transaction is that the dog should be found. It is not necessary under such circumstances, it seems to me, that in order to make the contract binding, there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it. A person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection. In his offer he impliedly indicates that he does not require notification of the acceptance of the offer.

Then counsel for the defendants pressed on us very much in a most admirable argument, as it struck me, that this was a nudum pactum, that there was no consideration for this promise. He said that there was no consideration - that taking the influenza was a condition, and using the smoke ball was a condition, and that there was no consideration at all. In fact, he said that there was no request to use, express or implied. I will not elaborate the discussion upon the exact law as to requests in this kind of contract. I will simply seder to Victors v Davies (6). There is also the note in MANNING AND GRANGER, which everybody ought to read who wishes to embark in this controversy - a note by SERJEANT MANNING in 1 Man & G at p 265. The short answer, to abstain from academical discussion, is, it seems to me, that in the present case there is a request to use involved in the very offer and the acceptance. What is the definition of consideration? The

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definition of consideration was given in SELWYN'S NISI PRIUS, which is cited by TINDAL, CJ, in Laythoarp v Bryant (7) (3 Scott at p 250). It is any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment or inconvenience sustained by the plaintiff, provided such act is performed or such inconvenience is suffered by the plaintiff with the consent, either express or implied, of the defendant. Can it be said here that if the person who reads this advertisement applies thrice daily, or such time as may seem to him to be bearable, the carbolic smoke ball to his nostrils for a whole fortnight, he is doing nothing at all - that it is a mere act which is not to count towards consideration to support a promise? The law does not require us to measure the adequacy of the consideration. Sufficient if there is an inconvenience sustained by the one party with the consent of the other. That is enough to support a consideration, as AL SMITH, LJ, pressed upon counsel from time to time during the argument here. It is enough to my mind that the plaintiff used the smoke ball. That is enough consideration. But the other view is, I think, that she used it, and that her using it was intended to be, and contemplated by the promissors as being indirectly a benefit to themselves, because the use of the smoke ball would promote the sale of the smoke ball.

We were pressed with Gerhard v Bates (3). As to that I have only to repeat what LINDLEY, LJ, has said. In Gerhard v Bates (3) which arose upon demurrer, the point upon which the action turned was that they did not allege that the promise was made to the class of which alone the plaintiff was one, and, therefore, there was no privity between the plaintiff and the defendant. LORD CAMPBELL went on to give a second reason. If his first reason was not enough, and the plaintiff and the defendant there had come together as contracting parties and the only question was consideration, it seems to me LORD CAMPBELL's reasoning would not have been sound. It is only to be supported if you read it as emphasising that the parties had not come into the relation of contracting parties.

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But if so the language was superfluous. The truth is that if you had found a contract between the parties, there would have been no difficulty about consideration. But you could not find such a contract. In the same way in the present case, if you once make up your mind that there was a promise made to the plaintiff, as one of the public - a promise that, if she used the smoke ball three times daily for a fortnight, and contracted influenza, she should have the reward - it seems to me that her using the smoke ball was sufficient consideration. I cannot picture to myself a view of the law on which the opposite could be entertained, when you have once found the contracting parties. If I say to a person: "If you use such and such a medicine for a week I will give you 5 pounds," and he uses it there is ample consideration for the promise.

In the present case the promise was put forward, I think, with the intention that it should be acted upon, and it was acted upon. It seems to me that there was ample consideration for the promise, and that, therefore, the plaintiff is entitled to recover the reward.

OPINIÓN POR: SMITH

The first point in this case is whether the defendants' advertisement which appeared in the "Pall Mall Gazette" was an offer which, when accepted and its conditions performed, constituted a promise to pay, assuming that there was good consideration to uphold that promise; or whether it was only a puff from which no promise could be implied. In other words, as it has been stated to us, whether it was a mere statement by the defendants of the confidence they entertained in the efficacy of their remedy. That is the first matter to be determined. Or I might put it in other words, to use the words of LORD CAMPBELL in Denton v Great Northern Rail Co (8) whether this advertisement was to be mere waste paper. That is how that learned judge summarised the arguments put forward in regard to the advertisement in that case. In my view, the true reading of this advertisement is this:

"100 pounds reward will be paid by the Carbolic Smoke Ball Co to any person who, after having used the ball three

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times daily for two weeks according to the printed directions supplied with such ball, contracts influenza, a cold, or any diseases caused by taking cold."

That, I think, is the true meaning of that advertisement, as I understand it. I think it means that if one of the public, as yet not ascertained, but as BOWEN, LJ, and LINDLEY, LJ, have pointed out, will be ascertained by the performing of the conditions, will hereafter use my smoke ball three times daily for two weeks according to my printed directions, I will pay him 100 pounds if he contracts influenza within the period mentioned in the advertisement. Why is there not a request there? In consideration of your using my smoke balls at my request, and paying for them, which is a necessary part of the use, then if you catch influenza within a certain time I will pay you 100 pounds. It must not be lost sight of that this advertisement also states that, as security far what is being offered, and as proof of its security, 1,000 pounds is actually lodged at the bank, wherewith to satisfy a possible demand which might be made in the event of the conditions contained therein being fulfilled, entitling a recipient to the 100 pounds offered. How can it be said that such a statement as that embodied a mere expression of confidence in the wares which they had to sell? I cannot read the advertisement in any such way. In my judgment, the advertisement was an offer intended to be acted upon if the conditions were performed, and, when accepted, constituted a binding promise on which an action would lie assuming that there was consideration for that promise.

Counsel for the defendants stated that it was a promise in honour or an agreement in honour or a contract in honour. Asked what he meant by that, he said: "It is a nudum pactum." I understand that, if there is no consideration for a promise, it may be a promise in honour, or, as we should call it, a promise without consideration and nudum pactum. But if he means anything else I do not understand it. I do not understand what a bargain or a promise or an agreement "in honour" is unless it is one on which an action cannot be brought because it is nudum

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pactum. About nudum pactum I will say a word in a moment. In my judgment, therefore, this point fails. I think that this was an offer intended to be acted upon, and, when acted upon and the conditions performed, gave a right of action to a person performing these conditions.

In the next place, it is said that the promise is too wide, because it is said there is no limit of time within which the person is to catch influenza. I am not going to pause there. As has been pointed out by my brothers who preceded me, there are three possible constructions of this contract. I like the last two, if I may call them so, the best. I like the construction that it means catching influenza during the time you are using the ball, or catching influenza within a reasonable time after the expiration of the two weeks during which you have used it throe times daily. It is not necessary to say which is the correct construction of this contract. The third construction is catching influenza during the epidemic. But, whichever is the true construction, there is sufficient limit of time so as not to make the contract too vague on that account. Then it was argued that, if the advertisement constituted an offer which might culminate in a contract if it was accepted, it was not accepted by the plaintiff in the manner contemplated. And it was said that the offer contemplated was such that notice of his acceptance had to be given by the party using the carbolic ball to the defendants before user, so that the defendants might be at liberty to superintend the experiment. All I can say is that there is no such clause in the advertisement, and, in my judgment, such a clause cannot be read into it. I only wish to say that I entirely agree with what has fallen from my brothers, namely, that this is one of those cases in which a performance of the conditions, the conditions being the use of these smoke balls for two weeks, three times a day, is an acceptance of the offer.

It was then said that there was no person named in the advertisement with whom any contract was made. That, I suppose, has taken place in every case in which actions on advertisements have been maintained from the time of Williams v Carwardine (1) and before that down to the

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present day. I have nothing to add to what has been said on that subject - that a person becomes a persona designate, and able to sue when be performs the conditions mentioned in the advertisement, which gives him a right to the reward therein offered. Then it was said that there was no consideration, and that it was nudum pactum. BOWEN and LINDLEY, LJJ, have both pointed out the considerations. There are two considerations here. One is the consideration of the inconvenience of having to use the carbolic smoke ball for two weeks three times a day. That is a consideration moving from the plaintiff to the defendants. The other consideration is the money gain likely to accrue to the defendants by the enhanced sale of the smoke balls by reason of the plaintiff's user of them - ample consideration, it seems to me to support this promise. I have only now to add that, as regards the policy and the wagering points, in my judgment, there is nothing in either of them.

Appeal dismissed.

¿Qué era un contrato bajo seal? ¿Por qué es ésta una versión medieval del estipulación romana? ¿Qué pasó con la writ de debt para las obligaciones unilaterales bajo seal?

JOHN D.R. LEONARD, Plaintiff, -against- PEPSICO, INC., Defendant. UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK 88 F. Supp. 2d 116; 39 U.C.C. Rep. Serv. 2d (Callaghan) 1 August 4, 1999, Decided August 5, 1999, Filed

OPINIÓN POR: WOOD

Plaintiff brought this action seeking, among other things, specific performance [*118] of an alleged offer of a Harrier Jet, featured in a television advertisement for defendant's "Pepsi Stuff" promotion. Defendant has moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons stated below, defendant's motion is granted.

I. Background

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This case arises out of a promotional campaign conducted by defendant, the producer and distributor of the soft drinks Pepsi and Diet Pepsi. (See PepsiCo Inc.'s Rule 56.1 Statement ("Def. Stat. [**2] ") P 2.) 1 The promotion, entitled "Pepsi Stuff," encouraged consumers to collect "Pepsi Points" from specially marked packages of Pepsi or Diet Pepsi and redeem these points for merchandise featuring the Pepsi logo. (See id. PP 4, 8.) Before introducing the promotion nationally, defendant conducted a test of the promotion in the Pacific Northwest from October 1995 to March 1996. (See id. PP 5-6.) A Pepsi Stuff catalog was distributed to consumers in the test market, including Washington State. (See id. P 7.) Plaintiff is a resident of Seattle, Washington. (See id. P 3.) While living in Seattle, plaintiff saw the Pepsi Stuff commercial (see id. P 22) that he contends constituted an offer of a Harrier Jet.

1 The Court's recitation of the facts of this case is drawn from the statements of uncontested facts submitted by the parties pursuant to Local Civil Rule 56.1. The majority of citations are to defendant's statement of facts because plaintiff does not contest many of defendant's factual assertions. (See Plaintiff Leonard's Response to PepsiCo's Rule 56.1 Statement ("Pl. Stat.").) Plaintiff's disagreement with certain of defendant's statements is noted in the text.

In an Order dated November 24, 1997, in a related case (96 Civ. 5320), the Court set forth an initial account of the facts of this case. Because the parties have had additional discovery since that Order and have crafted Local Civil Rule 56.1 Statements and Counterstatements, the recitation of facts herein should be considered definitive.

[**3] A. The Alleged Offer

Because whether the television commercial constituted an offer is the central question in this case, the Court will describe the commercial in detail. The commercial opens upon an idyllic, suburban morning, where the chirping of birds in sun-dappled trees welcomes a paperboy on his morning route. As the newspaper hits the stoop of a

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conventional two-story house, the tattoo of a military drum introduces the subtitle, "MONDAY 7:58 AM." The stirring strains of a martial air mark the appearance of a well-coiffed teenager preparing to leave for school, dressed in a shirt emblazoned with the Pepsi logo, a red-white-and-blue ball. While the teenager confidently preens, the military drumroll again sounds as the subtitle "T-SHIRT 75 PEPSI POINTS" scrolls across the screen. Bursting from his room, the teenager strides down the hallway wearing a leather jacket. The drumroll sounds again, as the subtitle "LEATHER JACKET 1450 PEPSI POINTS" appears. The teenager opens the door of his house and, unfazed by the glare of the early morning sunshine, puts on a pair of sunglasses. The drumroll then accompanies the subtitle "SHADES 175 PEPSI POINTS." A voiceover then intones, [**4] "Introducing the new Pepsi Stuff catalog," as the camera focuses on the cover of the catalog. (See Defendant's Local Rule 56.1 Stat., Exh. A (the "Catalog").) 2

2 At this point, the following message appears at the bottom of the screen: "Offer not available in all areas. See details on specially marked packages."

The scene then shifts to three young boys sitting in front of a high school building. The boy in the middle is intent on his Pepsi Stuff Catalog, while the boys on either side are each drinking Pepsi. The three boys gaze in awe at an object rushing overhead, as the military march builds to a crescendo. The Harrier Jet is not yet visible, but the observer senses the presence of a mighty plane as the extreme winds generated by its flight create a paper maelstrom in a classroom devoted to an otherwise dull physics lesson. Finally, [*119] the Harrier Jet swings into view and lands by the side of the school building, next to a bicycle rack. Several students run for cover, and the velocity of the wind strips [**5] one hapless faculty member down to his underwear. While the faculty member is being deprived of his dignity, the voiceover announces: "Now the more Pepsi you drink, the more great stuff you're gonna get."

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The teenager opens the cockpit of the fighter and can be seen, helmetless, holding a Pepsi. "Looking very pleased with himself," (Pl. Mem. at 3,) the teenager exclaims, "Sure beats the bus," and chortles. The military drumroll sounds a final time, as the following words appear: "HARRIER FIGHTER 7,000,000 PEPSI POINTS." A few seconds later, the following appears in more stylized script: "Drink Pepsi -- Get Stuff." With that message, the music and the commercial end with a triumphant flourish.

Inspired by this commercial, plaintiff set out to obtain a Harrier Jet. Plaintiff explains that he is "typical of the 'Pepsi Generation' . . . he is young, has an adventurous spirit, and the notion of obtaining a Harrier Jet appealed to him enormously." (Pl. Mem. at 3.) Plaintiff consulted the Pepsi Stuff Catalog. The Catalog features youths dressed in Pepsi Stuff regalia or enjoying Pepsi Stuff accessories, such as "Blue Shades" ("As if you need another reason to look forward to sunny days. [**6] "), "Pepsi Tees" ("Live in 'em. Laugh in 'em. Get in 'em."), "Bag of Balls" ("Three balls. One bag. No rules."), and "Pepsi Phone Card" ("Call your mom!"). The Catalog specifies the number of Pepsi Points required to obtain promotional merchandise. (See Catalog, at rear foldout pages.) The Catalog includes an Order Form which lists, on one side, fifty-three items of Pepsi Stuff merchandise redeemable for Pepsi Points (see id. (the "Order Form")). Conspicuously absent from the Order Form is any entry or description of a Harrier Jet. (See id.) The amount of Pepsi Points required to obtain the listed merchandise ranges from 15 (for a "Jacket Tattoo" ("Sew 'em on your jacket, not your arm.")) to 3300 (for a "Fila Mountain Bike" ("Rugged. All-terrain. Exclusively for Pepsi.")). It should be noted that plaintiff objects to the implication that because an item was not shown in the Catalog, it was unavailable. (See Pl. Stat. PP 23-26, 29.)

The rear foldout pages of the Catalog contain directions for redeeming Pepsi Points for merchandise. (See Catalog, at rear foldout pages.) These directions note that merchandise may be ordered "only" with the original Order Form. ([**7] See id.) The Catalog notes that in the event

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that a consumer lacks enough Pepsi Points to obtain a desired item, additional Pepsi Points may be purchased for ten cents each; however, at least fifteen original Pepsi Points must accompany each order. (See id.)

Although plaintiff initially set out to collect 7,000,000 Pepsi Points by consuming Pepsi products, it soon became clear to him that he "would not be able to buy (let alone drink) enough Pepsi to collect the necessary Pepsi Points fast enough." (Affidavit of John D.R. Leonard, Mar. 30, 1999 ("Leonard Aff."), P 5.) Reevaluating his strategy, plaintiff "focused for the first time on the packaging materials in the Pepsi Stuff promotion," (id.,) and realized that buying Pepsi Points would be a more promising option. (See id.) Through acquaintances, plaintiff ultimately raised about $ 700,000. (See id. P 6.)

B. Plaintiff's Efforts to Redeem the Alleged Offer

On or about March 27, 1996, plaintiff submitted an Order Form, fifteen original Pepsi Points, and a check for $ 700,008.50. (See Def. Stat. P 36.) Plaintiff appears to have been represented by counsel at the time he mailed his check; the check is [**8] drawn on an account of plaintiff's first set of attorneys. (See Defendant's Notice of Motion, Exh. B (first).) At the bottom of the Order Form, plaintiff wrote in "1 Harrier Jet" in the "Item" column and "7,000,000" in the "Total Points" column. (See id.) In a letter accompanying his submission, [*120] plaintiff stated that the check was to purchase additional Pepsi Points "expressly for obtaining a new Harrier jet as advertised in your Pepsi Stuff commercial." (See Declaration of David Wynn, Mar. 18, 1999 ("Wynn Dec."), Exh. A.)

On or about May 7, 1996, defendant's fulfillment house rejected plaintiff's submission and returned the check, explaining that:

> The item that you have requested is not part of the Pepsi Stuff collection. It is not included in the catalogue or on the order form, and only catalogue merchandise can be redeemed under this program.

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The Harrier jet in the Pepsi commercial is fanciful and is simply included to create a humorous and entertaining ad. We apologize for any misunderstanding or confusion that you may have experienced and are enclosing some free product coupons for your use.

(Wynn Aff. Exh. B (second).) Plaintiff's previous counsel responded [**9] on or about May 14, 1996, as follows:

Your letter of May 7, 1996 is totally unacceptable. We have reviewed the video tape of the Pepsi Stuff commercial . . . and it clearly offers the new Harrier jet for 7,000,000 Pepsi Points. Our client followed your rules explicitly. . . .

This is a formal demand that you honor your commitment and make immediate arrangements to transfer the new Harrier jet to our client. If we do not receive transfer instructions within ten (10) business days of the date of this letter you will leave us no choice but to file an appropriate action against Pepsi . . . .

(Wynn Aff., Exh. C.) This letter was apparently sent onward to the advertising company responsible for the actual commercial, BBDO New York ("BBDO"). In a letter dated May 30, 1996, BBDO Vice President Raymond E. McGovern, Jr., explained to plaintiff that:

I find it hard to believe that you are of the opinion that the Pepsi Stuff commercial ("Commercial") really offers a new Harrier Jet. The use of the Jet was clearly a joke that was meant to make the Commercial more humorous and entertaining. In my opinion, no reasonable person would agree with your analysis of the Commercial. [**10]

(Wynn Aff. Exh. A.) On or about June 17, 1996, plaintiff mailed a similar demand letter to defendant. (See Wynn Aff., Exh. D.)

Litigation of this case initially involved two lawsuits, the first a declaratory judgment action brought by PepsiCo in this district (the "declaratory judgment action"), and the second an action brought by Leonard in Florida state court (the "Florida action"). 3 PepsiCo brought suit in this Court on July 18, 1996, seeking a declaratory judgment stating

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that it had no obligation to furnish plaintiff with a Harrier Jet. That case was filed under docket number 96 Civ. 5320. In response to PepsiCo's suit in New York, Leonard brought suit in Florida state court on August 6, 1996, although this case had nothing to do with Florida. 4 That suit was removed to the Southern District of Florida in September 1996. In an Order dated November 6, 1996, United States District Judge James Lawrence King found that, "Obviously this case has been filed in a forum that has no meaningful relationship to the controversy and warrants a transfer pursuant to 28 U.S.C. § 1404(a)." Leonard v. PepsiCo, [*121] 1996 U.S. Dist. LEXIS 22407, *2, 96-2555 Civ.-King, at 1 (S.D. Fla. Nov. 6, 1996). [**11] The Florida suit was transferred to this Court on December 2, 1996, and assigned the docket number 96 Civ. 9069.

3 Because Leonard and PepsiCo were each plaintiff in one action and defendant in the other, the Court will refer to the parties as "Leonard" and "PepsiCo," rather than plaintiff and defendant, for its discussion of the procedural history of this litigation.

4 The Florida suit alleged that the commercial had been shown in Florida. Not only was this assertion irrelevant, in that plaintiff had not actually seen the commercial in Florida, but it later proved to be false. See Leonard v. PepsiCo, 1996 U.S. Dist. LEXIS 22407, *2, 96-2555 Civ.-King, at 1 (S.D. Fla. Nov. 6, 1996) ("The only connection this case has to this forum is that Plaintiff's lawyer is in the Southern District of Florida.").

Once the Florida action had been transferred, Leonard moved to dismiss the declaratory judgment action for lack of personal jurisdiction. In an Order dated November 24, 1997, the Court granted the motion to dismiss for lack of personal [**12] jurisdiction in case 96 Civ. 5320, from which PepsiCo appealed. Leonard also moved to voluntarily dismiss the Florida action. While the Court indicated that the motion was proper, it noted that PepsiCo was entitled to some compensation for the costs of litigating this case in Florida, a forum that had no meaningful relationship to the case. (See Transcript of

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Proceedings Before Hon. Kimba M. Wood, Dec. 9, 1997, at 3.) In an Order dated December 15, 1997, the Court granted Leonard's motion to voluntarily dismiss this case without prejudice, but did so on condition that Leonard pay certain attorneys' fees.

In an Order dated October 1, 1998, the Court ordered Leonard to pay $ 88,162 in attorneys' fees within thirty days. Leonard failed to do so, yet sought nonetheless to appeal from his voluntary dismissal and the imposition of fees. In an Order dated January 5, 1999, the Court noted that Leonard's strategy was "'clearly an end-run around the final judgment rule.'" (Order at 2 (quoting Palmieri v. DeFaria, 88 F.3d 136 (2d Cir. 1996)).) Accordingly, the Court ordered Leonard either to pay the amount due or withdraw his voluntary dismissal, as well as his appeals therefrom, [**13] and continue litigation before this Court. (See Order at 3.) Rather than pay the attorneys' fees, Leonard elected to proceed with litigation, and shortly thereafter retained present counsel.

On February 22, 1999, the Second Circuit endorsed the parties' stipulations to the dismissal of any appeals taken thus far in this case. Those stipulations noted that Leonard had consented to the jurisdiction of this Court and that PepsiCo agreed not to seek enforcement of the attorneys' fees award. With these issues having been waived, PepsiCo moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. The present motion thus follows three years of jurisdictional and procedural wrangling.

II. Discussion

A. The Legal Framework

1. Standard for Summary Judgment

On a motion for summary judgment, a court "cannot try issues of fact; it can only determine whether there are issues to be tried." Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 58 (2d Cir. 1987) (citations and internal quotation marks omitted). To prevail on a motion for summary judgment, the moving party therefore must show that there are no such genuine issues of material [**14] fact to be tried, and that he or she is entitled to

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judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Citizens Bank v. Hunt, 927 F.2d 707, 710 (2d Cir. 1991). The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion," which includes identifying the materials in the record that "it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp., 477 U.S. at 323.

Once a motion for summary judgment is made and supported, the non-moving party must set forth specific facts that show that there is a genuine issue to be tried. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Although a court considering a motion for summary judgment must view all evidence in the light most favorable to the non-moving party, and must draw all reasonable inferences in that party's favor, see Consarc Corp. v. Marine Midland Bank, N.A., 996 F.2d 568, 572 (2d Cir. 1993), the nonmoving party [**15] "must do more [*122] than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). If, based on the submissions to the court, no rational fact-finder could find in the non-movant's favor, there is no genuine issue of material fact, and summary judgment is appropriate. See Anderson, 477 U.S. at 250.

The question of whether or not a contract was formed is appropriate for resolution on summary judgment. As the Second Circuit has recently noted, "Summary judgment is proper when the 'words and actions that allegedly formed a contract [are] so clear themselves that reasonable people could not differ over their meaning.'" Krumme v. Westpoint Stevens, Inc., 143 F.3d 71, 83 (2d Cir. 1998) (quoting Bourque v. FDIC, 42 F.3d 704, 708 (1st Cir. 1994)) (further citations omitted); see also Wards Co. v. Stamford Ridgeway Assocs., 761 F.2d 117, 120 (2d Cir. 1985) (summary judgment is appropriate in contract case where interpretation urged by non-moving party is not

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"fairly reasonable"). Summary [**16] judgment is appropriate in such cases because there is "sometimes no genuine issue as to whether the parties' conduct implied a 'contractual understanding.'. . . . In such cases, 'the judge must decide the issue himself, just as he decides any factual issue in respect to which reasonable people cannot differ.'" Bourque, 42 F.3d at 708 (quoting Boston Five Cents Sav. Bank v. Secretary of Dep't of Housing & Urban Dev., 768 F.2d 5, 8 (1st Cir. 1985)).

2. Choice of Law

The parties disagree concerning whether the Court should apply the law of the state of New York or of some other state in evaluating whether defendant's promotional campaign constituted an offer. Because this action was transferred from Florida, the choice of law rules of Florida, the transferor state, apply. See Ferens v. John Deere Co., 494 U.S. 516, 523-33, 108 L. Ed. 2d 443, 110 S. Ct. 1274 (1990). Under Florida law, the choice of law in a contract case is determined by the place "where the last act necessary to complete the contract is done." Jemco, Inc. v. United Parcel Serv., Inc., 400 So. 2d 499, 500-01 (Fla. Dist. Ct. App. 1981); see also [**17] Shapiro v. Associated Int'l Ins. Co., 899 F.2d 1116, 1119 (11th Cir. 1990).

The parties disagree as to whether the contract could have been completed by plaintiff's filling out the Order Form to request a Harrier Jet, or by defendant's acceptance of the Order Form. If the commercial constituted an offer, then the last act necessary to complete the contract would be plaintiff's acceptance, in the state of Washington. If the commercial constituted a solicitation to receive offers, then the last act necessary to complete the contract would be defendant's acceptance of plaintiff's Order Form, in the state of New York. The choice of law question cannot, therefore, be resolved until after the Court determines whether the commercial was an offer or not. The Court agrees with both parties that resolution of this issue requires consideration of principles of contract law that are not limited to the law of any one state. Most of the cases cited by the parties are not from New York courts. As

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plaintiff suggests, the questions presented by this case implicate questions of contract law "deeply ingrained in the common law of England and the States of the Union." (Pl. Mem. at 8.)

B. [**18] Defendant's Advertisement Was Not An Offer

1. Advertisements as Offers

The general rule is that an advertisement does not constitute an offer. The Restatement (Second) of Contracts explains that:

Advertisements of goods by display, sign, handbill, newspaper, radio or television are not ordinarily intended or understood as offers to sell. The same is true of catalogues, price lists and circulars, even though the terms of suggested bargains may be stated in some detail. [*123] It is of course possible to make an offer by an advertisement directed to the general public (see § 29), but there must ordinarily be some language of commitment or some invitation to take action without further communication.

Restatement (Second) of Contracts § 26 cmt. b (1979). Similarly, a leading treatise notes that:

It is quite possible to make a definite and operative offer to buy or sell goods by advertisement, in a newspaper, by a handbill, a catalog or circular or on a placard in a store window. It is not customary to do this, however; and the presumption is the other way. . . . Such advertisements are understood to be mere requests to consider and examine and negotiate; [**19] and no one can reasonably regard them as otherwise unless the circumstances are exceptional and the words used are very plain and clear.

1 Arthur Linton Corbin & Joseph M. Perillo, Corbin on Contracts § 2.4, at 116-17 (rev. ed. 1993) (emphasis added); see also 1 E. Allan Farnsworth, Farnsworth on Contracts § 3.10, at 239 (2d ed. 1998); 1 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 4:7, at 286-87 (4th ed. 1990). New York courts adhere to this general principle. See Lovett v. Frederick Loeser & Co., 124 Misc. 81, 207 N.Y.S. 753, 755 (Mun. Ct. N.Y.

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City 1924) (noting that an "advertisement is nothing but an invitation to enter into negotiations, and is not an offer which may be turned into a contract by a person who signifies his intention to purchase some of the articles mentioned in the advertisement"); see also Geismar v. Abraham & Straus, 109 Misc. 2d 495, 439 N.Y.S.2d 1005, 1006 (Dist. Ct. Suffolk Cty. 1981) (reiterating Lovett rule); People v. Gimbel Bros. Inc., 202 Misc. 229, 115 N.Y.S.2d 857, 858 (Ct. Spec. Sess. 1952) (because an "advertisement does not constitute an [**20] offer of sale but is solely an invitation to customers to make an offer to purchase," defendant not guilty of selling property on Sunday).

An advertisement is not transformed into an enforceable offer merely by a potential offeree's expression of willingness to accept the offer through, among other means, completion of an order form. In Mesaros v. United States, 845 F.2d 1576 (Fed. Cir. 1988), for example, the plaintiffs sued the United States Mint for failure to deliver a number of Statue of Liberty commemorative coins that they had ordered. When demand for the coins proved unexpectedly robust, a number of individuals who had sent in their orders in a timely fashion were left empty-handed. See id. at 1578-80. The court began by noting the "well-established" rule that advertisements and order forms are "mere notices and solicitations for offers which create no power of acceptance in the recipient." Id. at 1580; see also Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 538-39 (9th Cir. 1983) ("The weight of authority is that purchase orders such as those at issue here are not enforceable contracts until [**21] they are accepted by the seller."); 5 Restatement (Second) of Contracts § 26 ("A manifestation of willingness to enter a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent."). The spurned coin collectors could not maintain a breach of contract action because no contract would be formed until the advertiser accepted the order form and processed payment. See 845 F.2d at 1581;

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see also Alligood v. Procter & Gamble, 72 Ohio App. 3d 309, 594 N.E.2d 668 (Ohio Ct. App. 1991) (finding that no offer was made in promotional campaign for baby diapers, in which consumers were to redeem teddy bear proof-of-purchase symbols for catalog merchandise); Chang v. First Colonial Savings Bank, 242 Va. 388, [*124] 410 S.E.2d 928 (Va. 1991) (newspaper advertisement for bank settled the terms of the offer once bank accepted plaintiffs' deposit, notwithstanding bank's subsequent effort to amend the terms of the offer). Under these principles, plaintiff's letter of March 27, 1996, with the Order Form and the appropriate number [**22] of Pepsi Points, constituted the offer. There would be no enforceable contract until defendant accepted the Order Form and cashed the check.

5 Foremost Pro was overruled on other grounds by Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1041 (9th Cir. 1987), aff'd, 496 U.S. 543, 110 L. Ed. 2d 492, 110 S. Ct. 2535 (1990). See Chroma Lighting v. GTE Products Corp., 111 F.3d 653, 657 (9th Cir. 1997), cert. denied sub nom., Osram Sylvania Products, Inc. v. Von Der Ahe, 522 U.S. 943, 118 S. Ct. 357, 139 L. Ed. 2d 278 (1997).

The exception to the rule that advertisements do not create any power of acceptance in potential offerees is where the advertisement is "clear, definite, and explicit, and leaves nothing open for negotiation," in that circumstance, "it constitutes an offer, acceptance of which will complete the contract." Lefkowitz v. Great Minneapolis Surplus Store, 251 Minn. 188, 86 N.W.2d 689, 691 (Minn. 1957). In Lefkowitz, [**23] defendant had published a newspaper announcement stating: "Saturday 9 AM Sharp, 3 Brand New Fur Coats, Worth to $ 100.00, First Come First Served $ 1 Each." 86 N.W.2d at 690. Mr. Morris Lefkowitz arrived at the store, dollar in hand, but was informed that under defendant's "house rules," the offer was open to ladies, but not gentlemen. See id. The court ruled that because plaintiff had fulfilled all of the terms of the advertisement and the advertisement was specific and left nothing open for negotiation, a contract had been formed. See id.; see also Johnson v. Capital City Ford Co., 85 So. 2d 75, 79 (La. Ct.

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App. 1955) (finding that newspaper advertisement was sufficiently certain and definite to constitute an offer).

The present case is distinguishable from Lefkowitz. First, the commercial cannot be regarded in itself as sufficiently definite, because it specifically reserved the details of the offer to a separate writing, the Catalog. 6 The commercial itself made no mention of the steps a potential offeree would be required to take to accept the alleged offer of a Harrier Jet. The advertisement in Lefkowitz, in contrast, "identified the person who could [**24] accept." Corbin, supra, § 2.4, at 119. See generally United States v. Braunstein, 75 F. Supp. 137, 139 (S.D.N.Y. 1947) ("Greater precision of expression may be required, and less help from the court given, when the parties are merely at the threshold of a contract."); Farnsworth, supra, at 239 ("The fact that a proposal is very detailed suggests that it is an offer, while omission of many terms suggests that it is not."). 7 Second, even if the Catalog had included a Harrier Jet among the items that could be obtained by redemption of Pepsi Points, the advertisement of a Harrier Jet by both television commercial and catalog would still not constitute an offer. As the Mesaros court explained, the absence of any words of limitation such as "first come, first served," renders the alleged offer sufficiently indefinite that no contract could be formed. See Mesaros, 845 F.2d at 1581. "A customer would not usually have reason to believe that the shopkeeper intended exposure to the risk of a multitude of acceptances resulting in a number of contracts exceeding the shopkeeper's inventory." Farnsworth, supra, at 242. There was no such danger [**25] in Lefkowitz, owing to the limitation "first come, first served."

6 It also communicated additional words of reservation: "Offer not available in all areas. See details on specially marked packages."

7 The reservation of the details of the offer in this case distinguishes it from Payne v. Lautz Bros. & Co., 166 N.Y.S. 844 (City Ct. Buffalo 1916). In Payne, a stamp and coupon broker purchased massive quantities of coupons produced by defendant, a soap company, and tried to

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redeem them for 4,000 round-trip tickets to a local beach. The court ruled for plaintiff, noting that the advertisements were "absolutely unrestricted. It contained no reference whatever to any of its previous advertising of any form." Id. at 848. In the present case, by contrast, the commercial explicitly reserved the details of the offer to the Catalog.

The Court finds, in sum, that the Harrier Jet commercial was merely an advertisement. The Court now turns to the line of cases upon which [**26] plaintiff rests much of his argument.

[*125] 2. Rewards as Offers

In opposing the present motion, plaintiff largely relies on a different species of unilateral offer, involving public offers of a reward for performance of a specified act. Because these cases generally involve public declarations regarding the efficacy or trustworthiness of specific products, one court has aptly characterized these authorities as "prove me wrong" cases. See Rosenthal v. Al Packer Ford, 36 Md. App. 349, 374 A.2d 377, 380 (Md. Ct. Spec. App. 1977). The most venerable of these precedents is the case of Carlill v. Carbolic Smoke Ball Co., 1 Q.B. 256 (Court of Appeal, 1892), a quote from which heads plaintiff's memorandum of law: "If a person chooses to make extravagant promises . . . he probably does so because it pays him to make them, and, if he has made them, the extravagance of the promises is no reason in law why he should not be bound by them." Carbolic Smoke Ball, 1 Q.B. at 268 (Bowen, L.J.).

Long a staple of law school curricula, Carbolic Smoke Ball owes its fame not merely to "the comic and slightly mysterious object involved," A.W. Brian Simpson, [**27] Quackery and Contract Law: Carlill v. Carbolic Smoke Ball Company (1893), in Leading Cases in the Common Law 259, 281 (1995), but also to its role in developing the law of unilateral offers. The case arose during the London influenza epidemic of the 1890s. Among other advertisements of the time, for Clarke's World Famous Blood Mixture, Towle's Pennyroyal and Steel Pills for Females, Sequah's Prairie Flower, and Epp's Glycerine

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Jube-Jubes, see Simpson, supra, at 267, appeared solicitations for the Carbolic Smoke Ball. The specific advertisement that Mrs. Carlill saw, and relied upon, read as follows:

100 # reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any diseases caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. 1000 # is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter.

During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those [**28] using the carbolic smoke ball.

Carbolic Smoke Ball, 1 Q.B. at 256-57. "On the faith of this advertisement," id. at 257, Mrs. Carlill purchased the smoke ball and used it as directed, but contracted influenza nevertheless. 8 The lower court held that she was entitled to recover the promised reward.

8 Although the Court of Appeals's opinion is silent as to exactly what a carbolic smoke ball was, the historical record reveals it to have been a compressible hollow ball, about the size of an apple or orange, with a small opening covered by some porous material such as silk or gauze. The ball was partially filled with carbolic acid in powder form. When the ball was squeezed, the powder would be forced through the opening as a small cloud of smoke. See Simpson, supra, at 262-63. At the time, carbolic acid was considered fatal if consumed in more than small amounts. See id. at 264.

Affirming the lower court's decision, Lord Justice Lindley began by [**29] noting that the advertisement was an express promise to pay # 100 in the event that a consumer of the Carbolic Smoke Ball was stricken with influenza. See id. at 261. The advertisement was construed as offering a reward because it sought to induce

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performance, unlike an invitation to negotiate, which seeks a reciprocal promise. As Lord Justice Lindley explained, "advertisements offering rewards . . . are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer." Id. at 262; see also id. at 268 (Bowen, L.J.). 9 Because Mrs. Carlill had complied with the terms of the offer, yet [*126] contracted influenza, she was entitled to # 100.

9 Carbolic Smoke Ball includes a classic formulation of this principle: "If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write a note saying that they have accepted my proposal?" Carbolic Smoke Ball, 1 Q.B. at 270 (Bowen, L.J.).

[**30] Like Carbolic Smoke Ball, the decisions relied upon by plaintiff involve offers of reward. In Barnes v. Treece, 15 Wash. App. 437, 549 P.2d 1152 (Wash. Ct. App. 1976), for example, the vice-president of a punchboard distributor, in the course of hearings before the Washington State Gambling Commission, asserted that, "'I'll put a hundred thousand dollars to anyone to find a crooked board. If they find it, I'll pay it.'" 549 P.2d at 1154. Plaintiff, a former bartender, heard of the offer and located two crooked punchboards. Defendant, after reiterating that the offer was serious, providing plaintiff with a receipt for the punchboard on company stationery, and assuring plaintiff that the reward was being held in escrow, nevertheless repudiated the offer. See id. at 1154. The court ruled that the offer was valid and that plaintiff was entitled to his reward. See id. at 1155. The plaintiff in this case also cites cases involving prizes for skill (or luck) in the game of golf. See Las Vegas Hacienda v. Gibson, 77 Nev. 25, 359 P.2d 85 (Nev. 1961) (awarding $ 5,000 to plaintiff, who successfully shot a hole-in-one); see also Grove v. Charbonneau Buick-Pontiac, Inc., 240 N.W.2d 853 (N.D.

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1976) [**31] (awarding automobile to plaintiff, who successfully shot a hole-in-one).

Other "reward" cases underscore the distinction between typical advertisements, in which the alleged offer is merely an invitation to negotiate for purchase of commercial goods, and promises of reward, in which the alleged offer is intended to induce a potential offeree to perform a specific action, often for noncommercial reasons. In Newman v. Schiff, 778 F.2d 460 (5th Cir. 1985), for example, the Fifth Circuit held that a tax protestor's assertion that, "If anybody calls this show . . . and cites any section of the code that says an individual is required to file a tax return, I'll pay them $ 100,000," would have been an enforceable offer had the plaintiff called the television show to claim the reward while the tax protestor was appearing. See id. at 466-67. The court noted that, like Carbolic Smoke Ball, the case "concerns a special type of offer: an offer for a reward." Id. at 465. James v. Turilli, 473 S.W.2d 757 (Mo. Ct. App. 1971), arose from a boast by defendant that the "notorious Missouri desperado" Jesse James had not been killed [**32] in 1882, as portrayed in song and legend, but had lived under the alias "J. Frank Dalton" at the "Jesse James Museum" operated by none other than defendant. Defendant offered $ 10,000 "to anyone who could prove me wrong." See id. at 758-59. The widow of the outlaw's son demonstrated, at trial, that the outlaw had in fact been killed in 1882. On appeal, the court held that defendant should be liable to pay the amount offered. See id. at 762; see also Mears v. Nationwide Mutual Ins. Co., 91 F.3d 1118, 1122-23 (8th Cir. 1996) (plaintiff entitled to cost of two Mercedes as reward for coining slogan for insurance company).

In the present case, the Harrier Jet commercial did not direct that anyone who appeared at Pepsi headquarters with 7,000,000 Pepsi Points on the Fourth of July would receive a Harrier Jet. Instead, the commercial urged consumers to accumulate Pepsi Points and to refer to the Catalog to determine how they could redeem their Pepsi Points. The commercial sought a reciprocal promise, expressed through

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acceptance of, and compliance with, the terms of the Order Form. As noted previously, the Catalog contains no mention of [**33] the Harrier Jet. Plaintiff states that he "noted that the Harrier Jet was not among the items described in the catalog, but this did not affect [his] understanding of the offer." (Pl. Mem. at 4.) It should have. 10

10 In his affidavit, plaintiff places great emphasis on a press release written by defendant, which characterizes the Harrier Jet as "the ultimate Pepsi Stuff award." (See Leonard Aff. P 13.) Plaintiff simply ignores the remainder of the release, which makes no mention of the Harrier Jet even as it sets forth in detail the number of points needed to redeem other merchandise.

[*127] Carbolic Smoke Ball itself draws a distinction between the offer of reward in that case, and typical advertisements, which are merely offers to negotiate. As Lord Justice Bowen explains:

It is an offer to become liable to any one who, before it is retracted, performs the condition . . . . It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, [**34] or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate - offers to receive offers - offers to chaffer, as, I think, some learned judge in one of the cases has said.

Carbolic Smoke Ball, 1 Q.B. at 268; see also Lovett, 207 N.Y.S. at 756 (distinguishing advertisements, as invitation to offer, from offers of reward made in advertisements, such as Carbolic Smoke Ball). Because the alleged offer in this case was, at most, an advertisement to receive offers rather than an offer of reward, plaintiff cannot show that there was an offer made in the circumstances of this case.

C. An Objective, Reasonable Person Would Not Have Considered the Commercial an Offer

Plaintiff's understanding of the commercial as an offer must also be rejected because the Court finds that no

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objective person could reasonably have concluded that the commercial actually offered consumers a Harrier Jet.

1. Objective Reasonable Person Standard

In evaluating the commercial, the Court must not consider defendant's subjective intent in making the commercial, or plaintiff's subjective view of what [**35] the commercial offered, but what an objective, reasonable person would have understood the commercial to convey. See Kay-R Elec. Corp. v. Stone & Weber Constr. Co., 23 F.3d 55, 57 (2d Cir. 1994) ("We are not concerned with what was going through the heads of the parties at the time [of the alleged contract]. Rather, we are talking about the objective principles of contract law."); Mesaros, 845 F.2d at 1581 ("A basic rule of contracts holds that whether an offer has been made depends on the objective reasonableness of the alleged offeree's belief that the advertisement or solicitation was intended as an offer."); Farnsworth, supra, § 3.10, at 237; Williston, supra, § 4:7 at 296-97.

If it is clear that an offer was not serious, then no offer has been made:

> What kind of act creates a power of acceptance and is therefore an offer? It must be an expression of will or intention. It must be an act that leads the offeree reasonably to conclude that a power to create a contract is conferred. This applies to the content of the power as well as to the fact of its existence. It is on this ground that we must exclude invitations to deal [**36] or acts of mere preliminary negotiation, and acts evidently done in jest or without intent to create legal relations.

Corbin on Contracts, § 1.11 at 30 (emphasis added). An obvious joke, of course, would not give rise to a contract. See, e.g., Graves v. Northern N.Y. Pub. Co., 260 A.D. 900, 22 N.Y.S.2d 537 (App. Div. 4th Dept. 1940) (dismissing claim to offer of $ 1000, which appeared in the "joke column" of the newspaper, to any person who could provide a commonly available phone number). On the other

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hand, if there is no indication that the offer is "evidently in jest," and that an objective, reasonable person would find that the offer was serious, then there may be a valid offer. See Barnes, 549 P.2d at 1155 ("If the jest is not apparent and a reasonable hearer would believe that an offer was being made, then the speaker risks the formation of a contract which was not intended."); see also Lucy v. Zehmer, 196 Va. 493, 84 S.E.2d 516, 518, 520 (Va. 1954) [*128] (ordering specific performance of a contract to purchase a farm despite defendant's protestation that the transaction was done in jest as "'just a bunch of two doggoned [**37] drunks bluffing'").

2. Necessity of a Jury Determination

Plaintiff also contends that summary judgment is improper because the question of whether the commercial conveyed a sincere offer can be answered only by a jury. Relying on dictum from Gallagher v. Delaney, 139 F.3d 338 (2d Cir. 1998), plaintiff argues that a federal judge comes from a "narrow segment of the enormously broad American socio-economic spectrum," id. at 342, and, thus, that the question whether the commercial constituted a serious offer must be decided by a jury composed of, inter alia, members of the "Pepsi Generation," who are, as plaintiff puts it, "young, open to adventure, willing to do the unconventional." (See Leonard Aff. P 2.) Plaintiff essentially argues that a federal judge would view his claim differently than fellow members of the "Pepsi Generation."

Plaintiff's argument that his claim must be put to a jury is without merit. Gallagher involved a claim of sexual harassment in which the defendant allegedly invited plaintiff to sit on his lap, gave her inappropriate Valentine's Day gifts, told her that "she brought out feelings that he had not had since [**38] he was sixteen," and "invited her to help him feed the ducks in the pond, since he was 'a bachelor for the evening.'" Gallagher, 139 F.3d at 344. The court concluded that a jury determination was particularly appropriate because a federal judge lacked "the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle

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perceptions, and implicit communications." Id. at 342. This case, in contrast, presents a question of whether there was an offer to enter into a contract, requiring the Court to determine how a reasonable, objective person would have understood defendant's commercial. Such an inquiry is commonly performed by courts on a motion for summary judgment. See Krumme, 143 F.3d at 83; Bourque, 42 F.3d at 708; Wards Co., 761 F.2d at 120.

3. Whether the Commercial Was "Evidently Done In Jest"

Plaintiff's insistence that the commercial appears to be a serious offer requires the Court to explain why the commercial is funny. Explaining why a joke is funny is a daunting task; as the essayist E.B. White has remarked, "Humor can be dissected, [**39] as a frog can, but the thing dies in the process . . . ." 11 The commercial is the embodiment of what defendant appropriately characterizes as "zany humor." (Def. Mem. at 18.)

11 Quoted in Gerald R. Ford, Humor and the Presidency 23 (1987).

First, the commercial suggests, as commercials often do, that use of the advertised product will transform what, for most youth, can be a fairly routine and ordinary experience. The military tattoo and stirring martial music, as well as the use of subtitles in a Courier font that scroll terse messages across the screen, such as "MONDAY 7:58 AM," evoke military and espionage thrillers. The implication of the commercial is that Pepsi Stuff merchandise will inject drama and moment into hitherto unexceptional lives. The commercial in this case thus makes the exaggerated claims similar to those of many television advertisements: that by consuming the featured clothing, car, beer, or potato chips, one will become attractive, stylish, desirable, and admired by all. A reasonable [**40] viewer would understand such advertisements as mere puffery, not as statements of fact, see, e.g., Hubbard v. General Motors Corp., 1996 U.S. Dist. LEXIS 6974, 95 Civ. 4362 (AGS), 1996 WL 274018, at *6 (S.D.N.Y. May 22, 1996) (advertisement describing

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automobile as "Like a Rock," was mere puffery, not a warranty of quality); Lovett, 207 N.Y.S. at 756; and refrain from interpreting the promises of the commercial as being literally true.

Second, the callow youth featured in the commercial is a highly improbable pilot, one who could barely be trusted with the [*129] keys to his parents' car, much less the prize aircraft of the United States Marine Corps. Rather than checking the fuel gauges on his aircraft, the teenager spends his precious preflight minutes preening. The youth's concern for his coiffure appears to extend to his flying without a helmet. Finally, the teenager's comment that flying a Harrier Jet to school "sure beats the bus" evinces an improbably insouciant attitude toward the relative difficulty and danger of piloting a fighter plane in a residential area, as opposed to taking public transportation. 12

12 In this respect, the teenager of the advertisement contrasts with the distinguished figures who testified to the effectiveness of the Carbolic Smoke Ball, including the Duchess of Sutherland; the Earls of Wharncliffe, Westmoreland, Cadogan, and Leitrim; the Countesses Dudley, Pembroke, and Aberdeen; the Marchionesses of Bath and Conyngham; Sir Henry Acland, the physician to the Prince of Wales; and Sir James Paget, sergeant surgeon to Queen Victoria. See Simpson, supra, at 265.

[**41] Third, the notion of traveling to school in a Harrier Jet is an exaggerated adolescent fantasy. In this commercial, the fantasy is underscored by how the teenager's schoolmates gape in admiration, ignoring their physics lesson. The force of the wind generated by the Harrier Jet blows off one teacher's clothes, literally defrocking an authority figure. As if to emphasize the fantastic quality of having a Harrier Jet arrive at school, the Jet lands next to a plebeian bike rack. This fantasy is, of course, extremely unrealistic. No school would provide landing space for a student's fighter jet, or condone the disruption the jet's use would cause.

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Fourth, the primary mission of a Harrier Jet, according to the United States Marine Corps, is to "attack and destroy surface targets under day and night visual conditions." United States Marine Corps, Factfile: AV-8B Harrier II (last modified Dec. 5, 1995) <http://www.hqmc.usmc.mil/factfile.nsf>. Manufactured by McDonnell Douglas, the Harrier Jet played a significant role in the air offensive of Operation Desert Storm in 1991. See id. The jet is designed to carry a considerable armament load, including Sidewinder and Maverick missiles. [**42] See id. As one news report has noted, "Fully loaded, the Harrier can float like a butterfly and sting like a bee -- albeit a roaring 14-ton butterfly and a bee with 9,200 pounds of bombs and missiles." Jerry Allegood, Marines Rely on Harrier Jet, Despite Critics, News & Observer (Raleigh), Nov. 4, 1990, at C1. In light of the Harrier Jet's well-documented function in attacking and destroying surface and air targets, armed reconnaissance and air interdiction, and offensive and defensive anti-aircraft warfare, depiction of such a jet as a way to get to school in the morning is clearly not serious even if, as plaintiff contends, the jet is capable of being acquired "in a form that eliminates [its] potential for military use." (See Leonard Aff. P 20.)

Fifth, the number of Pepsi Points the commercial mentions as required to "purchase" the jet is 7,000,000. To amass that number of points, one would have to drink 7,000,000 Pepsis (or roughly 190 Pepsis a day for the next hundred years -- an unlikely possibility), or one would have to purchase approximately $ 700,000 worth of Pepsi Points. The cost of a Harrier Jet is roughly $ 23 million dollars, a fact of which plaintiff was [**43] aware when he set out to gather the amount he believed necessary to accept the alleged offer. (See Affidavit of Michael E. McCabe, 96 Civ. 5320, Aug. 14, 1997, Exh. 6 (Leonard Business Plan).) Even if an objective, reasonable person were not aware of this fact, he would conclude that purchasing a fighter plane for $ 700,000 is a deal too good to be true. 13

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13 In contrast, the advertisers of the Carbolic Smoke Ball emphasized their earnestness, stating in the advertisement that "# 1,000 is deposited with the Alliance Bank, shewing our sincerity in the matter." Carbolic Smoke Ball, 1 Q.B. at 257. Similarly, in Barnes, the defendant's "subsequent statements, conduct, and the circumstances show an intent to lead any hearer to believe the statements were made seriously." Barnes, 549 P.2d at 1155. The offer in Barnes, moreover, was made in the serious forum of hearings before a state commission; not, as defendant states, at a "gambling convention." Compare Barnes, 549 P.2d at 1154, with Def. Reply Mem. at 6.

[**44] [*130] Plaintiff argues that a reasonable, objective person would have understood the commercial to make a serious offer of a Harrier Jet because there was "absolutely no distinction in the manner" (Pl. Mem. at 13,) in which the items in the commercial were presented. Plaintiff also relies upon a press release highlighting the promotional campaign, issued by defendant, in which "no mention is made by [defendant] of humor, or anything of the sort." (Id. at 5.) These arguments suggest merely that the humor of the promotional campaign was tongue in cheek. Humor is not limited to what Justice Cardozo called "the rough and boisterous joke . . . [that] evokes its own guffaws." Murphy v. Steeplechase Amusement Co., 250 N.Y. 479, 483, 166 N.E. 173, 174 (1929). In light of the obvious absurdity of the commercial, the Court rejects plaintiff's argument that the commercial was not clearly in jest.

4. Plaintiff's Demands for Additional Discovery

In his Memorandum of Law, and in letters to the Court, plaintiff argues that additional discovery is necessary on the issues of whether and how defendant reacted to plaintiff's "acceptance" of their "offer"; how defendant and its [**45] employees understood the commercial would be viewed, based on test-marketing the commercial or on their own opinions; and how other individuals actually responded to the commercial when it was aired. (See Pl. Mem. at 1-2;

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Letter of David E. Nachman to the Hon. Kimba M. Wood, Apr. 5, 1999.)

Plaintiff argues that additional discovery is necessary as to how defendant reacted to his "acceptance," suggesting that it is significant that defendant twice changed the commercial, the first time to increase the number of Pepsi Points required to purchase a Harrier Jet to 700,000,000, and then again to amend the commercial to state the 700,000,000 amount and add "(Just Kidding)." (See Pl. Stat. Exh C (700 Million), and Exh. D (700 Million -- Just Kidding).) Plaintiff concludes that, "Obviously, if PepsiCo truly believed that no one could take seriously the offer contained in the original ad that I saw, this change would have been totally unnecessary and superfluous." (Leonard Aff. P 14.) The record does not suggest that the change in the amount of points is probative of the seriousness of the offer. The increase in the number of points needed to acquire a Harrier Jet may have been prompted [**46] less by the fear that reasonable people would demand Harrier Jets and more by the concern that unreasonable people would threaten frivolous litigation. Further discovery is unnecessary on the question of when and how the commercials changed because the question before the Court is whether the commercial that plaintiff saw and relied upon was an offer, not that any other commercial constituted an offer.

Plaintiff's demands for discovery relating to how defendant itself understood the offer are also unavailing. Such discovery would serve only to cast light on defendant's subjective intent in making the alleged offer, which is irrelevant to the question of whether an objective, reasonable person would have understood the commercial to be an offer. See Kay-R Elec. Corp., 23 F.3d at 57 ("We are not concerned with what was going through the heads of the parties at the time [of the alleged contract]."); Mesaros, 845 F.2d at 1581; Corbin on Contracts, § 1.11 at 30. Indeed, plaintiff repeatedly argues that defendant's subjective intent is irrelevant. (See Pl. Mem. at 5, 8, 13.)

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Finally, plaintiff's assertion that he should be afforded an opportunity [**47] to determine whether other individuals also tried to accumulate enough Pepsi Points to "purchase" a Harrier Jet is unavailing. The possibility that there were other people who interpreted the commercial as an "offer" of a Harrier Jet does not render that belief any more or less reasonable. The alleged offer must be evaluated on its own terms. Having made the evaluation, [*131] the Court concludes that summary judgment is appropriate on the ground that no reasonable, objective person would have understood the commercial to be an offer. 14

14 Even if plaintiff were allowed discovery on all of these issues, such discovery would be relevant only to the second basis for the Court's opinion, that no reasonable person would have understood the commercial to be an offer. That discovery would not change the basic principle that an advertisement is not an offer, as set forth in Section II.B of this Order and Opinion, supra; nor would it affect the conclusion that the alleged offer failed to comply with the Statute of Frauds, as set forth in Section II.D, infra.

[**48] D. The Alleged Contract Does Not Satisfy the Statute of Frauds

The absence of any writing setting forth the alleged contract in this case provides an entirely separate reason for granting summary judgment. Under the New York 15 Statute of Frauds, a contract for the sale of goods for the price of $ 500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

N.Y.U.C.C. § 2-201(1); see also, e.g., AFP Imaging Corp. v. Philips Medizin Systeme, 1994 U.S. Dist. LEXIS 16504, 92 Civ. 6211 (LMM), 1994 WL 652510, at *4 (S.D.N.Y. Nov. 17, 1994)). Without such a writing, plaintiff's claim must fail as a matter of law. See Hilord Chem. Corp. v. Ricoh Elecs., Inc., 875 F.2d 32, 36-37 (2d Cir. 1989) ("The adequacy of a writing for Statute of

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Frauds purposes 'must be determined from the documents themselves, as a matter of law.'") (quoting Bazak Int'l. Corp. v. Mast Indus., Inc., 73 N.Y.2d 113, 118, 538 N.Y.S.2d 503, 535 N.E.2d 633 (1989)).

15 Having determined that defendant's advertisement was not an offer, the last act necessary to complete the contract would be defendant's acceptance in New York of plaintiff's Order Form. Thus the Court must apply New York law on the statute of frauds issue. See supra Section II.A.2.

[**49] There is simply no writing between the parties that evidences any transaction. Plaintiff argues that the commercial, plaintiff's completed Order Form, and perhaps other agreements signed by defendant which plaintiff has not yet seen, should suffice for Statute of Frauds purposes, either singly or taken together. (See Pl. Mem. at 18-19.) For the latter claim, plaintiff relies on Crabtree v. Elizabeth Arden Sales Corp., 305 N.Y. 48, 110 N.E.2d 551 (N.Y. 1953). Crabtree held that a combination of signed and unsigned writings would satisfy the Statute of Frauds, "provided that they clearly refer to the same subject matter or transaction." Id. at 55. Yet the Second Circuit emphasized in Horn & Hardart Co. v. Pillsbury Co., 888 F.2d 8 (2d Cir. 1989), that this rule "contains two strict threshold requirements." Id. at 11. First, the signed writing relied upon must by itself establish "'a contractual relationship between the parties.'" Id. (quoting Crabtree, 305 N.Y. at 56); see also O'Keeffe v. Bry, 456 F. Supp. 822, 829 (S.D.N.Y. 1978) ("To the extent that Crabtree permits [**50] the use of a 'confluence of memoranda,' the minimum condition for such use is the existence of one [signed] document establishing the basic, underlying contractual commitment."). The second threshold requirement is that the unsigned writing must "'on its face refer to the same transaction as that set forth in the one that was signed.'" Horn & Hardart, 888 F.2d at 11 (quoting Crabtree, 305 N.Y. at 56); see also Bruce Realty Co. of Florida v. Berger, 327 F. Supp. 507, 510 (S.D.N.Y. 1971).

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None of the material relied upon by plaintiff meets either threshold requirement. The commercial is not a writing; plaintiff's completed order form does not bear the signature of defendant, or an agent thereof; and to the extent that plaintiff seeks discovery of any contracts between defendant and its advertisers, such discovery would be unavailing: plaintiff [*132] is not a party to, or a beneficiary of, any such contracts. Because the alleged contract does not meet the requirements of the Statute of Frauds, plaintiff has no claim for breach of contract or specific performance.

E. Plaintiff's Fraud Claim

In addition to moving for summary judgment [**51] on plaintiff's claim for breach of contract, defendant has also moved for summary judgment on plaintiff's fraud claim. The elements of a cause of action for fraud are '"representation of a material existing fact, falsity, scienter, deception and injury."' New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 639 N.Y.S.2d 283, 662 N.E.2d 763 (1995) (quoting Channel Master Corp. v. Aluminium Ltd. Sales, Inc., 4 N.Y.2d 403, 407, 176 N.Y.S.2d 259, 262, 151 N.E.2d 833 (1958)).

To properly state a claim for fraud, "plaintiff must allege a misrepresentation or material omission by defendant, on which it relied, that induced plaintiff" to perform an act. See NYU, 639 N.Y.S.2d at 289. "General allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support the claim." See id. (citing Rocanova v. Equitable Life Assur. Soc'y, 83 N.Y.2d 603, 612 N.Y.S.2d 339, 634 N.E.2d 940 (1994)); see also Grappo v. Alitalia Linee Aeree Italiane, S.P.A., 56 F.3d 427, 434 (2d Cir. 1995) ("A cause of action does not generally lie where the plaintiff alleges only that the [**52] defendant entered into a contract with no intention of performing it"). Instead, the plaintiff must show the misrepresentation was collateral, or served as an inducement, to a separate agreement between the parties. See Bridgestone/Firestone v. Recovery Credit, 98 F.3d 13, 20 (2d Cir. 1996) (allowing a fraud claim

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where plaintiff "'demonstrate[s] a fraudulent misrepresentation collateral or extraneous to the contract'") (quoting Deerfield Communications Corp. v. Chesebrough-Ponds, Inc., 68 N.Y.2d 954, 510 N.Y.S.2d 88, 89, 502 N.E.2d 1003 (1986)).

For example, in Stewart v. Jackson & Nash, 976 F.2d 86 (2d Cir. 1992), the Second Circuit ruled that plaintiff had properly stated a claim for fraud. In the course of plaintiff's negotiations for employment with defendant, a law firm, defendant represented to plaintiff not only that plaintiff would be hired (which she was), but also that the firm had secured a large environmental law client, that it was in the process of establishing an environmental law department, and that plaintiff would head the environmental law department. See id. at 89-90. The Second Circuit concluded [**53] that these misrepresentations gave rise to a fraud claim, because they consisted of misrepresentations of present fact, rather than future promises.

Plaintiff in this case does not allege that he was induced to enter into a contract by some collateral misrepresentation, but rather that defendant never had any intention of making good on its "offer" of a Harrier Jet. (See Pl. Mem. at 23.) Because this claim "alleges only that the defendant entered into a contract with no intention of performing it," Grappo, 56 F.3d at 434, judgment on this claim should enter for defendant.

III. Conclusion

In sum, there are three reasons why plaintiff's demand cannot prevail as a matter of law. First, the commercial was merely an advertisement, not a unilateral offer. Second, the tongue-in-cheek attitude of the commercial would not cause a reasonable person to conclude that a soft drink company would be giving away fighter planes as part of a promotion. Third, there is no writing between the parties sufficient to satisfy the Statute of Frauds.

For the reasons stated above, the Court grants defendant's motion for summary judgment. The Clerk of

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Court is instructed to close [**54] these cases. Any pending motions are moot.

SO ORDERED.

¿Bajo qué condiciones puede un anuncio comercial constituir una oferta para celebrar un contrato?

EMBRY, Appellant, v. HARGADINE, McKITTRICK DRY GOODS COMPANY, Respondent.
COURT OF APPEALS OF MISSOURI, ST. LOUIS
127 Mo. App. 383; 105 S.W. 777
November 5, 1907, Decided

OPINIÓN POR: GOODE

[**777] [*384] GOODE, J.--We dealt with this case on a former appeal (115 Mo. App. 130). It has been retried and is again before us for the determination of questions not then reviewed. The appellant was an employee of the respondent company under a written contract to expire December 15, 1903, at a salary of $ 2,000 per annum. His duties were to attend to the sample department of respondent, of which he was given complete charge. It was his business to select samples for the traveling salesmen of the company, which is a wholesale dry goods concern, to use in selling goods to retail merchants. Appellant contends that on December 23, 1903, he was re-engaged by respondent, through its president, Thos. H. McKittrick, for another year at the same compensation and for the same duties stipulated in his previous written contract. On March 1, 1904, he was discharged, having been notified in February, that on account of the necessity of retrenching expenses, his services and that of some other employees, would no longer be required. The respondent company contends that its president never re-employed appellant after the termination of his written contract and hence that it had a right to discharge him when it chose. The point with which we are concerned requires an epitome of the testimony of appellant and the counter-testimony of McKittrick, [*385] the president of the company, in reference to the alleged re-employment. Appellant testified that several times prior to the termination of his written contract on December 15, 1903, he had endeavored to get

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an understanding with McKittrick for another year, but had been put off from time to time; that on December 23d, eight days after the expiration of said contract, he called on McKittrick, in the latter's office, and said to him that as appellant's written employment had lapsed eight days before, and as there were only a few days between then and the first of January in which to seek employment with other firms, if respondent wished to retain his services longer he must have a contract for another year or he would quit respondent's service then and there; that he had been put off twice before and wanted an understanding or contract at once so that he could go ahead without worry; that McKittrick asked him how he was getting along in his department, and appellant said he was very busy as they were in the height of the season getting men out--had about 110 salesmen on the line and others in preparation; that McKittrick then said: "Go ahead, you're all right; get your men out and don't let that worry you;" that appellant took McKittrick at his word and worked until February 15th without any question in his mind. It was on February 15th that he was notified his services would be discontinued on March 1st. McKittrick denied this conversation as related by appellant and said that when accosted by the latter on December 23d, he (McKittrick) was working on his books in order to get out a report for a stockholders' meeting and when appellant said if he did not get a contract he would leave, that he (McKittrick) said:

"Mr. Embry, I am just getting ready for the stockholders' meeting to-morrow, I have no time to take it up now; I have told you before I would not take it up [*386] until I had [**778] these matters out of the way; you will have to see me at a later time. I said: 'Go back upstairs and get your men out on the road.' I may have asked him one or two other questions relative to the department; I don't remember. The whole conversation did not take more than a minute."

Embry also swore that when he was notified he would be discharged, he complained to McKittrick about it, as being a violation of their contract, and McKittrick said it

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was due to the action of the board of directors and not to any personal action of his and that others would suffer by what the board had done as well as Embry. Appellant requested an instruction to the jury setting out in substance the conversation between him and McKittrick according to his version and declaring that those facts, if found to be true, constituted a contract between the parties that defendant would pay plaintiff the sum of $ 2,000 for another year, provided the jury believed from the evidence that plaintiff commenced said work believing he was to have $ 2,000 for the year's work. This instruction was refused but the court gave another embodying in substance appellant's version of the conversation, and declaring it made a contract "if you (the jury) find both parties thereby intended and did contract with each other for plaintiff's employment for one year from and including December 23, 1903, at a salary of $ 2,000 per annum." Embry swore that on several occasions when he spoke to McKittrick about employment for the ensuing year, he asked for a renewal of his former contract and that on December 23d, the date of the alleged renewal, he went into Mr. McKittrick's office and told him his contract had expired and he wanted to renew it for a year, having always worked under year contracts. Neither the refused instruction nor the one given by the court embodied facts quite as strong as appellant's testimony, because neither referred to appellant's alleged statement [*387] to McKittrick, that unless he was re-employed he would stop work for respondent then and there. It is assigned for error that the court required the jury, in order to return a verdict for appellant, not only to find the conversation occurred as appellant swore, but that both parties intended by such conversation to contract with each other for plaintiff's employment for the year from December, 1903, at a salary of $ 2,000. If it appeared from the record that there was a dispute between the parties as to the terms on which appellant wanted re-employment, there might have been sound reason for inserting this clause in the instruction; but no issue was made that they split on terms; the testimony of McKittrick tending to prove only

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that he refused to enter into a contract with appellant regarding another year's employment until the annual meeting of stockholders was out of the way. Indeed, as to the proposed terms McKittrick agrees with Embry; for the former swore as follows: "Mr. Embry said he wanted to know about the renewal of his contract; said if he did not have the contract made he would leave." As the two witnesses coincided as to the terms of the proposed re-employment, there was no reason for inserting the above mentioned clause in the instruction in order that it might be settled by the jury whether or not plaintiff, if employed for one year from December 23, 1903, was to be paid $ 2000 a year. Therefore it remains to determine whether or not this part of the instruction was a correct statement of the law in regard to what was necessary to constitute a contract between the parties; that is to say, whether the formation of a contract by what, according to Embry was said, depended on the intention of both Embry and McKittrick. Or, to put the question more precisely, did what was said constitute a contract of re-employment on the previous terms irrespective of the intention or purpose of McKittrick? Judicial opinion and elementary treatises abound in statements of the rule [*388] that to constitute a contract there must be a meeting of the minds of the parties and both must agree to the same thing in the same sense. Generally speaking this may be true; but it is not literally or universally true. That is to say, the inner intention of parties to a conversation subsequently alleged to create a contract, cannot either make a contract of what transpired or prevent one from arising, if the words used were sufficient to constitute a contract. In so far as their intention is an influential element, it is only such intention as the words or acts of the parties indicate; not one secretly cherished which is inconsistent with those words or acts. The rule is thus stated by a text-writer and many decisions are cited in support of his text: "The primary object of construction in contract law is to discover the intention of the parties. This intention in express contracts is, in the first instance, embodied in the words which the parties have used and is

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to be deduced therefrom. This rule applies to oral contracts, as well as to contracts in writing, and is the rule recognized by courts of equity." [2 Paige, Contracts, sec. 1104.] So it is said in another work: "Now this measure of the contents of the promise will be found to coincide, in the usual dealings of men of good faith and ordinary competence, both with the actual intention of the promisor and with the actual expectation of the promisee. But this is not a constant or a necessary coincidence. In exceptional cases a promisor may be bound to perform something which he did not intend to promise, or a promisee may not be entitled to require that performance which he understood to be promised to him." [Walds-Pollock, Contracts (3 Ed.), 309.] In Brewington v. Mesker, 51 Mo. App. 348, 356, it is said that the meeting of minds which is essential to the formation of a contract, is not determined [**779] by the secret intention of the parties, but by their expressed intention, which may be wholly at variance with the former. In Machine Co. v. Criswell, 58 Mo. App. 471, an [*389] instruction was given on the issue of whether the sale of a machine occurred, which told the jury that an intention on the part of the seller to pass the title and of the purchaser to receive and accept the machine for the purpose of making it his own, was essential to a sale, and if the jury believed such intention did not exist in the minds of both parties at the time and was not made known to each other, then there was no sale notwithstanding the delivery. In commenting on this instruction the court said:

"The latter clause of the instruction is erroneous and misleading. It is true that in every case of purchase the question of sale or no sale is a matter of intention; but such intention must always be determined by the conduct, acts and express declarations, of the parties and not by the secret intention existing in the mind or minds of the contracting parties. If the validity of such a contract depended upon secret intentions of the parties, then no oral contract of sale could be relied on with safety. [58 Mo. 473.]"

In Smith v. Hughes, L. R. 6 Q. B. 597, 607, it was said:

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"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he intended to agree to the other party's terms."

And that doctrine was adopted in Phillip v. Gallant, 62 N.Y. 256.

In 9 Cyc. 245, we find the following text:

"The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a [*390] reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on the subject."

Even more pointed was the language of Baron BRAMWELL in Brown v. Hare, 3 Hurlst. & N. * 484, * 495:

"Intention is immaterial till it manifests itself in an act. If a man intends to buy, and says so to the intended seller, and he intends to sell and says so to the intended buyer, there is a contract of sale; and so there would be if neither had the intention."

In view of those authorities we hold that though McKittrick may not have intended to employ Embry by what transpired between them according to the latter's testimony, yet if what McKittrick said would have been taken by a reasonable man to be an employment, and Embry so understood it, it constituted a valid contract of employment for the ensuing year.

The next question is whether or not the language used was of that character; namely, was such that Embry, as a reasonable man, might consider he was re-employed for the ensuing year on the previous terms, and act accordingly. We do not say that in every instance it would be for the

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court to pronounce on this question, because, peradventure, instances might arise in which there would be such an ambiguity in the language relied on to show an assent by the obligor to the proposal of the obligee, that it would be for the jury to say whether a reasonable mind would take it to signify acceptance of the proposal. [Belt v. Goode, 31 Mo. 128; Davies v. Baldwin, 66 Mo. App. 577.] In Lancaster v. Elliott, 28 Mo. App. 86, 92, the opinion, as to the immediate point, reads:

"The interpretation of a contract in writing is always a matter of law for determination by the court, and equally so, upon like principles, is the question what acts and words, in nearly every case, will suffice to constitute [*391] an acceptance by one party, of a proposal submitted by the other, so that a contract or agreement thereby becomes matured."

The general rule is that it is for the court to construe the effect of writing relied on to make a contract and also the effect of unambiguous oral words. [Belt v. Goode, supra; Brannock v. Elmore, 114 Mo. 55, 21 S.W. 451; Norton v. Higbee, 38 Mo. App. 467, 471.] However, if the words are in dispute, the question of whether they were used or not is for the jury. [Belt v. Goode, supra.] With those rules of law in mind, let us recur to the conversation of December 23d between Embry and McKittrick as related by the former. Embry was demanding a renewal of his contract, saying he had been put off from time to time and that he had only a few days before the end of the year in which to seek employment from other houses, and that he would quit then and there unless he was re-employed. McKittrick inquired how he was getting along with the department and Embry said they (i. e., the employees of the department) were very busy getting out salesmen; whereupon McKittrick said: "Go ahead, you are all right; get your men out and do not let that worry you." We think no reasonable man would construe that answer to Embry's demand that he be employed for another year, otherwise than as an assent to the demand, and that Embry had the right to rely on it as an assent. The natural inference is, though we do not find it

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testified to, that Embry was at work getting samples ready for the salesmen to use during the ensuing season. Now when he was complaining of the worry and mental distress he was under because of his uncertainty about the future, and his urgent need, either of an immediate contract with respondent, or a refusal by it to make one, leaving him free to seek employment elsewhere, McKittrick must have answered as he did for the purpose of assuring appellant that any apprehension was [**780] needless, as appellant's services would [*392] be retained by the respondent. The answer was unambiguous, and we rule that if the conversation was according to appellant's version and he understood he was employed, it constituted in law a valid contract of reemployment, and the court erred in making the formation of a contract depend on a finding that both parties intended to make one. It was only necessary that Embry, as a reasonable man, had a right to and did so understand.

Some other rulings are assigned for error by the appellant, but we will not discuss them because we think they are devoid of merit.

The judgment is reversed and the cause remanded.

¿Es verdad que queda muy poco del common law después de la promulgación del Uniform Commercial Code? ¿Cómo es distinta la división que se hace entre common law y derecho comercial a la que conocemos entre el derecho civil y derecho comercial en Hispanoamérica?

RICH HILL and ENZA HILL, on behalf of a class of persons similarly situated, Plaintiffs-Appellees, v. GATEWAY 2000, INC., and DAVID PRAIS, Defendants-Appellants. UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 105 F.3d 1147; 31 U.C.C. Rep. Serv. 2d (Callaghan) 303 December 10, 1996, Argued January 6, 1997, Decided

OPINIÓN POR: EASTERBROOK

[*1148] A customer picks up the phone, orders a computer, and gives a credit card number. Presently a box arrives, containing the computer and a list of terms, said to

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govern unless the customer returns the computer within 30 days. Are these terms effective as the parties' contract, or is the contract term-free because the order-taker did not read any terms over the phone and elicit the customer's assent?

One of the terms in the box containing a Gateway 2000 system was an arbitration clause. Rich and Enza Hill, the customers, kept the computer [**2] more than 30 days before complaining about its components and performance. They filed suit in federal court arguing, among other things, that the product's shortcomings make Gateway a racketeer (mail and wire fraud are said to be the predicate offenses), leading to treble damages under RICO for the Hills and a class of all other purchasers. Gateway asked the district court to enforce the arbitration clause; the judge refused, writing that "the present record is insufficient to support a finding of a valid arbitration agreement between the parties or that the plaintiffs were given adequate notice of the arbitration clause." Gateway took an immediate appeal, as is its right. 9 U.S.C. § 16(a)(1)(A).

The Hills say that the arbitration clause did not stand out: they concede noticing the statement of terms but deny reading it closely enough to discover the agreement to arbitrate, and they ask us to conclude that they therefore may go to court. Yet an agreement to arbitrate must be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Doctor's Associates, Inc. v. Casarotto, 134 L. Ed. 2d 902, 116 S. Ct. 1652 (1996), holds that this provision [**3] of the Federal Arbitration Act is inconsistent with any requirement that an arbitration clause be prominent. A contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome. Carr v. CIGNA Securities, Inc., 95 F.3d 544, 547 (7th Cir. 1996); Chicago Pacific Corp. v. Canada Life Assurance Co., 850 F.2d 334 (7th Cir. 1988). Terms inside Gateway's box stand or fall together. If they constitute the parties' contract because the Hills had an opportunity to return the computer after reading them, then all must be enforced.

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ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), holds that terms inside a box of software bind consumers who use the software after an opportunity to read the terms and to reject them by returning the product. Likewise, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 113 L. Ed. 2d 622, 111 S. Ct. 1522 (1991), enforces a forum-selection clause that was included among three pages of terms attached to a cruise ship ticket. ProCD and Carnival Cruise Lines exemplify the many commercial transactions in which people pay for products with terms to follow; ProCD discusses others. 86 F.3d at 1451-52. The district [**4] court concluded in ProCD that the contract is formed when the consumer pays for the software; as a result, the court held, only terms known to the consumer at that moment are part of the contract, and provisos inside the box do not count. Although this is one way a contract [*1149] could be formed, it is not the only way: "A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance." Id. at 1452. Gateway shipped computers with the same sort of accept-or-return offer ProCD made to users of its software. ProCD relied on the Uniform Commercial Code rather than any peculiarities of Wisconsin law; both Illinois and South Dakota, the two states whose law might govern relations between Gateway and the Hills, have adopted the UCC; neither side has pointed us to any atypical doctrines in those states that might be pertinent; ProCD therefore applies to this dispute.

Plaintiffs ask us to limit ProCD to software, but where's the sense in that? ProCD is about the law of contract, not the law of software. Payment [**5] preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors. Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone

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for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread. For what little it is worth, we add that the box from Gateway was crammed with software. The computer came [**6] with an operating system, without which it was useful only as a boat anchor. See Digital Equipment Corp. v. Uniq Digital Technologies, Inc., 73 F.3d 756, 761 (7th Cir. 1996). Gateway also included many application programs. So the Hills' effort to limit ProCD to software would not avail them factually, even if it were sound legally--which it is not.

For their second sally, the Hills contend that ProCD should be limited to executory contracts (to licenses in particular), and therefore does not apply because both parties' performance of this contract was complete when the box arrived at their home. This is legally and factually wrong: legally because the question at hand concerns the formation of the contract rather than its performance, and factually because both contracts were incompletely performed. ProCD did not depend on the fact that the seller characterized the transaction as a license rather than as a contract; we treated it as a contract for the sale of goods and reserved the question whether for other purposes a "license" characterization might be preferable. 86 F.3d at 1450. All debates about characterization to one side, the transaction in ProCD [**7] was no more executory than the one here: Zeidenberg paid for the software and walked out of the store with a box under his arm, so if arrival of the

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box with the product ends the time for revelation of contractual terms, then the time ended in ProCD before Zeidenberg opened the box. But of course ProCD had not completed performance with delivery of the box, and neither had Gateway. One element of the transaction was the warranty, which obliges sellers to fix defects in their products. The Hills have invoked Gateway's warranty and are not satisfied with its response, so they are not well positioned to say that Gateway's obligations were fulfilled when the motor carrier unloaded the box. What is more, both ProCD and Gateway promised to help customers to use their products. Long-term service and information obligations are common in the computer business, on both hardware and software sides. Gateway offers "lifetime service" and has a round-the-clock telephone hotline to fulfil this promise. Some vendors spend more money helping customers use their products than on developing and manufacturing them. The document in Gateway's box includes promises of [*1150] future performance that some consumers [**8] value highly; these promises bind Gateway just as the arbitration clause binds the Hills.

Next the Hills insist that ProCD is irrelevant because Zeidenberg was a "merchant" and they are not. Section 2-207(2) of the UCC, the infamous battle-of-the-forms section, states that "additional terms [following acceptance of an offer] are to be construed as proposals for addition to a contract. Between merchants such terms become part of the contract unless. . .". Plaintiffs tell us that ProCD came out as it did only because Zeidenberg was a "merchant" and the terms inside ProCD's box were not excluded by the "unless" clause. This argument pays scant attention to the opinion in ProCD, which concluded that, when there is only one form, " § 2-207 is irrelevant." 86 F.3d at 1452. The question in ProCD was not whether terms were added to a contract after its formation, but how and when the contract was formed--in particular, whether a vendor may propose that a contract of sale be formed, not in the store (or over the phone) with the payment of money or a general "send me the product," but after the customer has had a

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chance to inspect both the item and the terms. ProCD answers [**9] "yes," for merchants and consumers alike. Yet again, for what little it is worth we observe that the Hills misunderstand the setting of ProCD. A "merchant" under the UCC "means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction", § 2-104(1). Zeidenberg bought the product at a retail store, an uncommon place for merchants to acquire inventory. His corporation put ProCD's database on the Internet for anyone to browse, which led to the litigation but did not make Zeidenberg a software merchant.

At oral argument the Hills propounded still another distinction: the box containing ProCD's software displayed a notice that additional terms were within, while the box containing Gateway's computer did not. The difference is functional, not legal. Consumers browsing the aisles of a store can look at the box, and if they are unwilling to deal with the prospect of additional terms can leave the box alone, avoiding the transactions costs of returning the package after reviewing its contents. Gateway's box, by contrast, is just a shipping carton; it is not on display [**10] anywhere. Its function is to protect the product during transit, and the information on its sides is for the use of handlers ("Fragile!" "This Side Up!") rather than would-be purchasers.

Perhaps the Hills would have had a better argument if they were first alerted to the bundling of hardware and legal-ware after opening the box and wanted to return the computer in order to avoid disagreeable terms, but were dissuaded by the expense of shipping. What the remedy would be in such a case--could it exceed the shipping charges?--is an interesting question, but one that need not detain us because the Hills knew before they ordered the computer that the carton would include some important terms, and they did not seek to discover these in advance. Gateway's ads state that their products come with limited warranties and lifetime support. How limited was the

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warranty--30 days, with service contingent on shipping the computer back, or five years, with free onsite service? What sort of support was offered? Shoppers have three principal ways to discover these things. First, they can ask the vendor to send a copy before deciding whether to buy. The Magnuson-Moss Warranty Act requires firms [**11] to distribute their warranty terms on request, 15 U.S.C. § 2302(b)(1)(A); the Hills do not contend that Gateway would have refused to enclose the remaining terms too. Concealment would be bad for business, scaring some customers away and leading to excess returns from others. Second, shoppers can consult public sources (computer magazines, the Web sites of vendors) that may contain this information. Third, they may inspect the documents after the product's delivery. Like Zeidenberg, the Hills took the third option. By keeping the computer beyond 30 days, the Hills accepted Gateway's offer, including the arbitration clause.

The Hills' remaining arguments, including a contention that the arbitration [*1151] clause is unenforceable as part of a scheme to defraud, do not require more than a citation to Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967). Whatever may be said pro and con about the cost and efficacy of arbitration (which the Hills disparage) is for Congress and the contracting parties to consider. Claims based on RICO are no less arbitrable than those founded on the contract or the law of torts. Shearson/ American Express, Inc. v. McMahon, 482 U.S. 220, [**12] 238-42, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987). The decision of the district court is vacated, and this case is remanded with instructions to compel the Hills to submit their dispute to arbitration.

¿Había necesidad de tipificar los contratos comerciales en el mercado norteño? ¿El Uniform Commercial Code no es un trasplante craso del Bürgerliches Gesetzbuchalemán al corazón del ordenamiento jurídico estadounidense? ¿Por qué Luisiana no necesitó promulgar una versión del Uniform Commercial Code?

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NEBRASKA SEED COMPANY, Appellee, v. H. F. HARSH, Appellant. SUPREME COURT OF NEBRASKA 98 Neb. 89; 152 N.W. 310 April 3, 1915, Filed

OPINIÓN POR: MORRISSEY

Plaintiff, a corporation, engaged in buying and selling seed in the city of Omaha, Nebraska, brought this action against the defendant, a farmer, residing at Lowell, Kearney county, Nebraska. The petition alleges: "That on the 26th day of April, 1912, the plaintiff purchased of and from the defendant 1,800 bushels of millet seed at the agreed price of $ 2.25 per hundred-weight, f. o. b. Lowell, Nebraska, which said purchase and contract was evidenced by writing and correspondence passing between the respective parties, of which the following is a copy:

"'Lowell, Nebraska, 4-24-1912.

"'Neb. Seed Co., Omaha, Neb. Gentlemen: I have about 1,800 bu. or thereabouts of millet seed of which I am mailing you a sample. This millet is recleaned and was grown on sod and is good seed. I want $ 2.25 per cwt. for this seed f. o. b. Lowell. Yours truly, H. F. Harsh.'

"Said letter was received by the plaintiff at its place of business in Omaha, Nebraska, on the 26th day of April, 1912, and immediately thereafter the plaintiff telegraphed [*90] to the defendant at Lowell, Nebraska, a copy of which is as follows:

"'4-26-12.

"'H. F. Harsh, Lowell, Neb. Sample and letter received. Accept your offer. Millet like sample two twenty-five per hundred. Wire how soon can load. The Nebraska Seed Co.'

"On the same day, to wit, April 26, 1912, the plaintiff, in answer to the letter of the said [**311] defendant, wrote to him a letter and deposited the same in the United States mail, directed to the said defendant at Lowell, Nebraska, which said letter was duly stamped, and which the plaintiff charges the defendant in due course of mail received; that a copy of said letter is as follows:

"'4-26-12.

"'Mr. H. F. Harsh, Lowell, Neb. Dear Sir: We received your letter and sample of millet seed this morning and at

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once wired you as follows: "Sample and letter received. Accept your offer. Millet like sample two twenty-five per hundred. Wire how soon can load." We confirm this message. Have booked purchase of you 1,800 bushels of millet seed to be fully equal to sample you sent us at $ 2.25 per cwt., you track. Please be so kind as to load this seed at once and ship to us at Omaha. We thank you in advance for prompt attention. When anything further in the line of millet to offer, let us have samples. Yours truly, Nebraska Seed Co.'"

It alleges that defendant refused to deliver the seed, after due demand and tender of the purchase price, and prays judgment in the sum of $ 900. Defendant filed a demurrer, which was overruled. He saved an exception to the ruling, and answered, denying that the petition stated a cause of action; that the correspondence set out constituted a contract, etc. There was a trial to a jury, with verdict and judgment for plaintiff, and defendant appeals.

In our opinion, the letter of defendant cannot be fairly construed into an offer to sell to the plaintiff. After describing the seed, the writer says: "I want $ 2.25 per cwt. [*91] for this seed f. o. b. Lowell." He does not say I offer to sell to you. The language used is general, and such as may be used in an advertisement, or circular addressed generally to those engaged in the seed business, and is not an offer by which he may be bound, if accepted by any or all of the persons addressed.

"If a proposal is nothing more than an invitation to the person to whom it is made to make an offer to the proposer, it is not such an offer as can be turned into an agreement by acceptance. Proposals of this kind, although made to definite persons and not to the public generally, are merely invitations to trade; they go no further than what occurs when one asks another what he will give or take for certain goods. Such inquiries may lead to bargains, but do not make them. They ask for offers which the proposer has a right to accept or reject as he pleases." 9 Cyc. 278e.

The letter as a whole shows that it was not intended as a final proposition, but as a request for bids. It did not fix a

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time for delivery, and this seems to have been regarded as one of the essentials by plaintiff, for in his telegram he requests defendant to "wire how soon can load."

"The mere statement of the price at which property is held cannot be understood as an offer to sell." Knight v. Cooley, 34 Iowa 218.

The letter of acceptance is not in the terms of the offer. Defendant stated that he had 1,800 bushels or thereabouts. He did not fix a definite and certain amount. It might be 1,800 bushels; it might be more; it might be less; but plaintiff undertook to make an acceptance for 1,800 bushels--no more, no less. Defendant might not have this amount, and therefore be unable to deliver, or he might have a greater amount, and, after filling plaintiff's order, have a quantity of seed left for which he might find no market. We may assume that when he wrote the letter he did not contemplate the sale of more seed than he had, and that he fixed the price on the whole lot, whether it was more or less than 1,800 bushels.

[*92] We do not think the correspondence made a complete contract. To so hold where a party sends out letters to a number of dealers would subject him to a suit by each one receiving a letter, or invitation to bid, even though his supply of seed were exhausted. In Lyman v. Robinson, 14 Allen (Mass.) 242, 254, the supreme court of Massachusetts has sounded the warning: "Care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation."

Holding as we do, that there was no binding contract between the parties, it is unnecessary to discuss the other questions presented. The judgment of the district court is

Reversed.

TRT TRANSPORTATION, INC., d/b/a CHICAGO TROLLEY CO., Plaintiff-Appellee, v. YILDIRIM B. AKSOY, Defendant-Appellant. UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 506 Fed. Appx. 511 February 21, 2013, Submitted February 22, 2013, Decided

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OPINIÓN POR: EASTERBROOK

TRT Transportation, Inc., which does business as the Chicago Trolley Company, operates a fleet of trolleys and offers sightseeing tours as well as rentals for special events. The company sued Chicago Trolley Rentals, Inc., and its president and sole shareholder, Yildirim Aksoy, claiming trademark infringement, trade-dress infringement, and cybersquatting in violation of the Lanham Act, see 15 U.S.C. §§ 1114(1), 1125(a), (d), and Illinois statutory and common law, see 765 ILCS 1036/65; 815 ILCS 505/1-12, 510/2. TRT Transportation alleged that the defendants offered substantially similar services under the name "Chicago Trolley Rentals," used trolleys copying its distinctive [*2] paint colors and patterns, and advertised services on the website www.chicagotrolleyrentals.com. The district court concluded that the parties had reached an enforceable agreement during a settlement conference with a magistrate judge and issued an injunction enforcing that settlement, which Aksoy (but not the corporation) appeals. We affirm the judgment.

The parties engaged in a settlement conference with a magistrate judge in January 2012. At the conclusion of that conference the parties went on record to state the material terms they had agreed upon, specifically: (1) the defendants would redirect their website and transfer the original website to the plaintiff, (2) the defendants would be allowed to purchase the phrase "Chicago trolley" for keyword searches, (3) the defendants would be enjoined from using the words "Chicago" and "trolley" "together in any form or anything confusingly similar," (4) the defendants would not use TRT Transportation's color scheme in the future, and (5) the parties would share documents relating to a Groupon sale that occurred the day of the settlement. After reciting these terms the lawyer for TRT Transportation stated that "all of this is going to [*3] be subject to a negotiation of a formal settlement agreement in an agreed injunction." The magistrate judge then said: "Right. But the injunction will include these terms. These

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terms are enforceable." The parties agreed and concluded the settlement conference.

Though the parties initially made progress in drafting a written agreement, negotiations eventually broke down over the defendants' proposed use of the phrase "trolley rentals in Chicago." The defendants then filed a "motion for declaration of the absence of an enforceable settlement agreement," and in response TRT Transportation moved to enforce the settlement. The district court found that the parties had entered into an enforceable agreement at the conclusion of the January settlement conference, and informed the parties that unless they submitted an executed settlement agreement, the court would enter a permanent injunction based on the terms announced at the settlement conference. The parties failed to submit a written agreement and the court entered the injunction enjoining the defendants from, among other things, using the phrase "Chicago Trolley Rentals" or the words Chicago and trolley immediately adjacent to each other [*4] "or in any form or manner that is confusingly similar to Plaintiff's Chicago Trolley marks."

On appeal Aksoy argues that the settlement conference did not end with an enforceable agreement because, he says, the parties manifested an intent not to be bound without a formal, written agreement. He also contends that the terms of the oral agreement were too vague to enforce because no mention was made about the defendants' proposed use of the phrase "trolley rentals in Chicago." Illinois law governs whether the parties reached an enforceable agreement, see Lewis v. Sch. Dist. #70, 648 F.3d 484, 486 n.1 (7th Cir. 2011); Holmes v. Potter, 552 F.3d 536, 539 (7th Cir. 2008), and we review for abuse of discretion the district court's conclusion that they did, see Lewis, 648 F.3d at 486; Dillard v. Starcon Int'l, Inc., 483 F.3d 502, 506 (7th Cir. 2007); Hakim v. Payco-Gen. Am. Credits, Inc., 272 F.3d 932, 935 (7th Cir. 2001).

Aksoy's argument that a formal document was a condition precedent to enforceability rests on the statement of TRT Transportation's attorney at the end of the

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settlement conference that "all of this is going to be subject to a negotiation of a formal settlement agreement in [*5] an agreed injunction." Under Illinois law an oral settlement agreement is enforceable if "there is offer, acceptance, and a meeting of the minds as to the terms." Lewis, 648 F.3d at 486; see also Dillard, 483 F.3d at 507; Kim v. Alvey, Inc., 322 Ill. App. 3d 657, 749 N.E.2d 368, 378, 255 Ill. Dec. 267 (Ill. App. Ct. 2001). Though there is no contract if "the reduction of an agreement to writing and its formal execution is intended by the parties as a condition precedent to its completion," In re Estate of Glassman, 257 Ill. App. 3d 102, 628 N.E.2d 666, 670, 195 Ill. Dec. 202 (Ill. App. Ct. 1993), the simple fact that a formal document will follow does not reduce an oral agreement to a "negotiation" if "'the ultimate contract will be substantially based upon the same terms,'" Citadel Grp. Ltd. v. Washington Reg'l Med. Ctr., 692 F.3d 580, 588 (7th Cir. 2012) (quoting Quake Constr., Inc. v. Am. Airlines, Inc., 141 Ill. 2d 281, 565 N.E.2d 990, 993, 152 Ill. Dec. 308 (Ill. 1990)); see also Glassman, 628 N.E.2d at 670.

To determine whether a "meeting of the minds" occurred, Illinois courts measure the parties' intent objectively, considering their words and conduct but not their subjective beliefs. See Citadel Grp., 692 F.3d at 588; Newkirk v. Vill. of Steger, 536 F.3d 771, 774 (7th Cir. 2008); Dillard, 483 F.3d at 507. [*6] Though the use of the words "subject to" might suggest that the parties intended to require a formalized writing, even the case cited by Aksoy notes that those words are not dispositive. See Empro Mfg. Co. v. Ball-Co Mfg., Inc., 870 F.2d 423, 425 (7th Cir. 1989); see also Magallanes Inv., Inc. v. Circuit Sys., Inc., 994 F.2d 1214, 1218-19 (7th Cir. 1993). And immediately after the lawyer mentioned the anticipated written agreement, the magistrate judge sought and received verbal confirmation, directly from Aksoy and an officer of TRT Transportation, that "[t]hese terms are enforceable." Thus the district court did not abuse its discretion in finding that the parties intended to be bound

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by the oral agreement. See Lewis, 648 F.3d at 486-87; Glassman, 628 N.E.2d at 670-71.

Even weaker is Aksoy's contention that the oral terms were not sufficiently definite as required by Illinois law to be enforceable. See Rose v. Mavrakis, 343 Ill. App. 3d 1086, 799 N.E.2d 469, 473, 278 Ill. Dec. 751 (Ill. App. Ct. 2003); Pritchett v. Asbestos Claims Mgmt. Corp., 332 Ill. App. 3d 890, 773 N.E.2d 1277, 1282, 266 Ill. Dec. 207 (Ill. App. Ct. 2002). All that is required is sufficient clarity to ascertain the parties' understanding. Miniat v. Ed Miniat, Inc., 315 F.3d 712, 716 (7th Cir. 2002). [*7] Here the parties agreed that the defendants would not use the phrase "Chicago Trolley Rentals" or the words "Chicago" and "trolley" immediately adjacent to each other "or in any form or manner that is confusingly similar to Plaintiff's Chicago Trolley marks." Aksoy does not say what is uncertain about these terms, except to argue that the language must be too vague because specific mention is not made of his proposed use of the phrase "trolley rentals in Chicago." But the language provides a basis to decide whether a phrase like "trolley rentals in Chicago" conforms to the parties' agreement, see Rose, 799 N.E.2d at 474-75, and the agreed terms need not address every possible combination of the words Chicago and trolley to be enforceable, see Dillard, 483 F.3d at 508; Pritchett, 773 N.E.2d at 1282.

Affirmed.

LA COMUNICACIÓN DE ACEPTACIÓN O MAILBOX RULE

DICKINSON v DODDS. COURT OF APPEAL 2 Ch D 463 1st April 1876

OPINIÓN POR: BACON, V.C

I consider that to be one agreement, and I think the terms of the agreement put an end to any question of nudum pactum. I think the inducement for the Plaintiff to enter into the contract was the Defendant's compliance with the Plaintiff's request that there should be some time allowed to him to determine whether he would accept it or not. But whether the letter is read with or without the

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postscript, it is, in my judgment, as plain and clear a contract for sale as can be expressed in words, one of the terms of that contract being that the Plaintiff shall not be called upon to accept, or to testify his acceptance, until 9 o'clock on the morning of the 12th of June. I see, therefore, no reason why the Court should not enforce the specific performance of the contract, if it finds that all the conditions have been complied with.

Then what are the facts? It is clear that a plain, explicit acceptance of the contract was, on Thursday, the 11th of June, delivered by the Plaintiff at the place of abode of the Defendant, and ought to have come to his hands. Whether it came to his hands or not, the fact remains that, within the time limited, the Plaintiff did accept and tesuify his acceptance. From that moment the Plaintiff was bound, and the Defendant could at any time, notwithstanding Allan, have filed a bill against the Plaintiff for the specific performance of the contract which he had entered into, and which the Defendant had accepted.

I am at a loss to guess upon what ground it can be said that it is not a contract which the Court will enforce. It cannot be on the ground that the Defendant had entered into a contract with Allan, because, giving to the Defendant all the latitude which can be desired, admitting that he had the same time to change his mind as he, by the agreement, gave to the Plaintiff - the law, I take it, is clear on the authorities, that if a contract, unilateral in its shape, is completed by the acceptance of the party on the other side, it becomes a perfectly valid and binding contract. It may be withdrawn from by one of the parties in the meantime, but, in order to be withdrawn from, information of that fact must be conveyed to the mind of the person who is to be affected by it. It will not do for the Defendant to say, "I made up my mind that I would withdraw, but I did not tell the Plaintiff; I did not say anything to the Plaintiff until after he had told me by a written notice and with a loud voice that he accepted the option which bad been left to him by the agreement." In my opinion, after that hour on Friday, earlier than nine o'clock, when the Plaintiff and Defendant

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met, if not before, the contract was completed, and neither party could retire from it.

It is said that the authorities justify the Defendant's contention that he is not bound to perform this agreement, and the case of Cooke v. Oxley n(1) was referred to. But I find that the judgment in Cooke v. Oxley went solely upon the pleadings. It was a rule to shew cause why judgment should not be arrested, therefore it must have been upon the pleadings. Now, the pleadings were that the vendor in that case proposed to sell to the Defendant. There was no suggestion of any agreement which could be enforced. The Defendant proposed to the Plaintiff to sell and deliver, if the Plaintiff would agree to purchase upon the terms offered, and give notice at an earlier hour than four of the afternoon of that day; and the Plaintiff says he agreed to purchase, but does not say the Defendant agreed to sell. He agreed to purchase, and gave notice before four o'clock in the afternoon. Although the case is not so clearly and satisfactorily reported as might be desired, it is only necessary to read the judgment to see that it proceeds solely upon this allegation in the pleadings. Mr. Justice Buller says, "As to the subsequent time, the promise can only be supported upon the ground of a new contract made at four o'clock; but there was no pretence for that." Nor was there the slightest allegation in the pleadings for that; and judgment was given against the Plaintiff.

Routledge v. Grant n(2) is plainly distinguishable from this case upon the grounds which have bden mentioned. There the contract

n(1) 3 T. R. 653.

n(2) 4 Bing. 653.

was to sell on certain terms; possession to be given upon a particular day. Those terms were varied, and therefore no agreement was come to; and when the intended purchaser was willing to relinquish the condition which he imposed, the other said, "No, I withdraw; I have made up my mind not to sell to you;" and the judgment of the Court was that he was perfectly right.

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Then Warner v. Willington n(1) seems to point out the law in the clearest and most distinct manner possible. An offer was made - call it an agreement or offer, it is quite indifferent. It was so far an offer, that it was not to be binding unless there was an acceptance, and before acceptance was made, the offer was retracted, the agreement was rescinded, and the person who had then the character of vendor declined to go further with the arrangement, which had been begun by what had passed between them. In the present case I read the agreement as a positive engagement on the part of the Defendant Dodds that he will sell for £800, and, not a promise, but, an agreement, part of the same instrument, that the Plaintiff shall not be called upon to express his acquiescence in that agreement until Friday at nine o'clock. Before Friday at nine o'clock the Defendant receives notice of acceptance. Upon what, ground can the Defendant now be let off his contract? It is said that Allan can sustain his agreement with the Defendant, because at the time when they entered into the contract the Defendant was possessed of the property, and the Plaintiff had nothing to do with it. But it would be opening the door to fraud of the most flagrant description if it was permitted to a Defendant, the owner of property, to enter into a binding contract to sell, and then sell it to somebody else and say that by the fact of such second sale he has deprived himself of the property which he has agreed to sell by the first contract. That is what Allan says in substance, for he says that the sale to him was a retractation which deprived Dodds of the equitable interest he had in the property, although the legal estate remained in him. But by the fact of the agreement, and by the relation back of the acceptance (for such I must hold to be the law) to the date of the agreement, the property in equity was the property of the Plaintiff, and Dodds had nothing to sell to Allan. The property

n(1) 3 Drew. 523.

remained intact, unaffected by any contract with Allan, and there is no ground, in my opinion, for the contention that the contract with Allan can be supported. It would be

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doing violence to principles perfectly well known and often acted upon in this Court. I think the Plaintiff has made out very satisfactorily his title to a decree for specific performance, both as having the equitable interest, which he asserts is vested in him, and as being a purchaser of the property for valuable consideration without notice against both Dodds, the vendor, and Allan, who has entered into the contract with him.

There will be a decree for specific performance, with a declaration that Allan has no interest in the property; and the Plaintiff will be at liberty to deduct his costs of the suit out of his purchase-money.

OPINIÓN POR: JAMES, L.J

The document, though beginning "I hereby agree to sell," was nothing but an offer, and was only intended to be an offer, for the Plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed there was no concluded agreement then made; it was

n(1) 1 Y. & C. Ch. 554.

n(2) 6 E. & B. 765.

n(3) 3 Man. & Ry. 97.

n(4) 1 Russ. & My. 391.

in effect and substance only an offer to sell. The Plaintiff, being minded not to complete the bargain at that time, added this memorandum - "This offer to be left over until Friday, 9 o'clock A.M., 12th June, 1874." That shews it was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o'clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere nudum pactum, was not binding, and that at any moment before a complete acceptance by Dickinson of

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the offer, Dodds was as free as Dickinson himself. Well, that being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, "Now I withdraw my offer." It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retractation. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the Plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, "I withdraw the offer." This is evident from the Plaintiff's own statements in the bill.

The Plaintiff says in effect that, having heard and knowing that Dodds was no longer minded to sell to him, and that he was selling or had sold to someone else, thinking that he could not in point of law withdraw his offer, meaning to fix him to it, and endeavouring to bind him," I went to the house where he was lodging, and saw his mother-in-law, and left with her an acceptance of the

offer, knowing all the while that he had entirely changed his mind. I got an agent to watch for him at 7 o'clock the next morning, and I went to the train just before 9 o'clock, in order that I might catch him and give him my notice of acceptance just before 9 o'clock, and when that occurred he told my agent, and he told me, you are too late, and he then threw back the paper." It is to my mind quite clear that before there was any attempt at acceptance by the Plaintiff, he was perfectly well aware that Dodds had changed his mind, and that he had in fact agreed to sell the property to Allan. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of

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an agreement. I am of opinion, therefore, that the Plaintiff has failed to prove that there was any binding contract between Doddsand himself.

OPINIÓN POR: MELLISH, L.J

I am of the same opinion. The first question is, whether this document of the 10th of June, 1874, which was signed by Dodds,was an agreement to sell, or only an offer to sell, the property therein mentioned to Dickinson; and I am clearly of opinion that it was only an offer, although it is in the first part of it, independently of the postscript, worded as an agreement. I apprehend that, until acceptance, so that both parties are bound, even though an instrument is so worded as to express that both parties agree, it is in point of law only an offer, and, until both parties are bound, neither party is bound. It is not necessary that both parties should be bound within the Statute of Frauds, for, if one party makes an offer in writing, and the other accepts it verbally, that will be sufficient to bind the person who has signed the written document. But, if there be no agreement, either verbally or in writing, then, until acceptance, it is in point of law an offer only, although worded as if it were an agreement. But it is hardly necessary to resort to that doctrine in the present case, because the postscript calls it an offer, and says, "This offer to be left over until Friday, 9 o'clock A.M." Well, then, this being only an offer, the law says - and it is a perfectly clear rule of law - that, although it is said that the offer is to be left open until Friday morning at

9 o'clock, that did not bind Dodds. He was not in point of law bound to hold the offer over until 9 o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when on the next day he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as good and binding a contract as ever was made. Assuming Allan to have known (there is some dispute about it, and Allan does not admit that he knew of it, but I will assume that he did) that Dodds had made the offer to Dickinson, and had given him till Friday

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morning at 9 o'clock to accept it, still in point of law that could not prevent Allan from making a more favourable offer than Dickinson,and entering at once into a binding agreement with Dodds.

Then Dickinson is informed by Berry that the property has been sold by Dodds to Allan. Berry does not tell us from whom he heard it, but he says that he did hear it, that he knew it, and that he informed Dickinson of it. Now, stopping there, the question which arises is this - If an offer has been made for the sale of property, and before that offer is accepted, the person who has made the offer enters into a binding agreement to sell the property to somebody else, and the person to whom the offer was first made receives notice in some way that the property has been sold to another person, can he after that make a binding contract by the acceptance of the offer? I am of opinion that he cannot. The law may be right or wrong in saying that a person who has given to another a certain time within which to accept an offer is not bound by his promise to give that time; but, if he is not bound by that promise, and may still sell the property to some one else, and if it be the law that, in order to make a contract, the two minds must be in agreement at some one time, that is, at the time of the acceptance, how is it possible that when the person to whom the offer has been made knows that the person who has made the offer has sold the property to someone else, and that, in fact, he has not remained in the same mind to sell it to him, he can be at liberty to accept the offer and thereby make a binding contract? It seems to me that would be simply absurd. If a man makes an offer to sell a particular horse in his stable, and says, "I will give you until the day after to-morrow to

accept the offer," and the next day goes and sells the horse to somebody else, and receives the purchase-money from him, can the person to whom the offer was originally made then come and say, "I accept," so as to make a binding contract, and so as to be entitled to recover damages for the non-delivery of the horse? If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on

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the acceptance of the person to whom it is made, is a mere nudum pactum,how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when once the person to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer, and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson, and even if there had been, it seems to me that the sale of the property to Allan was first in point of time. However, it is not necessary to consider, if there had been two binding contracts, which of them would be entitled to priority in equity, because there is no binding contract between Dodds and Dickinson.

OPINIÓN POR: BAGGALLAY, J.A

I entirely concur in the judgments which have been pronounced.

OPINIÓN POR: JAMES, L.J

The bill will be dismissed with costs.

OPINIÓN POR: MELLISH, L.J

He had a separate case. There might, if two contracts had been proved, have been a question of priority.

OPINIÓN POR: JAMES, L.J

I think the Plaintiff must pay the costs of both appeals.

SAMUEL P. WHITE, Respondent, v. JOHN W. CORLIES and JONATHAN N. TIFFT, Appellants.
COURT OF APPEALS OF NEW YORK 46 N.Y. 467
November 17, 1871, Argued November 20, 1871, Decided

OPINIÓN POR: Folger

[*469] Folger, J. We do not think that the jury found, or that the testimony shows, that there was any agreement

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between the parties, before the written communication of the defendants of September thirtieth was received by the plaintiff. This note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound, in contract, to the other. The only overt action which is claimed by the plaintiff as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work, as we understand the testimony, upon that stuff.

We understand the rule to be, that where an offer is made by one party to another [**5] when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound, if that manifestation is not put in a proper way to be in the usual course of events, in some reasonable time communicated to him. Thus a letter received by mail containing a proposal, may be answered by letter by mail, containing the acceptance. And in general, as soon as the answering letter is mailed, the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him.

In the case in hand, the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act, which, in itself, is no indication of an acceptance, become such, [*470] because accompanied by an unevinced mental determination. Where the act uninterpreted by concurrent evidence [**6] of the mental purpose accompanying it, is as well referable to one state of facts as another, it is no indication to the other party of an acceptance, and does not operate to hold him to his offer.

Conceding that the testimony shows, that the plaintiff did resolve to accept this offer, he did no act which

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indicated an acceptance of it to the defendants. He, a carpenter and builder, purchased stuff for the work. But it was stuff as fit for any other like work. He began work upon the stuff, but as he would have done for any other like work. There was nothing in his thought formed but not uttered, or in his acts that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

But the charge of the learned judge was fairly to be understood by the jury as laying down the rule to them, that the plaintiff need not indicate to the defendants his acceptance of their offer; and that the purchase of stuff and working on it after receiving the note, made a binding contract between the parties. In this we think the learned judge fell into error.

The judgment appealed from must be reversed, and a new trial ordered, with [**7] costs to abide the event of the action.

Judgment reversed, and new trial ordered.

CHARLES A. HOBBS v. MASSASOIT WHIP COMPANY. SUPREME JUDICIAL COURT OF MASSACHUSETTS 158 Mass. 194; 33 N.E. 495 January 12, 1893, Argued March 1, 1893, Decided

OPINIÓN POR: HOLMES

[*196] [**495] Holmes, J. This is an action for the price of eelskins sent by the plaintiff to the defendant, and kept by the defendant some months, until they were destroyed. It must be taken that the plaintiff received no notice that the defendants declined to accept the skins. The case comes before us on exceptions to an instruction to the jury, that, whether there was any prior contract or not, if skins are sent to the defendant, and it sees fit, whether it has agreed to take them or not, to lie back, and to say nothing, having reason to suppose that the man who has sent them believes that it is taking them, since it says nothing about it, then, if it fails to notify, the jury would be warranted in finding for the plaintiff.

[*197] Standing alone, and unexplained, this proposition might seem to imply that one stranger may

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impose a duty upon another, and make him a purchaser, in spite of himself, by sending goods to him, unless he will take the trouble, and be at the expense, of notifying the sender that he will not buy. The case was argued for the defendant on that interpretation. But, in view of the evidence, we do not understand that to have been the meaning of the judge, and we do not think that the jury can have understood that to have been his meaning. The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eelskins in the same way four or five times before, and they had been accepted and paid for. On the defendant's testimony, it is fair to assume that, if it had admitted the eelskins to be over twenty-two inches in length, and fit for its business, as the plaintiff testified, and the jury found that they were, it would have accepted them; that this was understood by the plaintiff; and, indeed, that there was a standing offer to him for such skins. In such a condition of things, the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance. See Bushel v. Wheeler, 15 Q. B. 442; Benjamin on Sales, §§ 162-164; Taylor v. Dexter Engine Co. 146 Mass. 613, 615. The proposition stands on the general principle that conduct whichimports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of mind of the party, -- a principle sometimes lost sight of in the cases. O'Donnell v. Clinton, 145 Mass. 461, 463. McCarthy v. Boston & Lowell Railroad, 148 Mass. 550, 552.

Exceptions overruled.

ADAMS & Others v LINDSELL & Others. IN THE HIGH COURT OF JUSTICE, KING'S BENCH DIVISION 106 Eng. Rep. 250 5th June 1818

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OPINIÓN POR: Lord Ellenborough

Action for non-delivery of wool according to agreement. At the trial at the last Lent Assizes for the county of Worcester, before Burrough J. it appeared that the defendants, who were dealers in wool, at St. Ives, in the county of Huntingdon, had, on Tuesday the 2d of September 1817, written the following letter to the plaintiffs, who were woollen manufacturers residing in Bromsgrove, Worcestershire: "We now offer you eight hundred tods of wether fleeces, of a good fair quality of our country wool, at 35s. 6d. per tod, to be delivered at Leicester, and to be paid for by two months' bill in two months, and to be weighed up by your agent within fourteen days, receiving your answer in course of post."

This letter was misdirected by the defendants, to Bromsgrove, Leicestershire, in consequence of which it was not received by the plaintiffs in Worcestershire till 7 p.m. on Friday, September 5th. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. The course of the post between St. Ives and Bromsgrove is through London, and consequently this answer was not received by the defendants till Tuesday, September 9th. On the Monday September 8th, the defendants not having, as they expected, received an answer on Sunday September 7th, (which in case their letter had not been misdirected, would have been in the usual course of the post,) sold the wool in question to another person. Under these circumstances, the learned Judge held, that the delay having been occasioned by the neglect of the defendants, the jury must take it, that the answer did come back in due course of post; and that then the defendants were liable for the loss that had been sustained: and the plaintiffs accordingly recovered a verdict.

Jervis having in Easter term obtained a rule nisi for a new trial, on the ground that there was no binding contract between the parties, Dauncey, Puller, and Richardson, shewed cause. They contended, that at the moment of the acceptance of the offer of the defendants by the plaintiffs,

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the former became bound. And that was on the Friday evening, when there had been no change of circumstances. They were then stopped by the Court, who called upon Jervis and Campbell in support of the rule. They relied on Payne v. Cave[1], and more particularly on Cooke v. Oxley[2]. In that case, Oxley, who had proposed to sell goods to Cooke, and given him a certain time at his request, to determine whether he would buy them or not, was held not liable to the performance of the contract, even though Cooke, within the specified time, had determined to buy them, and given Oxley notice to that effect. So here the defendants who have proposed by letter to sell this wool, are not to be held liable, even though it be now admitted that the answer did not come back in due course of post. Till the plaintiffs' answer was actually received, there could be no binding contract between the parties; and before then, the defendants had retracted their offer, by selling the wool to other persons.

But the Court said, that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them, that the plaintiffs' answer was received in course of post.

Rule discharged.

Note 1 3 T. R. 148.

Note 2 Ibid. 653.

Charles W. MORRISON and Yvonne Morrison, his wife, Appellants, v. A. H. THOELKE and Mattie Thoelke,

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his wife, Appellees. COURT OF APPEAL OF FLORIDA, SECOND DISTRICT 155 So. 2d 889 Aug. 30, 1963

OPINIÓN POR: ALLEN

Appellants, defendants and counter-plaintiffs in the lower court, appeal a summary final decree for appellees, plaintiffs and counter-defendants below. The plaintiff-appellees, owners of certain realty, sued to quiet title, specifically requesting that defendant-appellants be enjoined from making any claim under a recorded contract for the sale of the subject realty. Defendant-appellants counterclaimed, seeking specific performance of the same contract and conveyance of the subject property to them. The lower court, after hearing, entered a summary decree for plaintiffs.

A number of undisputed facts were established by the pleadings, including the facts that appellees are the owners of the subject property, located in Orange County; that on November 26, 1957, appellants, as purchasers, executed a contract for the sale and purchase of the subject property and mailed the contract to appellees who were in Texas; and that on November 27, 1957, appellees executed the contract [**2] and placed it in the mails addressed to appellants' attorney in Florida. It is also undisputed that after mailing said contract, but prior to its receipt in Florida, appellees called appellants' attorney and cancelled and repudiated the execution and contract. Nonetheless, appellants, upon receipt of the contract caused the same to be recorded. Additional factual allegations concerning demand for performance, tender of the purchase price and payment of taxes were disputed.

On the basis of the foregoing facts, the lower court entered summary decree for the appellees, quieting title in them. The basis of this decision was, in the words of the able trial judge:

"[The] contract executed by the parties hereto * * * constituted a cloud on the title of Plaintiffs.* * * The Court finds said contract to have been cancelled and repudiated by Plaintiffs prior to its receipt by Defendants * * * and

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that on this basis there was no legal contract binding on the parties * * *."

In appealing the summary decree the appellants argue that the lower court erred in determining the contract void and, [*891] in any event, erred in entering summary decree when factual matters were disputed. [**3] The latter contention is without merit since it is obvious that such factual matters as were material to the lower court's decision were undisputed. While the existence of genuine issues of material fact precludes summary decree, the existence of dispute as to immaterial facts does not. Of course, as the lower court observed, if appellants' contention that the contract is valid were sustained, the factual matters which are disputed would be material. However, under appellees' view of the cause and the view adopted by the lower court, the disputed facts were immaterial and summary decree was proper.

Turning to the principal point raised in this appeal, we are confronted with a question apparently of first impression in this jurisdiction. The question is whether a contract is complete and binding when a letter of acceptance is mailed, thus barring repudiation prior to delivery to the offeror, or when the letter of acceptance is received, thus permitting repudiation prior to receipt. Appellants, of course, argue that posting the acceptance creates the contract; appellees contend that only receipt of the acceptance bars repudiation.

The appellants suggest that the law of Texas [**4] controls in determining this question, although they do not limit themselves to this argument. Close scrutiny of the record discloses that this interesting question of conflict of laws was not raised nor was the law of Texas relied upon below. Accordingly, the question cannot be raised on appeal. Kingston v. Quimby, Fla.1955, 80 So.2d 455. See 2 Fla.Jur., Appeals § 290 (1963).

Treating the question as one arising under the laws of Florida and as a question of first impression in this jurisdiction, both parties have submitted briefs containing cogent argument and ample authority in support of their

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respective contentions. As the able trial judge observed, "the authorities cited and relied upon * * * appear to be in conflict."

The appellant, in arguing that the lower court erred in giving effect to the repudiation of the mailed acceptance, contends that this case is controlled by the general rule that insofar as the mail is an acceptable medium of communication, a contract is complete and binding upon posting of the letter of acceptance. See, e.g. 12 Am.Jur., Contracts § 46 (1938, Supp.1963); 1 Williston, Contracts § 81 (3rd ed. 1957); 1 Corbin, Contracts § 78 (1950 Supp.1961). [**5] Appellees, on the other hand, argue that the right to recall mail makes the Post Office Department the agent of the sender, and that such right coupled with communication of a renunication prior to receipt of the acceptance voids the acceptance. In short, appellees argue that acceptance is complete only upon receipt of the mailed acceptance. They rely, inter alia, on Rhode Island Tool Company v. United States, 128 F. Supp. 417, 130 Ct.Cl. 698 (1955) and Dick v. United States, 82 F. Supp. 326, 113 Ct.Cl. 94 (1949).

Turning first to the general rule relied upon by appellant some insight may be gained by reference to the statement of the rule in leading encyclopedias and treatises. Accordingly, attention is directed to 12 Am.Jur., Contracts §§ 46, 49 (1938) for the following:

" § 46. Acceptance by Mail. - The formation of the contract may be made dependent upon the communication of the acceptance to the offerer, and in such a case there will be no contract if for any reason the offerer is not notified of the acceptance according to the agreement. In cases in which such an arrangement has not been made, the courts have been confronted by the rather difficult question whether [**6] the contract is completed when the letter of acceptance is mailed or when it is received by the offerer. There is no doubt that the implication that a complete, final, and absolutely binding contract [*892] is formed as soon as the acceptance of an offer is posted may in some cases lead to inconvenience and hardship. At the same time, it has

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been pointed out that an offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance and that if no answer to his offer is received by him and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. It has been suggested, moreover, that if the offerer is not to be bound by the acceptance until it is received by him, the party accepting the offer ought not to be bound when his acceptance is received, because he does not know of the meeting of the minds, for the offer may have been withdrawn before his acceptance was received. Upon balancing convenience and inconvenience, the courts have deemed it more consistent with the acts and declarations of the parties to consider the contract complete and [**7] absolutely binding on the transmission of the acceptance through the post, as the medium of communication which the parties themselves contemplate, instead of postponing its completion until the acceptance has been received by the offerer. By treating the post office as the agency of both parties, the courts have managed to harmonize the legal notion that it is necessary that the minds of the parties meet with the equally well-established principle that a determination to accept is ineffectual if it is not communicated either actually or by legal implication. Accordingly, if acceptance by mail is authorized, the contract is completed at the moment the acceptor deposits in the post office the letter of acceptance directed to the offeror's proper address and with the postage prepaid, provided he does so within the proper time and before receiving any intimation of the revocation of the offer.

* * *

"Of course, a letter which is written, but remains in the writer's hands or under his control, is not an acceptance.

* * *

" § 49. - Effect of Withdrawal of, or Right to Withdraw, Letter from Mail. - Since 1887, at least, postal regulations have permitted the [**8] withdrawal, under certain conditions, of letters from the mail. * * *

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"The authorities are not entirely harmonious as to the effect of such right to withdraw letters or of the withdrawal of letters pursuant to such regulations upon the acceptance of contracts. A leading authority on contracts states that it is not important that the acceptor has the power to withdraw his acceptance from the mail. Moreover, there are several decisions holding that an acceptance duly deposited in the mail is effective, although the acceptor intercepts the letter of acceptance and secures its return before it has reached the addressee. There are also numerous recent cases in which no question of withdrawal or the right to withdraw the acceptance from the mail arose, applying or recognizing the rule that a contract is complete at the time of the depositing of a proper letter of acceptance in the mail, where acceptance in this manner is authorized. On the other hand, the view is held that a contract is not deemed consummated by a deposit in the mail of a letter accepting an offer, so long as the sender has a right to withdraw the letter. The position has been taken that in view of the postal regulations [**9] permitting the withdrawal of a letter from the mail by the depositor, the post office should be regarded as the latter's agent, so long as the letter may be withdrawn by him, unless it appears, expressly or by implication, that the parties intended that the sender of the communication, [*893] after mailing, should have no right to withdraw it."

A near identical statement of the general rule is found in 1 Williston, Contracts § 81 (3rd ed. 1957):

"Contracts are frequently made between parties at some distance and therefore it is of vital importance to determine at what moment the contract is complete. If the mailing of an acceptance completes the contract, what happens thereafter, whether the death of either party, the receipt of a revocation or rejection, or a telegraphic recalling of the acceptance, though occurring before the receipt of the acceptance, will be of no avail; whereas, if a contract is not completed until the acceptance has been received, in all the situations supposed no contract will arise.

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"It was early decided that the contract was completed upon the mailing of the acceptance. The reason influencing the court was evidently that when the acceptance [**10] was mailed, there had been an overt manifestation of assent to the proposal. The court failed to consider that since the proposed contract was bilateral, as is almost invariably any contract made by mail, the so-called acceptance must also have become effective as a promise to the offeror in order to create a contract. The result thus early reached, however, has definitely established the law not only in England but also in the United States, Canada and other common law jurisdictions. It is, therefore, immaterial that the acceptance never reaches its destination."

The same work, in Section 86, negatives the possible effect of a power to recall an acceptance after mailing. In the author's words:

"By the United States Postal Regulations, the sender of a letter may regain it by complying with certain specified formalities, and yet a contract is completed by mailing an acceptance in the authorized channel. Since the acceptance is binding when it is mailed, the fact that the sender of a letter may regain possession of it should have no effect on the validity of the acceptance. * * *

"Title to chattels may also pass by an authorized appropriation on the part of the seller while [**11] they still remain entirely within his own control, and though it would not be generally admitted that there may be delivery of a formal document remaining wholly within the marker's hands, the mere possibility that the marker may regain possession would still permit a delivery to the post-office to operate as a delivery of the instrument to the person addressed.

"Though the analogy is by no means perfect between a transfer of property or of a formal instrument on mailing and the formation of a bilateral contract by the mailing of a letter of acceptance, no reason is apparent why the possibility of the withdrawal by the sender should be of any more importance in the latter case than in the former."

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A second leading treatise on the law of contracts, Corbin, Contracts §§ 78 and 80 (1950 Supp.1961), also devotes some discussion to the "rule" urged by appellants. Corbin writes:

"Where the parties are negotiating at a distance from each other, the most common method of making an offer is by sending it by mail; and more often than not the offeror has specified no particular mode of acceptance. In such a case, it is now the prevailing rule that the offeree has power to accept and [**12] close the contract by mailing a letter of acceptance, properly stamped and addressed, within a reasonable time. The contract is regarded as made at the [*894] time and place that the letter of acceptance is put into the possession of the post office department."

Like the editor of Williston, Corbin negates the effect of the offeree's power to recall his letter:

"The postal regulations have for a long period made it possible for the sender of a letter to intercept it and prevent its delivery to the addressee. This has caused some doubt to be expressed as to whether an acceptance can ever be operative upon the mere mailing of the letter, since the delivery to the post office has not put it entirely beyond the sender's control.

"It is believed that no such doubt should exist. * * * In view of common practices, in view of the difficulties involved in the process of interception of a letter, and in view of the decisions and printed discussions dealing with acceptance by post, it is believed that the fact that a letter can be lawfully intercepted by the sender should not prevent the acceptance from being operative on mailing. If the offer was made under such circumstances [**13] that the offeror should know that the offeree might reasonably regard this as a proper method of closing the deal, and the offeree does so regard it, and makes use of it, the contract is consummated even though the letter of acceptance is intercepted and not delivered."

Significantly, Corbin expressly distinguishes cases involving bank drafts or bills of exchange from cases involving bilateral contracts. He writes:

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"It should be borne in mind that whenever the receipt of the letter is necessary to produce some legal effect, the interception, and resulting non-delivery of the letter will prevent that effect. For almost all purposes, other than the acceptance of an offer, the mere mailing of a letter is not enough to attain the purpose. Unless it is clearly otherwise agreed, the mailing of a letter is not a sufficient notice to quit a tenancy, it is not actual payment of money that is inclosed, it does not transfer title to a check or other document; it will not ordinarily be sufficient notice required by a contract as a condition precedent to some contractual duty of immediate performance."

To a certain extent both appellants and appellees admit and approve the position adopted [**14] by the authorities quoted above. However, to the extent that these authorities would negative or disallow effect to appellees - offerees' power to repudiate their acceptance prior to its receipt by appellants, the appellees disagree. Their argument, and the position adopted by the lower court is succinctly expressed in the excellent memorandum opinion of the lower court as follows:

"* * * From our examination * * * the decisions of the Courts seem to hinge upon the question of whether or not the party has lost control of the instrument prior to the time of its renunciation by him. Formerly, the Courts took the position that once a letter had been deposited in the U.S. Mail, is was beyond retrieve and the depositor no longer had control over it; that the Post Office Department became, in fact, the agent of the addressee so that any attempt to cancel or repudiate the written document was beyond the power and authority of the sender and without effect once it had been deposited in the mail. U.S. Postal Regulations, Sec. 153.5, provide, and for some years has provided, that mail deposited in a post office may be recalled by the sender before delivery to the addressee.

"In the [**15] Court decisions cited by the parties here, wherever this Postal Regulation has been brought to the attention of the Court, they have held that the Post Office is the agent of the [*895] sender, rather than the addressee,

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and his right to withdraw mail after deposit gives him the right to repudiate a document signed and mailed by him but not yet received by the addressee."

An examination of the cases relied upon by appellees sustains their contention that these decisions represent a departure from the general rule. In Traders National Bank v. First National Bank, 1920, 142 Tenn. 229, 217 S.W. 977, 9 A.L.R. 382, the Court held, when appellant bank, in response to receipt of a check drawn on it, mailed a draft to appellee bank but phoned and requested return of the draft prior to its receipt by appellee, that appellant had not accepted the check. This holding was predicated on the existence of a power in appellant to recall the draft from the mails. The Court concluded:

"In ordinary cases we will adhere to the old rule that the mailing of a letter amounts to a delivery of its contents to the person to whom it is addressed. This, however, is subject to the power of the person [**16] sending the letter to recover it from the mails, under the Postal Regulations of 1913. Such a delivery is therefore subject to be defeated by the proper exercise of such power."

In Guardian National Bank v. Huntington County State Bank, 1933, 206 Ind. 185, 187 N.E. 388, 92 A.L.R. 1056, the appellant bank sued to recover on checks drawn on appellee bank. The checks had been deposited in appellant bank and forwarded to a second bank, which bank notified appellee bank. Appellee prepared and mailed a letter indicating that it had credited the second bank with the amount of the checks. Later in the day, however, this letter was withdrawn from the mail and the credit changed to exclude the amount of the subject checks. The Court held that the original mailing had not constituted acceptance of the checks. Citing the Traders National Bank case, supra, and Ex parte Cote, L.R. 9 Ch. 27, (1873), the court determined that the Post Office was an agent of the sender and that until delivery to the addressee, mail remained in control of the sender. Discussing the rule that deposit in the mail constitutes acceptance, the Court said:

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"It will be noted that in the rule as stated in the leading [**17] cases the element of surrendering control is always present. In some of the decisions which rely upon the leading cases that element is not included in the statement of the rule. It is often said that the rule depends upon the fiction that the post office is the agent of both parties. But agency is a question of fact, and the courts have ever been conscious of the difficulty of an agent serving two masters. It appears that in England, and in this country for a considerable time at least prior to 1913, communications deposited in the mail could not be recovered by the depositor, and by depositing in the mail the depositor parted with his dominion and control over the communication. The post office took control and possession for the addressee exclusively, and bound itself to hold possession and control for him and to deliver to him. The post office, therefore, became the agent of the addressee and of no one else, and, when it received the communication, it received it for the addressee and for no one else, and, when it took possession, it was for the addressee and for no one else, and for the purpose of delivery to the addressee and for no other purpose. It follows that the post [**18] office was not the agent of both parties. And thus the situation fits the rule, and, when a communication was delivered to the post office, the mailer, in fact, parted with his 'dominion and control over it,' and the delivery was in fact, as well as in legal contemplation, complete.

"But in 1913 the Post Office Department adopted a regulation by the terms of which, under certain conditions, a [*896] communication which has been mailed may be recovered as a matter of right and without the consent or authority of the addressee. Under this regulation, when a communication is mailed, it is as though it is intrusted to the sender's agent or servant for delivery, and is subject to recall at any time before actual delivery."

Referring to the Traders National Bank case, the Court said:

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"If the post office is the agent of the sender in a case involving the mailing of a draft, because of the fact that the sender may recover the same, how can it be said that it is not the agent of the sender in the case of an acceptance of an offer which is subject to the same regulation? No rule of construction has been suggested that would permit of treating a messenger from whom a message may [**19] be recalled as the agent of any one but the sender.

"The time at which payment would become effective or a contract consummated by acceptance of an offer is controlled by contract, express or implied. The parties are bound to know the rules and regulations of the Post Office Department, and must be considered as acting in the light of those rules, and unless it appears by expression or implication that the parties intended that the acceptor or remittor should have no right to withdraw his communication after mailing, it must be assumed that they intended that he should continue to exercise control of it, and that therefore, following the normal rules of interpretation, the post office should be his agent.

"We conclude that the post office is the agent of the sender so long as the communication may be withdrawn by him, regardless of whether the transaction be treated as a payment or an acceptance of an offer to contract, and therefore the evidence supports the verdict of the jury."

A third case cited by appellee, Dick v. United States, 82 F. Supp. 326, 113 Ct.Cl. 94 (1949), involved mistaken acceptance of an offer evidenced by a government purchase order. The appellant, after [**20] mailing his acceptance wired a repudiation of the acceptance. The repudiation was received prior to the acceptance. Although remanding the cause for proofs, the court inferred that the fact of a mailed acceptance did not, as a matter of law, bar subsequent repudiation. In an opinion paralleling the opinion in the Guardian National Bank case, the court, over a vigorous dissent, concluded that the Post Office was the sender's agent and that "delivery" was incomplete so long as the acceptance had not been received.

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The same court, in Rhode Island Tool Company v. United States, 128 F. Supp. 417, 130 Ct.Cl. 698 (1955), extended the principle that a contract was made only upon receipt of the acceptance to permit revocation of an offer after an acceptance had been posted but prior to its receipt. Again predicating its decision on the postal regulations, the court concluded:

"Does any one believe that if the mistake had been the other way, * * * that through oversight the defendant had mailed an acceptance for too high a price and the same day had wired withdrawing and cancelling the acceptance before it left the sending post office the defendant would nevertheless have been held [**21] to an excessive price? Or again, if after mailing such an acceptance the defendant, discovering its mistake, had gone to the sending post office and withdrawn the letter, the plaintiff on hearing of it, could have enforced an excessive contract on the ground that the acceptance actually had been posted and became final and enforceable, notwithstanding its withdrawal and nondelivery?

"We cannot conceive of such an unjust enforcement. No, under the new regulation, the Post Office Department becomes, in effect, the agency of the sender until actual delivery.

[*897] "We are living in a time of change. The theories of yesterday, proved by practice today, give way to the improvements of tomorrow.

"To apply an outmoded formula is not only unjust, it runs counter to the whole stream of human experience. It is like insisting on an ox cart as the official means of transportation in the age of the automobile. The cart served a useful purpose in its day, but is now a museum piece.

"The old rule was established before Morse invented the telegraph as a means of communication. Commercemust have a breaking point upon which it may rely for the completion of a contract. At that [**22] time no faster mode of communication was known. But in the light of the faster means of communication the Post Office Department wisely changed the rule. The reason for the old

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rule had disappeared. This does not change any principle, it simply changes the practice to suit the changed conditions, but leaves unchanged the principle of finality, which is just as definite as ever, though transferred to a different point by the new regulation.

"This change seems to have been recognized by the Government officials who prepared the Invitation for Bids. The offer by the defendant stated that when the award was 'received' by the bidder it would 'thereupon' become a binding contract. This it would seem clinches the correctness of our interpretation."

It is clear then, as aforesaid, that these cases represent a departure from the general rule. It is equally clear that at least three of them might be distinguished. See 1 Corbin, Contracts § 80 n. 77 (1950 Supp. 1961). However, even if the cases are distinguishable as concerning payment rather than acceptance or as being unnecessarily broad in their pronouncements, their clear implication, be it by holding or dicta, deserves analysis [**23] and consideration.

As is abundantly clear from the quoted material excerpted from appellees' cases, cases, the decision in each is predicated on an assumption, correct or incorrect, that the basis of the rule they reject was invalidated by changed postal regulations. The opinions cited by appellees each proceed on the theory that the "deposited acceptance" rule was based on a theory that the depositor lost control of his acceptance when it was deposited and that this fact rendered the acceptance complete upon deposit. To the extent that "loss of control" was the significant element in the "deposited acceptance" rule, the logic of appellees. cases is impeccable. On the other hand, if the rule is, in fact, not based on the "loss of control" element, the fact that this element has been altered may in no way affect the validity of the rule. Determination of the question presented in this appeal cannot then be had merely by adoption or rejection of the logic of appellees' cases. Rather, the source and justification of the "deposited acceptance" rule must be found and appellees' argument considered in light of this finding. Should the proffered justification for the rule be

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other [**24] than the "loss of control" theory, adoption or rejection of the rule must be based on considerations other than those relied upon in appellees' cases.

As both of the treatises cited and quoted earlier point out, the courts have often been remiss in failing to distinguish between application of the "deposited acceptance" rule in cases involving offer and acceptance in contract law and its application in cases involving sales, negotiable instruments and notice. Yet the distinction is significant. Accordingly, in the attempt to find the basis of the rule, the cases discussed should be limited to contract cases with allusion to other applications of the rule only insofar as necessary to understanding of its application to contracts.

The rule that a contract is complete upon deposit of the acceptance in the mails, hereinbefore referred to as "deposited [*898] acceptance rule" and also known as the "rule in Adams v. Lindsell," had its origin, insofar as the common law is concerned, in Adams v. Lindsell, 1 Barn. & Ald. 681, 106 Eng.Rep.250 (K.B. 1818). In that case, the defendants had sent an offer to plaintiffs on September 2nd, indicating that they expected an answer "in course [**25] of post." The offer was misdirected and was not received and accepted until the 5th, the acceptance being mailed that day and received by defendant-offerors on the 9th. However, the defendants, who had expected to receive the acceptance on or before the 7th, sold the goods offered on the 8th of September. It was conceded that the delay had been occasioned by the fault of the defendants in initially misdirecting the offer.

Defendants contended that no contract had been made until receipt of the offer on the 9th.

"* * * They relied on Payne v. Cave, 3 T.R. 148, and more particularly on Cooke v. Oxley, [ibid., 653].In that case Oxley, who had proposed to sell goods to Cooke, and given him a certain time at his request, to determine whether he would buy them or not, was held not liable to the performance of the contract, even though Cooke, within the specified time, had determined to buy them, and given

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Oxley notice to that effect. So here the defendants who have proposed by letter to sell this wool, are not to be held liable, even though it be now admitted that the answer did come back in due course of post. Till the plaintiffs' answer was actually received there could be [**26] no binding contract between the parties; and before then the defendants had retracted their offer by selling the wool to other persons.

"But the court said that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum. The defendants must be considered in law as making, during every instant of the time their letter was traveling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them that the plaintiffs' answer was received in course of post."

Examination of the decision in Adams v. Lindsell reveals three distinct factors deserving consideration. The first and most significant is the court's obvious concern with the necessity of drawing a line, with establishing [**27] some point at which a contract is deemed complete and their equally obvious concern with the thought that if communication of each party's assent were necessary, the negotiations would be interminable. A second factor, again a practical one, was the court's apparent desire to limit but not overrule the decision in Cooke v. Oxley, 3 T.R. 653 [1970] that an offer was revocable at any time prior to acceptance. In application to contracts negotiated by mail, this latter rule would permit revocation even after unqualified assent unless the assent was deemed effective upon posting. Finally, having chosen a point at which negotiations would terminate and having effectively

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circumvented the inequities of Cooke v. Oxley, the court, apparently constrained to offer some theoretical justification for its decision, designated a mailed offer as "continuing" and found a meeting of the minds upon the instant of posting assent. Significantly, the factor of the offeree's loss of control of his acceptance is not mentioned.

The "meeting of the minds" justification advanced in Adams v. Lindsell is repeated in the first of two leading American cases [*899] on point. In Mactier's Adm'rs v. [**28] Frith, New York, 1830, 6 Wendell 103, 21 Am.Dec. 262, the offeree died while an acceptance was in the post. Since, if a "meeting of the minds" was essential to the contract, the contract could have been completed only during the offeree's lifetime, the court found it necessary to determine the effective date of acceptance. They deemed the posting of the assent sufficient and wrote:

"All the authorities state a contract or an agreement (which is the same thing) to be aggregation mentium . Why should not this meeting of the minds, which makes the contract, also indicate the moment when it becomes obligatory? I might rather ask, is it not and must it not be the moment when it does become obligatory? If the party making the offer is not bound until he knows of this meeting of minds, for the same reason the party accepting the offer ought not to be bound when his acceptance is received, because he does not know of the meeting of the minds, for the offer may have been withdrawn before his acceptance was received. If more than a concurrence of minds upon a distinct proposition is required to make an obligatory contract, the definition of what constitutes a contract is not correct. [**29] Instead of being the meeting of the minds of the contracting parties, it should be a knowledge of this meeting. It was said on the argument that if concurrence of minds alone would make a valid contract, one might be constructed out of mere volitions and uncommunicated wishes; I think such a result would not follow. The law does not regard bare volitions and pure mental abstractions. When it speaks of the operations of the mind, it means such as have been made manifest by overt

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acts; when it speaks of the meeting of minds, it refers to such a meeting as has been made known by proper acts, and when thus made known it is effective, although the parties who may claim the benefit of, or be bound by a contract thus made, may for a season remain ignorant of its being made."

However, the court went beyond this justification and proceeded to consider what facts constituted acceptance.

"What shall constitute an acceptance will depend, in a great measure, upon circumstances. The mere determination of the mind, unacted on, can never be an acceptance. Where the offer is by letter, the usual mode of acceptance is the sending of a letter announcing a consent to accept; where it is made [**30] by messenger, a determination to accept, returned through him, or sent by another, would seem to be all the law requires, if the contract may be consummated without writing. There are other modes which are equally conclusive upon the parties: keeping silence, under certain circumstances, is an assent to a proposition; anything that shall amount to a manifestation of a formed determination to accept, communicated or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract; but a letter written would not be an acceptance so long as it remained in the possession or under the control of the writer . An acceptance is the distinct act of one party to the contract as much as the offer is of the other; the knowledge by the party making the offer, of the determination of the party receiving it, is not an ingredient of an acceptance. It is not compounded of an assent by one party to the terms offered, and a knowledge of that assent by the other." (Emphasis added.)

Thus, the element of loss of control was introduced, not as a primary legal requisite to the existence of a contract but as a factual matter affecting the sufficiency of [**31] the manifestation of assent. But see, Dunlop [*900] v. Higgens, 1 H.L.C. 381 (1848). Significantly, in the second leading American case, Tayloe v. Merchants' Fire Insurance Co. of Baltimore, 9 How. [50 U.S.] 390, 13 L.

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Ed. 187 (1850) the Supreme Court did not advert to the "loss of control" but closely followed the reasoning of Adams v. Lindsell. Holding an insurance contract complete upon posting of an acceptance, the Court wrote:

"The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and, if the process is to be carried further in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other.

"It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment [**32] they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated; instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

"For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part, after an unconditional acceptance by the party to whom is is addressed?

"We have said that this view is in accordance with the usages and practices of these companies, as well as with the general principles of law governing contracts entered into by absent parties."

Whereas Mactier's Adm'rs v. Frith, supra, had made "loss of control" an operative fact, later courts tended to

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make this the operative fact of conclusive legal significance. Thus, in Dunlop v. Higgens, [**33] 1 H.L.C. 381 (1848) one Justice wrote:

"If a party does all that he can do, that is all that is called for. If there is a usage of trade to accept such an offer, and to return an answer to such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done everything he was bound to do? How can he be responsible for that over which he has no control?"

The significance attached to "loss of control" in the Dunlop case must be considered a departure from the original reasoning of Adams v. Lindsell similarly so considered is the suggestion in another leading English case that the post is a common agent or agent of the offeror. This suggestion (and it can be considered nothing more) is found in Household Fire & Carriage Acc. Ins. Co. Ltd. v. Grant, 4 Exch. Div. 216 (Ct.App. 1879). In that case, one Justice, speaking for a majority, held a contract complete upon posting acceptance and justified this with the observation, inter alia, that:

"* * * It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust [**34] conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the [*901] shoulders of both . At the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. If he trusts to the post he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. * * *

"Upon balance of conveniences and inconveniences it seems to me, applying with slight alterations the language

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of the Supreme Court of the United States in Tayloe v. Merchants' Fire Insurance Co., 9 How. 390, 13 L. Ed. 187, more consistent with the acts and declarations of the parties in this case to consider the contract complete and absolutely binding on the transmission of the notice of allotment through the post, as the medium of communication that [**35] the parties themselves contemplated, instead of postponing its completion until the notice had been received by the defendant * * *." (Emphasis added.)

Examining the decisions in the Dunlop and Household Fire & Carriage Ins. Co. cases, it would seem clear that in attempting to provide additional justification for the "deposited acceptance" rule, the courts, in fact, served only to confuse and weaken the essential validity of the rule. Thus, the observation that the offeror having chosen to utilize the mails should bear the risk of delay occasioned thereby was extended by subsequent cases to a point wherein the validity of the contract was made to turn on a theory of communication to an agent. As Corbin points out, this fictitious agency theory cannot withstand criticism. See 1 Corbin, Contracts, § 78 (1950). However, the ease with which the agency theory is refuted does not necessarily impair the validity of the rule.

Similarly, the "loss of control" theory, having its origin in the observation that under general contract principles an acceptance is manifest only when the offeree loses the power to suppress the manifestation, has, by a process of extension, come to be urged [**36] as a factor of primary legal significance. Yet, as was discussed earlier, the "loss of control" was not deemed controlling in the earliest cases. Nor is the general principle that a manifestation of assent must be beyond the party's control to be effective any more sacred than the general rule that assent in contract must be communicated. Yet the latter is obviously qualified in the "deposited acceptance" rule and in many instances of unilateral contract. Why then should the "loss of control" principle not also be - or have been - qualified?

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The unjustified significance placed on the "loss of control" in the cases relied upon by appellee follows from two errors. The first error is failure to distinguish between relinquishment of control as a factual element of manifest intent, which it is, and as the legal predicate for completion of contract, which it is not. The second error lies in confusing the "right" to recall mail with the "power" to recall mail. Under current postal regulations, the sender has the "power" to regain a letter, but this does not necessarily give him the "right" to repudiate acceptance. The existence of the latter right is a matter of contract law [**37] and is determinable by reference to factors which include, but are not limited to the existence of the power to recall mail. In short, the power to recall mail is a factor, among many others, which may be significant in determining when an acceptance is effective, but the right to effectively withdraw and repudiate an acceptance must be dependent upon the initial determination of when that acceptance is effective and irrevocable.

[*902] From the foregoing it is clear that a change in postal regulations does not, ipso facto, alter or effect the validity of the rule in Adams v. Lindsell. To the extent that the cases relied upon by appellee mistakenly assumed that "loss of control" and "agency" were determinative of the validity of the rule they are not authority for rejecting the rule. Rather, the adoption of the rule in this jurisdiction must turn on an evaluation of its justifications, quite apart from the fallacious theories of agency and control sometimes advanced in its support.

Before discussing the justification of the "deposited acceptance" rule in contract law, it is important, to avoid confusion, to again distinguish between the rule in its application to [**38] offer and acceptance in contract and the application or nonapplication of an identical principle in other areas of the law. As the section from Corbin, quoted at pages 8 and 9 supra, indicates, the courts and authors properly distinguish clearly between these applications, although often, as in the cases relied upon by appellee, the

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distinction is overlooked. See Annot. 9 A.L.R. 386 (1920); 92 A.L.R. 1062 (1934).

When, as in those latter cases, a case like Ex parte Cote, L.R. 9 Ch. 27 (1873), which was concerned exclusively with negotiable instruments and delivery, is cited as controlling in cases involving contracts, both an insufficient analysis of contract law and a misapplication of otherwise valid principles result. It may well be that a transcendent uniformity with respect to the effect of mailing is desirable. See Bramwell, J., dissenting, in Household Fire & Carriage Acc. Ins. Co., Ltd. v. Grant, supra. But this extra-contract argument must abide disposition of the question as a matter of contract law. In any event, recognizing both the conceptual and practical distinctions between contract law and other areas, the argument for uniformity is scarcely persuasive. Disposition [**39] of the issue can and should be made within the context of traditional and current contract concepts.

An attempt at critical analysis of the "deposited acceptance" rule is by no means a new or unusual endeavor. The cases, treatises and learned journals are replete with discussion and analysis of the rule both in its practical and theoretical aspects. E. g., 1 Corbin, Contracts § 78 (1950); Ashley, Contracts Inter Absentes, 2 Col.L.Rev. 1 (1902); Winfield, Some Aspects of Offer and Acceptance, 55 L.Q.R. 499 (1939); Samek, A Reassessment of the Present Rule Relating to Postal Acceptance, 35 Aust.L.J. 38 (1961). Unfortunately, much of the adverse criticism is directed to justifications for the rule which are, in fact, not relied upon by its proponents. Accordingly, the brilliant refutations at the conceptual level of the argument from loss of control, the argument from agency and the related argument from waiver, do not meet the issue. Rather, discussion and criticism must be directed to the practical and theoretical basis of the rule relied upon by its advocates.

The justification for the "deposited acceptance" rule proceeds from the uncontested premise of Adams v. Lindsell [**40] that there must be, both in practical and

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conceptual terms, a point in time when a contract is complete. In the formation of contracts inter praesentes this point is readily reached upon expressions of assent instantaneously communicated. In the formation of contracts inter absentes by post, however, delay in communication prevents concurrent knowledge of assents and some point must be chosen as legally significant. The problem raised by the impossibility of concurrent knowledge of manifest assent is discussed and a justification for the traditional rule is offered in Corbin, Contracts § 78 (1950).

"A better explanation of the existing rule seems to be that in such cases the mailing of a letter has long been a customary and expected way of accepting the offer. It is ordinary business usage. More than this, however, is needed to explain why the letter is operative on mailing rather than on receipt by the [*903] offeror. Even though it is business usage to send an offer by mail, it creates no power of acceptance until it is received. Indeed, most notices sent by mail are not operative unless actually received.

"The additional reasons for holding that a different [**41] rule applies to an acceptance and that it is operative on mailing may be suggested as follows: When an offer is by mail and the acceptance also is by mail, the contract must date either from the mailing of the acceptance or from its receipt. In either case, one of the parties will be bound by the contract without being actually aware of that fact. If we hold the offeror bound on the mailing of the acceptance, he may change his position in ignorance of the acceptance; even though he waits a reasonable time before acting, he may still remain unaware that he is bound by contract because the letter of acceptance is delayed, or is actually lost or destroyed, in the mails. Therefore this rule is going to cause loss and inconvenience to the offeror in some cases. But if we adopt the alternative rule that the letter of acceptance is not operative until receipt, it is the offeree who is subjected to the danger of loss and inconvenience. He can not know that his letter has been received and that

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he is bound by contract until a new communication is received by him. His letter of acceptance may never have been received and so no letter of notification is sent to him; or it may have been [**42] received, and the letter of notification may be delayed or entirely lost in the mails. One of the parties must carry the risk of loss and inconvenience. We need a definite and uniform rule as to this. We can choose either rule; but we must choose one. We can put the risk on either party; but we must not leave it in doubt. The party not carrying the risk can then act promptly and with confidence in reliance on the contract; the party carrying the risk can insure against it if he so desires. The business community could no doubt adjust itself to either rule; but the rule throwing the risk on the offeror has the merit of closing the deal more quickly and enabling performance more promptly. It must be remembered that in the vast majority of cases the acceptance is neither lost nor delayed; and promptness of action is of importance in all of them. Also it is the offeror who has invited the acceptance."

The justification suggested by Corbin has been criticized as being anachronistic. Briefly, critics argue that the evident concern with risk occasioned by delay is premised on a time lag between mailing and delivery of a letter of acceptance, which lag, in modern postal systems [**43] is negligible. Opponents of the rule urge that if time is significant to either party, modern means of communication permit either party to avoid such delay as the post might cause. See Samek, A Reassessment of the Present Rule Relating to Postal Acceptance, supra. Cf. Rhode Island Tool Co. v. United States, supra. At the same time critics of the rule cannot deny that even in our time delay or misdirection of a letter of acceptance is not beyond the realm of possibility.

Another justification offered for the rule, related to the argument of expediency discussed by Corbin, is the mixed practical and conceptual argument attributed to Holmes but in reality being manifest in Adams v. Lindsell itself. See Holmes, The Common Law, 305-307 (1881); Note, 38

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Geo.L.J. 106, 110 (1949). This argument proposes that the making of an offer constitutes an expression of assent to the terms of the contract and that the "overt act" of depositing a written acceptance in the post represents the offeror's assent, whereupon the "concluding prerequisite" of a contract, mutual assent, is formed and the contract is complete. Critics of the rule respond by pointing out that the deposit of a letter in [**44] the mail is, in and of itself, a neutral factor, [*904] charged with legal significance only because the rule makes this particular "over act" significant: signing a contract but then pocketing it could be, they argue, viewed as equally conclusive.

At this point and upon the "overt act" theory issue is clearly joined. On the one hand proponents of the rule insist that contracts inter absentes are sui generis and require consideration not in terms of the secondary principles of contract law relating to the necessity of communicating assent and the necessity of an unrecoverable expression of acceptance, but in terms of the essential concept of manifest intent and assent. Opponents of the rule, though no longer encountering conceptual difficulty in the abandonment of the principle of communication, compare Langdell, Summary of Law of Contracts, 1-31 (2d ed. 1880) and Williston, Contracts § 81 (1957) with Samek, A Reassessment * * * supra, argue that absent overriding practical considerations the law relating to acceptance by mail should be harmonized with the law regarding offers by mail and contracts generally, i.e. that the acceptance is ineffective until [**45] received. Ultimately then the weight given the "practical considerations" and the emphasis accorded the reliance - expectation factors determine the view adopted as to the "deposited acceptance" rule.

In support of the rule proponents urge its sanction in tradition and practice. They argue that in the average case the offeree receives an offer and, depositing an acceptance in the post, begins and should be allowed to begin reliance on the contract. They point out that the offeror has, after all, communicated his assent to the terms by extending the

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offer and has himself chosen the medium of communication. Depreciating the alleged risk to the offeror, proponents argue that having made an offer by post the offeror is seldom injured by a slight delay in knowing it was accepted, whereas the offeree, under any other rule, would have to await both the transmission of the acceptance and notification of its receipt before being able to rely on the contract he unequivocally accepted. Finally, proponents point out that the offeror can always expressly condition the contract on his receipt of an acceptance and, should he fail to do so, the law should not afford him this advantage.

[**46] Opponents of the rule argue as forcefully that all of the disadvantages of delay or loss in communication which would potentially harm the offeree are equally harmful to the offeror. Why, they ask, should the offeror be bound by an acceptance of which he has no knowledge? Arguing specific cases, opponents of the rule point to the inequity of forbidding the offeror to withdraw his offer after the acceptance was posted but before he had any knowledge that the offer was accepted; they argue that to forbid the offeree to withdraw his acceptance, as in the instant case, scant hours after it was posted but days before the offeror knew of it, is unjust and indefensible. Too, the opponents argue, the offeree can always prevent the revocation of an offer by providing consideration, by buying an option.

In short, both advocates and critics muster persuasive argument. As Corbin indicated, there must be a choice made, and such choice may, by the nature of things, seem unjust in some cases. Weighing the arguments with reference not to specific cases but toward a rule of general application and recognizing the general and traditional acceptance of the rule as well as the modern changes [**47] in effective long-distance communication, it would seem that the balance tips, whether heavily or near imperceptively, to continued adherence to the "Rule in Adams v. Lindsell." This rule, although not entirely compatible with ordered, consistent and sometime artificial

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principles of contract advanced by some theorists, is, in our view, in accord with the practical considerations and essential concepts of contract law. See Llewellyn, Our Case Law of Contracts; Offer and Acceptance II, 48 Yale L.J. 779, 795 (1939). Outmoded precedents may, on occasion, be discarded and the [*905] function of justice should not be the perpetuation of error, but, by the same token, traditional rules and concepts should not be abandoned save on compelling ground.

In choosing to align this jurisdiction with those adhering to the deposited acceptance rule, we adopt a view contrary to that of the very able judge below, contrary to the decisions of other respected courts and possibly contrary to the decision which might have been reached had this case been heard in a sister court in this State. However, we are constrained by factors hereinbefore discussed to hold that an acceptance is effective upon [**48] mailing and not upon receipt. Necessarily this decision is limited in any prospective application to circumstances involving the mails and does not purport to determine the rule possibly applicable to cases involving other modern methods of communication. Cf. Entores v. Miles Far East Corp., 2 Q.B. 327 (1955) (rejecting the application of Adams v. Lindsell to a case involving instantaneous communication). Restatement, Contracts § 65 (1932).

In the instant case, an unqualified offer was accepted and the acceptance made manifest. Later, the offerees sought to repudiate their initial assent. Had there been a delay in their determination to repudiate permitting the letter to be delivered to appellant, no question as to the invalidity of the repudiation would have been entertained. As it were, the repudiation antedated receipt of the letter. However, adopting the view that the acceptance was effective when the letter of acceptance was deposited in the mails, the repudiation was equally invalid and cannot alone, support the summary decree for appellees.

The summary decree is reversed and the cause remanded for further proceedings.

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¿No es efectiva una aceptación desde el momento en el cual es depositada en un buzón de correos?

MIRROR IMAGE RULE

KLEINHANS et al. v. JONES et ux. CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT 68 F. 742 June 10, 1895

OPINIÓN POR: SEVERENS

[*745] Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

Having stated the case, SEVERENS, District Judge, delivered the opinion of the court.

We think it quite clear that it was competent for the parties to become bound by correspondence carried on in the way in which this was, -- by letters and telegrams, -- and that these, when put together, if they made out an assent of the parties to the terms of sale, would make a binding agreement, which could be specifically enforced, and that such a mode of creating a binding contract would be sufficient under the statute of frauds of the state of Kentucky, which seems to be not essentially different from that of other states, in requiring [*746] written evidence of the agreement of the vendor of real estate, and of the authority of the attorney, when the making of the agreement is not the personal act of the owner, but is made by his agent in his name. Lyon v. Pollock, 99 U.S. 668; Ryan v. U.S., 136 [**2] U.S. 83, 10 Sup. Ct. 913; Minnesota Linseed Oil Co. v. Collier White-Lead Co., 4 Dill. 431, Fed. Cas. No. 9,635; Fry, Spec. Perf. 291; Mechem, Ag. § 92; Godwin v. Francis, L.R. 5 C.P. 295; Saveland v. Green, 40 Wis. 431. Negotiations on the part of the vendors were carried on through Pope, as their agent. We say the "vendors," intending thereby, of course, to include Mrs. Jones, because it was undoubtedly expected that she would join in making the proper conveyance. We do not, however, intend to imply that she was, in any legal sense, a party to these negotiations. Counsel for complainants attributes to Mr. Pope a larger capacity, as

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agent, than we think the evidence justifies. We can entertain no doubt, after an examination of the testimony, that Pope had no general authority to make a sale of the Mozart Hall property, and that this powers were limited to a mere communication of the proposals of the buyer to Jones, and of Jones' responses to such offers. He was therefore a special agent, the limitation of whose powers was well known to the complainants; and they can rely upon no act of his in fixing the terms of purchase, which he was not specially authorized to make. Morrill [**3] v. Cone, 22 How. 75; Butler v. Maples, 9 Wall. 766; Hennessey v. Woolworth, 128 U.S. 438, 442, 9 Sup. Ct. 109; Chinnock v. Ely, 4 De Gex, 4. & S. 638; Hamer v. Sharp, L.R. 19 Eq. 108; Pom. Spec. Perf. § 77; Mechem, Ag. § 288.

We come then to the main question in the case, which is whether the principals ever came to an agreement. When the original petition in the case was filed in the state court, the complainants based their suit upon a supposed contract created by their offer of October 10th, and the acceptance thereof on October 11th by Pope, for Jones, under the authority of Jones' telegram to Pope bearing the same date as Pope's acceptance of the offer made on October 10th. This telegram of October 11, 1893, was as follows: "I accept the offer in your telegram of October 2nd, provided the notes are properly secured on the property." Thus it will be seen that the authorization of Pope by Jones was to accept a contract of the terms of October 2d. This is plainly indicated by the language of the telegram itself; and, if that were doubtful, it is made clear that Jones' authorization of acceptance had no reference to the offer made on October 10th, for he then had no knowledge [**4] of that proposition. It follows that Pope was without authority to bind his principal to the terms contained in complainants' proposition of October 10th, unless that proposition was in fact identical with, and a mere continuation of, the proposition of October 2d. Whether it was so or not we will consider further on. The statement of the alleged contract made in the original petition leaves a fatal hiatus, in not

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setting forth what was the offer contained in Pope's telegram of October 2d, for it was that offer only which the petitioner shows Jones had given Pope authority to accept. It was not stated in the petition that the offer of October 2d was the same as the offer of October 10th, and [*747] there was no presumption that it was so. After the case was removed into the circuit court of the United States, and during its pendency there, the incongruity of the contract, as originally stated in the petition, seems to have occurred to the learned counsel for the complainants; and, in the hope of putting the alleged contract upon a surer foundation, leave was obtained from the court to amend the bill, and this was done. By this amendment the complainants' ground was shifted, [**5] and the contract which the amended bill asked the court to enforce was a contract constructed upon the proposition of the complainants' communication by Pope to Jones of October 2, 1893, and the alleged accpetance thereof by Jones in his telegram to Pope of October 11th, and the proposition of the complainants of October 10th was relegated to a new place, the allegation being that this was drawn up merely for the purpose of carrying into more expanded form the contract alleged to have been made by complainants' proposition of October 2d and Jones' telegram of October 11th; and it is alleged that the instrument bearing date October 10th was not intended to vary the original contract, and that if it does so it is a mistake, and contrary to the intention of the parties, and should be reformed. But, unfortunately for the complainants, the new ground does not furnish them any better standing than that originally taken. In the first place, the evidence fails to show a binding acceptance by Jones of the offer of October 2d. The telegram indicating an acceptance was addressed to Pope, his own agent, and not to the complainants. It is manifest that the understanding of all parties was that [**6] the acceptance was to be made by Pope by some further affirmative act on his part to be done, in the way of closing the sale. That this was so is also shown by the actual transaction which occurred on the 11th of October, when

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Pope signed the complainants' offer of October 10th in behalf of Jones, and then attached the telegram of that date as his authority for signing Jones' acceptance. Jones' telegram, in the circumstances, amounted to only an authorization, and indeed, being addressed, as it was, to one who was in no sense the agent of the proposed purchasers, was not sufficient to bind the vendor, under the statute of frauds.

But there is another difficulty. The instrument of October 10th, made by the complainants, was made the day before the date of Jones' telegram authorizing the acceptance of their offer, and this circumstance negatives the contention that it was made in the elaboration and further explanation of the contract already made; and the oral testimony taken in the case fails to satisfy us that this paper of October 10th, signed by the complainants, was in fact intended to be anything else than to be the foundation of the contract they proposed to make. We are [**7] convinced that the fact was that, while the complainants were waiting for Jones' reply to their offer of October 2d, they formulated a fresh offer, and then, when Jones' telegram came, Pope, instead of executing his authority by accepting the original offer of October 2d, accepted the other offer of October 10th, assuming that that amounted to practically the same thing as the first offer, and would be equally acceptable to his principal. We have no doubt that this general statement embodies the substantial fact. [*748] We are therefore to consider whether the complainants' proposition of October 10th, which Pope, in behalf of Jones, accepted, was in truth the same thing as the offer of October 2d, which Jones authorized Pope to accept. The offer of October 2d, as communicated, reserved to the payee the privilege of paying all notes for the deferred purchase money on or before five years. That of October 10th made them payable on or before maturity, the maturity of the last note being ten years after date. The offer of October 2d was to pay all the notes, if desired, at the end of five years, if money should be easy. There was nothing of that kind in the offer of October [**8] 10th. In the original

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offer it was stipulated that the purchasers would improve the property at once. There was no stipulation of that kind in the offer of October 10th. In the offer of October 2d was a proposition to insure for the benefit of the vendor, to secure him, no amount at which the insurance should be made being stated. In that of October 10th the agreement was to insure for the same purpose for at least $20,000, and an insurance for that amount would have answered that stipulation. In the offer of October 2d, possession was required to be given in 60 days from that date. In that of October 10th, possession was to be given within 30 days after the date of the deed of conveyance. And an entirely new term was inserted in the offer to October 10th, in the form of a stipulation that the vendor should pay the commission of Stratton & Co. for selling the property, thus attempting to convert Stratton & Co. into the relation of agents for Jones. In fact, Stratton & Co. were never the agents of Jones, but were, and continued to be, acting as the agents of the complainants in the transaction. If, on the other hand, we compare the offer of October 10th with that laid before [**9] Pope on October 2d, instead of the form in which the latter actually transmitted it to Jones, upon the assumption that Jones was responsible for Pope's negligence in the transmission of the offer, and that the complainants had the right to suppose that the vendor was dealing with them upon the footing of their offer as made (see Insurance Co. v. Waterman, 6 U.S. App. 549, 560, 4 C.C.A. 600, 54 Fed. 839), it will be found that the variations are quite as important, and trench quite as deeply into the substance of the contract. Now, some of these stipulations in the complainants' offer of October 2d, it must be confessed, were somewhat vague, and it may be that their vagueness would start a doubt whether the terms of their offer were sufficiently definite to make a legally binding contract. But several of the stipulations we have referred to are sufficiently definite and distinct to furnish the basis of a comparison with those contained in the later offer, and it is manifest from such comparison that it is impossible to say that the acceptance of one would make a

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contract identical with one made by the acceptance of the other. While it may be -- and we think it quite probable that [**10] such would have been the result -- that Jones would not have objected to the variations from the first offer contained in the second, which was accepted by Pope, but for the intervention of other parties, and the prospect of obtaining a larger purchase price by disavowing the act of Pope and accepting the better bid of the interveners, yet we are not at liberty to act upon any conjecture [*749] as to whether Jones would have ratified Pope's act, whether or not the new parties had come into the field. In the first place, a court of equity has no power to enforce the specific performance of a contract which is not already established between the parties; and, in order to give ground for the action of the court, it must be made clearly to appear that a definite and binding legal contract exists. Carr v. Duval, 14 Pet. 77; Marble Co. v. Ripley, 10 Wall. 339, 359; Nickerson v. Nickerson, 127 U.S. 668, 8 Sup. Ct. 1355; Dalzell v. Manufacturing Co., 149 U.S. 315, 13 Sup. Ct. 886. Then, recurring to the rules of law whereby such binding contract may be formed, it is an elementary doctrine that, to constitute a valid contract, the minds of the parties must have met, and agreed to the [**11] terms of their agreement. It is necessary, not only that the parties shall have assented to the several terms of the contract, but, in order that there shall be any bond which shall tie the parties in mutual obligations, their assent must be communicated to each other. Smith v. Hughes, L.R. 6 Q.B. 607, per Blackburn, J.; Cornish v. Abington, 4 Hurl. & N. 549; Cox v. Troy, 5 Barn. & Ald. 474; Browne v. Hare, 3 Hurl. & N. 495; Shepherd v. Gillespie, 3 Ch. App. 764; In re East of England Banking Co., 4 Ch. App. 14; Mactier v. Frith, 6 Wend. 103; White v. Corlies, 46 N.Y. 467. Where it is apparent that one party has not consented to the several terms to which the other has agreed, no contract is formed. If the divergence is of anything which partakes of the substance of the contract at all, there is no legal agreement; and the court is not at liberty to speculate upon the question whether some stipulation which it might think of minor

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importance, or some variation which it might think would not have influenced the parties in making the contract, can be dispensed with, and the parties held, in disregard of them. Bank v. Hall, 101 U.S. 50; Eggleston v. Wagner, 46 Mich. 610, 620, 10 N.W. [**12] 37; Pol. Cont. c. 1; Leake, Cont. 17 (3d Ed.); De Sollar v. Hanscome, 158 U.S. 216, 15 Sup. Ct. 816. In the case last cited the bill was filed to compel specific performance. The vendor had given authority to his agent to sell certain real estate in Denver for $5,000, one-half cash, and the balance one-half in one and one-half in two years. The agent had sold by contract which required only $200 of the cash payment down, and $2,300 in three weeks. And, while the contract price was nominally $5,000, the actual price was $4,950, the agent throwing off $50 from his commission. It was held that the agent had transcended his authority, and specific performance was refused. Applying these rules to the present case, we can reach no other conclusion than that arrived at by the court below, which was that the proof failed to establish a contract between the parties for the purchase and sale of the property in question. As this result is fatal to the case of the complainants, it is unnecesary to discuss the other questions which were argued at the hearing. The result is that the decree of the court below must be affirmed.

¿Qué similitud tiene esta doctrina angloamericana con la estipulación romana? ¿No es la llave para comprender todo el sistema de obligaciones contractuales del common law que es un sistema de contratación enteramente atípica, por no existir los contratos típicos dominados del derecho romano en este sistema?

REILLY FOAM CORP., Plaintiff, v. RUBBERMAID CORP., Defendant. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA 206 F. Supp. 2d 643; 48 U.C.C. Rep. Serv. 2d (Callaghan) 81 May 28, 2002, Decided

OPINIÓN POR: SCHILLER

I. INTRODUCTION

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A dispute between Plaintiff Reilly Foam Corporation ("Reilly Foam") and Defendant Rubbermaid Corporation ("Rubbermaid") over a contract for sponges results in the Court doing the mopping-up. Reilly Foam alleges that it contracted to supply Rubbermaid with its requirements for certain sponges for assembly into mops sold to Target stores. Reilly Foam alleges that rather than obtaining sponges solely from Reilly Foam, Rubbermaid continued to obtain sponges from another supplier and failed to make set minimum purchases. Rubbermaid denies that the contract created between the parties called for Reilly Foam to be its exclusive supplier.

Reilly Foam moved for partial summary judgment, contending the agreement and record demonstrate Rubbermaid's liability as [**2] a matter of law. Rubbermaid, in a cross-motion, argues that it had no obligation to directly purchase sponges, that Plaintiff's misrepresentation claims are barred by the economic loss and gist-of-the-action doctrines, and that its claims for promissory estoppel and restitution are pre-empted by the parties' contract. The water here is murkier than both parties believe. Plaintiff's Motion for Partial Summary Judgment is granted in part and Defendant's Motion for Summary Judgment is granted in part as explained below.

Rubbermaid has also moved for sanctions because Reilly Foam produced a supplemental expert report after this Court's scheduling deadline. As set forth below, that motion is also granted in part.

II. BACKGROUND

Reilly Foam manufactures custom-order sponges and other foam products. Defendant Rubbermaid manufactures home products, including mops nationwide. Before its agreement with Reilly Foam, Rubbermaid obtained sponges for its mop products from a company known as Tek Pak, a competitor of Reilly Foam.

In 1997, Rubbermaid launched its "Tidal Wave Project" to introduce new and improved sponge mops into the marketplace. The new sponge mops were named for a wave [**3] pattern which would be cut into the sponges. There

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were to be two basic designs for the Tidal Wave mops: a butterfly sponge and a roller sponge. The butterfly sponge mop included a mechanism which folded in half like the wings of a butterfly in order to wring out water. The roller [*647] sponge would be squeezed by a roller mechanism.

Target Stores agreed to stock cobalt blue and yellow laminate versions of the Tidal Wave sponge mop line at its stores nationwide. Rubbermaid initially sought to obtain sponges for the mops from Tek Pak. However, Tek Pak could not make timely deliveries of sponges to meet Target's needs.

Rubbermaid contacted Reilly Foam on March 4, 1999 to determine if it could fulfill Rubbermaid's need for sponges. Rubbermaid's immediate objective with Reilly Foam was to satisfy Target's current demand. Reilly Foam submitted a price quotation to Rubbermaid on March 8, 1999 for Pattern Butterfly sponges and Pattern Roller Mop sponges on an expedited basis. Reilly Foam then manufactured and delivered the sponges.

Between March 8 and March 30, the parties discussed a longer-term relationship in which Reilly Foam would supply sponges for Rubbermaid's Tidal Wave Project. But [**4] the parties now vigorously dispute what the terms of the relationship were. According to Joseph Reilly of Reilly Foam, his company was to be the exclusive supplier of Butterfly and Roller Mop sponges with a Tidal Wave design. Rubbermaid was to purchase a minimum of 300,000 Butterfly, 300,000 Roller Mop, and 300,000 yellow ester Tidal Wave sponges each year. Rubbermaid also submitted written estimates to Reilly Foam of its requirements for Butterfly and Roller Mop sponges. Reilly Foam needed to retool its equipment and to license technology from a corporation named Foamex to produce the sponges with a "tidal wave" effect carved into their bottoms. Reilly Foam expressed concern that its profits on the contract permit it to recoup its costs.

On March 26, 1999, Reilly Foam forwarded a letter to Tony Ferrante of Rubbermaid signed by Joseph Reilly. The letter read:

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This letter details the proposal that we briefly spoke about last evening. This includes the two laminates that we are currently working on, the roller mop and the butterfly mop. There are other products that we are familiar with through Kendo/New Knight, which would be the brown large celled ester, the pattern yellow [**5] ester and the yellow ether and white scrubmate. All of these are priced on the ensuing quotation.

Our proposal is that Rubbermaid Cleaning Products commit to two million pieces of product under the sub-heading Other Affected Products. There would be a surcharge of $.015 per part in an effort to amortize the cost of tooling for the wave pattern. The two million products would need to be taken over a two year period. We would also require a commitment for all of the butterfly and roller mop laminates that include the Rubbermaid Cleaning Products design.

I have also spoken to Foamex and they have agreed to run their "sample" tool for the short term until the production tool is complete, which would be approximately eight weeks. Please keep in mind that this is a proprietary pattern and we would need your design should this project move forward.

Finally, we appreciate the opportunity and understand the price sensitive nature of your products. Reilly Foam Corporation has made various concession to keep this program moving forward.

Tony, after reviewing the quotation and the conditions of this letter, please respond through a letter stating Rubbermaid Cleaning Products [**6] intentions.

I look forward to your response. [*648]

/s/ Joseph G. Reilly

Joseph G. Reilly

(March 26, 1999 Letter, Def. App. at 2a). Accompanying the letter was a list of products, prices, and quantities on Reilly Foam letterhead:

RUBBERMAID CLEANING PRODUCTS PROJECT Quotation 3/25/99

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Butterfly Sponge 1-14" x 2-7/8" x 9 $ .675 each
Roller Mop 2-3/8" x 3-3/4" x 8-1/2" $ .675 each
OTHER AFFECTED PRODUCTS
Brown Sponge 2-3/8" x 3-3/4" x 8-1/2"
Annual Quantity 340,000 Pcs. $ .290 each
Yellow Ester with Wave Pattern 2-1/2" x 3-3/4" x 8-1/2"
Annual Quantity 350,000 Pcs. $ .320 each
Yellow Ether to White Scrubmate 2-3/8" x 3-3/4" x 8-5/8"
Annual Quantity 300,000 Pcs. $ .290 each

1 The Court has attempted to reproduce the formatting of the original price quote.

(Def. App. at 3a).

Tony Ferrante responded by letter on March 30, 1999. The [**7] letter, addressed to "Joe" Reilly, read in relevant part:

This letter is to serve as Rubbermaid's commitment and authorization to procure tooling so that Reilly Foam will be in a position to make sponge products with Rubbermaid's patent pending Tidal Wave TM design. I understand that $.015 will be added to the cost of the sponge purchase price until we have made purchases of 2 million sponges, thereby covering the tooling cost of $30,000.

Referencing the attached quotation, our commitment is as follows:

1. Any sponge mop product produced by New Knight, Inc., on behalf of Rubbermaid Home Products, will source the sponge component from Reilly Foam. This includes the current product offering, as referenced in your quotation, as well as any future new products that New Knight will produce for us.

2. Should any cost savings arise from productivity improvements, Rubbermaid is entitled to share in those benefits.

* * *

Best Regards
/s/ Tony Ferrante
Tony Ferrante

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Product Manager
Rubbermaid Home Products

(Def. App. at 4a). New Knight, an independent corporation, assembled mops on behalf of Rubbermaid. Attached to his letter was Reilly Foam's price list, marked "Approved" [**8] and signed by Mr. Ferrante. Shortly thereafter, Rubbermaid supplied Reilly Foam with a forecast of how many sponges of each variety it would need.

[*649] Following the exchange of letters, Rubbermaid instructed New Knight to purchase sponges solely from Reilly Foam. New Knight complied and used Reilly Foam as its exclusive source of sponges until New Knight entered bankruptcy in August 2001. Rubbermaid itself made purchases of sponges listed under the "other affected products" category. At the same time, Rubbermaid continued to purchase sponges from Tek Pak for use in the Tidal Wave line of mops. Moreover, Rubbermaid did not purchase two million sponges within the two-year window which Reilly Foam sought. 2

2 Unfortunately, the record is unclear as to how many such sponges Rubbermaid actually purchased. Plaintiff's evidence suggests that Rubbermaid has only purchased 86,882 Brown Sponges, 60,485 Yellow Ester with Wave Pattern Sponges, and 3,400 Yellow Ether to White Scrubmate Sponges. The defense contends that it purchased significantly more sponges. However, both parties agree that Rubbermaid's purchases of sponges in the "other affected products" category do not approach two million pieces within the first two years and that Rubbermaid has not bought the minimum quantities stated in Joseph Reilly's March 26 correspondence.

[**9] Reilly Foam contends that Rubbermaid has breached the contract by failing to use Reilly Foam as Rubbermaid's exclusive supplier for the Tidal Wave Project (including roller mop and butterfly mop sponges) and making purchases from Plaintiff's competitors, by failing to purchase the minimum annual quantities of sponges in the "other affected products category" set forth in the price list

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which Joseph Reilly sent on March 26, 1999, and by failing to purchase two million "other affected sponges" within two years with a $0.015 surcharge.

III. DISCUSSION OF CROSS-MOTIONS FOR SUMMARY JUDGMENT

A. Standard of Review

The parties have now filed cross-motions for summary judgment. The standard for summary judgment does not change when parties file cross-motions. See Southeastern Pa. Transp. Auth. v. Pa. Pub. Util. Comm'n, 826 F. Supp. 1506, 1512 (E.D. Pa. 1993)(Pollak, J.). Summary judgment must be granted if the record, when viewed in a light most favorable to the non-moving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). [**10] If a party bears the burden of persuasion at trial, the party must support its motion with evidence as permitted by Rule 56(c). See Anderson v. Deluxe Homes of Pennsylvania, Inc., 131 F. Supp. 2d 637, 648 (M.D. Pa. 2001). Such evidence includes pleadings, depositions, answers to interrogatories, admissions, and affidavits. See FED. R. CIV. P. 56(c).

B. Choice of Law

Reilly Foam contends that Pennsylvania law applies to all claims in this action. In its briefs, Rubbermaid has relied heavily on Pennsylvania's Uniform Commercial Code, 13 PENN. CONS. STAT. ANN. § 1101 et seq. ("Pa.U.C.C."), economic loss rule, and laws of promissory estoppel and restitution. Nevertheless, it states in a footnote that Ohio law may apply. Because I ordered the parties to brief the Court on the choice of law question and Rubbermaid has not done so, I deem it to have waived any recourse to Ohio law. The parties agree that Article 2 of the Pa.U.C.C. governs the sales contract at issue.

C. Contract Claim

Plaintiff alleges that the March 26 letter was a contractual offer, which Rubbermaid [*650] accepted through its March 30 correspondence. Under the contract's

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terms, Reilly Foam [**11] became Rubbermaid's exclusive supplier of sponges for the Tidal Wave project. Rubbermaid was to purchase at minimum two million sponges of "other affected products" within two years of execution of the contract. Of the sponges in the category of "Other Affected Products," Rubbermaid was to annually purchase 340,000 Brown Sponges, 350,000 Yellow Ester Sponges with Wave Pattern, and 300,000 Yellow Ether to White Scrubmate Sponges.

Rubbermaid, in turn, argues that Reilly Foam's March 26 letter was merely a price quote and the terms contained within it are not part of the contract. Alternatively, Rubbermaid argues that the March 30 letter from Mr. Ferrante demonstrates that Rubbermaid did not accept all the terms contained in the March 26 letter, and certain key terms must be excluded under the "knockout rule."

1. Whether the March 26, 1999 Letter Was an Offer Within the Meaning of Pa.UCC 2206

The parties first dispute whether the March 26, 1999 correspondence was merely a price quote or an "offer" within the meaning of the Pa.U.C.C. The Pa.U.C.C. does not expressly define 'offer,' but it has been defined based on common law principles as "the manifestation of willingness [**12] to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Bergquist Co. v. Sunroc Corp., 777 F. Supp. 1236, 1248 (E.D. Pa. 1991)(Ditter, J.); see also RESTATEMENT (SECOND) OF CONTRACTS §§ 24 (1979). Documents reflecting preliminary negotiations between the parties do not evince an enforceable contract. See ATACS Corp. v. Trans World Communs., 155 F.3d 659, 666 (3d Cir. 1998).

In the U.C.C. context, courts have encountered difficulty determining whether a document that quotes a seller's prices constitutes an offer. Generally, price quotes are not considered an offer, but rather "mere invitations to enter into negotiations or to submit offers." Bergquist, 777 F. Supp. at 1248; cf. Dean Foods Co. v. Brancel, 187 F.3d 609, 619 (7th Cir. 1999)(price quote commonly deemed

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invitation to offer rather than offer even if directed at particular customer). The buyer's purchase order - which sets such terms as product choice, quantity, price, and terms of delivery - is usually the offer. See Audio Visual Assocs. v. Sharp Elec. Corp., 210 F.3d 254, 259 (4th Cir. 2000). [**13]

However, some price quotes are sufficiently detailed to be deemed offers, which turns a subsequent document from a buyer containing a positive response into an acceptance. See Bergquist, 777 F. Supp. at 1248; see also White Consol. Indus., Inc. v. McGill Mfg. Co., 165 F.3d 1185, 1190-91 (8th Cir. 1999)(holding price quotation may constitute offer if sets forth sufficient detail and contract can be formed by acceptance of its terms); Reaction Molding Techs. v. Gen. Elec. Co., 585 F. Supp. 1097, 1106-07 (E.D. Pa. 1984)(Lord, J.)("Reaction Molding I")(price quote sent in response to buyer's request supplying property, price, terms of payment and delivery terms sufficient to constitute offer); cf. F. Schumacher & Co. v. Silver Wallpaper & Paint Co., 810 F. Supp. 627, 633 (E.D. Pa. 1992)(Brody, J.)(refusing to consider price list as offer because lacked terms of "quantity and commitment"). What transforms a quotation into an offer cannot be neatly defined; it depends on the manifestation of intent by the seller and the "unique facts and circumstances of each case." Rich Prods. Corp. v. Kemutec, [*651] Inc., 66 F. Supp. 2d 937, 956 (E.D. Wis. 1999). [**14] As is the case with a purported offer under the common law, the seller "must intend that the contract exist upon acceptance of the offer; that is, it must reasonably appear from the price quotation that assent to that quotation is all that is needed to ripen the offer into a contract." Bergquist, 777 F. Supp. at 1249.

Reviewing Reilly Foam's March 26 correspondence and its treatment by Rubbermaid, both parties treated the price quote as an offer and not merely a price quote. First, the March 26 letter did not merely list price. The letter refers to itself as a "proposal" in its opening paragraph. The attached list also includes a number of specific terms including the

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identification of products, their quantities, the licensing of needed technology, and details for the special manufacture of the sponges. Rubbermaid treated the letter as an offer at least with respect to quantities and prices of "other affected products." Mr. Ferrante's March 30 response merely noted that the terms states on the price list were "approved" and stated in his letter that the $0.015 surcharge for the first two million sponges purchased was acceptable.

While it may have been desirable [**15] to include additional terms in the March 26, 1999 letter to clarify its status as an offer, contract formation depends on the manifestation of intent by the parties to be bound rather than the presence or absence of specific terms. See ATACS Corp., 155 F.3d at 667. Moreover, Joseph Reilly's March 26 letter described the price list as a quotation, no such appellation is given to the letter itself. In any event, a party's description of a document as a price quote or offer is not determinative. The Court finds the March 26 correspondence contains sufficient detail and is deemed an offer as a matter of law.

2. Effect of Different Terms in Rubbermaid's March 30 Acceptance

Once Reilly Foam's March 26 letter is deemed an offer, there can be no doubt that Rubbermaid's March 30 response accepted it. See Pa.U.C.C. § 2207(a) (expression of acceptance operates to form contract even if it states additional or different terms). 3 However, Rubbermaid argues that even if the March 26 letter is deemed an offer, its March 30 acceptance contained a number of different terms which modified the contract under the Pa.U.C.C.'s purported "knockout rule." Reilly Foam retorts [**16] that the Court should not follow the knockout rule and permit the terms of its offer to govern. If the knockout rule does apply, it argues, Rubbermaid's acceptance did not contain any different terms.

3 Rubbermaid does argue that its March 30, 1999 letter was not an acceptance but a rejection and counteroffer because it constituted a conditional acceptance. However, to be deemed a rejection due to conditional acceptance, the

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offeree must do more than allude to preferred terms. It must make its acceptance "expressly . . . conditional on assent to the additional or added terms." Pa.U.C.C. § 2207(a). In other words, it must demonstrate an unwillingness to proceed with the transaction unless its conditions are met. See Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 102 (3d Cir. 1991); Reaction Molding Techs., Inc. v. Gen. Elec. Co., 588 F. Supp. 1280, 1289 (E.D. Pa. 1984)(Lord, J.)("Reaction Molding II") (strictly construing clauses claiming to make acceptance expressly conditional). Rubbermaid's March 30 letter evinces a willingness to proceed with the transaction and therefore cannot be deemed a rejection or counteroffer.

[**17] a. Rubbermaid's March 30 Acceptance Contains Different Terms

Pointing to Mr. Ferrante's writing "approved" on the list accompanying the [*652] March 26 letter, Reilly Foam first contends that Rubbermaid accepted all terms on the price list in their entirety without modification. Therefore, Mr. Ferrante's "hidden intent" to impose additional or different terms should not be enforced. (Ans. of Reilly Foam Mem. in Opp. to Rubbermaid's Mot. for Summ. Judg. at 20). As a general matter, Reilly Foam is correct; undisclosed intentions cannot be considered terms of a contract. See Ingrassia Constr. Co. v. Walsh, 337 Pa. Super. 58, 486 A.2d 478, 483 (Pa. Super. Ct. 1984); Pioneer Commercial Funding Corp. v. Am. Fin. Mortg. Corp., 50 Pa. D. & C. 4th 31, 70 (Ct. Com. Pl. 2000).

Mr. Ferrante did not "hide" his intentions, however; he stated a number of new terms quite clearly in his letter of March 30. In particular, he attempted to do three things: restrict Rubbermaid's commitment to two million sponges, permitting Reilly Foam to recoup its tooling cost of $30,000; ensure that New Knight would purchase its sponges from Reilly Foam; and provide that Rubbermaid [**18] would share in any cost savings from productivity improvements.

Although Reilly Foam seeks to dismiss the letter as mere "correspondence" without any effect on the contract

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terms, the Court is bound to read both documents of March 30 - Ferrante's letter and the approved list - together. Reilly Foam's March 26 correspondence specifically invited Rubbermaid to respond by letter. It would be incongruous for Reilly Foam to now ignore that letter after Rubbermaid complied with its instructions. As part of the contract, the documents should be read as a whole, with the aim of construing conflicting clauses together, if possible. See Brown v. Cooke, 707 A.2d 231, 233 (Pa. Super. Ct. 1998); Bickings v. Bethlehem Lukens Plate, 82 F. Supp. 2d 402, 405 (E.D. Pa. 2000)(Brody, J.).

Reilly Foam notes that, in part, Mr. Ferrante has accepted and concluded purchase contracts with a mere notation of approval on a price quote. Thus, he should be deemed to have approved and accepted Reilly Foam's offer. The Court need not speculate as to Mr. Ferrante's intentions based solely on the single word "approved" on a price list in other cases or the instant one. Mr. Ferrante's [**19] letter expresses an intent to impose new terms on the contract.

b. Terms of the Contract

If Reilly Foam's March 26 letter operates as an offer and Rubbermaid's March 30 correspondence acts as an acceptance, the Court is left with the task of determining the terms of the agreement between these merchants under Pa.U.C.C. § 2207, commonly called the "Battle of the Forms" provision.

i. Section 2207

Frequently, businessmen do not set forth all of the terms of their agreements in a single, comprehensive document. Rather, deals are made on the basis of conversations and letters exchanged between the parties. Ultimately, one party reduces the terms of a proposed deal to writing, which is deemed an offer. Under the common law, a document qualifying as an offer could only be 'accepted' by a second document expressing acceptance on terms identical to the offer. See Slaymaker v. Irwin, 4 Whart. 369, 380-81 (Pa. 1839); Joseph v. Richardson, 2 Pa. Super. 208, 212, 38 Week. Notes Cas. 487, 44 Pitts. Leg. J. 138-14 (Pa. Super. Ct. 1896).

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The rule changed with the enactment of the Battle of the Forms provision of the Pa.U.C.C., which permits an expression of acceptance to operate as an acceptance [**20] even if it contains additional or different terms. See Pa.U.C.C. § 2207(a). The additional [*653] terms become part of the contract unless: (1) the offer expressly limits acceptance to the terms of the offer; (2) the inserted term materially alters the offer; or (3) notification of objection to the inserted terms has been given or is given within a reasonable time. Pa.U.C.C. § 2207(b)(1)-(3). 4

4 For the sake of consistency, all citations to the U.C.C. use Pennsylvania's format. Section 2207 is the equivalent of in the original version promulgated by the American Law Institute and the National Conference of Commissioners of Uniform States Laws. Section 2207(b) corresponds to § 2-207(2).

The fate of different terms is less clear. Section 2207(b) does not directly address different terms in an acceptance, and the question remains: if the offer is accepted on different terms, should the terms of the offer control or should the acceptance be followed, or should the conflicting terms cancel [**21] each other out, to be replaced by gap fillers provided by the U.C.C.? The question has divided courts and scholars.

One approach considers any expression of acceptance with differing terms as actually a rejection and counter-offer. Thus, the terms outlined in the acceptance would govern. See Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962), overruled by Ionics, Inc. v. Elmwood Sensors, Inc., 110 F.3d 184, 187 (1st Cir. 1997). This view has been widely discredited as a revival of the common law rule, and the Court is not aware of any jurisdiction in which it is currently in force.

The minority view permits the terms of the offer to control. Because there is no rational distinction between additional terms and different terms, both are handled under § 2207(b). For support, advocates of this position point to Official Comment 3: "Whether or not additional or different terms will become part of the agreement depends

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upon the provisions of subsection [b]." See Steiner v. Mobile Oil Corp., 20 Cal. 3d 90, 569 P.2d 751, 759-60 n.5, 141 Cal. Rptr. 157 (Cal. 1977); Boese-Hilburn Co. v. Dean Mach. Co., 616 S.W.2d 520, 527 (Mo. Ct. App. 1981); [**22] see also Mead Corp. v. McNally-Pittsburgh Mfg. Corp., 654 F.2d 1197, 1204 & n.11 (6th Cir. 1981) (implicitly assuming, without holding, that different terms in acceptance would be subject to analysis under Ohio's version of § 2207(b)). 5 Professor Summers, the leading advocate of the minority rule, reasons that offerors have more reason to expect that the terms of their offer will be enforced than the recipient of an offer can hope that its inserted terms will be effective. See James J. White & Robert S. Summers, UNIFORM COMMERCIAL CODE § 1-3 at 35 (5th ed. 2000). The offeree at least had the opportunity to review the offer and object to its contents; if the recipient of an offer objected to a term, it should not have proceeded with the contract. See id. Following this approach, Reilly Foam urges that the terms of its March 26, 1999 letter and price list, as the offer, would control. Because each of Rubbermaid's new terms posed material alterations to the parties contract, they would have no effect.

5 Judge Posner, speaking for himself, has advocated a similar rule: that the terms of the offer prevail over different terms set forth in the acceptance only if the different terms do not materially alter the contract. See Northrop Corp. v. Litronic Indus., 29 F.3d 1173, 1178 (7th Cir. 1994). However, as noted below, he predicted that Illinois would adopt the knockout rule.

[**23] The final approach, held by a majority of courts, is now known as the "knockout rule." Under this approach, terms of the contract include those upon which the parties agreed and gap fillers provided by the U.C.C. provisions. This approach recognizes [*654] the fundamental tenet behind U.C.C. § 2207: to repudiate the "mirror-image" rule of the common law. One should not be able to dictate the terms of the contract merely because one sent the offer. Indeed, the knockout rule recognizes that

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merchants are frequently willing to proceed with a transaction even though all terms have not been assented to. It would be inequitable to lend greater force to one party's preferred terms than the other's. As one court recently explained, "An approach other than the knock-out rule for conflicting terms would result in. . . [] any offeror. . . [] always prevailing on its terms solely because it sent the first form. That is not a desirable result, particularly when the parties have not negotiated for the challenged clause." Richardson v. Union Carbide Indus. Gases Inc., 347 N.J. Super. 524, 790 A.2d 962, 968 (N.J. Super. Ct. App. Div. 2002). Support for this view is also found in the [**24] Official U.C.C. Comments:

Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in subsection [b] is satisfied and the conflicting terms do not become a part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this Act, including subsection [b].

U.C.C. § 2207 cmt. 6. Advocates of the knockout rule interpret Comment 6 to require the cancellation of terms in both parties' documents that conflict with one another, whether the terms are in confirmation notices or in the offer and acceptance themselves. A majority of courts now favor this approach. See JOM, Inc. v. Adell Plastics, Inc., 193 F.3d 47, 54 (1st Cir. 1999) (ascribing knockout rule to law of Maine and Maryland); Ionics v. Elmwood Sensors, Inc., 110 F.3d 184, 189 (1st Cir. 1997) (applying Massachusetts law); Northrop Corp. v. Litronic Indus., 29 F.3d 1173, 1178 (7th Cir. 1994) [**25] (describing this approach as "majority rule" and predicting Illinois would adopt it); Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569, 1578-79 (10th Cir.1984)(applying Pennsylvania law); Westinghouse Elec. Corp. v. Nielsons, Inc., 647 F. Supp. 896 (D. Colo. 1986) (applying Colorado law); Owens-Corning Fiberglas

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Corp. v. Sonic Dev. Corp., 546 F. Supp. 533 (D. Kan. 1982) (applying Kansas law); Armco Steel Corp. v. Isaacson Structural Steel Co., 611 P.2d 507, 518 & n.30 (Ala. 1980); Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc., 98 Idaho 495, 567 P.2d 1246, 1254-55 (Idaho 1977); Uniroyal, Inc. v. Chambers Gasket & Mfg. Co., 177 Ind. App. 508, 380 N.E.2d 571, 578 (Ind. Ct. App. 1978); S.C. Gray, Inc. v. Ford Motor Co., 92 Mich. App. 789, 286 N.W.2d 34 (Mich. 1979); St. Paul Structural Steel Co. v. ABI Contracting, Inc., 364 N.W.2d 83 (N.D. 1985) (applying Minnesota law); Richardson, 790 A.2d at 968 (applying New Jersey law); Gardner Zemke Co. v. Dunham Bush, Inc., 115 N.M. 260, 850 P.2d 319, 325-26 (N.M. 1993); [**26] Lory Fabrics, Inc. v. Dress Rehearsal, Inc., 78 A.D.2d 262, 434 N.Y.S.2d 359, 363 (N.Y. App. Div. 1980); Superior Boiler Works v. R.J. Sanders, Inc., 711 A.2d 628, 635 (R.I. 1998); Hartwig Farms, Inc. v. Pacific Gamble Robinson Co., 28 Wn. App. 539, 625 P.2d 171 (Wash. 1981).

The Court's task today is to predict how the Pennsylvania Supreme Court would rule if confronted with the issue. See Travelers Indem. Co. v. DiBartolo, 131 F.3d 343, 348 (3d Cir. 1997). In making this determination, federal courts should examine, if available: "(1) what the Pennsylvania Supreme Court has said in related [*655] areas; (2) the decisional law of the Pennsylvania intermediate courts; (3) federal appeals and district court cases interpreting state law; and (4) decisions from other jurisdictions that have discussed the issues we face here." Werwinski v. Ford Motor Co., 286 F.3d 661, 675 (3d Cir. 2002).

The Pennsylvania Supreme Court has never addressed the issue. The Court has unearthed only one intermediate court opinion, but it does not directly address the question, contains self- contradictory comments, and does little [**27] to aid in prediction. See United Coal & Commodities Co. v. Hawley Fuel Coal, Inc., 363 Pa. Super. 106, 525 A.2d 741, 743-44 (Pa. Super. Ct. 1987). 6 The

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court circumnavigated the issue. Therefore, United Coal provides little guidance.

6 Neither of the parties cited to United Coal in their briefs. However, the Court feels compelled to address it.

I next turn to federal courts within Pennsylvania. My colleagues seem to be comfortable with application of the knockout rule, but to date, no one has expressly held it to be the law. One court applied the knockout rule, but did so upon the agreement of the parties. See Titanium Metals Corp. v. Elkem Mgmt., 191 F.R.D. 468, 470 (W.D. Pa. 1998)(Smith, J.). Another described the debate in some detail but never specifically adopted a rule. See Pennsylvania Power & Light Co. v. Joslyn Corp., Civ. A. No. 87-2027, 1988 U.S. Dist. LEXIS 12073, at *6, 1988 WL 11577, at *3 (E.D. Pa. Oct. 31, 1988)(Cahn, J.). [**28] A third court has expressed a preference for the knockout rule, but it ultimately rested on the ground that the offeror had expressly objected to the offeree's insertion of a different delivery term into the contract, barring the term under Pa.U.C.C. § 2207(b)(3)). See Reaction Molding II, 588 F. Supp. at 1289.

The Tenth Circuit has predicted that the Pennsylvania Supreme Court would opt for the knockout rule. See Daitom, 741 F.2d at 1578-79. In light of the superior policy reasons behind the knockout rule, its fit with the text of the statute, and the vast majority of jurisdictions adopting it, I concur with the Tenth Circuit and conclude that the Pennsylvania Supreme Court would adopt the knockout rule.

ii. Application of § 2207 to the Exchange of Letters Between Reilly Foam and Rubbermaid

The parties have concluded a contract for the sale of sponges. Both Reilly Foam's proposal and Rubbermaid's response call for the sale of sponges of differing varieties, and they agree on the identification of particular sponges, along with dimensions and prices for each. Rubbermaid also agreed to add $0.015 to price of each sponge until Rubbermaid [**29] had made purchases of 2 million sponges to cover Reilly Foam's tooling costs of $30,000.00.

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As to annual purchases of "other affected products," the price list accompanying Reilly Foam's March 26 letter set a minimum annual quantity requirement for each type of sponge. Rubbermaid's March 30 response contains no term at odds with that requirement. To the contrary, Mr. Ferrante wrote "approved" on the page. Furthermore, while Mr. Ferrante's letter does not expressly mention "Other Affected Products," Mr. Ferrante did consent to the $0.015 surcharge on the first two million sponges, implying that he accepted an obligation to purchase sponges in the "other affected products" category. As noted above, the March 26, 1999 correspondence sets those numbers at 340,000 for Brown sponges, 350,000 for Yellow Ester with [*656] Wave Pattern sponges, and 300,000 for the Yellow Ether to White Scrubmate sponges.

The March 26 and March 30 letters also do not differ with respect to the time period within which Rubbermaid was to purchase two million sponges with a $0.015 surcharge. Reilly Foam sought a two-year time frame, and Rubbermaid omitted that term in its acceptance. Rubbermaid therefore argues the [**30] two terms drop out under the knockout rule, giving Rubbermaid an infinite period of time in which to make its purchases. However, Mr. Ferrante's March 30 letter is silent as to the time period within which Rubbermaid had to make its purchases. Thus, the offer and acceptance do not differ and the two-year requirement is part of the contract. 7

7 Reilly Foam seeks partial summary judgment for Rubbermaid's commitment to purchase the "other affected" sponges. The Court agrees, but notes that the parties dispute how many sponges were actually purchased. Reilly Foam presented documents which supposedly represent its document all of its sales to Rubbermaid and New Knight. Rubbermaid claims that the documents do not completely reflect all of its purchases to date. The parties may present evidence on point at trial.

However, as to the requirements contract clause that Reilly Foam sought respecting the butterfly and roller mop sponges, the knockout rule applies. Rubbermaid's

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acceptance of a requirements contract was [**31] limited to Tidal Wave project sponges produced by New Knight on behalf of Rubbermaid for current products listed in Reilly Foam's March 26 letter. The parties agree that New Knight assembled only the butterfly sponge mop; Rubbermaid manufactured the roller mop "in-house." Thus, Rubbermaid's commitment only related to the butterfly sponges. In addition, any new products that New Knight might produce in the future for Rubbermaid would be subject to the same arrangement. However, Rubbermaid did not commit to purchase all of its direct requirements for sponges from Reilly Foam. Therefore, the term creating a requirements contract for all of Rubbermaid's needs for the Tidal Wave brand of sponges falls out of the contract. Rubbermaid did commit to ensuring that its purchases from New Knight are manufactured with Reilly Foam sponges. Both letters agreed on that point. See Lory Fabrics, Inc., 434 N.Y.S.2d at 363 (knocking out those aspects of differing terms which are in conflict and sustaining remainder of provision). 8

8 At oral argument, Reilly Foam contended the provision respecting New Knight was an additional clause rather than a different one. However, Rubbermaid refused to commit itself to a requirements contract. The term regarding New Knight was a counterpart to Reilly Foam's original proposal for Rubbermaid to commit to an exclusive requirements contract. Rubbermaid's alteration of that proposal certainly qualifies as a "different" term.

[**32] All the evidence shows that Rubbermaid fulfilled its contractual duty to ensure that New Knight dealt exclusively with Reilly Foam. On instructions from Rubbermaid, New Knight made its purchases exclusively from Reilly Foam and never bought sponges for the Tidal Wave project from Tek Pak. (Lalli Dep. at 42-43; 57-58). A Tek Pak representative confirmed this. (Dignazio Dep. at 126). The uncontested evidence shows that New Knight went out of business in August, 2001 when it entered bankruptcy, terminating any continuing obligation that Rubbermaid held.

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However, the record remains unclear as to whether Rubbermaid satisfied its obligations regarding quantity requirements of butterfly sponges. Rubbermaid [*657] provided purchase forecasts to Reilly Foam of its anticipated purchases of butterfly sponges, but its purchases to date do not approach its forecasts. Rubbermaid contends that the Pa.U.C.C. imposes no obligation on it to make the purchases of sponges described in its forecasts.

Generally, the buyer under a requirements contract agrees to purchase all of its requirements for a particular good "as may occur in good faith, except that no quantity unreasonably disproportionate to any stated [**33] estimate . . . may be . . . demanded." Pa.U.C.C. § 2306(a). Rubbermaid construes the section to mean that a buyer cannot demand a quantity unreasonably greater than estimated, but "there is no indication that the draftsmen [of U.C.C. § 2306] were equally, if at all, concerned about the case where the buyer takes less than his estimated requirement." (Rubbermaid Mot. for Summ. Judg. at 16, quoting Empire Gas Corp. v. Am. Bakeries Co., 840 F.2d 1333, 1338 (7th Cir. 1988))(emphasis added).

Rubbermaid fails to fully state the Seventh Circuit's holding. After noting the above rationale, it held: "We conclude that the Illinois courts would allow a buyer to reduce his requirements to zero if he was acting in good faith, even though the contract contained an estimate of those requirements." Empire Gas, 840 F.2d at 1338 (emphasis added). While it is true that a "seller assumes the risk of all good faith variations in a buyer's requirements even to the extent of a determination to liquidate or discontinue the business," HML Corp. v. Gen'l Foods Corp., 365 F.2d 77, 81 (3d Cir. 1966), 9 a buyer purchasing less than its forecasts [**34] may still be found in breach if it acted in bad faith. Accord James J. White & Robert S. Summers, UNIFORM COMMERCIAL CODE § 3-9 at 141 (5th ed. 2000). Professors White and Summers recommend looking at a host of factors to determine bad faith, including whether the buyer is in fact procuring its requirements more cheaply from another source, whether

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the seller was unable to anticipate the buyer's action, and whether the seller "had even expended significant sums or otherwise relied on promises of the buyer in preparing to meet the buyer's needs." Id. at 141-42 (citing Paramount Lithographic Plate Serv. Inc. v. Hughes Printing Co., 2 Pa. D. & C.3d 677, 691 (Ct. Com. Pl. 1977)).

9 Although HML Corp. involved pre-U.C.C. New York law, the court also noted that the text and comments to Pa.U.C.C. § 2306 showed that section was not intended to bring about any change in doctrine. See HML Corp., 365 F.2d at 81 n.5.

Plaintiff has adduced evidence that Rubbermaid's [**35] conduct falls squarely within these categories. Reilly Foam contends that Rubbermaid has made purchases from Tek Pak. Rubbermaid also knew that Reilly Foam had expended a large sum of money in order to be in a position to manufacture the specially-ordered sponges. Thus, the Court leaves the determination of Rubbermaid's bad faith to the jury. See e.g. Paramount Lithographic, 2 Pa. D. & C.3d at 683 (charging jury on whether parties to requirements contract acted in good faith). Indeed, HML Corporation, which Rubbermaid cites, was an appeal following a bench trial and the issue on appeal was the plaintiff seller's failure to prove at trial that the defendant buyer acted in bad faith in substantially reducing its requirements. See id. 365 F.2d at 80 & 83. 10 Thus, Reilly Foam may seek damages for Rubbermaid's [*658] failure to ensure that New Knight purchased requirements of butterfly sponges from Reilly Foam until New Knight entered bankruptcy.

10 Reilly Foam, as both seller and plaintiff here, will bear the burden of proving Rubbermaid's bad faith in reducing its requirements. See Tigg Corp. v. Dow Corning Corp., 962 F.2d 1119, 1124 (3d Cir. 1992); HML Corp., 365 F.2d at 83.

[**36] In summary, Rubbermaid has breached the contract in failing: (1) to make minimum annual purchases of "other affected products" as set forth on the March 26 price list; (2) to purchase two million sponges under the "other affected products" category with a $0.015 surcharge

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within two years of the contract date. Reilly Foam may also sue for Rubbermaid's alleged failure to make good faith efforts to ensure that New Knight purchased all of its requirements of butterfly mop sponges for Rubbermaid products from Reilly Foam until New Knight went bankrupt in August 2001. Plaintiff must also establish the extent of its damages at trial.

B. Intentional/Negligent Misrepresentation

Reilly Foam has also brought claims for fraudulent misrepresentation, or in the alternative, negligent misrepresentation. Rubbermaid seeks judgment on these claims because there was no misrepresentation cognizable as a tort and because they are barred under the "economic loss" and "gist of the action" doctrines. Because the Court must grant summary judgment based on the economic loss doctrine, the Court need not reach Rubbermaid's remaining arguments.

The economic loss doctrine "prohibits plaintiffs from recovering [**37] in tort economic losses to which their entitlement flows only from a contract." Werwinski v. Ford Motor Co., 286 F.3d 661, 671 (3d Cir. 2002). Tort law does not function to compensate for a "breach of duties assumed only by agreement." Factory Mkt. v. Schuller Int'l, 987 F. Supp. 387, 395 (E.D. Pa. 1995) (Newcomer, J.).

Plaintiff's negligent misrepresentation claim is quickly dispatched; the economic loss doctrine bars claims for negligent misrepresentation. See Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 620 (3d Cir. 1995); Factory Mkt., 987 F. Supp. at 397 (negligence claim barred by economic loss doctrine); Sun Co. v. Badger Design & Constructors, 939 F. Supp. 365, 374 (E.D. Pa. 1996) (Padova, J.). A party negotiating with another can insist on contract language that protects it against the other party's "innocent, but wrong" representations. Duquesne Light, 66 F.3d at 620. Therefore, Reilly Foam's negligent misrepresentation claim is dismissed.

The intentional misrepresentation claim presents a more complicated issue. Recently, the Third Circuit held that an [**38] intentional misrepresentation claim is barred by the

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economic loss doctrine in the context of a products liability lawsuit where the representation concerned the character of the goods. See Werwinski, 286 F.3d at 674-81. The Court of Appeals found intentional misrepresentation claims are generally preempted by the economic loss rule, but noted an exception in limited instances in which a defendant committed fraud to induce another to enter a contract. However, if the alleged misrepresentation inducing the party to enter the contract concerned the quality or character of goods, the exception does not apply and the economic loss rule bars the misrepresentation claim. See id. at 676, 680-81 (citing Huron Tool & Engineering Co. v. Precision Consulting Servs., 209 Mich. App. 365, 532 N.W.2d 541 (Mich. Ct. App. 1995)). The Court reasoned that the parties were free to negotiate a warranty and other terms to address possible defects in the goods. See id. The Court also feared that if every fraudulent inducement claim to survive independently of the contract, then "tort law would swallow contract law." Id. at 678. [*659] Inducement claims [**39] remain viable only when a party makes a representation extraneous to the contract, but not when the representations concern the subject matter of the contract or the party's performance. See id. at 678 (quoting Rich Prod. Corp. v. Kemutec, 66 F. Supp. 2d 937, 979 (E.D. Wis. 1999)).

Plaintiff's sole argument that the economic loss doctrine does not apply is that Rubbermaid's statements preceded and were collateral to the contract. In light of Werwinski, Reilly Foam cannot avoid application of the doctrine. Reilly Foam's claim is predicated on Rubbermaid's failure to make its requirements purchases exclusively from Reilly Foam; the damages it seeks are for economic benefits to which it was only entitled under the contract. The quantity terms were directly discussed between the parties in a commercial setting, and Reilly Foam could have insisted upon contract terms to protect itself. Its expectation damages are now protected by contract law and not tort law. 11

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11 Plaintiff has not addressed whether the economic loss doctrine is applicable outside the context of warranty actions. Therefore, the Court deems the argument waived. A fuller discussion of the issue can be found in other cases. See Factory Mkt., 987 F. Supp. at 397; Sun Co., 939 F. Supp. at 372-73 (economic loss rule applicable to contract for management services); Auger v. Stouffer Corp., Civ. A. No. 93-2529, 1993 U.S. Dist. LEXIS 12719, at *11, 1993 WL 364622, at *5 (E.D. Pa. Aug. 31, 1993) (Weiner, J.) (applicable in hotel management context); Palco Linings, Inc. v. Pavex, Inc., 755 F. Supp. 1269, 1272 (M.D. Pa. 1990) (applicable to construction contract); PPG Indus., Inc. v. Sundstrand Corp., 681 F. Supp. 287 (W.D.Pa. 1988) (installation contract). But see Public Serv. Enter. Group, Inc. v. Phila. Elec. & Gas Co., 722 F. Supp. 184, 211 (D.N.J. 1989) ("Pennsylvania law cases have, for the most part, not extended [the economic loss doctrine] out of the warranty context" and labeling PPG a warranty case).

[**40] C. Promissory Estoppel and Restitution

In Counts Five and Six of the Amended Complaint, Reilly Foam sues for promissory estoppel and unjust enrichment. The parties here dispute the terms of the contract; they do not contest that one was formed. Claims of promissory estoppel and restitution are not cognizable where the parties have a contract. See Carlson v. Arnot-Ogden Mem. Hosp., 918 F.2d 411, 416 (3d Cir. 1990) (promissory estoppel only invoked "where the formal requirements of contract formation have not been satisfied and where justice would be served by enforcing a promise"); Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 999 (3d Cir. 1987) (holding unjust enrichment "inapplicable when the relationship between the parties is founded on a written agreement").

Reilly Foam urges that these counts be sustained because the contract does not explicitly provide for its recoupment of capital costs for machinery and licensing. However, "promissory estoppel. . . is not designed to protect parties who do not adequately memorialize their contracts in writing." Iversen Baking Co., Inc. v. Weston

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Foods, Ltd., 874 F. Supp. 96, [**41] (E.D. Pa. 1995). Restitution is similarly unavailable where a contract fixes the amount of compensation due. See Hershey Food Corp., 828 F.2d at 999. Reilly Foam had a sufficient opportunity to protect its expectations through express contract terms and cannot now rely on consideration substitutes and quasi-contract theory. Counts Five and Six are therefore dismissed.

IV. RUBBERMAID'S PETITION FOR FEES AND EXPENSES

Finally, Defendants seek monetary sanctions for Plaintiff's belated production [*660] of a revised economic expert report. Plaintiff's expert report was due March 8, 2002 per Court order. Plaintiff unavailingly contacted chambers to request an extension. Undeterred, Plaintiff produced a revised report by its economic experts on March 20, 2002, which Rubbermaid promptly moved to exclude as untimely. Exclusion is a drastic remedy for untimely production. See e.g. DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193, 1201-02 (3d Cir. 1978) (applying four factor test and deeming exclusion of expert evidence on untimeliness grounds to constitute reversible error); Bowersfield v. Suzuki Motor Corp., 151 F. Supp. 2d 625, 632 (E.D. Pa. 2001) [**42] (labeling exclusion of evidence a "drastic sanction" and permitting expert to opine beyond information contained in expert report). I found that Rubbermaid had adequate time to prepare an expert report of its own before trial and permitted it to prepare a report addressing contentions raised in Plaintiff's supplemental expert report. For Plaintiff's wilful violation of the Court's scheduling order, it was required to pay defense costs incurred due to the late report, including those incurred to prepare the Motion to Strike and to produce a second expert report. See FED. R. CIV. P. 16(f) (authorizing sanctions on violator of Rule 16 order including attorney's fees and other orders which court deems "just"). Rubbermaid then submitted a petition for $1,573.00 in legal fees and $5,640.13 in costs.

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Having reviewed the defendant's supplemental expert report, the Court finds that the new report is not all that new; it shares the same analysis, contentions and conclusions with the original. Thus, the Court is at a loss for why a veteran financial analyst like Geoffery Osborne spent so much time on it. The Court understands that a defense expert must be meticulous in his review of detail, [**43] but such an extravagance should not be taxed to the opposing party. Moreover, I am mindful that the Plaintiff's lapse was not so severe as to require heavy punishment to ensure compliance with future court orders. Rubbermaid had every right to produce a supplemental report of its own and to look to the plaintiff for recompense, but a bill for $7,213.13 bill is too onerous a fine for producing a report twelve days late. Therefore, the bill of costs is reduced, and Plaintiff is taxed $1,573.00 in attorneys fees and $2,500.00 in taxable costs. In accord with Plaintiff's request, the sanctions are stayed pending trial.

V. CONCLUSION

In summary, Rubbermaid has breached the contract in failing: (1) to make minimum annual purchases of "other affected products" as set forth on the March 26 price list; (2) to purchase two million sponges under the "other affected products" category with a $0.015 surcharge within two years of the contract date. Reilly Foam must prove at trial the extent of its damages. Reilly Foam may also sue for Rubbermaid's alleged failure to make good faith efforts to ensure that New Knight purchased all of its requirements of butterfly mop sponges for Rubbermaid [**44] products from Reilly Foam until New Knight went bankrupt in August 2001. The remainder of Plaintiff's contract claims are dismissed. Plaintiff's claims for fraudulent misrepresentation, negligent misrepresentation, promissory estoppel, and unjust enrichment are dismissed. Plaintiff is ordered to pay sanctions in the amount of $1,573.00 in attorneys fees and $2,500.00 in taxable costs.

An appropriate order follows.

ORDER

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AND NOW, this 28th day of May, 2002, upon consideration of the Parties' Cross-motions for Summary Judgment, Defendant's Motion for Sanctions, and opposition thereto, it is hereby ORDERED that:

[*661]

(1) Plaintiff's Motion for Partial Summary is GRANTED IN PART. Rubbermaid has breached the contract in failing: (1) to make minimum annual purchases of "other affected products" as set forth on the March 26 price list; (2) to purchase two million sponges under the "other affected products" category with a $0.015 surcharge within two years of the contract date. Plaintiff must establish the actual number of "other affected products" purchased during the two-year contract period..

(2) Reilly Foam may also sue for Rubbermaid's alleged failure [**45] to make good faith efforts to ensure that New Knight purchased all of its requirements of butterfly mop sponges for Rubbermaid products from Reilly Foam until New Knight went bankrupt in August 2001.

(3) Defendant's Motion for Summary Judgment is GRANTED IN PART. The Plaintiff's contract claims not discussed in paragraphs one and two of this Order are dismissed. Partial judgment is entered for the Defendant on Count III (Fraudulent Misrepresentation); Count IV (Negligent Misrepresentation); Count V (Detrimental Reliance/Promissory Estoppel); and Count VI (Unjust Enrichment), and those counts of the Complaint are DISMISSED.

(4) Defendant's Motion for Sanctions is GRANTED as follows: Plaintiff is ordered to pay sanctions to the Defendant in the amount of $1,573.00 in attorneys fees and $2,500.00 in taxable costs. Payment is stayed pending trial.

¿No fue la writ de assumpsit calcado sobre la acción de laesio fidei del derecho canónico? ¿Esto explica por qué las obligaciones contractuales en el país del norte son tan ajenas a lo que conocemos por el derecho civil? ¿Es un sistema contractual que deriva más bien del derecho canónico?

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II. LA EXCEPCIÓN DE DOLO PESE A NO TENER VINCULACIÓN CONTRACTUAL

A. LA VIABILIDAD DE LOS RECURSOS EQUITATIVOS CUANDO NO EXISTEN RECURSOS JURÍDICOS ADECUADOS

PROMISSORY ESTOPPEL

ANDREW D. RICKETTS, EXECUTOR, v. KATIE SCOTHORN. SUPREME COURT OF NEBRASKA 57 Neb. 51; 77 N.W. 365 December 8, 1898, Filed

OPINIÓN POR: SULLIVAN

[*52] [**365] The opinion contains a statement of the case.

[*53] In the district court of Lancaster county the plaintiff Katie Scothorn recovered judgment against the defendant [*54] Andrew D. Ricketts, as executor of the last will and testament of John C. Ricketts, deceased. The action was based upon a [**366] promissory note, of which the following is a copy:

"May the first, 1891. I promise to pay to Katie Scothorn on demand, $ 2,000, to be at 6 per cent per annum. J. C. RICKETTS."

In the petition the plaintiff alleges that the consideration for the execution of the note was that she should surrender her employment as bookkeeper for Mayer Bros. and cease to work for a living. She also alleges that the note was given to induce her to abandon her occupation, and that, relying on it, and on the annual interest, as a means of support, she gave up the employment in which she was then engaged. These allegations of the petition are denied by the executor. The material facts are undisputed. They are as follows: John C. Ricketts, the maker of the note, was the grandfather of the plaintiff. Early in May,--presumably on the day the note bears date,--he called on her at the store where she was working. What transpired between them is thus described by Mr. Flodene, one of the plaintiff's witnesses:

A. Well the old gentleman came in there one morning about 9 o'clock,--probably a little before or a little after, but

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early in the morning,--and he unbuttoned his vest and took out a piece of paper in the shape of a note; that is the way it looked to me; and he says to Miss Scothorn, "I have fixed out something that you have not got to work any more." He says, "None of my grandchildren work and you don't have to."

Q. Where was she?

A. She took the piece of paper and kissed him; and kissed the old gentleman and commenced to cry.

It seems Miss Scothorn immediately notified her employer of her intention to quit work and that she did soon after abandon her occupation. The mother of the plaintiff was a witness and testified that she had a conversation with her father, Mr. Ricketts, shortly after the [*55] note was executed in which he informed her that he had given the note to the plaintiff to enable her to quit work; that none of his grandchildren worked and he did not think she ought to. For something more than a year the plaintiff was without an occupation; but in September, 1892, with the consent of her grandfather, and by his assistance, she secured a position as bookkeeper with Messrs. Funke & Ogden. On June 8, 1894, Mr. Ricketts died. He had paid one year's interest on the note, and a short time before his death expressed regret that he had not been able to pay the balance. In the summer or fall of 1892 he stated to his daughter, Mrs. Scothorn, that if he could sell his farm in Ohio he would pay the note out of the proceeds. He at no time repudiated the obligation. We quite agree with counsel for the defendant that upon this evidence there was nothing to submit to the jury, and that a verdict should have been directed peremptorily for one of the parties. The testimony of Flodene and Mrs. Scothorn, taken together, conclusively establishes the fact that the note was not given in consideration of the plaintiff pursuing, or agreeing to pursue, any particular line of conduct. There was no promise on the part of the plaintiff to do or refrain from doing anything. Her right to the money promised in the note was not made to depend upon an abandonment of her employment with Mayer Bros. and

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future abstention from like service. Mr. Ricketts made no condition, requirement, or request. He exacted no quid pro quo. He gave the note as a gratuity and looked for nothing in return. So far as the evidence discloses, it was his purpose to place the plaintiff in a position of independence where she could work or remain idle as she might choose. The abandonment by Miss Scothorn of her position as bookkeeper was altogether voluntary. It was not an act done in fulfillment of any contract obligation assumed when she accepted the note. The instrument in suit being given without any valuable consideration, was nothing more than a promise to make a gift in the future of the [*56] sum of money therein named. Ordinarily, such promises are not enforceable even when put in the form of a promissory note. (Kirkpatrick v. Taylor, 43 Ill. 207; Phelps v. Phelps, 28 Barb. 121; Johnston v. Griest, 85 Ind. 503; Fink v. Cox, 18 Johns. 145.) But it has often been held that an action on a note given to a church, college, or other like institution, upon the faith of which money has been expended or obligations incurred, could not be successfully defended on the ground of a want of consideration. (Barnes v. Perine, 12 N.Y. 18; Philomath College v. Hartless, 6 Ore. 158; Thompson v. Mercer County, 40 Ill. 379; Irwin v. Lombard University, 56 Ohio St. 9, 46 N.E. 63.) In this class of cases the note in suit is nearly always spoken of as a gift or donation, but the decision is generally put on the ground that the expenditure of money or assumption of liability by the donee, on the faith of the promise, constitutes a valuable and sufficient consideration. It seems to us that the true reason is the preclusion of the defendant, under the doctrine of estoppel, to deny the consideration. Such seems to be the view of the matter taken by the supreme court of Iowa in the case of Simpson Centenary College v. Tuttle, 71 Iowa 596, 33 N.W. 74, where Rothrock, J., speaking for the court, said: "Where a note, however, is based on a promise to give for the support of the objects referred to, it may still be open to this defense [want of consideration], unless it shall appear that the donee has, prior to any revocation, entered into

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engagements or made expenditures based on such promise, so that he must suffer loss or injury if the note is not paid. This is based on the equitable principle that, after allowing the donee to incur obligations on the faith that the note would be paid, the donor would be estopped from pleading want of consideration." And in the case of Reimensnyder v. Gans, 110 Pa. 17, 2 A. 425, which was an action on a note given as a donation to a [**367] charitable object, the court said: "The fact is that, as we may see from the case of Ryerss v. Trustees, 33 Pa. 114, a contract of the kind here involved [*57] is enforceable rather by way of estoppel than on the ground of consideration in the original undertaking." It has been held that a note given in expectation of the payee performing certain services, but without any contract binding him to serve, will not support an action. (Hulse v. Hulse, 84 E.C.L. 709.) But when the payee changes his position to his disadvantage, in reliance on the promise, a right of action does arise. (McClure v. Wilson, 43 Ill. 356; Trustees v. Garvey, 53 Ill. 401.)

Under the circumstances of this case is there an equitable estoppel which ought to preclude the defendant from alleging that the note in controversy is lacking in one of the essential elements of a valid contract? We think there is. An estoppel in pais is defined to be "a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." Mr. Pomeroy has formulated the following definition: "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy." (2 Pomeroy, Equity Jurisprudence 804.)

According to the undisputed proof, as shown by the record before us, the plaintiff was a working girl, holding a

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position in which she earned a salary of $ 10 per week. Her grandfather, desiring to put her in a position of independence, gave her the note, accompanying it with the remark that his other grandchildren did not work, and that she would not be obliged to work any longer. In effect he suggested that she might abandon her employment and rely in the future upon the bounty which he promised. He, doubtless, desired that she should give [*58] up her occupation, but whether he did or not, it is entirely certain that he contemplated such action on her part as a reasonable and probable consequence of his gift. Having intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker, or his executor, to resist payment on the ground that the promise was given without consideration. The petition charges the elements of an equitable estoppel, and the evidence conclusively establishes them. If errors intervened at the trial they could not have been prejudicial. A verdict for the defendant would be unwarranted. The judgment is right and is

Affirmed.

HOFFMAN and wife, Plaintiffs, v. RED OWL STORES, INC., and another, Defendants. SUPREME COURT OF WISCONSIN 26 Wis. 2d 683; 133 N.W.2d 267 February 5, 1965, Argued March 2, 1965, Decided

OPINIÓN POR: CURRIE

[*693] [**272] The instant appeal and cross appeal present these questions:

(1) Whether this court should recognize causes of action grounded on promissory [**273] estoppel as exemplified by sec. 90 of Restatement, 1 Contracts?

(2) Do the facts in this case make out a cause of action for promissory estoppel?

(3) Are the jury's findings with respect to damages sustained by the evidence?

[*694] Recognition of a Cause of Action Grounded on Promissory Estoppel.

Sec. 90 of Restatement, 1 Contracts, provides (at p. 110):

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"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

The Wisconsin Annotations to Restatement, Contracts, prepared under the direction of the late Professor William H. Page and issued in 1933, stated (at p. 53, sec. 90):

"The Wisconsin cases do not seem to be in accord with this section of the Restatement. It is certain that no such proposition has ever been announced by the Wisconsin court and it is at least doubtful if it would be approved by the court."

Since 1933, the closest approach this court has made to adopting the rule of the Restatement occurred in the recent case of Lazarus v. American Motors Corp. (1963), 21 Wis. (2d) 76, 85, 123 N. W. (2d) 548, wherein the court stated:

"We recognize that upon different facts it would be possible for a seller of steel to have altered his position so as to effectuate the equitable considerations inherent in sec. 90 of the Restatement."

While it was not necessary to the disposition of the Lazarus Case to adopt the promissory-estoppel rule of the Restatement, we are squarely faced in the instant case with that issue. Not only did the trial court frame the special verdict on the theory of sec. 90 of Restatement, 1 Contracts, but no other possible theory has been presented to or discovered by this court which would permit plaintiffs to recover. Of [*695] other remedies considered that of an action for fraud and deceit seemed to be the most comparable. An action at law for fraud, however, cannot be predicated on unfulfilled promises unless the promisor possessed the present intent not to perform. Suskey v. Davidoff (1958), 2 Wis. (2d) 503, 507, 87 N. W. (2d) 306, and cases cited. Here, there is no evidence that would support a finding that Lukowitz made any of the promises, upon which plaintiffs' complaint is predicated, in bad faith

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with any present intent that they would not be fulfilled by Red Owl.

Many courts of other jurisdictions have seen fit over the years to adopt the principle of promissory estoppel, and the tendency in that direction continues. 1 As Mr. Justice McFaddin, speaking in behalf of the Arkansas court, well stated, that the development of the law of promissory estoppel "is an attempt by the courts to keep remedies abreast of increased moral consciousness of honesty and fair representations in all business dealings." Peoples National Bank of Little Rock v. [**274] Linebarger Construction Co. (1951), 219 Ark. 11, 17, 240 S. W. (2d) 12. For a further discussion of the doctrine of promissory estoppel, see 1A Corbin, Contracts, pp. 187 et seq., secs. 193-209; 3 Pomeroy's Equity Jurisprudence (5th ed.), pp. 211 et seq., sec. 808b; 1 Williston, Contracts (Jaeger's 3d ed.), pp. 607 et seq., [*696] sec. 140; Boyer, Promissory Estoppel: Requirements and Limitations of the Doctrine, 98 University of Pennsylvania Law Review (1950), 459; Seavey, Reliance Upon Gratuitous Promises or Other Conduct, 64 Harvard Law Review (1951), 913; Annos. 115 A. L. R. 152, and 48 A. L. R. (2d) 1069.

1 Among the many cases which have granted relief grounded upon promissory estoppel are: Goodman v. Dicker (D. C., D. C. 1948), 169 Fed. (2d) 684; Drennan v. Star Paving Co. (1958), 51 Cal. (2d) 409, 333 Pac. (2d) 757; Van Hook v. Southern California Waiters Alliance (1958), 158 Cal. App. (2d) 556, 323 Pac. (2d) 212; Chrysler Corp. v. Quimby (1958), 51 Del. 264, 144 Atl. (2d) 123, 144 Atl. (2d) 885; Lusk-Harbison-Jones, Inc., v. Universal Credit Co. (1933), 164 Miss. 693, 145 So. 623; Feinberg v. Pfeiffer Co. (Mo. App. 1959), 322 S. W. (2d) 163; Schafer v. Fraser (1955), 206 Or. 446, 290 Pac. (2d) 190, 294 Pac. (2d) 609; Northwestern Engineering Co. v. Ellerman (1943), 69 S. D. 397, 10 N. W. (2d) 879.

The Restatement avoids use of the term "promissory estoppel," and there has been criticism of it as an inaccurate term. See 1A Corbin, Contracts, p. 232 et seq., sec. 204. On the other hand, Williston advocated the use of this term or

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something equivalent. 1 Williston, Contracts (1st ed.), p. 308, sec. 139. Use of the word "estoppel" to describe a doctrine upon which a party to a lawsuit may obtain affirmative relief offends the traditional concept that estoppel merely serves as a shield and cannot serve as a sword to create a cause of action. See Utschig v. McClone (1962), 16 Wis. (2d) 506, 509, 114 N. W. (2d) 854. "Attractive nuisance" is also a much-criticized term. See concurring opinion, Flamingo v. Waukesha (1952), 262 Wis. 219, 227, 55 N. W. (2d) 24. However, the latter term is still in almost universal use by the courts because of the lack of a better substitute. The same is also true of the wide use of the term "promissory estoppel." We have employed its use in this opinion not only because of its extensive use by other courts but also since a more-accurate equivalent has not been devised.

Because we deem the doctrine of promissory estoppel, as stated in sec. 90 of Restatement, 1 Contracts, is one which supplies a needed tool which courts may employ in a proper case to prevent injustice, we endorse and adopt it.

Applicability of Doctrine to Facts of this Case.

The record here discloses a number of promises and assurances given to Hoffman by Lukowitz in behalf of Red [*697] Owl upon which plaintiffs relied and acted upon to their detriment.

Foremost were the promises that for the sum of $ 18,000 Red Owl would establish Hoffman in a store. After Hoffman had sold his grocery store and paid the $ 1,000 on the Chilton lot, the $ 18,000 figure was changed to $ 24,100. Then in November, 1961, Hoffman was assured that if the $ 24,100 figure were increased by $ 2,000 the deal would go through. Hoffman was induced to sell his grocery store fixtures and inventory in June, 1961, on the promise that he would be in his new store by fall. In November, plaintiffs sold their bakery building on the urging of defendants and on the assurance that this was the last step necessary to have the deal with Red Owl go through.

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We determine that there was ample evidence to sustain the answers of the jury to the questions of the verdict with respect to the promissory representations made by Red Owl, Hoffman's reliance thereon in the exercise of ordinary care, and his fulfilment of the conditions required of him by the terms of the negotiations had with Red Owl.

There remains for consideration the question of law raised by defendants that agreement was never reached on essential factors necessary to establish a contract between Hoffman and Red Owl. Among these were the size, cost, design, and layout of the store building; and the terms of the lease with respect to rent, maintenance, renewal, and purchase options. This poses the question of whether the promise necessary to sustain a cause of action for promissory estoppel must embrace all essential details of a proposed transaction between promisor and promisee so as to be the equivalent of an offer that would [**275] result in a binding contract between the parties if the promisee were to accept the same.

Originally the doctrine of promissory estoppel was invoked as a substitute for consideration rendering a gratuitous [*698] promise enforceable as a contract. See Williston, Contracts (1st ed.), p. 307, sec. 139. In other words, the acts of reliance by the promisee to his detriment provided a substitute for consideration. If promissory estoppel were to be limited to only those situations where the promise giving rise to the cause of action must be so definite with respect to all details that a contract would result were the promise supported by consideration, then the defendants' instant promises to Hoffman would not meet this test. However, sec. 90 of Restatement, 1 Contracts, does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee. Rather the conditions imposed are:

(1) Was the promise one which the promisor should reasonably expect to induce action or forbearance of a

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definite and substantial character on the part of the promisee?

(2) Did the promise induce such action or forbearance?

(3) Can injustice be avoided only by enforcement of the promise? 2

2 See Boyer, 98 University of Pennsylvania Law Review (1950), 459, 460. "Enforcement" of the promise embraces an award of damages for breach as well as decreeing specific performance.

We deem it would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach-of-contract action. As Dean Boyer points out, it is desirable that fluidity in the application of the concept be maintained. 98 University of Pennsylvania Law Review (1950), 459, at page 497. While the first two of the abovelisted three requirements of promissory estoppel present issues of fact which ordinarily will be resolved by a jury, the third requirement, that the remedy can only be invoked where necessary to avoid injustice, is one that involves a policy decision by the court. Such a policy decision necessarily embraces an element of discretion.

[*699] We conclude that injustice would result here if plaintiffs were not granted some relief because of the failure of defendants to keep their promises which induced plaintiffs to act to their detriment.

Damages.

Defendants attack all the items of damages awarded by the jury.

The bakery building at Wautoma was sold at defendants' instigation in order that Hoffman might have the net proceeds available as part of the cash capital he was to invest in the Chilton store venture. The evidence clearly establishes that it was sold at a loss of $ 2,000. Defendants contend that half of this loss was sustained by Mrs. Hoffman because title stood in joint tenancy. They point out that no dealings took place between her and defendants as all negotiations were had with her husband. Ordinarily only the promisee and not third persons are entitled to enforce the remedy of promissory estoppel against the

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promisor. However, if the promisor actually foresees, or has reason to foresee, action by a third person in reliance on the promise, it may be quite unjust to refuse to perform the promise. 1A Corbin, Contracts, p. 220, sec. 200. Here not only did defendants foresee that it would be necessary for Mrs. Hoffman to sell her joint interest in the bakery building, but defendants actually requested that this be done. We approve the jury's award of $ 2,000 damages for the loss incurred by both plaintiffs in this sale.

Defendants attack on two grounds the $ 1,000 awarded because of Hoffman's [**276] payment of that amount on the purchase price of the Chilton lot. The first is that this $ 1,000 had already been lost at the time the final negotiations with Red Owl fell through in January, 1962, because the remaining $ 5,000 of purchase price had been due on October 15, 1961. The record does not disclose that the lot owner had [*700] foreclosed Hoffman's interest in the lot for failure to pay this $ 5,000. The $ 1,000 was not paid for the option, but had been paid as part of the purchase price at the time Hoffman elected to exercise the option. This gave him an equity in the lot which could not be legally foreclosed without affording Hoffman an opportunity to pay the balance. The second ground of attack is that the lot may have had a fair market value of $ 6,000, and Hoffman should have paid the remaining $ 5,000 of purchase price. We determine that it would be unreasonable to require Hoffman to have invested an additional $ 5,000 in order to protect the $ 1,000 he had paid. Therefore, we find no merit to defendants' attack upon this item of damages.

We also determine it was reasonable for Hoffman to have paid $ 125 for one month's rent of a home in Chilton after defendants assured him everything would be set when plaintiff sold the bakery building. This was a proper item of damage.

Plaintiffs never moved to Chilton because defendants suggested that Hoffman get some experience by working in a Red Owl store in the Fox River Valley. Plaintiffs, therefore, moved to Neenah instead of Chilton. After

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moving, Hoffman worked at night in an Appleton bakery but held himself available for work in a Red Owl store. The $ 140 moving expense would not have been incurred if plaintiffs had not sold their bakery building in Wautoma in reliance upon defendants' promises. We consider the $ 140 moving expense to be a proper item of damage.

We turn now to the damage item with respect to which the trial court granted a new trial, i.e., that arising from the sale of the Wautoma grocery-store fixtures and inventory for which the jury awarded $ 16,735. The trial court ruled that Hoffman could not recover for any loss of future profits for the summer months following the sale on June 6, 1961, but that damages would be limited to the difference between [*701] the sales price received and the fair market value of the assets sold, giving consideration to any goodwill attaching thereto by reason of the transfer of a going business. There was no direct evidence presented as to what this fair market value was on June 6, 1961. The evidence did disclose that Hoffman paid $ 9,000 for the inventory, added $ 1,500 to it and sold it for $ 10,000 or a loss of $ 500. His 1961 federal income-tax return showed that the grocery equipment had been purchased for $ 7,000 and sold for $ 7,955.96. Plaintiffs introduced evidence of the buyer that during the first eleven weeks of operation of the grocery store his gross sales were $ 44,000 and his profit was $ 6,000 or roughly 15 percent. On cross-examination he admitted that this was gross and not net profit. Plaintiffs contend that in a breach-of-contract action damages may include loss of profits. However, this is not a breach-of-contract action.

The only relevancy of evidence relating to profits would be with respect to proving the element of goodwill in establishing the fair market value of the grocery inventory and fixtures sold. Therefore, evidence of profits would be admissible to afford a foundation for expert opinion as to fair market value.

Where damages are awarded in promissory estoppel instead of specifically enforcing the promisor's promise, they should be only such as in the opinion of the court are

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necessary to prevent injustice. Mechanical or rule-of-thumb approaches to the damage problem should be avoided. In discussing remedies to be applied by courts in promissory estoppel we quote the following views of writers on the subject:

"Enforcement of a promise does not necessarily mean Specific Performance. [**277] It does not necessarily mean Damages for breach. Moreover the amount allowed as Damages may be determined by the plaintiff's expenditures or change of position in reliance as well as by the value to him of the [*702] promised performance. Restitution is also an 'enforcing' remedy, although it is often said to be based upon some kind of a rescission. In determining what justice requires, the court must remember all of its powers, derived from equity, law merchant, and other sources, as well as the common law. Its decree should be molded accordingly." 1A Corbin, Contracts, p. 221, sec. 200.

"The wrong is not primarily in depriving the plaintiff of the promised reward but in causing the plaintiff to change position to his detriment. It would follow that the damages should not exceed the loss caused by the change of position, which would never be more in amount, but might be less, than the promised reward." Seavey, Reliance on Gratuitous Promises or Other Conduct, 64 Harvard Law Review (1951), 913, 926.

"There likewise seems to be no positive legal requirement, and certainly no legal policy, which dictates the allowance of contract damages in every case where the defendant's duty is consensual." Shattuck, Gratuitous Promises -- A New Writ?, 35 Michigan Law Review (1936), 908, 912. 3

3 For expression of the opposite view, that courts in promissory-estoppel cases should treat them as ordinary breach of contract cases and allow the full amount of damages recoverable in the latter, see note, 13 Vanderbilt Law Review (1960), 705.

At the time Hoffman bought the equipment and inventory of the small grocery store at Wautoma he did so in order to gain experience in the grocery-store business. At

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that time discussion had already been had with Red Owl representatives that Wautoma might be too small for a Red Owl operation and that a larger city might be more desirable. Thus Hoffman made this purchase more or less as a temporary experiment. Justice does not require that the damages awarded him, because of selling these assets at the behest of defendants, should exceed any actual loss sustained measured by the difference between the sales price and the fair market value.

[*703] Since the evidence does not sustain the large award of damages arising from the sale of the Wautoma grocery business, the trial court properly ordered a new trial on this issue.

By the Court. -- Order affirmed. Because of the cross appeal, plaintiffs shall be limited to taxing but two thirds of their costs.

MARBUCCO CORP., d/b/a GRANITE STATE GLASS, Plaintiff, Appellant, v. SUFFOLK CONSTRUCTION COMPANY, INC., Defendant, Appellee. UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT 165 F.3d 103 January 25, 1999, Decided

OPINIÓN POR: CAMPBELL

[*104] CAMPBELL, Senior Circuit Judge. The principal issue in this appeal is whether New Hampshire law requires a disappointed bidder to demonstrate a private subcontractor's bad faith before the bidder may recover lost profit damages under a theory of promissory estoppel. The district court held that such a showing was necessary in this case, and it instructed the jury accordingly. We find no error in the court's instructions and therefore affirm.

Appellee Suffolk Construction Company, Inc., a Massachusetts general building contractor, was awarded a contract to build a new sports arena for the University of New Hampshire. Suffolk invited nine glass suppliers to bid on a portion [**2] of the job that required the fabrication and installation of some of the glass products for the arena. Among these suppliers was Appellant, Marbucco Corporation. Marbucco claimed that one of Suffolk's agents

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had told Marbucco's Vice-President that Marbucco's bid would be selected so long as it was the lowest. When Suffolk awarded the subcontract to another glass supplier whose bid was higher than Marbucco's, Marbucco sued in New Hampshire Superior Court, seeking damages for its bid preparations costs and lost profits.

Suffolk removed the action to the district court based on the parties' diversity of citizenship. By the time of trial, Marbucco had abandoned its claim for bid preparation costs and instead sought only lost profits, which it asserted to be approximately $ 71,000. Upon conclusion of the evidence, the district court provided the following instruction to the jury regarding Marbucco's claim:

The Plaintiff is making a claim for damages based on what is known as the doctrine of promissory estoppel. In order to prove a claim of promissory estoppel the plaintiff must [prove] by a preponderance of the evidence that, one: the defendant's employee made a promise to the [**3] plaintiff. Two: the defendant reasonably expected that its employee's promise would cause the plaintiff to act on the promise. Three: the plaintiff relied to its detriment on the defendant's promise. Four: the plaintiff's reliance on the promise was reasonable under the circumstances. And five: the defendant acted in bad faith.

Marbucco contends that the district court erred in instructing the jury that bad faith was a necessary element of its claim, limited, as it was, to lost profits. It contends, based on the Supreme Court of New Hampshire's decision in Marbucco v. City of Manchester, 137 N.H. 629, 632 A.2d 522 (N.H. 1993), that New Hampshire law requires a plaintiff seeking [*105] lost profits under a promissory estoppel theory to prove a defendant's bad faith only if the defendant is a municipality. We do not read City of Manchester as necessarily so limited. In that case, the New Hampshire court faced what it characterized as a question of first impression: whether a disappointed low bidder on a municipal contract could recover money damages from the municipality for failure to award it the contract, and if so, what measure of damages. See [**4] 632 A.2d at 524-25.

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The court ruled that damages could be recovered, noting that "municipalities are generally subject to the same financial consequences for their misconduct as private corporations." Id. at 524 (citation omitted). Regarding the appropriate measure of damages, the court stated:

In the ordinary case, the damages that an unsuccessful low bidder may recover should be limited to those it sustained directly by reason of its justifiable reliance upon the municipality's promise to award the contract to the lowest responsible bidder submitting all essential information prior to the bidding deadline, if it awarded it at all. Hence, damages ordinarily should be limited to the expenses incurred by the low bidder in its fruitless participation in the competitive bidding process, i.e., its bid preparation costs. To permit the recovery of greater damages in such cases could drain the public fisc in response to mere carelessness on the part of low level government officials. If a disappointed low bidder complies with all requirements of the bid instructions but is deprived of the contract through some conduct of the awarding authority tantamount to bad faith, [**5] however, then the recovery of lost profits should be the measure of damages.

Id. at 525 (citations omitted).

Marbucco places special emphasis on this passage in arguing that the bad faith requirement applies only when the defendant is a municipality. This, we think, conflates merely one rationale animating the City of Manchester decision with the holding of the case itself. To be sure, the City of Manchester court noted certain concerns when a municipal defendant is sued for failing to award a competitive bid, e.g., the possibility of damages "draining the public fisc" or the municipality's eroding the "public confidence in government . . . [by acting] in bad faith." See id. But these concerns can be understood as relating to the particular circumstances pertaining to that case, not as essential ingredients of the legal principle being applied. The legal basis of City of Manchester was, we believe, the court's recognition -- regardless whether the subcontractor was a public or private entity -- that bid preparation costs

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are the "ordinary" remedy for a promissory estoppel claim, leaving lost profits for exceptional cases where bad faith (or something [**6] akin to bad faith) is proven. The New Hampshire court cited to the Restatement (Second) of Contracts in support of its determination that justifiable reliance could give rise to a promissory estoppel claim in the case of a disappointed bidder. See Restatement (Second) of Contracts, § 90, comment d, illustrations 8 & 9; City of Manchester, 632 A.2d at 524. The Restatement makes no distinction in this aspect of the law between public and private entities. Indeed, it would be inconsistent with the court's earlier statement that " municipalities are generally subject to the same financial consequences for their misconduct as private corporations" to require public and private subcontractors to prove different elements to recover lost profits on a promissory estoppel claim. In short, City of Manchester does not deter, and in fact guides, our view that the Supreme Court of New Hampshire, if faced with the circumstances of this case, would authorize the court below to require Marbucco to prove Suffolk's bad faith in order to recover its lost profits.

As an alternative to ruling in its favor, Marbucco asks us to certify the question to the Supreme Court of New Hampshire. [**7] It is inappropriate, however, to use certification "when the course state courts would take is reasonably clear." Porter v. Nutter, 913 F.2d 37, 41 n.4 (1st Cir. 1990). Accordingly, we deny the motion to certify.

We also discern no error in the wording of the court's jury instruction on the definition of the term "bad faith." Black's Law Dictionary defines it as "the opposite of [*106] 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." Black's Law Dictionary (6th ed. 1990), p. 139. The Supreme Court of New Hampshire has defined it as an "intentional disregard of a duty or an intent to injure." Murphy v. Financial Development Corp., 126 N.H. 536,

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495 A.2d 1245, 1250 (N.H. 1985). The court's instruction here was as follows: " A party acts in bad faith if the party makes a promise with the knowledge that the promise will not be fulfilled and with the intention of inducing another to rely on the promise. [**8] " We believe that this instruction adequately summarized the concept of bad faith for purposes of the present case -- i.e., one in which a disappointed bidder is suing a subcontractor for failing to award it a contract.

Marbucco does not, in fact, question the correctness of this instruction insofar as it goes. Rather, Marbucco wanted the court to supplement the instruction with a follow-up instruction allegedly more relevant to the case at hand. The requested follow-up instruction provided, if there was a promise to award the contract to the qualified low bidder, [and] that the defendant was aware that that promise had been made and thereafter for no reasonable or legitimate reason chose not to award the contract to [Marbucco] even though it was the lowest qualified bidder, [then] that conduct would constitute bad faith.

It was, however, well within the trial judge's discretion to determine how fact-specific and detailed an instruction to give on this matter. Trial judges are in the best position to know when to stop in the instructional process, there being a fine line between adequate guidance and that which may confuse or unfairly influence the jury. "Bad faith" [**9] having been adequately defined, we are unable to say that the judge abused his ample discretion by choosing not to dilate further on the subject. See United States v. Rule Industries, Inc., 878 F.2d 535, 543 (1st Cir. 1989)("The trial court is not obligated . . . to use the precise words proposed by one party in its instructions; it is sufficient if the principle of law is correctly stated."); United States v. Paredes-Rodriguez, 160 F.3d 49, 53 (1st Cir. 1998) (trial judge's choice of wording in the instructions is reviewed only for abuse of discretion).

Affirmed. Motion to Certify denied.

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COTNAM v. WISDOM. SUPREME COURT OF ARKANSAS 83 Ark. 601; 104 S.W. 164 July 15, 1907, Opinion Delivered

OPINIÓN POR: HILL

[*604] [**165] The Reporter will state the issues and substance of the testimony, and set out instructions one and two given at instance of appellees, and it will be seen therefrom that instruction one amounted to a peremptory instruction to find for the appellees in some amount.

1. The first question is as to the correctness of this instruction. As indicated therein, the facts are that Mr. Harrison, appellant's intestate, was thrown from a street car, receiving serious injuries which rendered him unconscious, and while in that condition the appellees were notified of the accident and summoned to his assistance by some spectator, and performed a difficult operation in an effort to save his life, but they were unsuccessful, and he died without regaining consciousness. The appellant says: "Harrison was never conscious after his head struck the pavement. He did not and could not, expressly or impliedly, assent to the action of the appellees. He was without knowledge or will power. However merciful or benevolent may have been the intention of the appellees, a new rule of law, of contract by implication of law, will have to be established by this court in order to sustain the recovery." Appellant is right in saying that the recovery must be sustained by a contract by implication of law, but is not right in saying that it is a new rule of law, for such contracts are almost as old as the English system of jurisprudence. They are usually called "implied contracts;" more properly, they should be called quasi-contracts or constructive contracts. See 1 Page on Contracts, § 14; also 2 Page on Contracts, § 771.

[*605] The following excerpts from Sceva v. True, 53 N.H. 627, are peculiarly applicable here:

"We regard it as well settled by the cases referred to in the briefs of counsel, many of which have been commented on at length by Mr. Shirley for the defendant, that an insane

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person, an idiot, or a person utterly bereft of all sense and reason by the sudden stroke of an accident or disease, may be held liable, in assumpsit, for necessaries furnished to him in good faith while in that unfortunate and helpless condition. And the reasons upon which this rests are too broad, as well as too sensible and humane, to be overborne by any deductions which a refined logic may make from the circumstance that in such cases there can be no contract or promise in fact--no meeting of the minds of the parties. The cases put it on the ground of an implied contract; and by this is not meant, as the defendant's counsel seems to suppose, an actual contract--that is, an actual meeting of the minds of the parties, an actual, mutual understanding, to be inferred from language, acts and circumstances by the jury--but a contract and promise, said to be implied by the law, where, in point of fact, there was no contract, no mutual understanding, and so no promise. The defendant's counsel says it is usurpation for the court to hold, as a matter of law, that there is a contract and a promise when all the evidence in the case shows that there was not a contract, nor the semblance of one. It is doubtless a legal fiction, invented and used for the sake of the remedy. If it was originally usurpation, certainly it has now become very inveterate, and firmly fixed in the body of the law.

* * * *

"Illustrations might be multiplied, but enough has been said to show that, when a contract or promise implied by law is spoken of, a very different thing is meant from a contract in fact, whether express or tacit. The evidence of an actual contract is generally to be found, either in some writing made by the parties, or in verbal communications which passed between them, or in their acts and conduct considered in the light of the circumstances of each particular case. A contract implied by law, on the contrary, rests upon no evidence. It has no actual existence; it is simply a mythical creation of the law. The laws says that it shall be taken that there was a [**166] promise when, in [*606] point of fact, there was none. Of course, this is not good logic, for the obvious and sufficient reason that it is

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not true. It is a legal fiction, resting wholly for its support on a plain legal obligation and a plain legal right. If it were true, it would not be a fiction. There is a class of legal rights, with their correlative legal duties, analogous to the obligationes quasi ex contractu of the civil law, which seem to lie in the region between contracts on the one hand and torts on the other, and to call for the application of a remedy not strictly furnished either by actions ex contractu or actions ex delicto. The common law supplies no action of duty, as it does of assumpsit and trespass; and hence the somewhat awkward contrivance of this fiction to apply the remedy of assumpsit where there is no true contract, and no promise to support it."

This subject is fully discussed in Beach on the Modern Law of Contracts, 639 et seq., and 2 Page on Contracts, § 771 et seq. One phase in the law of implied contracts was considered in the case of Lewis v. Lewis, 75 Ark. 191, 87 S.W. 134.

In its practical application, it sustains recovery for physicians and nurses who render services for infants, insane persons and drunkards. 2 Page on Contracts, §§ 867, 897, and 906. And services rendered by physicians to persons unconscious or helpless by reason of injury or sickness are in the same situation as those rendered to persons incapable of contracting, such as the classes above described. Raoul v. Newman, 59 Ga. 408; Meyer v. K. of P., 64 L.R.A. 839.

The court was therefore right in giving the instruction in question.

2. The defendant sought to require the plaintiff to prove, in addition to the value of the services, the benefit, if any, derived by the deceased from the operation, and alleges error in the court refusing to so instruct the jury. The court was right in refusing to place this burden upon the physicians. The same question was considered in Ladd v. Witte, 116 Wis. 35, 92 N.W. 365, where the court said: "That is not at all the test. So that a surgical operation be conceived and performed with due skill and care, the price to be paid therefor does not depend upon the result. The

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event so generally lies with the forces of nature that all intelligent men know and understand that the surgeon is not [*607] responsible therefor. In absence of express agreement, the surgeon, who brings to such a service due skill and care earns the reasonable and customary price therefor, whether the outcome be beneficial to the patient or the reverse."

3. The court permitted to go to the jury the fact that Mr. Harrison was a bachelor, and that his estate would go to his collateral relatives, and also permitted proof to be made of the value of the estate, which amounted to about $ 18,500, including $ 10,000 from accident and life insurance policies.

There is a conflict in the authorities as to whether it is proper to prove the value of the estate of a person for whom medical services were rendered, or the financial condition of the person receiving such services. In Robinson v. Campbell, 47 Iowa 625, it was said: "There is no more reason why this charge should be enhanced on account of the ability of the defendants to pay than that the merchant should charge them more for a yard of cloth, or the druggist for filling a prescription, or a laborer for a day's work." On the other hand, see Haley's Succession, 50 La. Ann. 840, 24 So. 285; and Lange v. Kearney, 4 N.Y.S. 14, which was affirmed by the Court of Appeals, 127 N. Y. 676, holding that the financial condition of the patient may be considered.

Whatever may be the true principle governing this matter in contracts, the court is of the opinion that the financial condition of a patient cannot be considered where there is no contract and recovery is sustained on a legal fiction which raises a contract in order to afford a remedy which the justice of the case requires.

In Morrisette v. Wood, 123 Ala. 384, 26 So. 307, the court said: "The trial court erred in admitting testimony as to the value of the patient's estate, against the objection of the defendant. The inquiry was as to the value of the professional services rendered by the plaintiff to the defendant's testator, and, as the case was presented below,

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the amount or value of the latter's estate could shed no legitimate light upon this issue nor aid in its elucidation. The cure or amelioration of disease is as important to a poor man as it is to a rich one, and, prima facie at least, the services rendered the one are of the same value as the same services rendered to the other. If there was a recognized usage obtaining [*608] in the premises here involved to graduate professional charges with reference to the financial condition of the person for whom such services are rendered, which had been so long established and so universally acted upon as to have ripened into a custom of such character that it might be considered that these services were rendered and accepted in contemplation of it, there is no hint of it in the evidence."

There was evidence in this case proving that it was customary for physicians to graduate their charges by the ability of the patient to pay, and hence, in regard to that element, this case differs from the Alabama case. But the value of the Alabama decision is the reason given which may admit such evidence, viz., because the custom would render the financial condition of the patient a factor to be contemplated by both parties when the services were rendered and accepted.

The same thought, differently expressed, is found in Lange v. Kearney, 4 N.Y.S. 14.

This could not apply to a physician called in an emergency by some bystander to attend a stricken man whom he never saw or [**167] heard of before; and certainly the unconscious patient could not, in fact or in law, be held to have contemplated what charges the physician might properly bring against him. In order to admit such testimony, it must be assumed that the surgeon and patient each had in contemplation that the means of the patient would be one factor in determining the amount of the charge for the services rendered. While the law may admit such evidence as throwing light upon the contract and indicating what was really in contemplation when it was made, yet a different question is presented when there is no contract to be ascertained or construed, but a mere

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fiction of law creating a contract where none existed in order that there might be a remedy for a right. This fiction merely requires a reasonable compensation for the services rendered. The services are the same, be the patient prince or pauper, and for them the surgeon is entitled to fair compensation for his time, service and skill. It was, therefore, error to admit this evidence and to instruct the jury in the 2nd instruction that in determining what was a reasonable charge they could consider the "ability to pay of the person operated upon."

[*609] It was improper to let it go to the jury that Mr. Harrison was a bachelor, and that his estate was left to nieces and nephews. This was relevant to no issue in the case, and its effect might well have been prejudicial. While this verdict is no higher than some of the evidence would justify, yet it is much higher than some of the other evidence would justify, and hence it is impossible to say that this was a harmless error.

Judgment is reversed and cause remanded.

CONCUERDA CON ESTA OPINIÓN: BATTLE; Wood

Justices BATTLE and Wood concur in sustaining the recovery and in holding that it was error to permit the jury to consider the fact that his estate would go to collateral heirs, but they do not concur in holding that it was error to admit evidence of the value of the estate and instructing that it might be considered in fixing the charge.

CONFOLD PACIFIC, INC., Plaintiff-Appellant, v. POLARIS INDUSTRIES, INC., Defendant-Appellee. UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 433 F.3d 952 September 23, 2005, Argued January 10, 2006, Decided

OPINIÓN POR: POSNER

[*954] The district judge granted summary judgment for the defendant, Polaris, a manufacturer of snowmobiles and other vehicles, in this diversity suit by ConFold for breach of contract and unjust enrichment. Polaris used to ship its vehicles in disposable containers, but in 1993 it began considering the possibility of using returnable

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containers instead. ConFold was a new company that wanted to produce such containers, and in the following two years, assisted by a management consulting and software development firm named CAPS Logistics, it conducted a "reverse logistics analysis" of Polaris's shipping needs. That is an analysis of how best to deal with goods returned by customers, for example whether to refurbish and resell them, recycle [**2] them, reuse their components, sell them as scrap, or tell the customer to discard them. Sarah Mason, "Backward Progress," Industrial Engineer, Aug. 1, 2002, p. 3; Patricia J. Daugherty, "Information Support for Reverse Logistics: The Influence of Relationship Commitment," 23 J. Bus. Logistics 85 (2002). It was conducted pursuant to an agreement, prepared by ConFold, between it and Polaris that was entitled "Mutual Non-Disclosure Agreement--Logistics Consulting Version." That agreement is the basis of ConFold's claim of breach of contract.

Two months after the agreement was signed, Polaris requested proposals for the design of a returnable container that would fit its needs. The request was sent to nine firms, including ConFold. All ConFold was told was that "your design will be one of nine considered at this point." Polaris accepted none of the proposals. But a few years later it designed a returnable container and subsequently began using containers manufactured by a firm to which it had given the design. ConFold claims that Polaris's design was based on the design that ConFold had submitted to Polaris in response to the request for proposals.

The breach of contract issue [**3] is whether the "Mutual Non-Disclosure Agreement--Logistics Consulting Version" bound Polaris not to reveal to a third party any returnable-container design that ConFold submitted to Polaris. The title of the contract suggests it did not, that the scope of the nondisclosure agreement was confined to reverse logistics analysis. The suggestion is reinforced by the timing; for when the contract was signed, the dealings between the parties related only to that analysis, which ConFold was to conduct for Polaris. The preamble to the

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contract states, moreover, that "ConFold has information relating to its proprietary software systems, documentation, and related consulting services which it considers to be proprietary," and the phrase "software systems, documentation, and related consulting services" refers to the reverse logistics analysis itself, for it was to that analysis that the software, documentation, and consulting services pertained. The implication is that the only proprietary information that ConFold would be revealing to Polaris would be information relating to the analysis.

This interpretation is bolstered by the statement in the contract that it is the "entire Agreement between [**4] the two parties concerning the exchange and protection of proprietary information relating to the program" (emphasis added). The only program in the contemplation of the parties was the software program to be used to produce the reverse logistics analysis, and the information that would be proprietary [*955] was the software and other materials relating to that analysis. It is one thing to determine whether a customer ought to switch to returnable containers and another to design the containers that the customer will use if he does switch. There is no hint in the contract that the design of containers was within its scope.

The district judge might have decided that the contract unambiguously excluded design information, in which event no evidence beyond the contract itself would have had to be considered. Especially when dealing with a substantial contract between "commercially sophisticated parties ...who know how to say what they mean and have an incentive to draft their agreement carefully," Bank of America, N.A. v. Moglia, 330 F.3d 942, 946 (7th Cir. 2003), there is great merit to the rule that the meaning of an unambiguous contract is a question of law rather than [**5] of fact, e.g., Columbia Propane, L.P. v. Wisconsin Gas Co., 250 Wis. 2d 582, 2002 WI App 9, 640 N.W.2d 819, 826 (Wis. App. 2001), rev'd on other grounds, 2003 WI 38, 261 Wis. 2d 70, 661 N.W.2d 776 (Wis. 2003); Insurance Co. of North America v. DEC Int'l, Inc., 220 Wis. 2d 840, 586 N.W.2d 691, 693 (Wis. App. 1998), with the consequence

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"that unambiguous contractual language must be enforced as it is written." Town of Neenah Sanitary Dist. No. 2 v. City of Neenah, 256 Wis. 2d 296, 2002 WI App 155, 647 N.W.2d 913, 916 (Wis. App. 2002); see also Folkman v. Quamme, 2003 WI 116, 264 Wis. 2d 617, 665 N.W.2d 857, 864 (Wis. 2003). The rule enables contract disputes to be resolved quickly and cheaply, "protects the parties against the vagaries of the litigation process--a major reason for committing contracts to writing--without too great a risk of misinterpretation," and by thus minimizing both contractual transaction costs and uncertainty increases the value of contracts as means of conducting business. Bank of America, N.A. v. Moglia, supra, 330 F.3d at 946.

Enforcing contracts as written has particular merit when the party that drafted the contract, which [**6] is to say ConFold (though, as we'll see, ConFold was largely copying an earlier contract drafted by someone else), is arguing that it should be relieved from the consequences of having neglected to spell out its rights concerning the very core of the transaction. Walters v. Nat'l Props., LLC, 2005 WI 87, 282 Wis. 2d 176, 699 N.W.2d 71, 75 (Wis. 2005); Tranzact Technologies, Ltd. v. Evergreen Partners, Ltd., 366 F.3d 542, 546 n. 2 (7th Cir. 2004); Harris v. Union Electric Co., 787 F.2d 355, 365 n. 7 (8th Cir. 1986). For the only subject of the contract was confidentiality. Polaris, though it knew that ConFold manufactured returnable containers, couldn't be expected to peek into ConFold's mind and discover that ConFold thought the duty of confidentiality extended to materials, namely container designs, that were neither mentioned in the contract nor germane to the project for which Polaris had hired ConFold, which was a consulting rather than a design project.

It is true that a contract can be clear on its face--clear, that is, to a reader not familiar with the commercial context-- yet still be ambiguous when that context is restored. [**7] That is the domain of "extrinsic" or "latent" ambiguity. Dispatch Automation, Inc. v. Richards, 280 F.3d 1116, 1121 (7th Cir. 2002); Evergreen Investments,

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LLC v. FCL Graphics, Inc., 334 F.3d 750, 756 (8th Cir. 2003); Mews v. Beaster, 279 Wis. 2d 507, 2005 WI App 53, 694 N.W.2d 476, 479 (Wis. App. 2005). The parties to a sale of cotton may have specified that the cotton be shipped on the ship Peerless-- nothing ambiguous about such a provision to the uninformed reader-- but if it turns out that there are two ships by that name to which the contract might refer, the contract is revealed as ambiguous and extrinsic evidence (evidence beyond the words of the contract) is admissible to help resolve the [*956] ambiguity. Raffles v. Wichelhaus, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864).

The district judge found the contract in this case ambiguous, but not because of anything in the commercial context. Rather, he thought it ambiguous on its face, requiring him to consider extrinsic evidence, First Bank & Trust v. Firstar Information Services, Corp., 276 F.3d 317, 322 (7th Cir. 2001) (Wisconsin law), because of the further [**8] statement in the preamble that "ConFold and Polaris are desirous of exchanging information for purposes of both companies developing future business with each other." The referent of "future business" could just be the reverse logistics analysis, which had not begun because Polaris refused to approve the project until a confidentiality agreement was signed; it was in response to that demand that Confold submitted the agreement. But a more natural reading, reinforced by the fact that the quoted language is in that agreement and the logistics analysis is the subject of the agreement and thus "present" rather than "future" business, is that the reference was to a possible future sale by ConFold of returnable containers to Polaris. The parties hoped not only that the exchange would enable successful completion of the analysis but also that, if so, it might provide the foundation for a fruitful relationship at the next stage, when (and if) Polaris went into the market to buy returnable containers, possibly from ConFold. It is not unusual for a firm to be hired first as a consultant to advise a buyer on his needs, and later, when those needs are formulated, to bid to supply them; and ConFold's [**9]

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initial proposal to Polaris for the reverse logistics analysis actually quoted a price for additional services--including design.

The quoted language is best understood, however, as merely an explanation for why the parties were exchanging information, and committing to its confidentiality, concerning the reverse logistics analysis. They hoped to do future business; they did not commit to. ConFold's interpretation lacks sensible limits. It spreads the blanket of confidentiality over "exchanging information"- any information. This would require that any information the parties exchanged, including their phone numbers, be kept confidential (forever?), and that is an implausible intention to impute to them.

But having rightly or wrongly decided that the contract was ambiguous, the district judge turned to the extrinsic evidence-- and concluded that it clinched Polaris's interpretation of the contract rather than creating a triable issue. The briefs in our court contain a confusing discussion of how a court should treat extrinsic evidence under various assumptions. ConFold mistakenly concedes that if that evidence is undisputed, the judge can interpret the contract without recourse to [**10] a trial. Not so; for if there is tension between that evidence and the words of the contract, or if for any other reason the meaning of the contract remains uncertain even after the extrinsic evidence is presented, there must be a trial to determine the contract's meaning. Miller v. McLean County Unit Dist. No. 5 (In re Modern Dairy, Inc.), 171 F.3d 1106, 1109 (7th Cir. 1999); Mathews v. Sears Pension Plan, 144 F.3d 461, 468 (7th Cir. 1998). The task of the trier of fact in a contract case includes putting together bits and pieces of evidence in order to create a convincing mosaic of meaning, rather than just resolving outright conflicts in extrinsic evidence. Western Industries, Inc. v. Newcor Canada Ltd., 739 F.2d 1198, 1205 (7th Cir. 1984) (Wisconsin law).

Nevertheless the undisputed extrinsic evidence so strongly supported Polaris that, considering that the language of the contract was only minimally ambiguous, a

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trial could have had but one out [*957] come. For it turned out that the confidentiality agreement had been copied from ConFold's confidentiality agreement with CAPS, a contract drafted by CAPS and limited to that firm's proprietary software and related intellectual [**11] property; CAPS does not design containers. Moreover, ConFold had a form confidentiality agreement "specific for design" but did not ask Polaris to sign it.

So summary judgment was properly granted on the contract claim, and we turn to the other claim, which is for unjust enrichment. ConFold contends that by exploiting its design for returnable containers Polaris wrongfully enriched itself to the tune of more than $ 25 million. Polaris denies that the returnable containers that it is using are based on ConFold's design, but the district judge did not reach that issue; nor need we.

ConFold argues that Minnesota law governs the unjust enrichment claim, Polaris that Wisconsin law does. (The contract claim is governed by general principles of contract law, rather than anything special to the law of either state.) Wisconsin law denies recovery for unjust enrichment if all the defendant has done is use (to his profit) an idea of the plaintiff that is not a trade secret. Gary Van Zeeland Talent, Inc. v. Sandas, 84 Wis. 2d 202, 267 N.W.2d 242, 249 (Wis. 1978); Abbott Laboratories v. Norse Chemical Corp., 33 Wis. 2d 445, 147 N.W.2d 529, 541 (Wis. 1967). Minnesota [**12] law contains hints of a contrary view. Rehabilitation Specialists, Inc. v. Koering, 404 N.W.2d 301, 302, 306-07 (Minn. App. 1987); Tate v. Scanlan Int'l, Inc., 403 N.W.2d 666, 671-72 (Minn. App. 1987); Micro Display Systems, Inc. v. Axtel, Inc., 699 F. Supp. 202, 205 (D. Minn. 1988) (Minnesota law). We doubt that there is a real conflict, for reasons explained below. But in any event the district judge was correct that Wisconsin would apply its own law to a case such as this. The Wisconsin cases adopt a presumption in favor of applying Wisconsin law to cases litigated in the state, as this case was. State Farm Mutual Automobile Ins. Co. v. Gillette, 2002 WI 31, 251 Wis. 2d 561, 641 N.W.2d 662, 676 (Wis. 2002); Hunker v. Royal Indemnity Co., 57

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Wis. 2d 588, 204 N.W.2d 897, 902-03 (Wis. 1973); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408, 416-17 (Wis. 1965). The presumption, the district judge rightly concluded in granting summary judgment for Polaris on this branch of the case as well, has not been rebutted, especially when we consider that ConFold both is incorporated in Wisconsin and, more important, [**13] has its principal place of business there. Beloit Liquidating Trust v. Grade, 2004 WI 39, 270 Wis. 2d 356, 677 N.W.2d 298, 306-07 (Wis. 2004).

The parties have hurled at us a bewildering array of terms on this branch of the case--"unjust enrichment," of course, but also "restitution," "trade secret," "misappropriation," "quasi-contract," "quantum meruit," and others. Let us try to make sense of them. (Proliferation of terms is a bane of the law.) "Unjust enrichment," and its synonym "restitution," has two referents, a remedial and a substantive. The remedial is to a situation in which a tort plaintiff asks not for the damages he has sustained but instead for the profit that the defendant obtained from the wrongful act. Hoagland v. Sandberg, 385 F.3d 737, 744-45 (7th Cir. 2004). If Polaris by copying (we are assuming) ConFold's design saved money, that was a gain to which ConFold is entitled--provided the copying was a wrongful act.

In its substantive sense, unjust enrichment or restitution refers primarily to situations in which either the defendant has received something that of rights belongs to the plaintiff [**14] (for example, he received it by mistake--or he stole it), or the plaintiff [*958] had rendered a service to the defendant in circumstances in which one would reasonably expect to be paid (and the defendant refused to pay) though for a good reason there was no contract. An example of the second case is that of the physician who renders services to an unconscious person and later sends him a bill that the patient refuses to pay. In re Crisan's Estate, 362 Mich. 569, 107 N.W.2d 907, 910-11 (Mich. 1961); Cotnam v. Wisdom, 83 Ark. 601, 104 S.W. 164 (Ark. 1907). In either case, restitution of the value of

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the benefit received (the mistaken payment in the first case, the normal fee for such a medical service in the second) enforces reasonable expectations.

The physician case, however, also parades under the name of "quasi-contract," on which see, e.g., Goldstick v. ICM Realty, 788 F.2d 456, 467 (7th Cir. 1986). For the court is constructing a contractual relationship in order to bring about the result for which the parties probably would have contracted had contracting been feasible in the circumstances, which it was not. A quasi-contract must [**15] not be confused with a "contract implied in fact," which is a contract "in which behavior takes the place of articulate acceptance." Brines v. XTRA Corp., 304 F.3d 699, 703 (7th Cir. 2002); see also Theuerkauf v. Sutton, 102 Wis. 2d 176, 306 N.W.2d 651, 657-58 (Wis. 1981); Schwartz v. Federated Realty Group, Inc., 148 Wis. 2d 419, 436 N.W.2d 34, 36 (Wis. App. 1988); E. Allan Farnsworth, Contracts § 3.10 (4th ed. 2004). A "contract implied in fact" is thus a species of express contract, Schwartz v. Federated Realty Group, Inc., supra, 436 N.W.2d at 36 n. 2, rather than one constructed by the court.

Similar to quasi-contract is "quantum meruit," which means suing for the value of a service rendered under circumstances in which payment was reasonably expected but the parties' contract was unenforceable, for example because it did not comply with the statute of frauds. Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp., 418 F.3d 168, 175 (2d Cir. 2005). In both the physician case (quasi-contract) and the statute of frauds case (quantum meruit), the plaintiff is entitled to the market value [**16] of his services rather than to the benefit that he conferred on the defendant, which might be much greater-- for example if the plaintiff physician had saved the defendant's life. The court tries to simulate a competitive market; and in such a market, price is based on the cost to the seller rather than on the subjective value to the buyer, which often is much greater. But the benefit received by the defendant is the proper measure of relief when he has appropriated something of value belonging to

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the plaintiff. On the distinction, see Ramsey v. Ellis, 168 Wis. 2d 779, 484 N.W.2d 331, 333-34 (Wis. 1992).

These interlocked, in some cases identical, theories of recovery have no application to this case. Firms constantly disseminate information without expectation of payment. It would be ridiculous to think that ConFold could simply have mailed its container design to every company in the world that uses containers and then gone around and sued all the companies that used the design. It is different if the design is patented or the recipient agrees not to use it, but then (since there is no patent claim here, although there is indeed such an animal as a design patent--as [**17] will turn out to be relevant to our analysis) we are back to the contract claim that the district judge properly rejected.

With the terms "trade secrets" and "misappropriation" we come at last to the issue that seems to divide Wisconsin and Minnesota but probably does not. ConFold believes mistakenly that a trade secret is a property right in the same sense in which a person has a property right in his mattress. A property right in the latter [*959] sense is a right good against the whole world, which a trade secret is not, because it is perfectly lawful to "steal" a firm's trade secret by reverse engineering. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 155-56, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989); Rockwell Graphic Systems, Inc. v. DEV Industries, Inc., 925 F.2d 174, 179 (7th Cir. 1991); American Can Co. v. Mansukhani, 742 F.2d 314, 334 n. 24 (7th Cir. 1984) (Wisconsin law). In contrast, a patent right is good against the whole world. A copyright is not because independent discovery is a defense to a copyright--or a trade secret--claim; it is not a defense to a patent claim. But a copyright is a fuller property right than a trade [**18] secret, because copying is infringement; copying a trade secret, which is what reverse engineering does, is not.

A trade secret is really just a piece of information (such as a customer list, or a method of production, or a secret formula for a soft drink) that the holder tries to keep secret by executing confidentiality agreements with employees and others and by hiding the information from outsiders by

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means of fences, safes, encryption, and other means of concealment, so that the only way the secret can be unmasked is by a breach of contract or a tort. Wis. Stat. § 134.90(2)(c); Learning Curve Toys, Inc. v. PlayWood Toys, Inc., 342 F.3d 714, 721-23 (7th Cir. 2003); Mangren Research & Development Corp. v. National Chemical Co., 87 F.3d 937, 942-43 (7th Cir. 1996). ConFold admits that its designs were not trade secrets.

In general, if information is not a trade secret and is not protected by patent, copyright, or some other body of law that creates a broader intellectual property right than trade secrecy does, anyone is free to use the information without liability. ConFold argues, however, that the common law of Minnesota [**19] imposes liability for such use if the defendant got hold of the information improperly. The argument is difficult to understand; if the information is not secret and not protected by any of the laws that create property rights in information, it is in the public domain and freely usable without need to commit a tort or a breach of contract to obtain it.

The cases on which ConFold relies--the Rehabilitation Specialists, Tate, and Micro Display Systems cases cited earlier--stand for the distinct proposition that while section 7(a) of the Uniform Trade Secrets Act (in force in Wisconsin, Wis. Stat. § 134.90(6)(a)) preempts most non-UTSA remedies for misappropriation of a trade secret, the victim can sue separately for a tort committed in the course of the misappropriation, such as a trespass. See also Frantz v. Johnson, 116 Nev. 455, 999 P.2d 351, 358 (Nev. 2000). The proposition is controversial. It sounds like an end run around preemption, since misappropriation of a trade secret normally is not actionable without either a tort or a breach of contract, and the UTSA already exempts (in section 7(b)(1)) claims of breach of contract from [**20] being preempted. Robert Unikel, "Bridging the 'Trade Secret' Gap: Protecting 'Confidential Information' Not Rising to the Level of Trade Secrets," 29 Loy. U. Chi. L.J. 841, 887-88 (1998). At all events, with the contract issue resolved in Polaris's favor, no contention that it obtained ConFold's

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designs by tortious means, and no trade secrets, ConFold can get no traction from the Minnesota cases.

There is, however, another version of "misappropriation," unrelated to trade secrets, which ironically has a footing in Wisconsin law, see Mercury Record Productions, Inc. v. Economic Consultants, Inc., 64 Wis. 2d 163, 218 N.W.2d 705, 709-11 (Wis. 1974); see generally McKevitt v. Pallasch, 339 F.3d 530, 533-35 (7th Cir. 2003), but has never been mentioned in a Minnesota [*960] case (and remember that ConFold is contending that Minnesota law governs its misappropriation claim), on which ConFold might have tried to rely, though with dim prospects of success.

International News Service v. Associated Press, 248 U.S. 215, 39 S. Ct. 68, 63 L. Ed. 211 (1918), a decision no longer authoritative because it was based on the federal courts' subsequently [**21] abandoned authority to formulate common law principles in suits arising under state law though litigated in federal court, has inspired the common law of a number of states, including, it seems, Wisconsin. The Associated Press and the International News Service competed in gathering news to be published in newspapers. Barred during much of World War I by British and French censors from sending war dispatches to the United States, INS would paraphrase AP's war dispatches that had been published in east coast newspapers, and it was able to publish its paraphrases in west coast newspapers at the same hour because of the difference in time zones and in east coast newspapers only a few hours later. There was no copyright infringement, because INS was copying the facts reported in AP's dispatches rather than the dispatches themselves and anyway AP had not bothered to copyright its dispatches. And of course there was no trade secrecy. Nevertheless the Court held that AP was entitled to enjoin INS's copying as a form of unfair competition.

In an effort to keep this concept of unfair competition or misappropriation--this bequest by the Supreme Court to a number of states--within reasonable [**22] limits, the

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Second Circuit, in an influential opinion interpreting New York law, stated the elements of the tort as follows: "(i) the plaintiff generates or collects information at some cost or expense; (ii) the value of the information is highly time-sensitive; (iii) the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it; (iv) the defendant's use of the information is in direct competition with a product or service offered by the plaintiff; (v) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality could be substantially threatened." National Basketball Association v. Motorola, Inc., 105 F.3d 841, 852 (2d Cir. 1997) (citations omitted). ConFold has made no effort to establish these elements. Its misappropriation claim comes down to a claim of infringement of a design that it did not patent. Such a claim is preempted by patent law, as held by the Supreme Court in the Bonito case cited earlier. See also Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 231-32, 84 S. Ct. 784, 11 L. Ed. 2d 661, 1964 Dec. Comm'r Pat. 425 (1964); [**23] Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 239, 84 S. Ct. 779, 11 L. Ed. 2d 669, 1964 Dec. Comm'r Pat. 421 (1964). The broader, INS-type claim probably is not preempted, see Bonito Boats, Inc. v. Thunder Craft Boats, Inc., supra, 489 U.S. at 154, but, as we have just noted, its elements have not been proved.

Affirmed.

III. EL RECURSO DE EXCEPCIÓN

A. STATUTE OF FRAUDS

LOS CONTRATOS QUE DEBEN CONCRETARSE POR ESCRITO

BOONE, et al. v. COE. COURT OF APPEALS OF KENTUCKY 153 Ky. 233; 154 S.W. 900 March 28, 1913, Decided

OPINIÓN POR: CLAY

[**900] [*234] Plaintiffs, W. H. Boone and J. T. Coe, brought this action against defendant, J. F. Coe, to recover certain damages alleged to have resulted from defendant's

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breach of a parol contract of lease for one year to commence at a future date. It appears from the petition that the defendant was the owner of a large and valuable farm in Ford County, Texas, Plaintiffs were farmers, and were living with their families in Monroe County, Kentucky. In the fall of 1909, defendant made a verbal contract with plaintiffs whereby he rented to them his farm in Texas for a period of twelve months, to commence from the date of plaintiffs' arrival at defendant's farm. Defendant agreed that if plaintiffs would leave their said homes and businesses in Kentucky, and with their families, horses and wagons, move to defendant's farm in Texas, and take charge of, manage and cultivate same in wheat, corn and cotton for the twelve months next following plaintiffs' arrival at said farm, the defendant would have a dwelling completed on said farm and ready for occupancy upon their arrival, which dwelling plaintiffs would occupy as a residence during the period of said tenancy. Defendant also agreed that he would furnish necessary material at a convenient place on said farm out of which to erect a good and commodious stock and grain barn, to be used by plaintiffs. The petition further alleges that plaintiffs were to cultivate certain portions of the farm and were to receive certain portions of the crops raised, and that plaintiffs, in conformity with their said agreement, did move from Kentucky to the farm in Texas, and carried with them their families, wagons, horses and camping outfit, and in going to Texas [**901] they traveled for a period of 55 days. It is also charged that defendant broke his contract, in that he failed to have ready and completed on the farm a dwelling house in which plaintiffs and their families could move, and also failed to furnish the necessary material for the erection of a suitable barn; that on December 6th, defendant refused to permit plaintiffs to occupy the house and premises, and failed and refused to permit them to cultivate the land or any part thereof; that on the. . . . day of December, 1909, they started for their home in Kentucky, and arrived there after traveling for a period of four days. It is charged that plaintiffs spent in going to Texas, in cash, the sum of $ 150; that the loss of time to

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plaintiffs and their teams in making the trip to Texas was reasonably worth $ 8 a [*235] day for a period of 55 days, or the sum of $ 440; that the loss of time to them and their teams during the period they remained in Texas was $ 8 a day for 22 days, or $ 176; that they paid out in actual cash for transportation for themselves, families and teams from Texas to Kentucky, the sum of $ 211.80; that the loss of time to them and their teams in making the last named trip was reasonably worth the sum of $ 100; that in abandoning and giving up their homes and businesses in Kentucky, they had been damaged in the sum of $ 150, making a total damage of $ 1,387.80, for which judgment was asked. Defendant's demurrer to the petition was sustained and the petition dismissed. Plaintiffs appeal.

Under the rule in force in this State, the statute of frauds relates to the remedy or mode of procedure, and not to the validity of the contract. Though the land is located in Texas, the parol contract of lease was made here, and here it is sought to enforce it. If unenforceable under our statute, it cannot be enforced here. Kleeman & Co. v. Collins, 9 Bush 460. If the statute requires the contract to be in writing, and the petition does not allege it to be in writing, defense may be presented by demurrer. Bull v. McCrea, 8 B. Mon. 422; Smith v. Fah, 15 B. Mon. 443; Smith v. Theobald, 86 Ky. 141, 5 S.W. 394.

The statute of frauds, section 470, sub-sections 6 and 7, Kentucky Statutes, provides as follows:

"No action shall be brought to charge any person:

"6. Upon any contract for the sale of real estate, or any lease thereof, for longer term than one year; nor

"7. Upon any agreement which is not to be performed within one year from the making thereof, unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or by his authorized agent; but the consideration need not be expressed in the writing; it may be proved when necessary, or disproved by parol or other evidence."

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A parol lease of land for one year, to commence at a future date, is within the statute. Greenwood v. Strother, 91 Ky. 482, 16 S.W. 138.

The question sharply presented is: May plaintiffs recover for expenses incurred and time lost on the faith of a contract that is unenforceable under the statute of frauds?

[*236] In the case of Hurley v. Woodsides, 21 Ky. L. Rep. 1073, 54 S.W. 8, Woodsides made a parol lease with Hurley for 25 acres of timber land for a period of five years. Under the contract Hurley was to clear five acres of the land in the winter of 1897 and 1898, ten acres in the winter of 1898 and 1899, and ten acres in the winter of 1899 and 1900, and was to have free use of the land so cleared up for three years thereafter. Woodsides agreed to erect a dwelling house, smoke house, kitchen and stable on the leased premises for Hurley's occupancy, and was to furnish a team of oxen with which to break up the land as soon as it was cleared. He was also to remove the logs lying upon the land at the time of the lease and to erect a tobacco barn for Hurley's use. Moreover, it was a part of the agreement that the contract was to be put in writing. Relying upon Woodsides' promise to do so, Hurley moved his personal effects into an old house located upon the land, which he was to occupy until the new house was finished, and gave up the premises previously occupied by him. After such removal, Woodsides denied that he had agreed to furnish cattle to break up the land or to remove the logs or to erect a tobacco barn, and refused to sign a contract embracing these stipulations. This refusal necessitated Hurley's abandonment of the leased premises. Alleging that as a result of Woodsides' failure to carry out the contract, he had been damaged in the sum of $ 100, the cost of removing his effects; $ 50 for time lost in hunting up another place; $ 200 in prospective profits which he would have realized by reason of his bargain, and $ 300 by reason of having been induced to surrender the premises formerly occupied by him. Hurley brought suit against Woodsides to recover the aforesaid item of damages, aggregating the sum of $ 650. The trial court sustained a demurrer to the

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petition, and the petition was dismissed. On appeal here the judgment was affirmed. After setting out the statute of frauds, the court said:

"Under this provision of the statute the alleged verbal contract was not binding or enforceable upon the parties thereto for the reason that it was a contract for the lease of real estate for a longer term than one year from the making thereof; and as the contract itself was not enforceable between the parties, no action for damages for refusing to execute it or to reduce it to writing can be maintained, as 'it would leave but little, if anything, of the statute of frauds to hold that a party might [*237] be mulcted in damages for refusing to execute in writing a verbal agreement, [**902] which, unless in writing is invalid under the statute of frauds.' (Chase v. Fitz, 132 Mass. 359; Lawrence v. Chase, 54 Me. 196.)"

In the case of Bromley, et al. v. Broyles, 58 S.W. 984, it was held that a tenant with a parol agreement for a lease for another year, which was within the statute of frauds, could not recover as damages for breach of the contract the loss sustained by him in making preparations for raising a crop.

In the case of King v. Cheatham, 31 Ky. L. Rep. 1176, 104 S.W. 751, King sued upon a writing signed by himself alone, in which he bound himself to buy from Cheatham certain trees standing on her land, to be severed in the future. It appears that he cut some 263 trees from the land before he was ousted. He asked damages for his labor and profit. There was a judgment below for defendant. On appeal the judgment was affirmed. In discussing the validity of the contract, and the right of plaintiff to recover damages thereon, the court said:

"The statute merely withholds a right of action upon them as against the party who has not signed them. The prohibition of the statute must reach the spirit of its purpose. As a suit to recover damages for the breach of such a contract would be an indirect enforcement, such actions are held to be within the inhibition of the statute. (M'Campbell v. M'Campbell, 5 Litt. 92; Bromley v. Broyles, 58 S.W. 984.) Nor does part performance of the party

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signing affect the matter. (Hunter v. Simrall, 5 Litt. 62; Hambell v. Hamilton, 3 Dana 501; Montague v. Garnett, 3 Bush 297; Mannen v. Bradbury, 4 Ky. L. Rep., 951, 81 Ky. 153; Graves Co. Water Co. v. Ligon, 23 Ky. L. Rep., 2149; 112 Ky. 775.)

"Although a recovery of purchase money paid on such contract may be recovered if the party not bound refused to execute it, that is not in any sense an action upon the contract, but is for money had and received for which the consideration has failed, and for which the law implies a promise to repay. But nothing was paid by appellant as consideration on this contract."

The same doctrine is applied in the case of Greenwood v. Strother, supra.

Indeed, it is the general rule that damages cannot be recovered for violation of a contract within the statute of frauds. Alabama Mineral Land Co. v. Jackson, 121 Ala. 172, 25 So. 709, [*238] 25 So. 709, 77 Am. St. Rep., 464; Dunphy v. Ryan, 116 U.S. 491, 6 S. Ct. 486, 29 L. Ed. 703; Franklin v. Matoa Gold Mining Co., 158 F. 941, 86 C.C.A. 145, 16 L. R. A. (N. S.), 381, 14 Am. & Eng. Ann. Cas., 302.

To this general rule there are certain well recognized exceptions. Thus, in Speers v. Sewell, 4 Bush 239; Myles v. Myles, 6 Bush 237; Usher v. Flood, 83 Ky. 552; Thomas v. Feese, 21 Ky. L. Rep. 206, 51 S.W. 150; Story v. Story, 61 S.W. 279, 22 Ky. L. Rep. 1731; Doty v. Doty, 118 Ky. 204, 80 S.W. 803, 26 Ky, L. Rep., 63, 2 L. R. A. (N. S.), 713; and in a number of other cases, it has been held that where services have been rendered during the life of another, on the promise that the person rendering the service should receive at the death of the person served a legacy, and the contract so made is within the statute of frauds, a reasonable compensation may be recovered for the services actually rendered. It has also been held that the vendee of land under a parol contract is entitled to recover any portion of the purchase money he may have paid, and is also entitled to compensation for improvements. Fox v. Longley, 1 Mar., 388; McCracken, v. Saunders, 4 Bibb

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511; Grimes v. Shrieve, 6 T.B. Mon. 557; Dean v. Cassiday, 88 Ky. 572, 11 S.W. 601.

And under a contract for personal services within the statute, an action may be maintained on a quantum meruit. Kleeman v. Collins, 9 Bush 460; Myers v. Korb, 21 Ky. L. Rep. 163, 50 S.W. 1108. The doctrine of these cases proceeds upon the theory that the defendant has actually received some benefits from the acts of part performance, and the law, therefore, implied a promise to pay. In 29 Am. & Eng. Encyc., 836, the rule is thus stated:

"Although part performance by one of the parties to a contract within the statute of frauds will not, at law entitle such party to recover upon the contract itself, he may nevertheless recover for money paid by him, or property delivered, or services rendered in accordance with and upon the faith of the contract. The law will raise an implied promise on the part of the other party to pay for what has been done in the way of part performance. But this right of recovery is not absolute. The plaintiff is entitled to compensation only under such circumstances as would warrant a recovery in case there was no express contract, and hence it must appear that [*239] the defendant has actually received or will receive some benefit from the acts of part performance. It is immaterial that the plaintiff may have suffered a loss because he is unable to enforce his contract."

In Brown on Statute of Frauds, section 118-a, the rule is announced in the following language:

"The rule that, where one person pays money or performs services for another upon a contract void under the statute of frauds, he may recover the money upon account for money paid, or recover for the services upon a quantum meruit, applies only to cases where the defendant has received and holds the money paid or the benefit of the services rendered. It does not apply to cases of money paid by the plaintiff to a third person in execution of a verbal contract between the plaintiff and defendant, such as by the statute of frauds must be in writing."

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The foregoing rule is supported by the following [**903] cases: Kimmins v. Oldham, 27 W. Va. 258; Emery v. Smith, 46 N.H. 151; Marcey v. Marcey, 9 Allen (Mass.) 8; Pierce v. Paine, 28 Vt. 34; Hambell v. Hamilton, 3 Dana 501; Montague v. Garnett, 3 Bush 297; Mannen v. Bradbury, 81 Ky. 153.

In the case under consideration, the plaintiffs merely sustained a loss. Defendant received no benefit. Had he received a benefit, the law would imply an obligation to pay therefor. Having received no benefit, no obligation to pay is implied. The statute says that the contract of defendant made with plaintiffs is unenforceable. Defendant, therefore, had the legal right to decline to carry it out. To require him to pay plaintiffs for losses and expenses incurred on the faith of the contract without any benefit accruing to him would, in effect, uphold a contract upon which the statute expressly declares no action shall be brought. The statute was enacted for the purpose of preventing frauds and perjuries. That it is a valuable statute is shown by the fact that similar statutes are in force in practically all, if not all, of the states of the union. Being a valuable statute, the purpose of the law-makers in its enactment should not be defeated by permitting recoveries in cases to which its provisions were intended to apply.

The contrary rule was announced by this court in the case of McDaniel v. Hutchinson, 136 Ky. 412. There the plaintiff lived in the State of Illinois. The defendant owned a farm in Mercer County, Kentucky. The defendant [*240] agreed with plaintiff that if plaintiff and his family would come to Kentucky and live with defendant, the defendant would furnish the plaintiff a home during defendant's life, and upon his death, would give plaintiff his farm. It was held that although the contract was within the statute of frauds, plaintiff could recover his reasonable expenses in moving to Kentucky, and reasonable compensation for loss sustained in giving up his business elsewhere. Upon reconsideration of the question involved, we conclude that the doctrine announced in that case is not in accord with the

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weight of authority, and should be no longer adhered to. It is therefore overruled.

Judgment affirmed.

L. G. RILEY, a Proprietorship, and d/b/a Riley Enterprises, Plaintiff, v. CAPITAL AIRLINES, INC., a Delaware Corporation, Defendant. UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION 185 F. Supp. 165 June 28, 1960

OPINIÓN POR: THOMAS

[*166] This is an action for breach of an oral contract allegedly entered into between L. G. Riley, a proprietorship and d/b/a Riley Enterprises, plaintiff herein, and Capital Airlines, Inc., defendant herein. The plaintiff seeks to recover by this action for merchandise, goods and chattels delivered to the defendant pursuant to the alleged contract, and in addition, seeks the recovery of damages for breach of the contract.

The contract which is the basis of this action is alleged to have been entered into the latter part of August 1956, by and between L. G. Riley and Victor H. Luecke, an employee of Capital Airlines, Inc. The plaintiff contends that he was given a five-year contract, with an option to renew, to supply water methanol to the defendant at its Mobile, Alabama, terminal for use in its turbo-prop jet aircraft.

The defendant denies that it entered into a five-year contract with the plaintiff at any time, and avers that all purchases made by it from the plaintiff were made pursuant to its Blanket [**2] Purchase Orders. The defendant further contends that if there was a contract [*167] between the parties, this action is barred by the Alabama Statute of Frauds.

Having considered the evidence, the major portion of which consisted of the testimony of witnesses, and the arguments of counsel, the Court, now, after due deliberation, makes the following findings of fact and conclusions of law:

Findings of Fact

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1. During the latter portion of 1955, Capital Airlines was obtaining water methanol 1. from various independent vendors throughout its national system of operations. As a general rule, these vendors were located in the immediate vicinity of the particular air terminal to be supplied. The plaintiff was one of these vendors and was located in the Mobile area. The only terminal supplied by the plaintiff was Capital's terminal at Bates Field in Mobile.

The plaintiff was approached by Bill Linthicum, manager of the defendant's terminal at Bates Field, during the latter portion of 1955, in order to ascertain if the plaintiff would be interested in supplying the local terminal with water methanol. These negotiations were verbal, and as a result thereof the plaintiff agreed [**3] to supply the mixture according to defendant's specifications. Although a five-year contract was discussed at this time, the plaintiff does not contend that the contract which is the subject of this litigation was made during the initial negotiations.

Subsequent to these discussions with Lithicum, the plaintiff purchased the equipment and materials necessary for the production of water methanol. 2.

2. In April 1956, the plaintiff received a blanket purchase order number from the defendant company. Prior to the actual receipt of the blanket purchase order form itself, Riley began making deliveries and invoicing to the defendant the amount of each delivery. Upon the receipt of the invoice, the defendant would pay the plaintiff for each separate delivery. Each delivery would be received and receipted by the defendant's agent, Linthicum; and each invoice referred to the blanket purchase order number issued by the defendant.

3. The plaintiff made deliveries under the above-described purchase order until August of 1956, without any demand for or reference to, a five-year contract. At that time, Victor H. Luecke, who was assistant superintendent, assistant line maintenance for Capital, [**4] made a routine inspection of the defendant's terminal facilities at Bates Field. It was on this occasion that the plaintiff contends the five-year contract made between himself and Luecke, on

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behalf of Capital. Luecke testified that he did not meet nor talk to Riley on this particular inspection trip.

Consequently, the plaintiff's evidence supports the contention that a five-year contract was executed between the parties, and the defendant's evidence is to the contrary.

4. Shortly after the August inspection, Riley purchased an additional tank to be used as a storage tank for the finished [*168] mixture of water methanol at Bates Field. This tank was mounted on a saddle structure provided by the defendant and was used exclusively by the defendant.

The plaintiff continued to furnish methanol under the original blanket purchase order, and the procedure as to invoicing for deliveries was in no way altered.

5. In March 1957, Luecke came to Mobile for the express purpose of examining the substance of the water methanol being furnished by Riley. Riley's facilities were inspected and minor changes in the equipment were suggested. These changes were made by the plaintiff at [**5] the defendant's expense.

After this particular visit, Riley purchased a third tank which was to be used to transport the finished mixture from his warehouse to the airport, but which in fact was never used in any capacity.

The plaintiff continued to furnish water methanol under the original blanket purchase order until January of 1958, when he received another blanket purchase order similar in form to the original except for the fact that the numbers differed.

6. In July 1957, Luecke advised the plaintiff that Capital was going to terminate its current system of obtaining water methanol from numerous vendors and was going to establish five-year contracts with a small number of suppliers who would supply a greater area. The plaintiff was invited to submit a bid for this contract in the Southeastern United States area, which bid he subsequently submitted in writing on October 21, 1957. His bid for the area was rejected, and another bidder was awarded the contract. Riley was notified on July 2, 1958, that the blanket purchase order under which he had been operating

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would be canceled as of September 1, 1958. The purchase order was in fact canceled, and the plaintiff filed this [**6] action shortly thereafter.

7. Supplying and storing water methanol was not the plaintiff's usual business; there was no other market for the product in the Mobile area; and the mixture was made exclusively for Capital according to its qualifications and specifications. The plaintiff has not sold the product to and other buyer except the defendant, and the equipment procured by him has not been subsequently used for any other purpose.

8. The complete cost of securing the necessary equipment to produce and store the mixture amounted to $ 3,418.15. 3. The three tanks have been sold on an approval basis to a third party for $ 700. Therefore, the only damage, if any, to which the plaintiff would be entitled for the loss of expenditures for equipment amounts to $ 2,718.15.

9. The Court is of the opinion that the facts when considered as a whole sustain the plaintiff's allegation that a five-year contract was made between the parties. Therefore, I find as a matter of fact that Capital Airlines, Inc., entered into a five-year contract with L. G. Riley whereby the latter was to supply the former with water methanol according to its demands and specifications.

Having reached the conclusion [**7] that there was in fact a contract between the parties, there remains for the Court to determine whether or not this action is barred by the Statute of Frauds of the State of Alabama.

[*169] Conclusions of Law

I. Diversity of the parties and the requisite amount gives the Court jurisdiction of this cause. 28 U.S.C.A. § 1332.

II. The Statute of Frauds of Alabama states in part:

'In the following cases, every agreement is void, unless such agreement, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing:

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'(1) Every agreement which, by its terms, is not to be performed within one year from the making thereof.' Title 20, Code of Alabama, 1940, section 3.

At first impression it would appear that the contract here in question falls within the statute and should therefore be unenforceable because it is obvious that it was not to be performed within the period of one year. Land v. Cooper, 1948, 250 Ala. 271, 34 So.2d 313; Restatement of Contracts, Section 198, page 262. However, the plaintiff contends that the agreement does [**8] not fall within the purview of the statute inasmuch as the agreement is a contract for the sale of goods and should not be barred under Title 57, Code of Alabama of 1940, section 10. That section states:

'Statute of frauds. -- (1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upward shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in his behalf. (2) * * *; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply * * *.'

It is the plaintiff's theory that since the water methanol was manufactured specially for the defendant and was not suitable for sale to others in the ordinary course of plaintiff's business, the five-year contract comes within the statutory exemption [**9] and is enforceable. While this theory is plausible, I do not believe it applicable to the facts of the present case for the reason that here each specially mixed delivery of water methanol was paid for separately by the defendant upon receipt of the plaintiff's invoice. This was not a case of goods being specially manufactured followed by a subsequent breach of by the buyer, as was the case in the landmark decision of Goddard v. Binney,

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115 Mass. 450, 15 Am.Rep. 112, wherein a contract to build a carriage to the buyer's specifications was held to fall outside the statute of frauds of the Sales Act. Although it is true that in the instant case the plaintiff manufactured the product exclusively for the defendant and according to its specifications, there was no product or item manufactured in its entirety for delivery five years from the date of making the contract. The plaintiff mixed the product when the defendant requested it; each order was delivered, invoiced, and paid for separately. I think that as to each delivery there was a contract which fell outside the statute of frauds and was thus enforceable to the extent that it was executed. Howard v. Mercury Record Corporation [**10] et al., 5 Cir., 1949, 178 F.2d 449; Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 5 Cir., 1959, 264 F.2d 751.

III. The unexecuted or executory portion of the five-year contract falls within the purview of the Alabama statute of frauds and is unenforceable. Howard v. Mercury [*170] Record Corporation et al., supra. To hold otherwise would be to defeat the very purpose for which the statute was devised, that is, the prevention of frauds which may be accomplished by setting up contracts of the interdicted class by parole testimony.

IV. There is no basic difference in the policy of Title 20, section 3, and Title 57, section 10, of the Code of Alabama of 1940. Both of these sections were devised for the prevention of fraud in contracts. It would be a fallacy to hold that one section permitted the enforcement of a contract, and at the same time find the identical contract to be unenforceable under another section of the Code. Clearly, this was not the legislative intent. The Court therefore concludes as a matter of law that both sections of the Alabama Code are applicable to the contract here in issue, and that said contract is enforceable under both sections of [**11] the Code to the extent that it has been executed between the parties. It follows that the unexecuted portion of the contract falls within the statute of frauds and is unenforceable in an action at law for damages resulting

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from the breach thereof. Howard v. Mercury Record Corporation et al., supra.

V. The plaintiff contends that the doctrine of part performance removes the contract from the effects of the statute of frauds. I cannot concur in this view. In Franklin v. Matoa Gold Min. Co., 8 Cir., 1907, 158 F. 941, Judge Philips, in an excellent discussion on the statute of frauds, states on page 947:

'There is much of illogical assertion by courts touching this question of part performance. In many cases there is an utter confusion of part performance and entire performance. Of course, when a contract is performed on both sides there is no longer a contract to be executed and enforced. In such case the statute of frauds has no application. Without pursuing this question, it is sufficient to say that both the weight of reason and authority is that the doctrine of part performance by the buyer, such as paying the purchase price, and the like, obtains only in equity and has [**12] no place in an action at law founded on the contract for damages.'

In Farrow v. Burns, 1922, 18 Ala.App. 350, 92 So. 236, 237, it is stated that:

'Whatever may be the law in other states, in this jurisdiction the partial performance of a contract, void under the statute of frauds, does not take it from under the influence of the statute (Conoly v. Harrell, 182 Ala. 243, 62 So. 511; Scoggin v. Blackwell, 36 Ala. 351), so as to permit a recovery under the contract for any part of the contract remaining executory.'

Consequently, part performance does not take the executory portion of the contract herein from the purview of the statute of frauds.

VI. By its petition the plaintiff seeks recovery for 'merchandise, goods and chattels sold by the Plaintiff to the Defendant on the 1st day of September, 1956, and merchandise, goods and chattels to be delivered over a period of five (5) years up to and including the 1st day of September, 1961, for which the Defendant now refuses to pay, * * *.' The evidence is uncontradicted that the plaintiff

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received payment for each delivery of the product; therefore, there is nothing due the plaintiff on the executed portion of the contract, and inasmuch [**13] as the executory portion of the contract is void under the statute of frauds, the plaintiff is entitled to recover nothing for the breach of the parole agreement by the defendant. Shannon v. Wisdom, 1911, 171 Ala. 409, 55 So. 102.

VII. The Court finds as a matter of law that the plaintiff is not entitled to damages for breach of the contract because the statute of frauds of the State of [*171] Alabama bars enforcement of the executory portion thereof.

VIII. The plaintiff has purchased expensive equipment in order to fulfill adequately the provisions of the contract. While under the above-expressed views I do not think the plaintiff entitled to recover damages for breach of the executory portion of the contract, I am of the opinion that he should be compensated for the loss in equipment which was purchased in good faith pursuant to the defendant's specifications. In the landmark case of United States v. Behan, 1883, 110 U.S. 338, 344, 4 S.Ct. 81, 83, 28 L.Ed. 168, Mr. Justice Bradley, speaking for the Court, said:

'Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear [**14] that the claimant ought at least to be made whole for his losses and expenditures. So far as appears, they were incurred in the fair endeavor to perform the contract which he assumed. If they were foolishly or unreasonably incurred, the government (defendant) should have proven this fact. It will not be presumed. The court finds that his expenditures were reasonable.'

Justice Bradley states further on page 345 of 110 U.S., on page 84 of 4 S.Ct.:

'As before stated, the primary measure of damages is the amount of the party's loss; and this loss, as we have seen, may consist of two heads or classes of damage -- actual outlay and anticipated profits.'

The expenses for equipment incurred by the plaintiff were incurred in the fair endeavor to perform the contract

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which he assumed; consequently, he is entitled to recover the loss of these expenditures which the Court finds were reasonable. The defendant has failed to prove that the expenses were foolishly or unreasonably incurred.

Reasonable expenditures incurred by the plaintiff in anticipation of a valid contract were the purchase of the three tanks, the storage drums, the demineralizing equipment, a pump, and an air compressor. [**15] These items were obtained at a cost of $ 3,418.15. Inasmuch as the tanks in question have been sold for $ 700, I find the plaintiff is entitled to recover the amount of $ 2,718.15, as the loss in expenditures which were incurred in a fair endeavor to perform the contract.

In accordance with the foregoing, judgment shall be entered for the plaintiff and costs of these proceedings taxed against the defendant.

1. Water methanol is a mixture of demineralized water and methanol (or methyl alcohol, commonly referred to as wood alcohol) which is utilized by jet-powered aircraft to assist in becoming airborne. The ratio of mixture is approximately 45% Methyl alcohol to 55% Demineralized water.

2. In April of 1956, Riley purchased one 6,000 gallon tank, lined with epoxyresin, for the purpose of storing water methanol at his warehouse. At the same time, thirty 16-gauge steel drums with double phenolic linings were obtained for transporting and storage of the product at Bates Field. (The mixture was carried in the drums from Riley's warehouse by trucks to the airport and would remain there until used.) A water demineralizer was also purchased. These items cost $ 2,431.78 and were purchased prior to the time the contract, which is the basis of this action, was allegedly entered into between the parties.

[**16]

3. This amount was derived from the following figures as shown in defendant's exhibit No. 1:

Total cost of 3 tanks $1,971.13

Total cost of drums $423.52

Cost of demineralizing equipment $827.71

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Cost of pump $97.63
Air compressor $98.16
Total $3,418.15

CLOUD CORPORATION, Plaintiff-Appellant, v. HASBRO, INC., Defendant-Appellee. UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 314 F.3d 289; 49 U.C.C. Rep. Serv. 2d (Callaghan) 413 November 8, 2002, Argued December 26, 2002, Decided

OPINIÓN POR: POSNER

[*291] "Wonder World Aquarium" is a toy that Hasbro, Inc., the well-known designer and marketer of toys, sold for a brief period in the mid-1990s. The toy comes as a package that contains (we simplify slightly) the aquarium itself, some plastic fish, and, depending on the size of the aquarium (for this varies), large or small packets of a powder that when dissolved in distilled water forms a transparent gelatinous filling for the aquarium. The gel simulates water, and the plastic fish can be inserted into it with tweezers to create the illusion of a real fish tank with living, though curiously inert, fish. "Pretend blood," included in some of the packages, can be added for even greater verisimilitude. The consumer can choose among versions of Wonder World Aquarium that range from "My Pretty Mermaid" to "Piranha Attack" -- the latter a scenario in which the pretend blood is doubtless a mandatory rather than optional ingredient.

Hasbro contracted [**2] out the manufacture of this remarkable product. Southern Clay Products Company was to sell and ship Laponite HB, a patented synthetic clay, to Cloud Corporation, which was to mix the Laponite with a preservative according [*292] to a formula supplied by Hasbro, pack the mixture in the packets that we mentioned, and ship them to affiliates of Hasbro in East Asia. The affiliates would prepare and package the final product -- that is, the aquarium, the packet of gel, and the plastic fish (and "pretend blood") -- and ship it back to Hasbro in the United States for distribution to retailers.

The project was in operation by the middle of 1995. Hasbro would from time to time issue purchase orders for a

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specified number of large and small packets to Cloud, which would in turn order the quantity of Laponite from Southern Clay Products that it needed in order to manufacture the specified number of packets. The required quantity of Laponite depended not only on the number of large and small packets ordered by Hasbro but also on the formula that Hasbro supplied to Cloud specifying the proportion of Laponite in each packet. The formula was changed frequently. The less Laponite per packet specified in [**3] the formula, the more packets could be manufactured for a given quantity of the ingredient.

Early in 1997 Hasbro discovered that its East Asian affiliates, the assemblers of the final package, had more than enough powder on hand to supply Hasbro's needs, which were diminishing, no doubt because Wonder World Aquarium was losing market appeal. Mistakenly believing that Hasbro's market was expanding rather than contracting, Cloud had manufactured a great many packets of powder in advance of receiving formal purchase orders for them from Hasbro. Hasbro refused to accept delivery of these packets or to pay for them. Contending that this refusal was a breach of contract, Cloud sued Hasbro in federal district court in Chicago, basing jurisdiction on diversity of citizenship and seeking more than $ 600,000 in damages based mainly on the price of the packets that it had manufactured and not delivered to Hasbro and now was stuck with -- for the packets, being usable only in Wonder World Aquaria, had no resale value. After a bench trial, the district judge ruled in favor of Hasbro.

Cloud does not quarrel with the district judge's findings of fact, but only with her legal conclusions. The governing [**4] law is the Uniform Commercial Code as interpreted in Illinois.

The original understanding between Hasbro and Cloud regarding Cloud's role in the Wonder World Aquarium project either was not a contract or was not broken -- probably the former, as the parties had not agreed on the price, quantity, delivery dates, or composition of the packets. These essential terms were set forth in the

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purchase orders that Hasbro sent Cloud, confirming discussions between employees of Cloud and Kathy Esposito, Hasbro's employee in charge of purchasing inputs for the company's foreign affiliates. Upon receipt of a purchase order, Cloud would send Hasbro an order acknowledgment and would order from Southern Clay Products the quantity of Laponite required to fill the purchase order.

In October 1995, which is to say a few months after the launch of Wonder World Aquarium, Hasbro sent a letter to all its suppliers, including Cloud, that contained a "terms and conditions" form to govern future purchase orders. One of the terms was that a supplier could not deviate from a purchase order without Hasbro's written consent. As requested, Cloud signed the form and returned it to Hasbro. Nevertheless, to make assurance [**5] doubly sure, every time Hasbro sent a purchase order to Cloud it would include an acknowledgment form for Cloud to sign that contained the same terms and conditions that were in the October letter. Cloud did not sign any of these acknowledgment forms. The [*293] order acknowledgments that it sent Hasbro in response to Hasbro's purchase orders contained on the back of each acknowledgment Cloud's own set of terms and conditions -- and the provision in Hasbro's letter and forms requiring Hasbro's written consent to any modification of the purchase order was not among them. There was a space for Hasbro to sign Cloud's acknowledgment form but it never did so. Neither party complained about the other's failure to sign the tendered forms.

Hasbro placed its last purchase orders with Cloud in February and April 1996. The orders for February specified 2.3 million small packets and 3.2 million large ones. For April the numbers were 1.5 and 1.4 million. Hasbro notified Cloud of the formula that it was to use in making the packets and Cloud ordered Laponite from Southern Clay Products accordingly.

Now as it happened Southern Clay Products was having trouble delivering the Laponite in time to enable [**6]

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Cloud to meet its own delivery schedule. In June 1996, amidst complaints from Hasbro's East Asian affiliates that they were running out of powder, and concerned about the lag in Laponite deliveries, Hasbro notified Cloud that it was to use a new formula in manufacturing the powder, a formula that required so much less Laponite that the same quantity would enable Cloud to produce a third again as many packets. Cloud determined that by using the new formula it could produce from the quantity of Laponite that it had on hand 4.5 million small and 5 million large packets, compared to the 3.8 and 3.9 million called for by the February and April orders but not yet delivered. Cloud had delivered 700,000 of the large packets ordered in February and April; that is why it had 7.7 million packets still to deliver under those orders rather than 8.4 million, the total number of packets ordered (2.3 + 3.2 + 1.5 +1.4 = 8.4).

Although it had received no additional purchase orders, Cloud sent Hasbro an order acknowledgment for 4.5 million small and 5 million large packets with a delivery date similar to that for the April order, but at a lower price per packet, reflecting the smaller quantity of Laponite, [**7] the expensive ingredient in the powder, in each packet.

Cloud's acknowledgment was sent in June. Hasbro did not respond to it -- at least not explicitly. It did receive it, however. And Kathy Esposito continued having e-mail exchanges and phone conversations with Cloud. These focused on delivery dates and, importantly, on the quantities to be delivered on those dates. Importantly because some very large numbers -- much larger than the February and April numbers, numbers consistent however with Cloud's order acknowledgment sent to Hasbro in June -- appear in these and other e-mails written by her. In two of the e-mails the quantity Cloud is to ship is described as "more or less depending on the formula," consistent with Cloud's understanding that if the formula reduced the amount of Laponite per packet Cloud should increase the number of packets it made rather than return unused

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Laponite to Southern Clay Products. A notation made in August by another member of Hasbro's purchasing department, Maryann Ricci -- "Cloud O/S; 4,000,000 sm; 3.5 million lg." -- indicates her belief that Cloud had outstanding ("O/S") purchase orders for 4 million small and 3.5 million large packets. These numbers [**8] were far in excess of the undelivered portions of the February and April orders; and since all the earlier orders had, so far as we can determine, already been filled and so were no longer [*294] outstanding, she must have been referring to the numbers in Cloud's June order acknowledgment.

The district judge, despite ruling for Hasbro, found that indeed "Hasbro intended to exceed the quantities of ... packages it had ordered from Cloud in February and April of 1996," that "Hasbro was more concerned with prompt product than with the specific terms of its orders," and, most important, that "given Hasbro's repeated message that it could not get enough Laponite HB to fill its needs in a timely fashion, Cloud's decision to produce as many packets as possible appeared to be a safe course of action. Cloud was trying to keep pace with Hasbro's Laponite HB needs, a task made virtually impossible by the length of time it took Southern Clay to fill Cloud's Laponite HB orders." The judge even suggested that given Hasbro's desperation, Cloud could have persuaded Hasbro to execute additional purchase orders at prices equal to those in the February and April orders. Instead, rather than trying to take [**9] advantage of Hasbro's fix, Cloud reduced its price to reflect its lower cost. A curious consequence of the reduction, unremarked by the parties, is that even if Cloud has no contract remedy, it has (unless time barred) a remedy in quantum meruit for the benefit it conferred on Hasbro by voluntarily reducing the price specified in the February and April purchase orders.

When some months later Hasbro pulled the plug on Wonder World Aquarium, Cloud had not begun delivering any of the additional quantity that it had manufactured over and above the quantities called for in the February and April purchase orders.

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Was Cloud commercially unreasonable in producing the additional quantity without a purchase order? If not, should the Uniform Commercial Code, which was intended to conform sales law to the customs and usages of business people, UCC §§ 1-102(2)(b), 1-105 comment 3; In re Merritt Dredging Co., 839 F.2d 203, 206 (4th Cir. 1988); Kerry Lynn Macintosh, "Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based on Business Practices?" 38 Wm. & Mary L. Rev. 1465, 1488-91 (1997), nevertheless condemn Cloud, as the district judge [**10] believed, for failing to request written purchase orders for the additional quantity that the change in formula enabled it to manufacture? Or was Hasbro contractually obligated to pay for that additional quantity?

The answer to these questions depends on whether there was a valid modification of the quantity specifications in the February and April purchase orders (obviously Hasbro cannot complain about the price modification!). The October letter provided that purchase orders could not be modified without Hasbro's written consent. Cloud signed the letter and so became bound by it, consideration being furnished by Hasbro's continuing to do business with Cloud. Hasbro's order acknowledgments accompanying its February and April purchase orders also provided that the orders could not be modified without Hasbro's written consent.

Cloud did not sign Hasbro's acknowledgments and its own acknowledgments omitted the provision requiring that any modification have Hasbro's written consent. But these facts have no significance. In the case of discrepant order and acceptance forms, if the acceptance merely adds a term, that term binds the offeror, UCC § 2-207(1); this modification of the common [**11] law's "mirror image" rule minimizes transaction costs by eliminating a negotiation over the additional term unless the offeror is unwilling to accede to the offeree's desire for it. But what if the [*295] term added by the acceptance contradicts a term in the offer? Then it doesn't become a part of the contract -- that much is clear. § 2-207(2)(b). But is there a contract,

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and if so what are its terms? The UCC doesn't say, but the majority rule, and the rule in Illinois, is that the inconsistent terms cancel each other out and the court fills the resulting void with a term of its own devising. William B. Davenport, Daniel R. Murray & Donald R. Cassling, Uniform Commercial Code with Illinois Code Comments § 5/2-207, Illinois Code Comment 11, pp. 126-27 (Illinois Practice Series, vol. 2a, 1997).

In this case, however, there was neither a supplemental nor an inconsistent term in the acceptance; there was no term concerning modification, and in such a situation Hasbro's term is enforceable. Earl M. Jorgensen Co. v. Mark Construction, Inc., 56 Haw. 466, 540 P.2d 978, 982-83 (Hawaii 1975); 1 James J. White & Robert S. Summers, Uniform Commercial Code 15-16 (4th ed. [**12] 1995). It is a case of different but not inconsistent terms, in which event the acceptance is effective to make a contract. UCC § 2-207(1). The offeree's silence is not interpreted as rejection in this situation because transaction costs would again be higher if the offeror had to quiz the offeree on whether every term in the offer not mentioned in the acceptance was acceptable to the offeree. Cloud, the offeree, knew that Hasbro wanted the modification provision and if this was unacceptable it should have said so.

For unexpressed reasons the district judge did not focus on the contractual provisions requiring that any modification of a purchase order be in writing. She considered only whether the UCC's statute of frauds required this, and ruled that it did. The quantity term in a contract for the sale of goods for more than $ 500 must be memorialized in a writing signed by the party sought to be held to that term, UCC § 2-201(1), and so, therefore, must a modification of that term. UCC § 2-209(3). However -- and here we part company with the district judge -- Kathy Esposito's e-mails, plus the notation that we quoted earlier signed by Maryann Ricci, another member of Hasbro's [**13] purchasing department, satisfy the statutory requirement. The UCC does not require that the contract

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itself be in writing, only that there be adequate documentary evidence of its existence and essential terms, which there was here. Architectural Metal Systems, Inc. v. Consolidated Systems, Inc., 58 F.3d 1227, 1229-31 (7th Cir. 1995); Monetti, S.P.A. v. Anchor Hocking Corp., 931 F.2d 1178, 1185 (7th Cir. 1991); Axelson, Inc. v. McEvoy-Willis, 7 F.3d 1230, 1233 n. 6 (5th Cir. 1993).

But what shall we make of the fact that Kathy Esposito's e-mails contained no signature? The Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, provides that in all transactions in or affecting interstate or foreign commerce (the transactions between Cloud and Hasbro were in interstate commerce and affected both interstate and foreign commerce), a contract or other record relating to the transaction shall not be denied legal effect merely because it is in electronic form. That would be conclusive in this case -- had the e-mails been sent after the Act took effect in 2000. But they were sent in 1996. The [**14] Act does not purport to be applicable to transactions that occurred before its effective date, and, not being procedural, compare Landgraf v. USI Film Products, 511 U.S. 244, 275, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994), it is presumed not to apply retroactively. Johnson v. Ventra Group, Inc., 191 F.3d 732, 745 (6th Cir. 1999). But like the court in Shattuck v. Klotzbach, 2001 Mass. Super. LEXIS 642, No. 011109A, 2001 WL 1839720, at *2-3 (Mass. Super. Dec. 11, 2001), [*296] we conclude without having to rely on the federal Act that the sender's name on an e-mail satisfies the signature requirement of the statute of frauds. Toghiyany v. AmeriGas Propane, Inc., 309 F.3d 1088, 1091 (8th Cir. 2002), another e-mail case that does not cite the electronic signatures act (maybe because, as in this case, the contract predated the Act), tugs the other way. But it is unclear whether the court thought the absence of a signature fatal or thought that it was that absence combined with the absence of an essential term -- the duration of the contract -- that triggered the statute of frauds.

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Neither the common law nor the UCC requires a handwritten signature, [**15] Just Pants v. Wagner, 247 Ill. App. 3d 166, 617 N.E.2d 246, 251, 187 Ill. Dec. 38 (Ill. App. 1993); Monetti, S.P.A. v. Anchor Hocking Corp., supra, 931 F.2d at 1182; Hillstrom v. Gosnay, 188 Mont. 388, 614 P.2d 466, 469 (Mont. 1980); Davenport, Murray & Cassling, supra, § 5/1-201, Illinois Code Comment 42, pp. 53-54; cf. Restatement (Second) of Contracts § 134, comment a (1981), even though such a signature is better evidence of identity than a typed one. It is not customary, though it is possible, to include an electronic copy of a handwritten signature in an e-mail, and therefore its absence does not create a suspicion of forgery or other fraud -- and anyway an electronic copy of a signature could be a forgery.

The purpose of the statute of frauds is to prevent a contracting party from creating a triable issue concerning the terms of the contract -- or for that matter concerning whether a contract even exists -- on the basis of his say-so alone. That purpose does not require a handwritten signature, especially in a case such as this in which there is other evidence, and not merely say-so evidence, of the existence [**16] of the contract (more precisely, the contract modification) besides the writings. The fact that Cloud produced the additional quantity is pretty powerful evidence of a contract, Consolidation Services, Inc. v. KeyBank National Ass'n, 185 F.3d 817, 821 (7th Cir. 1999); Monetti, S.P.A. v. Anchor Hocking Corp., supra, 931 F.2d at 1183, as it would have been taking a terrible risk in doing so had it thought it would have no right to be paid if Hasbro refused to accept delivery, but would instead be stuck with a huge quantity of a product that had no salvage value. Actually, in the case of a contract for goods specially manufactured by the buyer, partial performance by the seller takes the contract outside the statute of frauds, without more. UCC § 2-201(3)(a). This may well be such a case; but we need not decide.

The background to the modification -- the fact that the parties had dealt informally with each other (as shown by

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their disregard of the form contracts), and above all that Hasbro plainly wanted more product and wanted it fast -- is further evidence that had Cloud asked for a written purchase order in June 1996 for the additional quantity, [**17] Hasbro would have given it, especially since Cloud was offering a lower price.

There is more: "between merchants [a term that embraces 'any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants,' UCC § 2-104(3)] if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection 1 [the statute of frauds] ... unless written notice of objection to its contents is given within 10 days after it is received." UCC § 2-201(2). Cloud sent an order acknowledgment, reciting the increased quantity, shortly after the oral modification, and Hasbro did not object within ten days. Campbell v. Yokel, 20 Ill. App. 3d 702, 313 [*297] N.E.2d 628, 628-31 (Ill. App. 1974); Klockner, Inc. v. Federal Wire Mill Corp., 663 F.2d 1370, 1374, 1376 (7th Cir. 1981); Apex Oil Co. v. Vanguard Oil & Service Co., 760 F.2d 417, 423 (2d Cir. 1985).

So Hasbro's statute of frauds defense fails on a number of independent grounds. But what of the contractual requirement [**18] of the buyer's consent in writing to any modification? Could that stiffen the requirements of the UCC's statute of frauds? Parties are free to incorporate stronger conditions for contractual modification than the UCC provides: "A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party." UCC § 2-209(2); see Martinsville Nylon Employees Council Corp. v. NLRB, 297 U.S. App. D.C. 263, 969 F.2d 1263, 1267 (D.C. Cir. 1992); Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280, 1292 (7th Cir. 1986) (dissenting opinion); Frank A. Rothermel, Comment,

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"Role of Course of Performance and Confirmatory Memoranda in Determining the Scope, Operation and Effect of 'No Oral Modification' Clauses," 48 U. Pitt. L. Rev. 1239, 1251-52 (1987). The UCC's statute of frauds requires only quantity terms to be in writing. The contractual requirement that the buyer's consent be in writing was not limited to quantity terms, but this makes no difference, [**19] since those are the terms in dispute.

Could the contractual statute of frauds (to speak oxymoronically) be broader in a different sense? Specifically, could "consent in writing" require an explicit written statement of consent, missing here, rather than merely an inference of consent from a writing or series of writings? Maybe, but Hasbro does not argue that the contractual statute of frauds in this case has any different scope from the statutory, though it seems highly unlikely that a no-oral-modification clause would be subject to the exception in section 2-201(2) (quoted earlier) to the statute of frauds. Such a clause is added to a contract when the parties want to draft their own statute of frauds, as they are permitted to do; and there is no reason to suppose that they would want to adopt wholesale the limitations that the UCC imposes on its own statute of frauds. If they wanted those limitations they wouldn't need their own, customized clause.

So we may set section 2-201(2) to one side. That leaves intact, however, Cloud's argument, which we have accepted, that there was adequate evidence of written consent to the modification. And it leaves intact still another alternative [**20] argument by Cloud: "an attempt at modification" that does not satisfy the statute of frauds nevertheless "can operate as a waiver." § 2-209(4). The word "can" is key. To prevent the "attempt" provision from eviscerating the statute of frauds, the courts require that the attempting modifier, Cloud in this case, must show either that it reasonably relied on the other party's having waived the requirement of a writing, Wisconsin Knife Works v. National Metal Crafters, supra, 781 F.2d at 1286-87 (7th Cir. 1986); American Suzuki Motor Corp. v. Bill Kummer,

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Inc., 65 F.3d 1381, 1386 (7th Cir. 1995); contra, BMC Industries, Inc. v. Barth Industries, Inc., 160 F.3d 1322, 1333 (11th Cir. 1998), or that the waiver was clear and unequivocal. In re Nitz, 317 Ill. App. 3d 119, 739 N.E.2d 93, 103, 250 Ill. Dec. 632 (Ill. App. 2000); Lavelle v. Dominick's Finer Foods, Inc., 227 Ill. App. 3d 764, 592 N.E.2d 287, 291-92, 169 Ill. Dec. 800 (Ill. App. 1992); McElroy v. B.F. Goodrich Co., 73 F.3d 722, 724 (7th Cir. 1996); Bank v. Truck Ins. Exchange, 51 F.3d 736, 739 [*298] (7th Cir. 1995). [**21] This exception to the statute of frauds applies equally to the "buyer's written consent" provision of the parties' contracts, UCC § 2-209(4); Wisconsin Knife Works v. National Metal Crafters, supra, 781 F.2d at 1284-87, because waiver is a general doctrine of contract law rather than an appendage to the statute of frauds.

The district judge erred by requiring that Cloud show both reasonable reliance and that the waiver was clear and unequivocal. There was no clear and unequivocal waiver, but there was reliance. The judge found reliance. She found that Cloud had been acting in good faith in producing the additional quantity of packets because it reasonably believed that Hasbro wanted the additional quantity. But she concluded that Cloud had been unreasonable in relying on its reasonable belief because it could so easily have insisted on a written purchase order modifying the quantity terms in the February and April orders. Reasonableness, however, is relative to commercial practices and understandings rather than to the desire of judges and lawyers, reflecting their training and professional culture, to see a deal memorialized in a form that leaves no [**22] room for misunderstanding the legal consequences. The employees of Hasbro and Cloud who were responsible for the administration of the parties' contractual undertaking were not lawyers. Doubtless because of this, the parties had, as we have noted, been casual about documentation. Cloud had treated the purchase orders as sources of information on how much Hasbro wanted when and according to what formula, but had paid no attention to

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them as contracts containing terms and conditions that might bind it. Hasbro had treated Cloud's purchase-order acknowledgments with similar insouciance. The parties had a smooth working relationship the details of which were worked out in informal communications. With time of the essence and the parties on good terms and therefore careless or impatient with formalities, Cloud was reasonable in believing that if Hasbro didn't want to be committed to buying the additional quantity that it plainly wanted in the summer and autumn of 1996, it would so advise Cloud rather than leading Cloud down the primrose path. A practice, under the rubric of "course of dealing," can be evidence of what a contract requires, see, e.g., UCC § 1-205; Restatement (Second) of Contracts § 223 (1981); [**23] Frank Novak & Sons, Inc. v. Sommer & Maca Industries, Inc., 182 Ill. App. 3d 781, 538 N.E.2d 700, 703-05, 131 Ill. Dec. 325 (Ill. App. 1989) -- can even, under the rubric of "contract implied in fact," give rise to binding contractual obligations though no words are spoken. Brines v. XTRA Corp., 304 F.3d 699, 703 (7th Cir. 2002).

Cloud could have been more careful. But a failure to insist that every i be dotted and t crossed is not the same thing as being unreasonable. In any event, to repeat an earlier point, Hasbro did give its written consent to the modification.

We conclude that the June modification was enforceable and we therefore reverse the judgment and remand the case for a determination of Cloud's damages.

Reversed and remanded.

B. LOS VICIOS DEL CONSENTIMIENTO QUE HACEN NULA O ANULABLE LA OBLIGACIÓN

EL ERROR

RAFFLES v. WICHELHAUS. IN THE COURT OF EXCHEQUER 2 H. & C. 906, 159 Eng. Rep. 375 27th January 1865

OPINIÓN POR: PER CURIAM.

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To a declaration for not accepting Surat cotton which the defendant bought of the plaintiff " to arrive ex Peerless from Bomb-y," the defendant pleaded that he meant a ship called the "Peerless" which sailed from Bombay, in October, and the plaintiff was not ready to deliver any cotton which arrived by that ship, but only cotton which arrived by another ship called the " Peerless," which sailed from Bombay in December. -Held, on demurrer, that the plea was a good answer.

DECLARATION.- For that it was agreed between the plaintiff and the defendants, to wit, at Liverpool, that the plaintiff should sell to the defendants, and the defendants buy of the plaintiff, certain goods, to wit, 125 bales of Surat cotton, guaranteed middling fair merchant's Dhollorah, to arrive ex "Peerless" from Bombay; and that the cotton should be taken from the quay, and that the defendants would pay the plaintiff for the same at a certain rate, to wit, at the rate of 17-d. per pound, within a certain time then agreed upon after the arrival of the said goods in England.- Averments: that the said goods did arrive by the said ship from Bombay in England, to wit, at Liverpool, and the plaintiff was then and there ready, and willing and offered to deliver the said goods to the defendants, &c. Breach: that the defendants refused to accept the said goods or pay the plaintiff for them.

Plea.- That the said ship mentioned in the said agreement was meant and intended by the defendants to be the ship called the " Peerless," which sailed from Bombay, to wit, in October; and that the plaintiff was not ready and willing and did not offer to deliver to the defendants any bales of cotton which arrived by the last mentioned ship, but instead thereof was only ready and willing and offered to deliver to the defendants 125 bales of Surat cotton which arrived by another and different ship, which was also called the "Peerless," and which sailed from Bombay, to wit, in December.

Demurrer, and joinder therein.

Milward, in support of the demurrer.-The contract was 1864 for the sale of a number of bales of cotton of a

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particular RAFFLES description, which the plaintiff was ready to deliver. It is immaterial by what ship the cotton was to arrive, so that it was a ship called the "Peerless." The words " to arrive ex ' Peerless,'" only mean that if the vessel is lost on the voyage, the contract is to be at an end. [Pollock, C. B.-It would be a question for the jury whether both parties meant the same ship called the "Peerless."] That would be so if the contract was for the sale of a ship called the "Peerless;" but it is for the sale of cotton on board a ship of that name. [Pollock, C. B.-The defendant only bought that cotton which was to arrive by a particular ship. It may as well be said, that if there is a contract for the purchase of certain goods in warehouse A, that is satisfied by the delivery of goods of the same description in warehouse B.] In that case there would be goods in both warehouses; here it does not appear that the plaintiff had any goods on board the other "Peerless." [Martin, B.-It is imposing on the defendant a contract different from that which he entered into. Pollock, C. B.-It is like a contract for the purchase of wine coming from a particular estate in France or Spain, where there are two estates of that name.] The defendant has no right to contradict by parol evidence a written contract good upon the face of it. He does not impute misrepresentation or fraud, but only says that he fancied the ship was a different one. Intention is of no avail, unless stated at the time of the contract. [Pollock, C. B.-One vessel sailed in October and the other in December.] The time of sailing is no part of the contract.

Mellish (Cohen with him), in support of the plea.-There is nothing on the face of the contract to shew that any particular ship called the "Peerless" was meant; but the moment it appears that two ships called the "Peerless" were about to sail from Bombay there is a latent ambiguity, and parol evidence may be given for the purpose shewing that the defendant meant one "Peerless" and the plaintiff another. That being so, there was no consensus ad idem, and therefore no binding contract.-He was then stopped by the Court.

There must be judgment for the defendants.

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THEODORE C. SHERWOOD v. HIRAM WALKER et al. SUPREME COURT OF MICHIGAN 66 Mich. 568; 33 N.W. 919 May 3, 1887; May 4, 1887, Argued July 7, 1887, Decided

OPINIÓN POR: Morse

[*568] [**919] Replevin for a cow. Suit commenced in justice's court. Judgment for plaintiff. Appealed to circuit court of Wayne county, and verdict and judgment for plaintiff in that court. The defendants bring error, and set out 25 assignments of the same.

[*569] The main controversy depends upon the construction of a contract for the sale of the cow.

The plaintiff claims that the title passed, and bases his action upon such claim.

The defendants contend that the contract was executory, and by its terms no title to the animal was acquired by plaintiff.

The defendants reside at Detroit, but are in business at Walkerville, Ontario, and have a farm at Greenfield, in Wayne county, upon which were some blooded cattle supposed to be barren as breeders. The Walkers are importers and breeders of polled Angus cattle.

The plaintiff is a banker living at Plymouth, in Wayne county. He called upon the defendants at Walkerville for the purchase of some of their stock, but found none there that suited him. Meeting one of the defendants afterwards, he was informed that they had a few head [**920] upon this Greenfield farm. He was asked to go out and look at them, with the statement at the time that they were probably barren, and would not breed.

May 5, 1886, plaintiff went out to Greenfield and saw the cattle. A few days thereafter, he called upon one of the defendants with the view of purchasing a cow, known as "Rose 2d of Aberlone." After considerable talk, it was agreed that defendants would telephone Sherwood at his home in Plymouth in reference to the price. The second morning after this talk he was called up by telephone, and the terms of the sale were finally agreed upon. He was to pay five and one-half cents per pound, live weight, fifty

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pounds shrinkage. He was asked how he intended to take the cow home, and replied that he might ship her from King's cattle-yard. He requested defendants to confirm the sale in writing, which they did by sending him the following letter:

[*570] "Walkerville, May 15, 1886.

"T. C. Sherwood,

"President, etc.,--

"Dear Sir: We confirm sale to you of the cow Rose 2d of Aberlone, lot 56 of our catalogue, at five and a half cents per pound, less fifty pounds shrink. We inclose herewith order on Mr. Graham for the cow. You might leave check with him, or mail to us here, as you prefer.

"Yours truly,

"Hiram Walker & Sons."

The order upon Graham inclosed in the letter read as follows:

"Walkerville, May 15, 1886.

"George Graham: You will please deliver at King's cattle-yard to Mr. T. C. Sherwood, Plymouth, the cow Rose 2d of Aberlone, lot 56 of our catalogue. Send halter with cow, and have her weighed.

"Yours truly,

"Hiram Walker & Sons."

On the twenty-first of the same month the plaintiff went to defendants' farm at Greenfield, and presented the order and letter to Graham, who informed him that the defendants had instructed him not to deliver the cow. Soon after, the plaintiff tendered to Hiram Walker, one of the defendants, $ 80, and demanded the cow. Walker refused to take the money or deliver the cow. The plaintiff then instituted this suit.

After he had secured possession of the cow under the writ of replevin, the plaintiff caused her to be weighed by the constable who served the writ, at a place other than King's cattle-yard. She weighed 1,420 pounds.

When the plaintiff, upon the trial in the circuit court, had submitted his proofs showing the above transaction, defendants moved to strike out and exclude the testimony

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from the case, for the reason that it was irrelevant, and did not tend to show that the title to the cow passed, and that it showed [*571] that the contract of sale was merely executory. The court refused the motion, and an exception was taken.

The defendants then introduced evidence tending to show that at the time of the alleged sale it was believed by both the plaintiff and themselves that the cow was barren and would not breed; that she cost $ 850, and if not barren would be worth from $ 750 to $ 1,000; that after the date of the letter, and the order to Graham, the defendants were informed by said Graham that in his judgment the cow was with calf, and therefore they instructed him not to deliver her to plaintiff, and on the twentieth of May, 1886, telegraphed to the plaintiff what Graham thought about the cow being with calf, and that consequently they could not sell her. The cow had a calf in the month of October following.

On the nineteenth of May, the plaintiff wrote Graham as follows:

"Plymouth, May 19, 1886.

"Mr. George Graham,

"Greenfield,--

"Dear Sir: I have bought Rose or Lucy from Mr. Walker, and will be there for her Friday morning, nine or ten o'clock. Do not water her in the morning.

"Yours, etc.,

"T. C. Sherwood."

Plaintiff explained the mention of the two cows in this letter by testifying that, when he wrote this letter, the order and letter of defendants were at his house, and, writing in a hurry, and being uncertain as to the name of the cow, and not wishing his cow watered, he thought it would do no harm to name them [**921] both, as his bill of sale would show which one he had purchased. Plaintiff also testified that he asked defendants to give him a price on the balance of their herd at Greenfield, as a friend thought of buying some, and received a letter dated May 17, 1886, in which they named the price of five cattle, including Lucy at $ 90,

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and Rose 2d at $ 80. When he received the letter he called defendants up by telephone, [*572] and asked them why they put Rose 2d in the list, as he had already purchased her. They replied that they knew he had, but thought it would make no difference if plaintiff and his friend concluded to take the whole herd.

The foregoing is the substance of all the testimony in the case.

The circuit judge instructed the jury that if they believed the defendants, when they sent the order and letter to plaintiff, meant to pass the title to the cow, and that the cow was intended to be delivered to plaintiff, it did not matter whether the cow was weighed at any particular place, or by any particular person; and if the cow was weighed afterwards, as Sherwood testified, such weighing would be a sufficient compliance with the order; if they believed that defendants intended to pass the title by the writing, it did not matter whether the cow was weighed before or after suit brought, and the plaintiff would be entitled to recover.

The defendants submitted a number of requests, which were refused. The substance of them was that the cow was never delivered to plaintiff, and the title to her did not pass by the letter and order; and that under the contract, as evidenced by these writings, the title did not pass until the cow was weighed and her price thereby determined; and that, if the defendants only agreed to sell a cow that would not breed, then the barrenness of the cow was a condition precedent to passing title, and plaintiff cannot recover. The court also charged the jury that it was immaterial whether the cow was with calf or not. It will therefore be seen that the defendants claim that, as a matter of law, the title to this cow did not pass, and that the circuit judge erred in submitting the case to the jury, to be determined by them, upon the intent of the parties as to whether or not the title passed with the sending of the letter and order by the defendants to the plaintiff.

This question as to the passing of title is fraught with difficulties [*573] and not always easy of solution. An

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examination of the multitude of cases bearing upon this subject, with their infinite variety of facts, and at least apparent conflict of law, ofttimes tends to confuse rather than to enlighten the mind of the inquirer. It is best, therefore, to consider always, in cases of this kind, the general principles of the law, and then apply them as best we may to the facts of the case in hand.

The cow being worth over $ 50, the contract of sale, in order to be valid, must be one where the purchaser has received or accepted a part of the goods, or given something in earnest or in part payment, or where the seller has signed some note or memorandum in writing. How. Stat. § 6186.

Here there was no actual delivery, nor anything given in payment or in earnest, but there was a sufficient memorandum signed by the defendants to take the case out of the statute, if the matter contained in such memorandum is sufficient to constitute a completed sale. It is evident from the letter that the payment of the purchase price was not intended as a condition precedent to the passing of the title. Mr. Sherwood is given his choice to pay the money to Graham at King's cattle-yard, or to send check by mail.

Nor can there be any trouble about the delivery. The order instructed Graham to deliver the cow, upon presentation of the order, at such cattle-yard. But the price of the cow was not determined upon to a certainty. Before this could be ascertained, from the terms of the contract, the cow had to be weighed; and, by the order inclosed with the letter, Graham was instructed to have her weighed. If the cow had been weighed, and this letter had stated, upon such weight, the express and exact price of the animal, there can be no [**922] doubt but the cow would have passed with the sending and receipt of the letter and order by the plaintiff.

Payment was not to be a concurrent act with the delivery, and therein this case differs from Case v. Dewey, 55 Mich. [*574] 116. Also, in that case, there was no written memorandum of the sale, and a delivery was necessary to pass the title of the sheep; and it was held that

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such delivery could only be made by a surrender of the possession to the vendee, and an acceptance by him.

Delivery by an actual transfer of the property from the vendor to the vendee, in a case like the present, where the article can easily be so transferred by a manual act, is usually the most significant fact in the transaction to show the intent of the parties to pass the title, but it never has been held conclusive. Neither the actual delivery, nor the absence of such delivery, will control the case, where the intent of the parties is clear and manifest that the matter of delivery was not a condition precedent to the passing of the title, or that the delivery did not carry with it the absolute title. The title may pass, if the parties so agree, where the statute of frauds does not interpose, without delivery, and property may be delivered with the understanding that the title shall not pass until some condition is performed.

And whether the parties intended the title should pass before delivery or not is generally a question of fact to be determined by the jury. In the case at bar the question of the intent of the parties was submitted to the jury. This submission was right, unless from the reading of the letter and the order, and all the facts of the oral bargaining of the parties, it is perfectly clear, as a matter of law, that the intent of the parties was that the cow should be weighed, and the price thereby accurately determined, before she should become the property of the plaintiff.

I do not think that the intent of the parties in this case is a matter of law, but one of fact. The weighing of the cow was not a matter that needed the presence or any act of the defendants, or any agent of theirs, to be well or accurately done. It could make no difference where or when he was weighed, if the same was done upon correct [*575] scales, and by a competent person. There is no pretense but what her weight was fairly ascertained by the plaintiff. The cow was specifically designated by this writing, and her delivery ordered, and it cannot be said, in my opinion, that the defendants intended that the weighing of the animal should be done before the delivery even, or the passing of the title. The order to Graham is to deliver her, and then

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follows the instruction, not that he shall weigh her himself, or weigh her, or even have her weighed, before delivery, but simply, "Send halter with the cow, and have her weighed."

It is evident to my mind that they had perfect confidence in the integrity and responsibility of the plaintiff, and that they considered the sale perfected and completed when they mailed the letter and order to plaintiff. They did not intend to place any conditions precedent in the way, either of payment of the price, or the weighing of the cow, before the passing of the title. They cared not whether the money was paid to Graham, or sent to them afterwards, or whether the cow was weighed before or after she passed into the actual manual grasp of the plaintiff. The refusal to deliver the cow grew entirely out of the fact that, before the plaintiff called upon Graham for her, they discovered she was not barren, and therefore of greater value than they had sold her for.

The following cases in this Court support the instruction of the court below as to the intent of the parties governing and controlling the question of a completed sale, and the passing of title: Lingham v. Eggleston, 27 Mich. 324; Wilkinson v. Holiday, 33 Mich. 386; Grant v. Merchants' and Manufacturers' Bank, 35 Mich. 515; Carpenter v. Graham, 42 Mich. 191; Brewer v. Michigan Salt Ass'n, 47 Mich. 526; Whitcomb v. Whitney, 24 Mich. 486; Byles v. Colier, 54 Mich. 1; Scotten v. Sutter, 37 Mich. 526, 532; Ducey Lumber Co. v. Lane, 58 Mich. 520, 525; [**923] Jenkinson v. Monroe Bros. & Co., 61 Mich. 454.

[*576] It appears from the record that both parties supposed this cow was barren and would not breed, and she was sold by the pound for an insignificant sum as compared with her real value if a breeder. She was evidently sold and purchased on the relation of her value for beef, unless the plaintiff had learned of her true condition, and concealed such knowledge from the defendants. Before the plaintiff secured possession of the animal, the defendants learned that she was with calf, and therefore of great value, and

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undertook to rescind the sale by refusing to deliver her. The question arises whether they had a right to do so.

The circuit judge ruled that this fact did not avoid the sale, and it made no difference whether she was barren or not. I am of the opinion that the court erred in this holding. I know that this is a close question, and the dividing line between the adjudicated cases is not easily discerned. But it must be considered as well settled that a party who has given an apparent consent to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded, or the contract made, upon the mistake of a material fact,--such as the subject-matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual. 1 Benj. Sales, §§ 605, 606; Leake, Cont. 339; Story, Sales (4th ed.), §§ 148, 377. See, also, Cutts v. Guild, 57 N.Y. 229; Harvey v. Harris, 112 Mass. 32; Gardner v. Lane, 9 Allen 492; S. C., 12 Allen 39; Huthmacher v. Harris's Adm'rs, 38 Pa. 491; Byers v. Chapin, 28 Ohio St. 300; Gibson v. Pelkie, 37 Mich. 380, and cases cited; Allen v. Hammond, 11 Peters 63, 71.

If there is a difference or misapprehension as to the substance of the thing bargained for, if the thing actually delivered or received is different in substance from the thing bargained for and intended to be sold, then there is no contract; but if it be only a difference in some quality or accident, [*577] even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding.

"The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole contract, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." Kennedy v. Panama, etc., Mail Co., L.R. 2 Q.B. 580, 588.

It has been held, in accordance with the principles above stated, that where a horse is bought under the belief that he is sound, and both vendor and vendee honestly

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believe him to be sound, the purchaser must stand by his bargain, and pay the full price, unless there was a warranty.

It seems to me, however, in the case made by this record, that the mistake or misapprehension of the parties went to the whole substance of the agreement. If the cow was a breeder, she was worth at least $ 750; if barren, she was worth not over $ 80. The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding, and of no use as a cow. It is true she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much difference between them for all purposes of use as there is between an ox and a cow that is capable of breeding and giving milk. If the mutual mistake had simply related to the fact whether she was with calf or not for one season, then it might have been a good sale; but the mistake affected the character of the animal for all time, and for her present and ultimate use. She was not in fact the animal, or the kind of animal, the defendants intended to sell or the plaintiff to buy. [*578] She was not a barren cow, and, if this fact had been known, there would have been no contract. The mistake [**924] affected the substance of the whole consideration, and it must be considered that there was no contract to sell or sale of the cow as she actually was. The thing sold and bought had in fact no existence. She was sold as a beef creature would be sold; she is in fact a breeding cow, and a valuable one.

The court should have instructed the jury that if they found that the cow was sold, or contracted to be sold, upon the understanding of both parties that she was barren, and useless for the purpose of breeding, and that in fact she was not barren, but capable of breeding, then the defendants had a right to rescind, and to refuse to deliver, and the verdict should be in their favor.

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The judgment of the court below must be reversed, and a new trial granted, with costs of this Court to defendants.

DISCREPA DEL FUNDAMENTO: Sherwood

I do not concur in the opinion given by my brethren in this case. I think the judgments before the justice and at the circuit were right.

I agree with my Brother Morse that the contract made was not within the statute of frauds, and that payment for the property was not a condition precedent to the passing of the title from the defendants to the plaintiff. And I further agree with him that the plaintiff was entitled to a delivery of the property to him when the suit was brought, unless there was a mistake made which would invalidate the contract; and I can find no such mistake.

There is no pretense that there was any fraud or concealment in the case, and an intimation or insinuation that such a thing might have existed on the part of either of the parties would undoubtedly be a greater surprise to them than anything else that has occurred in their dealings or in the case.

[*579] As has already been stated by my brethren, the record shows that the plaintiff is a banker, and farmer as well, carrying on a farm, and raising the best breeds of stock, and lived in Plymouth, in the county of Wayne, 23 miles from Detroit; that the defendants lived in Detroit, and were also dealers in stock of the higher grades; that they had a farm at Walkerville, in Canada, and also one in Greenfield, in said county of Wayne, and upon these farms the defendants kept their stock. The Greenfield farm was about 15 miles from the plaintiff's.

In the spring of 1886 the plaintiff, learning that the defendants had some "polled Angus cattle" for sale, was desirous of purchasing some of that breed, and, meeting the defendants, or some of them, at Walkerville, inquired about them, and was informed that they had none at Walkerville, "but had a few head left on their farm in Greenfield, and they asked the plaintiff to go and see them, stating that in all probability they were sterile and would not breed." In accordance with said request, the plaintiff, on the fifth day

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of May, went out and looked at the defendants' cattle at Greenfield, and found one called "Rose 2d," which he wished to purchase, and the terms were finally agreed upon at five and one-half cents per pound, live weight, 50 pounds to be deducted for shrinkage. The sale was in writing, and the defendants gave an order to the plaintiff directing the man in charge of the Greenfield farm to deliver the cow to plaintiff. This was done on the fifteenth of May. On the twenty-first of May plaintiff went to get his cow, and the defendants refused to let him have her; claiming at the time that the man in charge at the farm thought the cow was with calf, and, if such was the case, they would not sell her for the price agreed upon.

The record further shows that the defendants, when they sold the cow, believed the cow was not with calf, and barren; that from what the plaintiff had been told by defendants [*580] (for it does not appear he had any other knowledge or facts from which he could form an opinion) he believed the cow was farrow, but still thought she could be made to breed.

The foregoing shows the entire interview and treaty between the parties as to the sterility and qualities of the cow sold to the plaintiff. The cow had a calf in the month of October.

[**925] There is no question but that the defendants sold the cow representing her of the breed and quality they believed the cow to be, and that the purchaser so understood it. And the buyer purchased her believing her to be of the breed represented by the sellers, and possessing all the qualities stated, and even more. He believed she would breed. There is no pretense that the plaintiff bought the cow for beef, and there is nothing in the record indicating that he would have bought her at all only that he thought she might be made to breed. Under the foregoing facts,--and these are all that are contained in the record material to the contract,--it is held that because it turned out that the plaintiff was more correct in his judgment as to one quality of the cow than the defendants, and a quality, too, which could not by any possibility be positively known at

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the time by either party to exist, the contract may be annulled by the defendants at their pleasure. I know of no law, and have not been referred to any, which will justify and such holding, and I think the circuit judge was right in his construction of the contract between the parties.

It is claimed that a mutual mistake of a material fact was made by the parties when the contract of sale was made. There was no warranty in the case of the quality of the animal. When a mistaken fact is relied upon as ground for rescinding, such fact must not only exist at the time the contract is made, but must have been known to one or both of the parties. Where there is no warranty, there can be no mistake of fact when no such fact exists, or, if in existence, [*581] neither party knew of it, or could know of it; and that is precisely this case. If the owner of a Hambletonian horse had speeded him, and was only able to make him go a mile in three minutes, and should sell him to another, believing that was his greatest speed, for $ 300, when the purchaser believed he could go much faster, and made the purchase for that sum, and a few days thereafter, under more favorable circumstances, the horse was driven a mile in 2 Minn. 13 sec., and was found to be worth $ 20,000, I hardly think it would be held, either at law or in equity, by any one, that the seller in such case could rescind the contract. The same legal principles apply in each case.

In this case neither party knew the actual quality and condition of this cow at the time of the sale. The defendants say, or rather said, to the plaintiff, "they had a few head left on their farm in Greenfield, and asked plaintiff to go and see them, stating to plaintiff that in all probability they were sterile and would not breed." Plaintiff did go as requested, and found there three cows, including the one purchased, with a bull. The cow had been exposed, but neither knew she was with calf or whether she would breed. The defendants thought she would not, but the plaintiff says that he thought she could be made to breed, but believed she was not with calf. The defendants sold the cow for what they believed her to be, and the plaintiff bought her as he believed she was, after the statements made by the

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defendants. No conditions whatever were attached to the terms of sale by either party. It was in fact as absolute as it could well be made, and I know of no precedent as authority by which this Court can alter the contract thus made by these parties in writing, and interpolate in it a condition by which, if the defendants should be mistaken in their belief that the cow was barren, she should be returned to them, and their contract should be annulled.

[*582] It is not the duty of courts to destroy contracts when called upon to enforce them, after they have been legally made. There was no mistake of any such material fact by either of the parties in the case as would license the vendors to rescind. There was no difference between the parties, nor misapprehension, as to the substance of the [**926] thing bargained for, which was a cow supposed to be barren by one party, and believed not to be by the other. As to the quality of the animal, subsequently developed, both parties were equally ignorant, and as to this each party took his chances. If this were not the law, there would be no safety in purchasing this kind of stock.

I entirely agree with my brethren that the right to rescind occurs whenever "the thing actually delivered or received is different in substance from the thing bargained for, and intended to be sold; but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive" of the parties in making the contract, yet it will remain binding. In this case the cow sold was the one delivered. What might or might not happen to her after the sale formed no element in the contract.

The case of Kennedy v. Panama, etc., Mail Co., L.R. 2 Q.B. 588, and the extract cited therefrom in the opinion of my brethren, clearly sustain the views I have taken. See, also, Smith v. Hughes, L.R. 6 Q.B. 597; Carter v. Crick, 4 Hurl. & N. 416.

According to this record, whatever the mistake was, if any, in this case, it was upon the part of the defendants, and while acting upon their own judgment. it is, however, elementary law, and very elementary, too, "that the

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mistaken party, acting entirely upon his own judgment, without any common understanding with the other party in the premises as to the quality of an animal, is remediless if he is injured [*583] through his own mistake." Leake, Cont. 338; Torrance v. Bolton, L.R. 8 Ch. App. 118; Smith v. Hughes, L.R 6 Q.B. 597.

The case cited by my brethren from 37 Mich. (Gibson v. Pelkie) I do not think sustains the conclusion reached by them. In that case the subject-matter about which the contract was made had no existence, and in such case Mr. Justice Graves held there was no contract; and to the same effect are all the authorities cited in the opinion. That is certainly not this case. Here the defendants claim the subject-matter not only existed, but was worth about $ 800 more than the plaintiff paid for it.

The case of Huthmacher v. Harris's Adm'rs, 38 Pa. 491, is this: A party purchased at an administrator's sale a drill machine, which had hid away in it by the deceased a quantity of notes, to the amount of about $ 3,000, money to the amount of over $ 500, and two silver watches and a pocket compass of the value of $ 60.25. In an action of trover for the goods, it was held that nothing but the machine was sold or passed to the purchaser, neither party knowing that the machine contained any such articles.

In Cutts v. Guild, 57 N.Y. 229, the defendant, as assignee, recovered a judgment against D. & H. He also recovered several judgments in his own name on behalf of the T. Co. The defendant made an assignment of and transferred the first judgment to an assignee of the plaintiff,--both parties supposing and intending to transfer one of the T. Co. judgments,--and it was held that such contract of assignment was void, because the subject-matter contained in the assignment was not contracted for.

In the case of Byers v. Chapin, 28 Ohio St. 300, the defendant sold the plaintiffs 5,000 oil barrels. The plaintiffs paid $ 5,000 upon their purchase, and took some of the barrels. The barrels proved to be unfit for use, and the contract was rescinded by consent of the parties. The defendant, [*584] instead of returning all the money paid to

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the purchasers, retained a portion and gave plaintiffs his note for the remainder. The plaintiffs brought suit upon this note. The defendant claimed that, under the contract of sale of the barrels, they were to be glued by the plaintiffs, which the plaintiffs properly failed to do, and this fact was not known to defendant when he agreed to rescind and gave the note, and therefore the note was given upon a mistaken state of facts, falsely represented to the defendant, and which were known to the plaintiffs. On the proofs, the jury found for the defendant, and the verdict was affirmed.

In Gardner v. Lane, 9 Allen 492, it is decided that if, upon a sale of No. 1 mackerel, the vendor delivers No. 3 mackerel, and some barrels of salt, no title to the articles thus delivered passes.

Allen v. Hammond, 11 Peters 63, decides that if a life-estate in land is sold, and at the time of the sale the estate is terminated by the death of the person in whom the right vested, a court of equity will rescind the purchase.

In Harvey v. Harris, 112 Mass. 32, at an auction two different grades of flour were sold, and a purchaser of the second claimed to have bought a quantity [**927] of the first grade, under a sale made of the second, and this he was not allowed to do, because of the mutual mistake; the purchaser had not in fact bought the flour he claimed. In this case, however, it is said it is true that, if there is a mutual agreement of the parties for the sale of particular articles of property, a mistake or misapprehension as to the quality of the articles will not enable the vendor to repudiate the sale.

The foregoing are all the authorities relied on as supporting the positions taken by my brethren in this case. I fail to discover any similarity between them and the present case; and I must say, further, in such examination as I have been able to make, I have found no adjudicated case going to the extent, either in law or equity, that has been held in this case. [*585] In this case, if either party had superior knowledge as to the qualities of this animal to the other, certainly the defendants had such advantage.

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I understand the law to be well settled that "there is no breach of any implied confidence that one party will not profit by his superior knowledge as to facts and circumstances" equally within the knowledge of both, because neither party reposes in any such confidence unless it be specially tendered or required, and that a general sale does not imply warranty of any quality, or the absence of any; and if the seller represents to the purchaser what he himself believes as to the qualities of an animal, and the purchaser buys relying upon his own judgment as to such qualities, there is no warranty in the case, and neither has a cause of action against the other if he finds himself to have been mistaken in judgment.

The only pretense for avoiding this contract by the defendants is that they erred in judgment as to the qualities and value of the animal. I think the principles adopted by Chief Justice Christiancy in Williams v. Spurr, 24 Mich. 335, completely cover this case, and should have been allowed to control in its decision. See, also, Story, Sales, §§ 174, 175, 382, and Benj. Sales, § 430.

The judgment should be affirmed.

¿Es el distingo entre meramente voidable y void ab initio otro que la doctrina medieval del ius commune de lo que constituye una causa de nulidad o de anulabilidad, que fue elaborada sobre las categorias de la sustancia y de los accidentes de la filosofía peripatética?

CENGIZ SENGEL, Appellant, vs. IGT, AND THE SILVER LEGACY-RENO, Respondents. SUPREME COURT OF NEVADA 116 Nev. 565; 2 P.3d 258; 116 Nev. Adv. Rep. 67 June 14, 2000, Decided

OPINIÓN POR: LEAVITT

While appellant was playing a slot machine, an internal malfunction suspended the game, abruptly stopping the reels. The reels stopped with three jackpot symbols appearing in an uneven line across the pay line. The internal error was cleared, causing the game to reset, and a non-winning combination appeared on the reels after play resumed. The Nevada Gaming Control Board agent

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dispatched to the scene conducted an investigation and concluded that appellant did not have a valid win because of the malfunction and the uneven alignment of the jackpot symbols. Appellant petitioned the Nevada Gaming Control Board for reconsideration and the Board affirmed the agent's decision. Appellant petitioned the district court for judicial review and the district court dismissed the petition, affirming the Board's decision.

We affirm the district court's judgment upholding the Board's decision, because the decision was supported by adequate evidence and was not arbitrary or capricious or otherwise contrary to law.

FACTS

On September 21, 1996, appellant Cengiz Sengel was playing an IGT Quartermania Triple Diamond slot machine at the Silver Legacy Casino in Reno, Nevada. The IGT slot machine was part of a statewide, progressive jackpot system of inter-linked slot machines. Sengel placed two quarters, the required number to play for the progressive jackpot, into the machine and initiated a play. The progressive jackpot amount at the time of the play was approximately $ 1,797,000, to be awarded for an alignment of three Quartermania symbols across the sole pay line.

[*568] The slot machine malfunctioned when the microswitch on the cash door of the bill validator reported to the machine's internal monitoring system that the cash door was open. This malfunction caused the slot machine to immediately suspend play: (1) the reels abruptly stopped spinning with three Quartermania jackpot symbols appearing in an uneven line across the pay line; (2) a tilt code appeared in the "winner paid" window; (3) the light on top of the machine flashed a maintenance signal; (4) the progressive jackpot amount did not stop; (5) no sirens or music came from the slot machine; and (6) no jackpot win registered on the inter-linked computer system.

Sengel claimed a jackpot win, but the casino's slot shift manager concluded that there was not a valid win because of the apparent malfunction and the misalignment of the symbols. Sengel disagreed with the shift [**260] manager,

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who immediately contacted the Nevada Gaming Control Board (hereafter "Board") and the slot machine manufacturer, IGT. Board agent Robert Johnson arrived at the Silver Legacy and conducted a thorough investigation of the dispute.

The tilt error code was cleared by a casino employee, through a manual adjustment of the microswitch on the cash door, and the game was reset. As soon as the game reset, play resumed and a non-winning combination, three blanks, appeared on the slot machine. The Board agent performed several tests on the machine and verified that Sengel did not have a valid jackpot. The agent concluded his investigation and sent a letter to Sengel, stating that there was not a valid win because the game had been suspended due to a malfunction and when the game was completed the result was a non-winning alignment.

Sengel filed a petition for reconsideration with the Board. A two-day hearing was held before a Board hearing examiner, who concluded that Sengel had not demonstrated by a preponderance of evidence that the Board agent's decision should be modified or reversed and recommended that the Board affirm the agent's decision. The Board subsequently accepted that recommendation and affirmed the denial of the jackpot.

Sengel filed a petition for judicial review with the district court. After a hearing, the district court dismissed the petition and affirmed the Board. This appeal followed.

DISCUSSION

The Nevada Gaming Control Board has exclusive jurisdiction to resolve a disputed claim, such as Sengel's, by a patron of a gaming licensee for payment of a gambling debt that is not evidenced by a credit instrument. NRS 463.361(2)(a). 1 No other remedy [*569] exists to enforce a gaming debt not evidenced by a credit instrument. NRS 463.361(1). Once the Board resolves such a gaming dispute, any person aggrieved by the Board's decision may obtain judicial review of the Board's decision, subject to the following limitations on judicial review:

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The reviewing court may affirm the decision and order of the board or the hearing examiner, or it may remand the case for further proceedings or reverse the decision if the substantial rights of the petitioner have been prejudiced because the decision is:

(a) In violation of constitutional provisions;

(b) In excess of the statutory authority or jurisdiction of the board or the hearing examiner;

(c) Made upon unlawful procedure;

(d) Unsupported by any evidence; or

(e) Arbitrary or capricious or otherwise not in accordance with law.

NRS 463.3666(3).

1 NRS 463.361 provides, as follows:

1. Except as otherwise provided in NRS 463.361 to 463.366, inclusive, gaming debts that are not evidenced by a credit instrument are void and unenforceable and do not give rise to any administrative or civil cause of action.

2. A claim by a patron of a licensee for payment of a gaming debt that is not evidenced by a credit instrument may be resolved in accordance with NRS 463.362 to 463.366, inclusive:

(a) By the board; or

(b) If the claim is for less than $ 500, by a hearing examiner designated by the board.

NRS 463.0171 defines a "licensee" as "any person to whom a valid gaming license, manufacturer's or distributor's license . . . has been issued." Respondents meet this definition.

I. Decision supported by "any" evidence

Sengel implicitly argues that reversal of the Board is justified under NRS 463.3666(3)(d) because the Board's decision is not supported by any evidence. Sengel states that there are no disputed facts, yet consistently recasts the factual findings of the Board throughout his argument. Therefore, we will address the issue as though raised explicitly.

The district court exhibited some confusion as to whether the "any" evidence or the "substantial" evidence

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standard applied. The district court stated that because there was "overwhelming" evidence supporting the Board's decision, there was enough evidence to affirm the Board under either [**261] standard. After reviewing the record, we agree that the Board's decision was supported by both "substantial" evidence and "any" evidence, although the district court should have conducted its review under the "any" [*570] evidence standard. NRS 463.3666(3)(d). Because the district court arrived at the correct decision, even though based on the wrong standard, we affirm that decision. See Hotel Riviera, Inc. v. Torres, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981) (holding that a correct decision of a district court will be affirmed, even if based on the wrong reason).

In order to give clear direction to the lower courts and prevent the application of the wrong standard in the future, primarily in cases with less than substantial evidence in which using the wrong standard could make a difference, we take this opportunity to clarify that the "any" evidence standard applies. NRS 463.3666(3)(d) uses the word "any" instead of "substantial," indicating that a reviewing court should affirm a decision of the Board which is supported by any evidence whatsoever, even if that evidence is less than "that which "'a reasonable mind might accept as adequate to support a conclusion.'"" City of Las Vegas v. Laughlin, 111 Nev. 557, 558, 893 P.2d 383, 384 (1995) (defining the "substantial" evidence standard) (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting Richardson v. Perales, 402 U.S. 389, 401, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971))). This comports with the "great deference" we afford a decision of the Board on appeal. See Redmer v. Barbary Coast Hotel & Casino, 110 Nev. 374, 378, 872 P.2d 341, 344 (1994).

With this standard in mind, we examine Sengel's contentions.

Sengel contends that the slot machine did not malfunction because it acted exactly as it was designed to operate. By stopping abruptly upon receiving an error code, the machine produced a result on the reels in a manner in

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which it was designed. Because, argues Sengel, the reels were stopped in a manner in which they were designed to be stopped, the result was not a malfunction.

However, the Board heard evidence that the slot machine was only designed to produce jackpots via the random number generator. It was not designed to produce a final game result with the sudden stoppage of the reels caused by an error code. Any result shown on the reels during suspension of the game was designed to be just that: a suspended result. Upon a reel shutdown caused by a tilt code, the machine was not designed to recognize the suspended result as a legitimate outcome, be it an apparent winning or non-winning alignment. Respondents' witnesses testified that, while the game did do what it was designed to do, which is to immediately shut down upon detection of an error code, the game was not designed to produce a final play alignment of the reels until after the error code was cleared. Sengel's own expert witness admitted on cross-examination that a door tilt code would [*571] have to be considered a malfunction. Further, the Board took evidence from Board agent Robert Johnson that the machine itself showed a malfunction code and in other ways visually appeared to not have a valid jackpot. The abrupt stop of the reels, the uneven alignment of the jackpot symbols, the tilt code in the "winner paid" window, the maintenance light on top of the machine and the absence of jackpot lights, the continued running of the progressive jackpot amount, the lack of sirens or music coming from the slot machine, and the fact that no jackpot win registered on the inter-linked computer system all support the Board's finding that a malfunction occurred. Accordingly, Sengel's argument is without merit, because there is evidence to support a finding that a malfunction occurred.

Sengel challenges the Board's finding that the malfunction was part of the slot machine, not part of associated equipment. He argues that the slot machine itself is a "gaming device," as defined in NRS 463.0155, but that the bill validator is merely "associated equipment, " as defined in NRS 463.0136. Sengel argues that some

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Quartermania slot machines have bill validators and some do not, so the bill validator is not an essential part of the actual gaming device. The Board, however, with its expertise in gaming matters, found that the bill validator, once placed [**262] inside the slot machine and connected with the machine's unified security system and part of the computerized "game flow" process, is part of the slot machine and not merely associated equipment. Because there is evidence supporting this finding, we again defer to the Board.

II. Decision not arbitrary, capricious or contrary to law

" An order of the Nevada Gaming Control Board will not be disturbed unless it is arbitrary, capricious or contrary to the law. Yet in spite of this standard, this court is free to examine purely legal questions decided at the administrative level." Redmer, 110 Nev. at 378, 872 P.2d at 344 (citations omitted). "This court's role in reviewing an administrative decision is identical to that of the district court." Nevada State Bd. of Nursing v. Merkley, 113 Nev. 659, 664, 940 P.2d 144, 147 (1997).

Even alignment required by pay table

The slot machine had a pay table which listed the possible winning alignments and their respective payoff amounts. The Board found that this pay table clearly showed an even alignment of jackpot symbols next to the progressive jackpot amount, and Sengel does not dispute this finding. The Board concluded from this finding that the even alignment of the symbols on the pay table was an express term of the wagering contract entered into between the [*572] parties. However, Sengel argues that the exact horizontal alignment of symbols on the pay table is merely for efficiency and aesthetics, and is not a binding term of the contract. However, no evidence in the record supports this claim. With no evidence to the contrary, the Board was justified in concluding that an even alignment of jackpot symbols was a term of the contract expressly stated on the face of the machine in the pay table.

Notice of random number generator

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Sengel characterizes one basis of the Board's decision as follows: any result on the pay line not produced by the random number generator is void and therefore the reels themselves are irrelevant to the game. Sengel labels this reasoning as the Board's secret policy, which allows it to arbitrarily and capriciously deny valid jackpots at will, a secret policy whereby a visual jackpot that is not generated by a random number generator is not a valid jackpot. Sengel argues that because the public is not given notice that jackpots not generated by a random number generator are invalid, the Board's implementation of this policy without public notice is arbitrary or capricious or otherwise contrary to law. 2 Sengel correctly points out that Nevada statutory and case law provide that a malfunction voids the play of a slot machine, provided the slot machine has a statement to that effect. He argues that if a new kind of malfunction, the kind that can merely suspend play for a time rather than void a play, is to be recognized by the Board, it is only fair that such a statement also be included on the face of the machine. He argues that it is arbitrary or capricious or contrary to law for the Board simply to recognize this new kind of malfunction without first requiring notification to the public on the face of the machine.

2 Appellant makes this argument in conjunction with a novel promissory estoppel argument. He argues that because respondents present the Quartermania slot machine to the public as a traditional reel-type machine, with payouts dependent only on the position of the reels and not dependent on a hidden random number generator inside the machine, the respondents are estopped from conditioning a jackpot on the results of the random number generator. We conclude that this argument lacks merit.

Sengel's argument fails for three reasons. First, Nevada Gaming Commission Regulation 14.040(2) requires that all gaming devices "must use a random selection process to determine the game outcome of each play of a game." Because the public has constructive knowledge of this regulation, which is state law, Sengel had constructive

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knowledge when he played the machine that the game result was to be determined by a "random selection process," and that any result or apparent result caused by any [*573] other means would be invalid. See Smith v. State, 38 Nev. 477, 481, 151 P. 512, 513 (1915) (stating that "every one is presumed to know the law, and this presumption is not [**263] even rebuttable"). Because of this constructive knowledge, Sengel's lack of notice argument fails. Second, even if the malfunction alignment was the final alignment and not the result of a malfunction, it is not a valid jackpot that is otherwise being denied arbitrarily. The Board found that the uneven alignment of the Quartermania symbols did not constitute a jackpot, even if that alignment had not been caused by a malfunction. Third, the statement on the face of the machine, "Malfunction voids all pays and plays," was sufficient to include the type of malfunction which occurred in this case.

Rules of play

Next, Sengel contends that the Board's denial of the jackpot is arbitrary and capricious because it violates the "rules of play" associated with slot machine play. However, he cites no legal authority to support his rules of play and instead claims that the rules of play have "been in effect for so long, are used so often, and are so widely known that it is difficult to find them cited as such in any one place." 3 We need not consider this argument because Sengel cites no legal authority to support it. See Cunningham v. State, 94 Nev. 128, 130, 575 P.2d 936, 938 (1978).

3 Appellant further states that the decisions of the Board and district court "seem to presume" the existence of the rules of play, without elaborating why. Appellant also requests this court to take judicial notice of his rules of play, without citing any determinative legal or non-legal authority in support of his request. We decline to do so.

Alignment anywhere on pay line

Finally, Sengel argues that the language on the machine, "On payline with two quarters in wins progressive," only requires that the symbols need be

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anywhere on the pay line, not perfectly aligned with the other symbols and not necessarily bisected by the pay line. The only evidence in support of this proposition is the testimony of Sengel's expert witness, a former slot manager who retired twenty years ago. The expert opined that the malfunction alignment was a winning alignment because all the symbols were cut somewhere by the pay line. He stated that a jackpot symbol is a winning symbol if it stops anywhere on the pay line, regardless of whether it is aligned with the other symbols. The Board, however, was free to discount the expert's testimony because he had been out of the gaming industry for twenty years. The Board was free to give more weight to an express term on the face of the slot [*574] machine, the picture on the pay table showing an even alignment of jackpot symbols, than to the opinion of a retired casino manager. There was evidence on the pay table located on the face of the machine that the symbols had to be evenly aligned and there was evidence that the symbols were in fact not in the even alignment shown on the pay table. Accordingly, the Board's conclusion that Sengel did not have a valid win was not arbitrary or capricious or contrary to law.

In closing, we note that both parties have advanced public policy arguments in support of their positions. While we appreciate the tension between these and other competing public policies, it is not this court's role to dictate public policy in gaming. The State Legislature, in enacting the legislative scheme of which NRS 463.3666 is a part, has empowered the Nevada Gaming Control Board, not this court, to make these policy decisions.

CONCLUSION

This court shows great deference to a decision of the Nevada Gaming Control Board. Because the Board's decision was not unsupported by any evidence and was not arbitrary or capricious or otherwise contrary to law, we affirm the order of the district court upholding the Board's decision. 4

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4 The Honorable David Zenoff, Senior Justice, was appointed by the court to sit in place of the Honorable Deborah Agosti, Justice. Nev. Const. art. 6, § 19; SCR 10.

The Honorable Robert Rose, Chief Justice, and the Honorable Cliff Young, Justice, voluntarily recused themselves from participation in the decision of this appeal.

EL DOLO

LAIDLAW et al. v. ORGAN. SUPREME COURT OF THE UNITED STATES 15 U.S. 178; 4 L. Ed. 214; 2 Wheat. 178 March 15, 1817, Decided

OPINIÓN POR: MARSHALL

[*195] [**218] The question in this case is, whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor? The court is of opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties. But at the same time, each party must take care not to say or do any thing tending to impose upon the other. The court thinks that the absolute instruction of the judge was erroneous, and that the question, whether any imposition was practised by the vendee upon the vendor ought to have been submitted to the jury. For these reasons the judgment must be reversed, and the cause remanded to the district court of Louisiana, with directions to award a venire facias de novo.

Venire de novo awarded.

RUTH S. HALPERT v. MARTIN G. ROSENTHAL. SUPREME COURT OF RHODE ISLAND 107 R.I. 406; 267 A.2d 730 July 20, 1970

OPINIÓN POR: KELLEHER

[*408] [**731] This is a civil action wherein the plaintiff vendor seeks damages for the breach by the defendant vendee [*409] of a contract for the sale of real estate. The defendant filed a counter-claim in which he

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sought [**732] the return of his deposit. A jury trial was held in the Superior Court. The jury found for the defendant and judgment followed. The case is before us on the plaintiff's appeal.

On February 21, 1967, the parties hereto entered into a real estate agreement whereby plaintiff agreed to convey a one-family house located in Providence on the southeasterly corner of Wayland and Upton Avenues to defendant for the sum of $ 54,000. The defendant paid a deposit of $ 2,000 to plaintiff. The agreement provided for the delivery of the deed and the payment of the balance of the purchase price by June 30, 1967.

On May 17, 1967, a termite inspection was made of the premises, and it was discovered that the house was inhabited by termites. The defendant then notified plaintiff that, because of the termite infestation, he was not going to purchase the property. The defendant did not appear for the title closing which plaintiff had scheduled for June 30, 1967.

The plaintiff immediately commenced this suit. Her complaint prayed for specific performance or monetary damages. When the case came on for trial, the property had been sold to another buyer for the sum of $ 35,000. The plaintiff then sought to recover from defendant the $ 19,000 difference between the selling price called for in the sales agreement and the actual selling price. The defendant in his answer alleged that plaintiff and her agent had, during the preagreement negotiation, intentionally misrepresented the house as being free of termites. The defendant's counterclaim sought the return of the $ 2,000 deposit.

At the conclusion of the presentation of all the evidence, plaintiff made a motion for a directed verdict on the issue of the alleged fraudulent misrepresentations. The trial [*410] justice reserved decision on the motion and submitted the case to the jury. After the jury's verdict, he denied the motion.

This case is unique in that plaintiff made no motion for a new trial. Her appeal is based for the most part on the trial court's refusal to direct a verdict in her favor on the

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counterclaim. She has also alleged that the trial justice erred in certain portions of his charge to the jury and in failing to adopt some 15 requests to charge submitted by plaintiff.

The absence of a motion for a new trial narrows the scope of an inquiry on appeal. Instead of being concerned with the credibility of witnesses or the weight of the evidence as we would be were we reviewing the usual motion for a new trial, we apply the standards applicable to a motion for a directed verdict. In doing so, it is our duty to consider all of the evidence and reasonable inferences deducible therefrom in the light most favorable to defendant. Cofone v. Narragansett Racing Ass'n, Inc., 103 R. I. 345, 237 A.2d 717; Gramolini v. Marzalkowski, 102 R. I. 85, 228 A.2d 537.

Since we consider only the evidence favorable to defendant, we shall set forth defendant's version of three different occasions in 1967 when the alleged misrepresentations relative to absence of any termites were made.

1. In early February, defendant and his wife inspected the Halpert home. They asked the agent about termites and he told them that there was no termite problem and that he had never experienced any termite problem with any of the houses he sold in the East Side section of Providence.

2. Later on in February, defendant, his wife, his sister-in-law and his brother-in-law met plaintiff. The brother-in-law inquired about the presence of termites; plaintiff said that there were no termites in the house.

[*411] 3. When defendant was about to sign the purchase and sales agreement, he asked plaintiff's real estate agent whether it might not be advisable if the home be inspected [**733] for termites before the agreement was signed. The agent told defendant that such a step was unnecessary because there were no termite problems in the house.

The plaintiff contends that any statements or representations attributed to her or her agent were qualified in that when asked about the termites, they replied that to

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the best of their knowledge or experience the Wayland Avenue property was termite free. What she overlooks is that in our consideration of the correctness of the denial of her motion for a direction, we can consider only that evidence and the reasonable inferences flowing therefrom which favor defendant. We do not weigh the evidence to determine whether her or her agent's representations were qualified or unqualified.

In contending that she was entitled to a directed verdict, plaintiff contends that to sustain the charge of fraudulent misrepresentation, some evidence had to be produced showing that either she or her agent knew at the time they said there were no termites in the house, that such a statement was untrue. Since the representations made to defendant were made in good faith, she argues that, as a matter of law, defendant could not prevail on his counterclaim.

The defendant concedes that there was no evidence which shows that plaintiff or her agent knowingly made false statements as to the existence of the termites but he maintains that an innocent misrepresentation of a material fact is grounds for rescission of a contract where, as here, a party relies to his detriment on the misrepresentation.

We affirm the denial of the motion for a directed verdict.

The plaintiff, when she made her motion for a directed verdict, stated that her motion was restricted to the issue [*412] of "fraud." The word "fraud" is a generic term which embraces a great variety of actionable wrongs. LaCourse v. Kiesel, 366 Pa. 385, 77 A.2d 877. It is a word of many meanings and defies any one all-inclusive definition. Fraud may become important either for the purpose of giving the defrauded person the right to sue for damages in an action for deceit or to enable him to rescind the contract. 12 Williston, Contracts § 1487 at 322 (Jaeger 3d ed. 1970). In this jurisdiction a party who has been induced by fraud to enter into a contract may pursue either one of two remedies. He may elect to rescind the contract to recover what he has paid under it, or he may affirm the

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contract and sue for damages in an action for deceit. Goodwin v. Silverman, 71 R. I. 163, 43 A.2d 50; Robinson v. Standard Stores, Inc., 52 R. I. 271, 160 A. 471; Moran v. Tucker, 40 R. I. 485, 101 A. 327.

The distinction between a claim for damages for intentional deceit and a claim for rescission is well defined. Deceit is a tort action, and it requires some degree of culpability on the misrepresenter's part. Prosser, Law of Torts (3d ed.) § 100. An individual who sues in an action of deceit based on fraud has the burden of proving that the defendant in making the statements knew they were false and intended to deceive him. Cliftex Clothing Co. v. DiSanto, 88 R. I. 338, 148 A.2d 273; Conti v. Walter Winters, Inc., 86 R. I. 456, 136 A.2d 622. On the other hand, a suit to rescind an agreement induced by fraud sounds in contract. It is this latter aspect of fraud that we are concerned with in this case, and the pivotal issue before us is whether an innocent misrepresentation of a material fact warrants the granting of a claim for rescission. We believe that it does.

When he denied plaintiff's motion, the trial justice indicated that a false, though innocent, misrepresentation of a fact made as though of one's knowledge may be the basis for the rescission of a contract. While this issue is one of [*413] first impression in this state, it is clear that the trial judge's action finds support in the overwhelming [**734] weight of decisional and textual authority which has established the rule that where one induces another to enter into a contract by means of a material misrepresentation, the latter may rescind the contract. It does not matter if the representation was "innocent" or fraudulent.

In 12 Williston, supra, § 1500 at 400-01, Professor Jaeger states:

" It is not necessary, in order that a contract may be rescinded for fraud or misrepresentation, that the party making the misrepresentation should have known that it was false. Innocent misrepresentation is sufficient, for though the representation may have been made innocently,

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it would be unjust and inequitable to permit a person who has made false representations, even innocently, to retain the fruits of a bargain induced by such representations."

This statement of law is in accord with Restatement of Contracts, § 476 at 908 which states:

" Where a party is induced to enter into a transaction with another party that he was under no duty to enter into by means of the latter's fraud or material misrepresentation, the transaction is voidable as against the latter * * *."

Misrepresentation is defined as

"* * * any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts." Restatement of Contracts, § 470 at 890-91.

The comment following this section explains that a misrepresentation may be innocent, negligent or known to be false. A misrepresentation becomes material when it becomes likely to affect the conduct of a reasonable man with reference to a transaction with another person. Restatement of Contracts, § 470 (2) at 891. Section 28 of Restatement of Restitution is also in accord with this proposition of law that a transaction can be rescinded for innocent misrepresentation [*414] of a material fact. In addition, many courts have also adopted this rule including the following: Lehnhardt v. City, 105 Ariz. 142, 460 P.2d 637; Prudential Ins. Co. v. Anaya, 78 N. M. 101, 428 P.2d 640; Lanners v. Whitney, 247 Ore. 223, 428 P.2d 398; Hudspeth v. Zorn, (Mo.) 292 S.W.2d 271; Keeton Packing Co. v. State, (Tex.) 437 S.W.2d 20; Chesapeake Homes, Inc. v. McGrath, 249 Md. 480, 240 A.2d 245; Yorke v. Taylor, 332 Mass. 368, 124 N.E.2d 912; Whipp v. Iverson, 43 Wis. 2d 166, 168 N.W.2d 201; Seneca Wire & Mfg. Co. v. A. B. Leach & Co., 247 N. Y. 1, 159 N.E. 700; Berger v. Pittsburgh Auto Equipment Co., 387 Pa. 61, 127 A.2d 334.

In Watkins v. Grady County Soil & Water Conservation District, (Okla.) 438 P.2d 491, 495, the court ordered cancellation of an easement agreement that was procured by a material misrepresentation honestly made with no intent to deceive. The court reasoned that the

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question is "* * * not whether the representation is knowingly false, but whether the other party believed it to be true and thus was misled by such misrepresentations into making the contract."

In Williams v. Benson, 3 Mich. App. 9, 141 N.W.2d 650, the court indicated that relief would be available if there was in fact a misrepresentation, though made innocently, and if its deceptive influence was effective, the consequences to the plaintiff being as serious as though it proceeded from a vicious purpose. Citing Converse v. Blumrich, 14 Mich. 109, the court said that in determining whether relief is appropriate, courts must look to the effect of the untrue statement upon the person to whom it is made, rather than to the motive of the one making the representation.

In Ham v. Hart, 58 N. M. 550, 273 P.2d 748, the court in holding that the honesty and good faith of the person making misrepresentations is immaterial, quoted the [**735] following [*415] excerpt from 1 Story Equity Jurisprudence § 272 (14 ed.):

" 'Whether the party thus misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally in morals and law as unjustifiable as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a material fact by mistake, it is equally conclusive; for it operates as a surprise and imposition upon the other party.'" 58 N. M. at 552, 273 P.2d at 749.

It is true that some courts require proof of knowledge of the falsity of the misrepresentation before a contract may be invalidated. Wilkinson v. Appleton, 28 Ill. 2d 184, 190 N.E.2d 727; Classic Bowl, Inc. v. AMF Pinspotters, Inc., 403 F.2d 463; Southern Roofing & Petroleum Co. v. Aetna Ins. Co., 293 F. Supp. 725. However, the weight of

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authority follows the view that the misrepresenter's good faith is immaterial. We believe this view the better one.

A misrepresentation, even though innocently made, may be actionable, if made and relied on as a positive statement of fact. The question to be resolved in determining whether a wrong committed as the result of an innocent misrepresentation may be rectified is succinctly stated in 12 Williston, supra, § 1510 at 462 as follows:

" When a defendant has induced another to act by representations false in fact although not dishonestly made, and damage has directly resulted from the action taken, who should bear the loss?"

The question we submit is rhetorical. The answer is obvious. Simple justice demands that the speaker be held responsible. Accordingly, we hold that here defendant vendee could maintain his counterclaim.

The plaintiff's second contention is to the effect that even if an innocent misrepresentation without knowledge [*416] of its falsity may under certain circumstances entitle the misrepresentee to relief by way of rescission, defendant cannot maintain his action because the sales agreement contains a merger clause. This provision immediately precedes the testimonium clause and provides that the contract "* * * contains the entire agreement between the parties, and that it is subject to no understandings, conditions or representations other than those expressly stated herein." The plaintiff argues that in order to enable a purchaser to rescind a contract containing a merger clause because of a misrepresentation, proof of a fraudulent misrepresentation must be shown. We find no merit in this argument.

If, as plaintiff concedes, a merger clause, such as is found within the sales contract now before us, will not prevent a rescission based on a fraudulent misrepresentation, 1 there is no valid reason to say that it will prevent a rescission of an agreement which is the result of a false though innocent misrepresentation where both

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innocent and fraudulent misrepresentations render a contract voidable. See Restatement of Contracts, § 476. As we observed before, the availability of the remedy of rescission is motivated by the obvious inequity of allowing a person who has made the innocent misrepresentation to retain the fruits of the bargain induced thereby. If we are to permit a party to rescind a contract which is the result of an innocent misrepresentation, the "boiler plate" found in the merger clause shall not bar the use of this remedy.

1 In Bloomberg v. Pugh Bros. Co., 45 R. I. 360, 121 A. 430, the contract contained a merger clause similar to the one before us. Such a provision, this court said, would not bar the introduction of evidence designed to show that the contract had been procured by fraud.

The plaintiff also makes much ado about the difference between what the vendee alleged [**736] in his counterclaim and what he proved at trial. She directs our attention to the [*417] undisputed fact that defendant pleaded an intentional misrepresentation of fact, whereas at trial he adduced evidence which would show that the contract was signed because of the innocent misrepresentation about the termites.

While the difference between defendant's "allegata" and his "probata" might have had some significance in the days prior to the adoption of the new rules of civil procedure in the Superior Court, we observed in Cofone v. Narragansett Racing Ass'n, Inc., supra, that the commonlaw requirement that the proof conform to the pleadings is no longer the law in this jurisdiction. It has been negated, we said, by that portion of Rule 15 (b) which provides that where an issue is tried in a cause by the expressed or implied consent of the parties, it shall be treated in all respects as if it had been pleaded even in the absence of amendment. An examination of the record shows that at no time during the Superior Court trial did plaintiff make objection to the trial justice that defendant's evidence was at variance with his plea. The only objection lodged by plaintiff to defendant's evidence relative to the alleged misrepresentations was that it violated the provisions of the contract's merger clause.

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Later in the trial, plaintiff stated that she would show that defendant's failure to purchase her home was due to reasons other than the presence of the termites. We therefore hold that plaintiff's complaint of a variance between the pleading and the proof comes too late in this litigation to warrant any consideration.

Before leaving this phase of plaintiff's appeal, we think it appropriate that we allude to the tendency of many courts to equate an innocent misrepresentation with some species of fraud. Usually the word "fraud" connotes a conscious dishonest conduct on the part of the misrepresenter. Fraud, however, is not present if the speaker actually believes that what he states as the truth is the truth. [*418] We believe that it would be better if an innocent misrepresentation was not described as some specie of fraud. Unqualified statements imply certainty. Reliance is more likely to be placed on a positive statement of fact than a mere expression of opinion or a qualified statement. The speaker who uses the unqualified statement does so at his peril. The risk of falsity is his. If he is to be liable for what he states, the liability is imposed because he is to be held strictly accountable for his words. Responsibility for an innocent misrepresentation should be recognized for what it is -- an example of absolute liability rather than as many courts have said, an example of constructive fraud. See 12 Williston, supra, § 1510; 1 Harper and James, The Law of Torts § 7.7.

When we consider plaintiff's allegations as to the errors committed by the trial justice in charging or in failing to charge the jury, we note that in most instances she has failed to comply with that portion of Rule 51 of Super. R. Civ. P. which states that a person objecting to the giving of or failure to give certain instructions shall specifically state the grounds for his objection. This provision is designed to give the trial justice an opportunity to correct any error in his charge. While plaintiff has lodged numerous objections to the charge as given and to the court's failure to charge, she has in most instances given no reason for any of the objections made. We shall not consider any of the

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objections taken to the trial justice's failure to give the requested instructions, and we shall consider only those objections to the charge where there has been some attempt at compliance with the rule or where the reason for the objection is obvious. See Paquin v. Providence Washington Ins. Co., 106 R. I. 267, 259 A.2d 115.

The plaintiff first contends that the trial justice failed to instruct the jury that the burden of proof as to the issue of misrepresentation was upon defendant. [**737] This argument [*419] is without merit. At one point in his instructions the trial justice made this statement:

"The defendant cannot avoid his contract unless you find, by a fair preponderance of the evidence, that a misrepresentation of fact was made to him by the plaintiff or her agent and that such a misrepresentation was material to the action here disputed."

While this portion of the charge did not specifically state that it was defendant's burden of proof to show that a misrepresentation had been made, in our opinion it adequately conveyed to the jury the obligation which this concept placed on the proponent of an issue. In addition, the trial justice earlier in his instructions had explained to the jury the phrase "preponderance of the evidence." Although the instructions are somewhat cryptic, the jury's verdict is proof positive that defendant had convinced the jury that the representations attributed to plaintiff had been made.

The plaintiff states that the trial judge should have instructed the jury that misrepresentations had to be proved by "clear and convincing evidence" and not by a "preponderance of the evidence" as they were charged. We disagree. Long ago in Smith v. Rhode Island Co., 39 R. I. 146, 98 A. 1, we stated in clear and express language that fraud must be proved by a preponderance of the evidence, and there is no reason why we should require a higher degree of proof when the good faith of the misrepresenter is unquestioned.

The plaintiff complains that the trial justice erred when he told the jury that defendant could recover even though

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he might have been "negligent" in signing the sales agreement. 2 [*420] The thrust of this objection is plaintiff's contention that either defendant's neglect to include in the contract a clause which would have protected his interest in the event termites were found on the property or his failure to have the premises inspected for termites prevents his recovery of the deposit. Such an argument is really aimed at the question of whether or not defendant was justified in relying on the representations made by plaintiff and her agent. We can see nothing patently absurd or ridiculous in the statements attributed to them which would warrant us in saying that defendant should be denied relief because of his failure to do what plaintiff now says he should have done. On the record before us, defendant was amply justified in believing that the home he was purchasing was free of termites.

2 The plaintiff concedes that this court has permitted the victim of an intentional misrepresentation to recover even though he had failed to make any investigation into the truth or falsity of the statements made to him. East Providence Loan Co. v. Ernest, 103 R. I. 259, 236 A.2d 639; Passarelli v. Boragini, 76 R. I. 60, 68 A.2d 74; Campanelli v. Vescera, 75 R. I. 71, 63 A.2d 722.

The plaintiff's final objection on her appeal is directed toward the refusal of the trial justice to allow her in two instances to attempt to impeach the credibility of defendant by using his answers to interrogatories as evidence of a prior inconsistent statement. Rule 33 (b) provides that answers to interrogatories may be used at trial to the same extent as provided in Rule 26 (d) for use of the deposition of a party. This means, in effect, that answers to interrogatories can be used by an adverse party for any purpose, including impeaching the credibility of a party as a witness, subject, however, to the evidentiary rules of admissibility.

On cross-examination plaintiff attempted to impeach the credibility of defendant in accordance with the rules stated [*421] above by showing that in answering interrogatories propounded to him, defendant stated that

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misrepresentations as to termites were made to his mother-in-law during the negotiation period. We note, however, that in direct examination, defendant [**738] made no reference whatsoever as to what was said or not said to his mother-in-law regarding termites. Whether cross-examination should be permitted beyond those matters testified to by a witness on direct examination is a matter vested within the sound discretion of the trial judge and his exercise thereof will not be disturbed except upon a clear showing of an abuse of such discretion. State v. Campbell, 95 R. I. 370, 187 A.2d 543. The question propounded by plaintiff was not in cross-examination of anything testified to by defendant in direct examination. On the record before us we can see no abuse of the trial court's discretion. See Vingi v. Trillo, 77 R. I. 55, 73 A.2d 43.

Thereafter, later in the trial, plaintiff called defendant to the stand under the adverse party rule, G. L. 1956 (1969 Reenactment) § 9-17-14, and attempted a second time to introduce the interrogatories for impeachment purposes. Again, the trial justice prohibited this line of questioning. Without making a determination as to the validity of this procedure under the adverse party rule, we find that there was no error. In Urbani v. Razza, 103 R. I. 445, 449, 238 A.2d 383, 386, we held that an exclusion of evidence, even if wrongful, will not suffice for a reversal unless the evidence excluded "* * * was relevant and material to a crucial issue and if it can with reason be said that such evidence, if admitted, would properly have influenced the verdict or had a controlling influence on a material aspect of the case."

As we have noted above, the record clearly discloses considerable evidence pertinent to the misrepresentation issue. Even if we were to assume that the exclusion of the interrogatories [*422] was improper, we are unable to say that it would have had such a substantial influence on the jury, if admitted, as to cause it to return a contrary verdict to that which it did. See Romanelli v. A. B. C., Inc., 104 R. I. 689, 248 A.2d 598.

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The appeal of the plaintiff is denied and dismissed, and the case is remanded to the Superior Court for entry of judgment thereon.

Motion for reargument denied.

LA VIOLENCIA

CHAS. H. HACKLEY and JAS. MCGORDON v. JOHN HEADLEY. SUPREME COURT OF MICHIGAN 45 Mich. 569; 8 N.W. 511 January 26, 1881, Submitted April 13, 1881, Decided

OPINIÓN POR: Cooley

[*571] [**511] Headley sued Hackley & McGordon to recover compensation for cutting, hauling and delivering in the Muskegon river a quantity of logs. The performance of the labor was not disputed, but the parties were not agreed as to the construction of the contract in some important particulars, and the amount to which Headley was entitled depended largely upon the determination of these differences. The defendants also claimed to have had a full and complete settlement with Headley, and produced his receipt in evidence thereof. Headley admitted the receipt, but insisted that it was given by him under duress, and the verdict which he obtained in the circuit court was in accordance with this claim.

I. The questions in dispute respecting the construction of the contract concerned the scaling of the logs. The contract was in writing, and bore date August 20, 1874. Headley agreed thereby to cut on specified lands and deliver in the main Muskegon river the next spring 8,000,000 feet of logs. The logs were to be measured or scaled by a competent person to be selected by Hackley & McGordon, "and in accordance with the standard rules or scales in general use on Muskegon lake and river," and the expense of scaling was to be mutually borne by the parties.

The dispute respecting the expense of scaling related only to the board of the scaler. Headley boarded him and claimed to recover one-half what it was worth. Defendants offered [*572] evidence that it was customary on the Muskegon river for jobbers to board the scalers, at their

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own expense, but we are of opinion that this was inadmissible. If under the contract with the scaler he was to be furnished his board, then the cost of the board was a part of the expense of scaling, and by the express terms of the contract was to be shared by the parties. If that was not the agreement with him, Headley could only look to the scaler himself for his pay.

This is a small matter; but the question what scale was to be the standard is one of considerable importance. The evidence tended to show that at the time the contract was entered into, scaling upon the river and lake was in accordance with the "Scribner rule," so-called; but that the "Doyle rule" was in general use when the logs were cut and delivered, and Hackley & McGordon had the logs scaled by that. By the new rule the quantity would be so much less than by the one in prior use that the amount Headley would be entitled to receive would be less by some $ 2000; and it was earnestly contended on behalf of Headley that the scale intended, as the one in general use, was the one in general use when the contract was entered into.

We are of opinion, however, that this is not the proper construction. The contract was for the performance of labor in the future, and as the scaling was to be done by third persons, and presumptively by those who were trained to the business, it would be expected they would perform their duties under such rules and according to such standards as were generally accepted at the time their services were called for. Indeed such contracts might contemplate performance [**512] at times when it would scarcely be expected that scalers would be familiar with scales in use when they were made. It is true the time that was to elapse between the making of this contract and its performance would be but short, but if it had been many years the question of construction would have been the same; and if we could not suppose under such circumstances that the parties contemplated the scalers should govern their measurements by obsolete and perhaps now unknown rules, neither can we here. It is fair to infer that [*573] the existing scale was well known to the parties, and that if

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they intended to be governed by it at a time when it might have ceased to be used, they would have said so in explicit terms. In the absence of an agreement to that effect, we must suppose they intended their logs to be scaled as the logs of others would be at the place and time of scaling.

II. The question of duress on the part of Hackley & McGordon, in obtaining the discharge, remains. The paper reads as follows:

"Muskegon, Mich., August 3, 1875.

Received from Hackley & McGordon their note for four thousand dollars, payable in thirty days, at First National Bank, Grand Rapids, which is in full for all claims of every kind and nature which I have against said Hackley & McGordon.

Witness: Thomas Hume. John Headley."

Headley's account of the circumstances under which this receipt was given is in substance as follows: On August 3, 1875, he went to Muskegon, the place of business of Hackley & McGordon, from his home in Kent county, for the purpose of collecting the balance which he claimed was due him under the contract. The amount he claimed was upwards of $ 6200, estimating the logs by the Scribner scale. He had an interview with Hackley in the morning, who insisted that the estimate should be according to the Doyle scale, and who also claimed that he had made payments to others amounting to some $ 1400 which Headley should allow. Headley did not admit these payments, and denied his liability for them if they had been made. Hackley told Headley to come in again in the afternoon, and when he did so Hackley said to him: "My figures show there is 4260 and odd dollars in round numbers your due, and I will just give you $ 4000. I will give you our note for $ 4000." To this Headley replied: "I cannot take that; it is not right, and you know it. There is over $ 2000 besides that belongs to me, and you know it." Hackley replied: "That is the best I will do with you." Headley said: "I cannot take that, Mr. Hackley," and Hackley replied, "You do the next best thing you are a mind to. [*574] You can sue me if you please." Headley

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then said: "I cannot afford to sue you, because I have got to have the money, and I cannot wait for it. If I fail to get the money to-day, I shall probably be ruined financially, because I have made no other arrangement to get the money only on this particular matter." Finally he took the note and gave the receipt, because at the time he could do nothing better, and in the belief that he would be financially ruined unless he had immediately the money that was offered him, or paper by means of which the money might be obtained.

If this statement is correct, the defendants not only took a most unjust advantage of Headley, but they obtained a receipt which, to the extent that it assumed to discharge anything not honestly in dispute between the parties, and known by them to be owing to Headley beyond the sum received, was without consideration and ineffectual. But was it a receipt obtained by duress? That is the question which the record presents. The circuit judge was of opinion that if the jury believed the statement of Headley they would be justified in finding that duress existed; basing his opinion largely upon the opinion of this Court in Vine v. Glenn 41 Mich. 112.

Duress exists when one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the [**513] exercise of free will. It is commonly said to be of either the person or the goods of the party. Duress of the person is either by imprisonment, or by threats, or by an exhibition of force which apparently cannot be resisted. It is not pretended that duress of the person existed in this case; it is if anything duress of goods, or at least of that nature, and properly enough classed with duress of goods. Duress of goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them in possession but refuses to surrender them unless the exaction is submitted to.

The leading case involving duress of goods is Astley v. Reynolds 2 Strange 915. The plaintiff had pledged goods for 20 pounds, and when he offered to redeem them, the

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pawnbroker [*575] refused to surrender them unless he was paid 10 pounds for interest. The plaintiff submitted to the exaction, but was held entitled to recover back all that had been unlawfully demanded and taken. This, say the court, "is a payment by compulsion: the plaintiff might have such an immediate want of his goods that an action of trover would not do his business: where the rule volenti non fit injuria is applied, it must be when the party had his freedom of exercising his will, which this man had not: we must take it he paid the money relying on his legal remedy to get it back again." The principle of this case was approved in Smith v. Bromley Doug. 696, and also in Ashmole v. Wainwright 2 QB 837. The latter was a suit to recover back excessive charges paid to common carriers who refused until payment was made to deliver the goods for the carriage of which the charges were made. There has never been any doubt but recovery could be had under such circumstances. Harmony v. Bingham 12 N.Y. 99. The case is like it of one having securities in his hands which he refuses to surrender until illegal commissions are paid. Scholey v. Mumford 60 N.Y. 498. So if illegal tolls are demanded, for passing a raft of lumber, and the owner pays them to liberate his raft, he may recover back what he pays. Chase v. Dwinal 7 Me. 134. Other cases in support of the same principle are Shaw v. Woodcock 7 B. & C. 73; Nelson v. Suddarth 1 H. & Munf. 350; White v. Heylman 34 Pa. 142; Sasportas v. Jennings 1 Bay 470; Collins v. Westbury 2 Bay 211; Crawford v. Cato 22 Ga. 594. So one may recover back money which he pays to release his goods from an attachment which is sued out with knowledge on the part of the plaintiff that he has no cause of action. Chandler v. Sanger 114 Mass. 364. See Spaids v. Barrett 57 Ill. 289. Nor is the principle confined to payments made to recover goods: it applies equally well when money is extorted as a condition to the exercise by the party of any other legal right; for example when a corporation refuses to suffer a lawful transfer of stock till the exaction is submitted to: Bates v. Insurance Co. 3 Johns. Cas. 235 at 238; or [*576] a creditor withholds his

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certificate from a bankrupt. Smith v. Bromley Doug. 696. And the mere threat to employ colorable legal authority to compel payment of an unfounded claim is such duress as will support an action to recover back what is paid under it. Beckwith v. Frisbie 32 Vt. 559; Adams v. Reeves 68 N.C. 134; Briggs v. Lewiston 29 Me. 472; Grim v. School District 57 Pa. 433; First Nat. Bank v. Watkins 21 Mich. 483.

But where the party threatens nothing which he has not a legal right to perform, there is no duress. Skeate v. Beale 11 Ad. & El. 983; Preston v. Boston 29 Mass/ 7, 12 Pick. 7 at 14. When therefore a judgment creditor threatens to levy his execution on the debtor's goods, and under fear of the levy the debtor executes and delivers a note for the amount, with sureties, the note cannot be avoided for duress. Wilcox v. Howland 40 Mass. 167, 23 Pick. 167. Many other cases might be cited, but it is wholly unnecessary. We have examined all to which our attention has been directed, and none are more favorable to the plaintiff's case than those above referred to. Some of them are much less so; [**514] notably Atlee v. Backhouse 3 Mees & Welsb. 633; Hall v. Schultz 4 Johns. 240; Silliman v. United States 101 U.S. 465.

In what did the alleged duress consist in the present case? Merely in this: that the debtors refused to pay on demand a debt already due, though the plaintiff was in great need of the money and might be financially ruined in case he failed to obtain it. It is not pretended that Hackley & McGordon had done anything to bring Headley to the condition which made this money so important to him at this very time, or that they were in any manner responsible for his pecuniary embarrassment except as they failed to pay this demand. The duress, then, is to be found exclusively in their failure to meet promptly their pecuniary obligation. But this, according to the plaintiff's claim, would have constituted no duress whatever if he had not happened to be in pecuniary straits; and the validity of negotiations, according to this claim, must be determined, not by the defendants' conduct, [*577] but by the plaintiff's

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necessities. The same contract which would be valid if made with a man easy in his circumstances, becomes invalid when the contracting party is pressed with the necessity of immediately meeting his bank paper. But this would be a most dangerous, as well as a most unequal doctrine; and if accepted, no one could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who professed to be in great need.

The case of Vine v. Glenn 41 Mich. 112, differs essentially from this. There was not a simple withholding of moneys in that case. The decision was made upon facts found by referees who reported that the settlement upon which the defendant relied was made at Chicago, which was a long distance from plaintiff's home and place of business; that the defendant forced the plaintiff into the settlement against his will, by taking advantage of his pecuniary necessities, by informing plaintiff that he had taken steps to stop the payment of money due to the plaintiff from other parties, and that he had stopped the payment of a part of such moneys; that defendant knew the necessities and financial embarrassments in which the plaintiff was involved, and knew that if he failed to get the money so due to him he would be ruined financially; that plaintiff consented to such settlement only in order to get the money due to him, as aforesaid, and the payment of which was stopped by defendant, and which he must have to save him from financial ruin. The report, therefore, showed the same financial embarrassment and the same great need of money which is claimed existed in this case, and the same withholding of moneys lawfully due, but it showed over and above all that an unlawful interference by defendant between the plaintiff and other debtors, by means of which he had stopped the payment to plaintiff of sums due to him from such other debtors. It was this keeping of other moneys from the plaintiff's hands, and not the refusal by defendant to pay his own debt, which was the ruling fact in that case, and which was equivalent, in our opinion, to duress of goods.

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[*578] These views render a reversal of the judgment necessary, and the case will be remanded for a new trial with costs to the plaintiffs in error.

AUSTIN INSTRUMENT, INC., Respondent, v. LORAL CORPORATION, Appellant. COURT OF APPEALS OF NEW YORK 29 N.Y.2d 124; 272 N.E.2d 533; 324 N.Y.S.2d 22 May 12, 1971, Argued July 6, 1971, Decided

OPINIÓN POR: FULD

[*128] The defendant, Loral Corporation, seeks to recover payment for goods delivered under a contract which it had with plaintiff Austin Instrument, Inc., on the ground that the evidence establishes, as [**10] a matter of law, that it was forced to agree to an increase in price on the items in question under circumstances amounting to economic duress.

In July of 1965, Loral was awarded a $ 6,000,000 contract by the Navy for the production of radar sets. The contract contained a schedule of deliveries, a liquidated damages clause applying to late deliveries and a cancellation clause in case of default by Loral. The latter thereupon solicited bids for some [*129] 40 precision gear components needed to produce the radar sets, and awarded Austin a subcontract to supply 23 such parts. That party commenced delivery in early 1966.

In May, 1966, Loral was awarded a second Navy contract for the production of more radar sets and again went about soliciting bids. Austin bid on all 40 gear components but, on July 15, a representative from Loral informed Austin's president, Mr. Krauss, that his company would be awarded the subcontract only for those items on which it was low bidder. The Austin officer refused to accept an order for less than all 40 of the gear parts and on the next day he told Loral that Austin would cease deliveries of the parts due under the existing subcontract unless [**11] Loral consented to substantial increases in the prices provided for by that agreement -- both retroactively for parts already delivered and prospectively on those not yet shipped -- and placed with Austin the order

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for all 40 parts needed under Loral's second Navy contract. Shortly thereafter, Austin did, indeed, stop delivery. After contacting 10 manufacturers of precision gears and finding none who could produce the parts in time to meet its commitments to the Navy, 1 Loral acceded to Austin's demands; in a letter dated July 22, Loral wrote to Austin that "We have feverishly surveyed other sources of supply and find that because of the prevailing military exigencies, were they to start from scratch as would have to be the case, they could not even remotely begin to deliver on time to meet the delivery requirements established by the Government. * * * Accordingly, we are left with no choice or alternative but to meet your conditions."

1 The best reply Loral received was from a vendor who stated he could commence deliveries sometime in October.

[**12] Loral thereupon consented to the price increases insisted upon by Austin under the first subcontract and the latter was awarded a second subcontract making it the supplier of all 40 gear parts for Loral's second contract with the Navy. 2 Although Austin was granted until September to resume deliveries, Loral did, in fact, receive parts in August and was able to produce the radar sets in time to meet its commitments to the Navy on both contracts. After Austin's last delivery under the second subcontract [*130] in July, 1967, Loral notified it of its intention to seek recovery of the price increases.

2 Loral makes no claim in this action on the second subcontract.

On September 15, 1967, Austin instituted this action against Loral to recover an amount in excess of $ 17,750 which was still due on the second subcontract. On the same day, Loral commenced an action against Austin claiming damages of some $ 22,250 -- the aggregate of the price increases under the first subcontract -- on the ground of economic [**13] duress. The two actions were consolidated and, following a trial, Austin was awarded the sum it requested and Loral's complaint against Austin was dismissed on the ground that it was not shown that "it could not have obtained the items in question from other sources

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in time to meet its commitment to the Navy under the first contract." A closely divided Appellate Division affirmed (35 A D 2d 387). There was no material disagreement concerning the facts; as Justice Steuer stated in the course of his dissent below, "[the] facts are virtually undisputed, nor is there any serious question of law. The difficulty lies in the application of the law to these facts." (35 A D 2d 392.)

The applicable law is clear and, indeed, is not disputed by the parties. A contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will. (See Allstate Med. Labs. v. Blaivas, 20 N Y 2d 654; Kazaras v. Manufacturers Trust Co., 4 N Y 2d 930; Adams v. Irving Nat. Bank, 116 N. Y. 606, 611; see, also, 13 Williston, Contracts [3d ed., 1970], § 1603, p. [**14] 658.) The existence of economic duress or business compulsion is demonstrated by proof that "immediate possession of needful goods is threatened" (Mercury Mach. Importing Corp. v. City of New York, 3 N Y 2d 418, 425) or, more particularly, in cases such as the one before us, by proof that one party to a contract has threatened to breach the agreement by withholding goods unless the other party agrees to some further demand. (See, e.g., du Pont de Nemours & Co. v. Hass Co., 303 N. Y. 785; Gallagher Switchboard Corp. v. Heckler Elec. Co., 36 Misc 2d 225; see, also, 13 Williston, Contracts [3d ed., 1970], § 1617, p. 705.) However, a mere threat by one party to breach the contract by not delivering the required items, though wrongful, does not in itself constitute economic duress. It must also appear that [*131] the threatened party could not obtain the goods from another source of supply 3 and that the ordinary remedy of an action for breach of contract would not be adequate. 4

3 See, e.g., du Pont de Nemours & Co. v. Hass Co., 303 N. Y. 785, supra; Gallagher Switchboard Corp. v. Heckler Elec. Co., 36 Misc 2d 225, 226, supra; 30 East End v. World Steel Prods. Corp., 110 N. Y. S. 2d 754, 757. [**15]

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4 See, e.g., Kohn v. Kenton Assoc., 27 A D 2d 709; Colonie Constr. Corp. v. De Lollo, 25 A D 2d 464, 465; Halperin v. Wolosoff, 282 App. Div. 876; J. R. Constr. Corp. v. Berkely Apts., 259 App. Div. 830; Boss v. Hutchinson, 182 App. Div. 88, 92.

We find without any support in the record the conclusion reached by the courts below that Loral failed to establish that it was the victim of economic duress. On the contrary, the evidence makes out a classic case, as a matter of law, of such duress. 5

5 The suggestion advanced that we are precluded from reaching this determination because the trial court's findings of fact have been affirmed by the Appellate Division ignores the question to be decided. That question, undoubtedly one of law (see Cohen and Karger, Powers of the New York Court of Appeals [1952], § 115, p. 492), is, accepting the facts found, did the courts below properly apply the law to them.

[**16] It is manifest that Austin's threat -- to stop deliveries unless the prices were increased -- deprived Loral of its free will. As bearing on this, Loral's relationship with the Government is most significant. As mentioned above, its contract called for staggered monthly deliveries of the radar sets, with clauses calling for liquidated damages and possible cancellation on default. Because of its production schedule, Loral was, in July, 1966, concerned with meeting its delivery requirements in September, October and November, and it was for the sets to be delivered in those months that the withheld gears were needed. Loral had to plan ahead, and the substantial liquidated damages for which it would be liable, plus the threat of default, were genuine possibilities. Moreover, Loral did a substantial portion of its business with the Government, and it feared that a failure to deliver as agreed upon would jeopardize its chances for future contracts. These genuine concerns do not merit the label "'self-imposed, undisclosed and subjective'" which the Appellate Division majority placed upon them. It was perfectly

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reasonable for Loral, or any other party similarly placed, to consider [**17] itself in an emergency, duress situation.

[*132] Austin, however, claims that the fact that Loral extended its time to resume deliveries until September negates its alleged dire need for the parts. A Loral official testified on this point that Austin's president told him he could deliver some parts in August and that the extension of deliveries was a formality. In any event, the parts necessary for production of the radar sets to be delivered in September were delivered to Loral on September 1, and the parts needed for the October schedule were delivered in late August and early September. Even so, Loral had to "work * * * around the clock" to meet its commitments. Considering that the best offer Loral received from the other vendors it contacted was commencement of delivery sometime in October, which, as the record shows, would have made it late in its deliveries to the Navy in both September and October, Loral's claim that it had no choice but to accede to Austin's demands is conclusively demonstrated.

We find unconvincing Austin's contention that Loral, in order to meet its burden, should have contacted the Government and asked for an extension of its delivery dates so [**18] as to enable it to purchase the parts from another vendor. Aside from the consideration that Loral was anxious to perform well in the Government's eyes, it could not be sure when it would obtain enough parts from a substitute vendor to meet its commitments. The only promise which it received from the companies it contacted was for commencement of deliveries, not full supply, and, with vendor delay common in this field, it would have been nearly impossible to know the length of the extension it should request. It must be remembered that Loral was producing a needed item of military hardware. Moreover, there is authority for Loral's position that nonperformance by a subcontractor is not an excuse for default in the main contract. (See, e.g., McBride & Wachtel, Government Contracts, § 35.10, [11].) In light of all this, Loral's claim

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should not be held insufficiently supported because it did not request an extension from the Government.

Loral, as indicated above, also had the burden of demonstrating that it could not obtain the parts elsewhere within a reasonable time, and there can be no doubt that it met this burden. The 10 manufacturers whom Loral contacted comprised [**19] its entire list of "approved vendors" for precision gears, and none was [*133] able to commence delivery soon enough. 6 As Loral was producing a highly sophisticated item of military machinery requiring parts made to the strictest engineering standards, it would be unreasonable to hold that Loral should have gone to other vendors, with whom it was either unfamiliar or dissatisfied, to procure the needed parts. As Justice Steuer noted in his dissent, Loral "contacted all the manufacturers whom it believed capable of making these parts" (35 A D 2d, at p. 393), and this was all the law requires.

6 Loral, as do many manufacturers, maintains a list of "approved vendors," that is, vendors whose products, facilities, techniques and performance have been inspected and found satisfactory.

It is hardly necessary to add that Loral's normal legal remedy of accepting Austin's breach of the contract and then suing for damages would have been inadequate under the circumstances, as Loral would still have had to obtain [**20] the gears elsewhere with all the concomitant consequences mentioned above. In other words, Loral actually had no choice, when the prices were raised by Austin, except to take the gears at the "coerced" prices and then sue to get the excess back.

Austin's final argument is that Loral, even if it did enter into the contract under duress, lost any rights it had to a refund of money by waiting until July, 1967, long after the termination date of the contract, to disaffirm it. It is true that one who would recover moneys allegedly paid under duress must act promptly to make his claim known. (See Oregon Pacific R. R. Co. v. Forrest, 128 N. Y. 83, 93; Port Chester Elec. Constr. Corp. v. Hastings Terraces, 284 App.

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Div. 966, 967.) In this case, Loral delayed making its demand for a refund until three days after Austin's last delivery on the second subcontract. Loral's reason -- for waiting until that time -- is that it feared another stoppage of deliveries which would again put it in an untenable situation. Considering Austin's conduct in the past, this was perfectly reasonable, as the possibility of an application by Austin of further business compulsion still existed [**21] until all of the parts were delivered.

In sum, the record before us demonstrates that Loral agreed to the price increases in consequence of the economic duress [*134] employed by Austin. Accordingly, the matter should be remanded to the trial court for a computation of its damages.

The order appealed from should be modified, with costs, by reversing so much thereof as affirms the dismissal of defendant Loral Corporation's claim and, except as so modified, affirmed.

DISCREPA DEL FUNDAMENTO: BERGAN

Whether acts charged as constituting economic duress produce or do not produce the damaging effect attributed to them is normally a routine type of factual issue.

Here the fact question was resolved against Loral both by the Special Term and by the affirmance at the Appellate Division. It should not be open for different resolution here.

In summarizing the Special Term's decision and its own, the Appellate Division decided that "the conclusion that Loral acted deliberately and voluntarily, without being under immediate pressure of incurring severe business reverses, precludes a recovery on the theory of economic duress" (35 A D 2d 387, 391).

When the testimony of the [**22] witnesses who actually took part in the negotiations for the two disputing parties is examined, sharp conflicts of fact emerge. Under Austin's version the request for a renegotiation of the existing contract was based on Austin's contention that Loral had failed to carry out an understanding as to the items to be furnished under that contract and this was the

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source of dissatisfaction which led both to a revision of the existing agreement and to entering into a new one.

This is not necessarily and as a matter of law to be held economic duress. On this appeal it is needful to look at the facts resolved in favor of Austin most favorably to that party. Austin's version of events was that a threat was not made but rather a request to accommodate the closing of its plant for a customary vacation period in accordance with the general understanding of the parties.

Moreover, critical to the issue of economic duress was the availability of alternative suppliers to the purchaser Loral. The demonstration is replete in the direct testimony of Austin's witnesses and on cross-examination of Loral's principal and purchasing agent that the availability of practical alternatives was a highly [**23] controverted issue of fact. On that issue of fact the [*135] explicit findings made by the Special Referee were affirmed by the Appellate Division. Nor is the issue of fact made the less so by assertion that the facts are undisputed and that only the application of equally undisputed rules of law is involved.

Austin asserted and Loral admitted on cross-examination that there were many suppliers listed in a trade registry but that Loral chose to rely only on those who had in the past come to them for orders and with whom they were familiar. It was, therefore, at least a fair issue of fact whether under the circumstances such conduct was reasonable and made what might otherwise have been a commercially understandable renegotiation an exercise of duress.

The order should be affirmed.

The SELMER COMPANY, Plaintiff-Appellant, v. BLAKESLEE-MIDWEST COMPANY, Westinghouse Electric Corporation, and Federal Insurance Company, Defendants-Appellees. UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 704 F.2d 924 February 11, 1983, Argued March 29, 1983, Decided

OPINIÓN POR: POSNER

[*926] This appeal by the plaintiff from summary judgment for the defendants in a diversity case requires us

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to consider the meaning, under Wisconsin contract law, of "economic duress" as a defense to a settlement of a contract dispute.

On this appeal, we must take as true the following facts. The plaintiff, Selmer, agreed to act as a subcontractor on a construction project for which the defendant Blakeslee-Midwest Prestressed Concrete Company was the general contractor. Under the contract between Blakeslee-Midwest and Selmer, Selmer was to receive $210,000 for erecting prestressed concrete materials supplied to it by Blakeslee-Midwest. Blakeslee-Midwest failed to fulfill its contractual obligations; among other things, it was tardy in supplying Selmer with the prestressed concrete materials. Selmer could have terminated the contract without penalty but instead agreed [**2] orally with Blakeslee-Midwest to complete its work, provided Blakeslee-Midwest would pay Selmer for the extra costs of completion due to Blakeslee-Midwest's defaults. When the job was completed, Selmer demanded payment of $120,000. Blakeslee-Midwest offered $67,000 and refused to budge from this offer. Selmer, because it was in desperate financial straits, accepted the offer.

Two and a half years later Selmer brought this suit against Blakeslee-Midwest (the other defendants' liability, being derivative from Blakeslee-Midwest's does not require separate consideration), claiming that its extra costs had amounted to $150,000 ($120,000 being merely a settlement offer), and asking for that amount minus the $67,000 it had received, plus consequential and punitive damages. Although Selmer, presumably in order to be able to claim such damages, describes this as a tort rather than a contract action, it seems really to be a suit on Blakeslee-Midwest's alleged oral promise to reimburse Selmer in full for the extra costs of completing the original contract after Blakeslee-Midwest defaulted. But the characterization is unimportant. Selmer concedes that, whatever its suit is, it is barred [**3] by the settlement agreement if, as the district court held, that agreement is valid. The only question is whether there is a triable issue as to whether the settlement

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agreement is invalid because procured by "economic duress."

If you extract a promise by means of a threat, the promise is unenforceable. This is not, as so often stated, see, e.g., Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co., 584 P.2d 15, 22 (Alaska 1978), because such a promise is involuntary, [*927] unless "involuntary" is a conclusion rather than the description of a mental state. If the threat is ferocious ("your money or your life") and believed, the victim may be desperately eager to fend it off with a promise. Such promises are made unenforceable in order to discourage threats by making them less profitable. The fundamental issue in a duress case is therefore not the victim's state of mind but whether the statement that induced the promise is the kind of offer to deal that we want to discourage, and hence that we call a "threat." Selmer argues that Blakeslee-Midwest said to it in effect, "give up $53,000 of your claim for extras [$120,000 minus $67,000], or you will get nothing." [**4] This has the verbal form of a threat but is easily recast as a promise innocuous on its face -- "I promise to pay you $67,000 for a release of your claim." There is a practical argument against treating such a statement as a threat: it will make an inference of duress inescapable in any negotiation where one party makes an offer from which it refuses to budge, for the other party will always be able to argue that he settled only because there was a (figurative) gun at his head. It would not matter whether the party refusing to budge was the payor like Blakeslee-Midwest or the promisor like Selmer. If Selmer had refused to complete the job without being paid exorbitantly for the extras and Blakeslee-Midwest had complied with this demand because financial catastrophe would have loomed if Selmer had walked off the job, we would have the same case.A vast number of contract settlements would be subject to being ripped open upon an allegation of duress if Selmer's argument were accepted.

Sensitive -- maybe oversensitive -- to this danger, the older cases held that a threat not to honor a contract could

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not be considered duress. See, e.g., Sistrom v. Anderson, 51 Cal.App.2d 213, [**5] 124 P.2d 372, 376 (Cal.App.1942); cf. Batavian Bank v. North, 114 Wis. 637, 645-46, 90 N.W. 1016, 1019 (1902). But the principle was not absolute, as is shown by Alaska Packers' Ass'n v. Domenico, 117 Fed. 99 (9th Cir.1902). Sailors and fishermen (the libelants) "agreed in writing, for a certain stated compensation, to render their services to the appellant in remote waters where the season for conducting fishing operations is extremely short, and in which enterprise the appellant had a large amount of money invested; and, after having entered upon the discharge of their contract, and at a time when it was impossible for the appellant to secure other men in their places, the libelants, without any valid cause, absolutely refused to continue the services they were under contract to perform unless the appellant would consent to pay them more money." Id. at 102. The appellant agreed, but later reneged, and the libelants sued. They lost; the court refused to enforce the new agreement. Although the technical ground of decision was the absence of fresh consideration for the modified agreement, it seems apparent both from the quoted language and from a reference on the same [**6] page to coercion that the court's underlying concern was that the modified agreement had been procured by duress in the form of the threat to break the original contract. Cf. Farnsworth, Contracts 271 (1982).

Alaska Packers' Ass'n shows that because the legal remedies for breach of contract are not always adequate, a refusal to honor a contract may force the other party to the contract to surrender his rights -- in Alaska Packers' Ass'n, the appellant's right to the libelants' labor at the agreed wage. It undermines the institution of contract to allow a contract party to use the threat of breach to get the contract modified in his favor not because anything has happened to require modification in the mutual interest of the parties but simply because the other party, unless he knuckles under to the threat, will incur costs for which he will have no adequate legal remedy. If contractual protections are illusory, people will be reluctant to make contracts.

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Allowing contract modifications to be voided in circumstances such as those in Alaska Packers' Ass'n assures prospective contract parties that signing a contract is not stepping into a trap, and by thus encouraging [**7] people to make contracts promotes the efficient allocation of resources.

[*928] Capps v. Georgia Pac. Corp., 253 Or. 248, 453 P.2d 935 (1969), illustrates the principle of Alaska Packers' Ass'n in the context of settling contract disputes. The defendant promised to give the plaintiff, as a commission for finding a suitable lessee for a piece of real estate, 5 percent of the total rental plus one half of the first month's rent. The plaintiff found a suitable lessee and the lease was signed. Under the terms of the commission arrangement the defendant owed the plaintiff $157,000, but he paid only $5,000 and got a release from the plaintiff of the rest. The plaintiff later sued for the balance of $157,000, alleging that when requesting payment of the agreed-upon commission he had "informed Defendant that due to Plaintiff's adverse financial condition, he was in danger of immediately losing other personal property through repossession and foreclosure unless funds from Defendant were immediately made available for the purpose of paying these creditors." 253 Or. at 252, 453 P.2d at 937. But "Defendant, through its agent . . ., advised Plaintiff that though he was entitled [**8] to the sums demanded in Plaintiff's Complaint, unless he signed the purported release set forth in Defendant's Answer, Plaintiff would receive no part thereof, inasmuch as Defendant had extensive resources and powerful and brilliant attorneys who would and could prevent Plaintiff in any subsequent legal proceeding from obtaining payment of all or any portion of said sums." Id. We can disregard the reference to the defendant's "powerful and brilliant attorneys" yet agree with the Oregon Supreme Court that the confluence of the plaintiff's necessitous financial condition, the defendant's acknowledged indebtedness for the full $157,000, and the settlement of the indebtedness for less than 3 cents on the dollar -- with no suggestion that the defendant did not have

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the money to pay the debt in full -- showed duress. The case did not involve the settlement of a genuine dispute, but, as in Alaska Packers' Ass'n, an attempt to exploit the contract promisee's lack of an adequate legal remedy.

Although Capps is not a Wisconsin case, we have no reason to think that Wisconsin courts would reach a different result. Cf. Mendelson v. Blatz Brewing Co., 9 Wis.2d 487, 494, 101 N.W.2d [**9] 805, 809 (1960); Wurtz v. Fleischman, 97 Wis.2d 100, 109-11, 293 N.W.2d 155, 160 (1980). But the only feature that the present case shares with Capps is that the plaintiff was in financial difficulties. Since Blakeslee-Midwest did not acknowledge that it owed Selmer $120,000, and since the settlement exceeded 50 percent of Selmer's demand, the terms of the settlement are not unreasonable on their face, as in Capps. Thus the question is starkly posed whether financial difficulty can by itself justify setting aside a settlement on grounds of duress. It cannot. "The mere stress of business conditions will not constitute duress where the defendant was not responsible for the conditions." Johnson, Drake & Piper, Inc. v. United States, 209 Ct. Cl. 313, 531 F.2d 1037, 1042 (Ct.Cl.1976) (per curiam). The adverse effect on the finality of settlements and hence on the willingness of parties to settle their contract disputes without litigation would be great if the cash needs of one party were alone enough to entitle him to a trial on the validity of the settlement. In particular, people who desperately wanted to settle for cash -- who simply could not afford to litigate [**10] -- would be unable to settle, because they could not enter into a binding settlement; being desperate, they could always get it set aside later on grounds of duress. It is a detriment, not a benefit, to one's long-run interests not to be able to make a binding commitment.

Matters stand differently when the complaining party's financial distress is due to the other party's conduct. Although Selmer claims that it was the extra expense caused by Blakeslee-Midwest's breaches of the original contract that put it in a financial vise, it could have walked away from the contract without loss or penalty when

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Blakeslee-Midwest broke the contract. Selmer was not forced by its contract to remain on the job, and was not prevented by circumstances from walking away from the contract, as the appellant in Alaska Packers' [*929] Ass'n had been; it stayed on the job for extra pay. We do not know why Selmer was unable to weather the crisis that arose when Blakeslee-Midwest refused to pay $120,000 for Selmer's extra expenses -- whether Selmer was undercapitalized or overborrowed or what -- but Blakeslee-Midwest cannot be held responsible for whatever it was that made Selmer so necessitous, [**11] when, as we have said, Selmer need not have embarked on the extended contract.

To assimilate this case to one of the conventional categories of duress Selmer argues that Blakeslee-Midwest withheld $21,000 in "retainage" in order to force Selmer to settle the dispute over the extras, and in thus withholding Selmer's property was guilty of "duress of goods," see, e.g., Williams v. Phelps, 16 Wis. 80, 85 (1862); Sistrom v. Anderson, supra, 124 P.2d at 376, rather than merely of a refusal to settle a contract dispute. Many construction contracts, including this one, allow the payor to retain 10 percent of any advance payments due under the contract as security for the contractor's completing the job. At the completion of the job the amount retained must of course be paid the contractor.To have held the retainage back with no justification at all, merely to force Selmer to yield on its dispute over the extras, might well have been duress, since Blakeslee-Midwest is alleged to have known of Selmer's desperate circumstances.

The precise allegation concerning retainage, however, is that Blakeslee-Midwest's take-it-or-leave-it offer of $67,000 included the retainage of $21,000. [**12] Since the retainage was 10 percent of the contract price, Selmer must have received 90 percent of the price, of $189,000, and that plus $67,000 would equal $256,000. But Selmer in fact received a total of $280,000 from Blakeslee-Midwest. As this must have included the retainage, the retainage allegation was discredited and so did not create a triable

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issue. It might of course have been duress for Blakeslee-Midwest to say to Selmer, "we will give you your retainage of $21,000 plus $67,000 if and only if you abandon your claim for any additional extra payments," but that is not Selmer's contention. It says it was offered $67,000 including the retainage -- not that it was offered $88,000 -- and this is inconsistent with the uncontradicted evidence that the entire contract price of $210,000 was paid plus the $67,000 in extras. Moreover, Selmer waived its subcontractor's lien, indicating it had been paid in full. This waiver, incidentally, was signed after Selmer received the $67,000 it claims to have accepted under duress. This is additional evidence that Selmer was not acting under duress when it made the settlement that years later it tried to repudiate.

Affirmed.

UNCONSCIONABILITY

BRUCE GATTON et al., Plaintiffs and Respondents, v. T-MOBILE USA, INC., Defendant and Appellant. CHRISTINA NGUYEN et al., Plaintiffs and Respondents, v. T-MOBILE USA, INC., Defendant and Appellant. COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE 152 Cal. App. 4th 571; 61 Cal. Rptr. 3d 344 June 22, 2007, Filed

OPINIÓN POR: GEMELLO

[**346] In this consolidated appeal, T-Mobile USA, Inc., appeals from an order denying its motion to compel arbitration of actions challenging the early termination fee charged to cellular telephone service subscribers and challenging the practice of selling locked handsets that a subscriber cannot use when switching carriers. T-Mobile contends the court erred in concluding [**347] that the arbitration clause in its service agreement is unconscionable.

(1) In the published portion of this opinion, we hold that the adhesive nature of the service agreement established a minimal degree of procedural [*575] unconscionability notwithstanding the availability of

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market alternatives and that the high degree of substantive unconscionability arising from the class action waiver rendered the arbitration provision unenforceable.

In the unpublished portion of this opinion, we reject T-Mobile's contention that the Federal Arbitration Act preempts any rule that class action waivers are unconscionable under California law.

We affirm the trial court order.

FACTUAL AND PROCEDURAL BACKGROUND

The Parties and the Service Agreements

T-Mobile USA, Inc. (T-Mobile), is a cellular telephone provider in California. Plaintiffs are or were subscribers to T-Mobile. 1

1 The two cases from which these appeals arise are among the cases ordered consolidated in the Alameda County "Cellphone Termination Fee Cases," JCCP No. 4332. All cases concern unfair business practices actions against the seven major cell phone providers in California. For purposes of case management, the trial court divided the coordinated proceedings into three substantive topics: early termination, handset policies, and deposits.

All plaintiffs executed service agreements drafted by T-Mobile. Each agreement incorporated terms and conditions drafted by T-Mobile. 2 Directly above the signature line in the service agreement executed by plaintiffs is a short paragraph stating, "By signing below, you acknowledge you ... have received a copy of this Agreement. ... You also acknowledge you have received and reviewed the T-Mobile Terms and Conditions, and agree to be bound by them. ... All disputes are subject to mandatory arbitration in accordance with paragraph 3 of the Terms and Conditions."

2 The service agreements and terms and conditions applicable to plaintiffs are not identical, but the differences are not material to the issues on appeal. Throughout this decision we will use the documents applicable to plaintiff Adrianne Grant as exemplars.

The introductory paragraph to the terms and conditions incorporated into the agreement states: "Welcome to T-Mobile. BY ACTIVATING OR USING OUR SERVICE

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YOU AGREE TO BE BOUND BY THE AGREEMENT. Please carefully read these Terms and Conditions ('T&C's') as they describe your Service and affect your legal rights. IF YOU DON'T AGREE WITH THESE T&C'S, DO NOT USE THIS SERVICE OR YOUR UNIT." Similarly, the handset shipping box was sealed across the closing seam with a sticker that stated: "IMPORTANT [¶] Read the enclosed T-Mobile Terms & Conditions. By using T-Mobile service, you agree to be bound by the Terms & Conditions, including the mandatory arbitration and early termination fee [*576] provisions." The terms and conditions were also included in a "Welcome Guide" enclosed in the boxes containing the handsets.

Section 3 of the terms and conditions incorporated into the agreement is entitled "Mandatory Arbitration; Dispute Resolution." It includes language waiving any right to seek classwide relief. 3 The terms [**348] and conditions incorporated into each of the plaintiff's agreements included a mandatory arbitration clause including a class action waiver.

3 Section 3 of the arbitration agreement provides: "you will first negotiate with [T-Mobile] IN GOOD FAITH TO SETTLE ANY CLAIM OR DISPUTE BETWEEN YOU AND US IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, OR OUR PROVISION TO YOU OF GOODS, SERVICES OR UNITS ('CLAIM'). YOU MUST SEND A WRITTEN DESCRIPTION OF YOUR CLAIM TO OUR REGISTERED AGENT. ... IF YOU DO NOT REACH AGREEMENT WITH US WITHIN 30 DAYS, INSTEAD OF SUING IN COURT, YOU AGREE THAT ANY CLAIM MUST BE SUBMITTED TO FINAL, BINDING ARBITRATION WITH THE AMERICAN ARBITRATION ASSOCIATION ('AAA') UNDER ITS PUBLISHED WIRELESS INDUSTRY ARBITRATION RULES, WHICH ARE A PART OF THE AGREEMENT BY THIS REFERENCE AND ARE AVAILABLE BY CALLING THE AAA AT [listed telephone number] OR VISITING ITS WEB SITE AT [listed]. ... You will pay

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your share of the arbitrator's fees except (a) for claims less than $25, we will pay all arbitrator's fees and (b) for claims between $25 and $1000, you will pay $25 for the arbitrator's fee. You and we agree to pay our own other fees, costs and expenses including ... .

"Neither you nor we may be a representative of other potential claimants or a class of potential claimants in any dispute, nor may two or more individuals' disputes be consolidated or otherwise determined in one proceeding. While the prohibition on consolidated or classwide proceedings in this Sec. 3 will continue to apply: (a) you may take claims to small claims court, if they qualify for hearing by such court and (b) if you fail to timely pay amounts due, we may assign your account for collection and the collection agency may pursue such claims in court limited strictly to the collection of the past due debt and any interest or cost of collection permitted by law or the Agreement. YOU AND WE ACKNOWLEDGE AND AGREE THAT THIS SEC. 3 WAIVES ANY RIGHT TO A JURY TRIAL OR PARTICIPATION AS A PLAINTIFF OR AS A CLASS MEMBER IN A CLASS ACTION. IF A COURT OR ARBITRATOR DETERMINES THAT YOUR WAIVER OF YOUR ABILITY TO PURSUE CLASS OR REPRESENTATIVE CLAIMS IS UNENFORCEABLE, THE ARBITRATION AGREEMENT WILL NOT APPLY AND OUR DISPUTE WILL BE RESOLVED BY A COURT OF APPROPRIATE JURISDICTION, OTHER THAN A SMALL CLAIMS COURT. SHOULD ANY OTHER PROVISION OF THIS ARBITRATION AGREEMENT BE DEEMED UNENFORCEABLE, THAT PROVISION SHALL BE REMOVED, AND THE AGREEMENT SHALL OTHERWISE REMAIN BINDING."

Early Termination Fees Case (No. A112082)

The action of plaintiffs Bruce Gatton, Jeweldean Hull, Christina Nguyen, and Conor Vaughn, brought on behalf of themselves individually and on behalf of all similarly situated California residents, challenges the fee imposed by

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T-Mobile for termination of the service agreement before its expiration date. [*577]

The complaint includes the following allegations. The service agreement between T-Mobile and its subscribers is typically one or two years in duration. Under the terms of the agreement, subscribers who terminate the service before the expiration of the agreement are subject to an early termination penalty of approximately $200 per telephone. The early termination penalties are also imposed if T-Mobile terminates the agreement for, among other reasons, nonpayment by the subscriber. The amount of the fee does not vary according to how long the contract has been in effect at the time of termination; it is the same whether the contract has been in effect for several weeks or several months. The flat-fee early termination penalty constitutes an unlawful penalty under Civil Code section 1671, subdivision (d), 4 is unlawful under the unfair competition law (Bus. & Prof. Code, § 17200 et seq.), and is unconscionable under the Consumers Legal [**349] Remedies Act (CLRA) (Civ. Code, § 1750 et seq.).

4 Civil Code section 1671, subdivision (d) provides: "[A] provision in a contract liquidating damages for the breach of the contract is void except that the parties to such a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the state of the case, it would be impracticable or extremely difficult to fix the actual damage."

Plaintiffs seek a permanent injunction prohibiting T-Mobile from collecting or enforcing the early termination penalty; a constructive trust on all monies collected as early termination penalties; and all other relief to which they are statutorily entitled, including restitution.

Handset Locking Case (No. A112084)

The action of plaintiffs Nguyen and Grant, brought on behalf of themselves individually and on behalf of all similarly situated California residents, challenges the practice of installing a locking device in T-Mobile handsets

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that prevents its subscribers from switching cell phone providers without purchasing a new handset.

The complaint includes the following allegations. The handsets T-Mobile sells its subscribers are manufactured by equipment vendors such as Nokia, Motorola, or Samsung. Each handset has a receptacle into which a machine-readable SIM (subscriber information module) card can be inserted. The card is approximately the size of a postage stamp and contains the subscriber and the provider identifying information. The SIM card can be inserted and removed by hand; no special tools or equipment are required. T-Mobile employs a SIM lock to prevent its handsets from operating with a SIM card programmed for any other network. The SIM lock can be unlocked by entering an eight-digit code number; once unlocked, the handset will operate with any compatible SIM card for any network. T-Mobile requires [*578] equipment vendors to alter the handsets they sell to T-Mobile by locking them with SIM locks and setting the SIM unlock code based on a secret algorithm provided by T-Mobile. The agreement between T-Mobile and its subscribers falsely states that T-Mobile handsets are not compatible with and will not work with other wireless networks. That misrepresentation constitutes unfair competition and violates the CLRA. The secret locking makes it impossible or impracticable for subscribers to switch cell phone service providers without purchasing a new handset.

Plaintiffs seek an order directing T-Mobile to disclose the existence and effect of the handset locks and to offer to unlock the handsets free of charge; an injunction prohibiting T-Mobile from secretly programming and selling handsets with SIM locks and from representing that the handsets are not compatible with services provided by other wireless carriers; and for restitution and/or disgorgement of all amounts wrongfully charged to plaintiffs and members of the class.

Motion to Compel Arbitration

T-Mobile moved to compel arbitration of the two actions in accord with the service agreement. Plaintiffs

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opposed the motion on the grounds that (1) their claims for injunctive relief under the unfair competition law and the CLRA were not arbitrable, and (2) their remaining claims were not arbitrable because the arbitration clause was unconscionable.

The trial court denied the motion to compel. It concluded that the claims for injunctive relief were primarily for the benefit of the public and, consequently, were not subject to arbitration. As to the other claims, it concluded that the arbitration provision was unconscionable and therefore unenforceable. The trial court held that although the indications of procedural unconscionability were "not particularly strong," under Discover Bank v. Superior Court (2005) 36 Cal.4th 148 [30 Cal. Rptr. 3d 76, 113 P.3d 1100] (Discover Bank), the arbitration clause was substantively unconscionable because its prohibition [**350] on class arbitrations or participation in a class action was against public policy.

DISCUSSION

Appellant T-Mobile contends the trial court erred in denying its motion to compel because the class action waiver did not render the arbitration provision unconscionable and because principles of federal preemption require enforcement of the provision. [*579]

I. Unconscionability

(2) An agreement to arbitrate is valid except when grounds exist for revocation of a contract. (Code Civ. Proc., §§ 1281, 1281.2, subd. (b).) Unconscionability is one ground on which a court may refuse to enforce a contract. (Civ. Code, § 1670.5.) The petitioner, T-Mobile here, bears the burden of proving the existence of a valid arbitration agreement and the opposing party, plaintiffs here, bears the burden of proving any fact necessary to its defense. (Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal.4th 951, 972 [64 Cal. Rptr. 2d 843, 938 P.2d 903].)

Whether a provision is unconscionable is a question of law. (Civ. Code, § 1670.5, subd. (a); Flores v. Transamerica HomeFirst, Inc. (2001) 93 Cal.App.4th 846, 851 [113 Cal. Rptr. 2d 376] (Flores).) On appeal, when the

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extrinsic evidence is undisputed, as it is here, we review the contract de novo to determine unconscionability. (Stirlen v. Supercuts, Inc. (1997) 51 Cal.App.4th 1519, 1527 [60 Cal. Rptr. 2d 138] (Stirlen); Flores, at p. 851.)

The analytic framework employed by the California Supreme Court in determining whether a contract provision is unconscionable has its origins in A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473 [186 Cal. Rptr. 114] (A & M Produce). (See Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 114 [99 Cal. Rptr. 2d 745, 6 P.3d 669] (Armendariz).) Unconscionability has a procedural and a substantive element; the procedural element focuses on the existence of oppression or surprise and the substantive element focuses on overly harsh or one-sided results. (Armendariz, at p. 114, quoting A & M Produce, at pp. 486-487; see also Discover Bank, supra, 36 Cal.4th at p. 160.) To be unenforceable, a contract must be both procedurally and substantively unconscionable, but the elements need not be present in the same degree. (Armendariz, at p. 114.) The analysis employs a sliding scale: "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (Ibid.; see also Donovan v. RRL Corp. (2001) 26 Cal.4th 261, 291 [109 Cal. Rptr. 2d 807, 27 P.3d 702].)

A. The Discover Bank Decision

Our analysis of the challenged arbitration provision is governed by the California Supreme Court decision Discover Bank. There, the court considered an unconscionability challenge to an arbitration provision prohibiting classwide arbitration in an agreement between a credit card company and its cardholders. (Discover Bank, supra, 36 Cal.4th at p. 152.) The provision was added to the agreement by a notice sent to cardholders. (Id. at p. 153.) [*580]

The court emphasized the "important role of class action remedies in California law." (Discover Bank, supra, 36 Cal.4th at p. 157.) [**351] " 'Frequently numerous

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consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.' " (Id. at p. 156, quoting Vasquez v. Superior Court (1971) 4 Cal.3d 800, 808 [94 Cal. Rptr. 796, 484 P.2d 964].)

In analyzing the unconscionability issue, Discover Bank first concluded that "when a consumer is given an amendment to its cardholder agreement in the form of a 'bill stuffer' that he would be deemed to accept if he did not close his account, an element of procedural unconscionability is present." (Discover Bank, supra, 36 Cal.4th at p. 160.) Turning to the substantive element, the court stated "although adhesive contracts are generally enforced [citation], class action waivers found in such contracts may also be substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy. As stated in Civil Code section 1668: 'All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.' (Italics added.)" (Discover Bank, at pp. 160-161.) The court acknowledged that class action and class arbitration waivers are not, in the abstract, exculpatory clauses, but because damages in consumer cases are often small and "because ' "[a] company which wrongfully exacts a dollar

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from each of millions of customers will reap a handsome profit" ' [citation], ' "the class action is often the only effective way to halt and redress such exploitation." ' " (Ibid.) Moreover, the court recognized that such class action and class arbitration waivers are "indisputably one-sided." (Ibid.) " 'Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover [Bank], because credit card companies typically do not sue their customers in class action lawsuits.' " (Ibid.)

(3) In light of those considerations, Discover Bank held that when a waiver of classwide relief "is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve [*581] small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' (Civ. Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced." (Discover Bank, supra, 36 Cal.4th at pp. 162-163.)

[**352] Against this legal backdrop, we consider the specific provision challenged here.

B. Procedural Unconscionability

(4) The procedural element of the unconscionability analysis concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. (Kinney v. United HealthCare Services, Inc. (1999) 70 Cal.App.4th 1322, 1329 [83 Cal. Rptr. 2d 348], citing A & M Produce, supra, 135 Cal. App. 3d at p. 486.) The element focuses on oppression or surprise. (Armendariz, supra, 24 Cal.4th at p. 114.) "Oppression arises from an inequality of bargaining power that results in no real negotiation and an

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absence of meaningful choice." (Flores, supra, 93 Cal.App.4th at p. 853, citing A & M Produce, at p. 486.) 5 Surprise is defined as " 'the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms.' " (Stirlen, supra, 51 Cal.App.4th at p. 1532, quoting A & M Produce, at p. 486.)

5 Oppression in the manner of formation of the contract is distinguished from substantive oppressiveness of the challenged provision. (See Armendariz, supra, 24 Cal.4th at p. 114 [referring to the "oppression" aspect of procedural unconscionability and also whether the challenged term is "substantively oppressive"]; Graham v. Scissor-Tail, Inc. (1981) 28 Cal.3d 807, 820 [171 Cal. Rptr. 604, 623 P.2d 165] [considering whether a contract provision is unduly oppressive in substance].) Even if the manner of formation of a contract involves oppression and thereby satisfies the procedural unconscionability element, the challenged provision is unenforceable only if it is unduly unfair or oppressive in substance.

In their reply brief, plaintiffs did not dispute T-Mobile's assertion that the surprise aspect of procedural unconscionability is absent because the arbitration provision was fully disclosed to T-Mobile's customers. In response to our request for supplemental briefing, plaintiffs first urged that surprise is not necessary to find procedural unconscionability. Plaintiffs then asserted that we could find surprise because T-Mobile did not specifically bring to the attention of its customers that the arbitration provision included a class action [*582] waiver and because the print used in the agreement was small. We conclude that plaintiffs have not shown surprise. The arbitration provision was not disguised or hidden, and T-Mobile made affirmative efforts to bring the provision to the attention of its customers, including by referencing the provision on a sticker placed across the closing seam of the handset shipping box. (Stirlen, supra, 51 Cal.App.4th at p. 1532.) A finding of procedural unconscionability in this case cannot be based on the existence of surprise.

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(5) The California Supreme Court has consistently reiterated that " '[t]he procedural element of an unconscionable contract generally takes the form of a contract of adhesion.' " (Discover Bank, supra, 36 Cal.4th at p. 160; see also Armendariz, supra, 24 Cal.4th at p. 113 ["Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion"]; Little v. Auto Stiegler, Inc. (2003) 29 Cal.4th 1064, 1071 [130 Cal. Rptr. 2d 892, 63 P.3d 979].) Appellate courts considering unconscionability challenges in consumer cases have routinely found the procedural element satisfied where the agreement containing the challenged provision was a contract of adhesion. For example, in Flores we stated [**353] that "[a] finding of a contract of adhesion is essentially a finding of procedural unconscionability" (Flores, supra, 93 Cal.App.4th at p. 853), and in Aral v. Earthlink, Inc. (2005) 134 Cal.App.4th 544, 557 [36 Cal. Rptr. 3d 229], the court described an adhesive contract as "quintessential procedural unconscionability." (See also Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc. (2001) 89 Cal.App.4th 1042, 1054 [107 Cal. Rptr. 2d 645] (Marin Storage); Cohen v. DIRECTV, Inc. (2006) 142 Cal.App.4th 1442, 1451 [48 Cal. Rptr. 3d 813].)

Whether the challenged provision is within a contract of adhesion pertains to the oppression aspect of procedural unconscionability. A contract of adhesion is " ' " 'imposed and drafted by the party of superior bargaining strength' " ' " and " ' " 'relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' " ' " (Discover Bank, supra, 36 Cal.4th at p. 160.) This definition closely parallels the description of the oppression aspect of procedural unconscionability, which "arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." (Flores, supra, 93 Cal.App.4th at p. 853, citing A & M Produce, supra, 135 Cal. App. 3d at p. 486; see also Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 925, fn. 9 [216 Cal. Rptr. 345, 702 P.2d 503] [noting that oppression

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arises from "unequal bargaining power"].) It is clear that the T-Mobile service agreement was a contract of adhesion: T-Mobile drafted the form agreement, its bargaining strength was far greater than that of individual customers, and customers were required to accept all terms and conditions of the agreement as presented or forgo T-Mobile's telephone service. [*583]

(6) Nevertheless, T-Mobile argues that there was no oppression in the formation of the agreements because plaintiffs had the option of obtaining mobile phone service from one of two other providers whose agreements did not contain class action waivers. Preliminarily, we note that the evidence of the availability of market alternatives is exceedingly slim. 6 More fundamentally, we reject the contention that the existence of market choice altogether negates the oppression aspect of procedural unconscionability. "Procedural unconscionability focuses on the manner in which the disputed clause is presented to the party in the weaker bargaining position. When the weaker party is presented the clause and told to 'take it or leave it' without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability, are present." (Szetela v. Discover Bank (2002) 97 Cal.App.4th 1094, 1100 [118 Cal. Rptr. 2d 862] (Szetela).) The existence of consumer choice decreases the extent of procedural unconscionability but does not negate the oppression and obligate courts to enforce the challenged provision regardless of the extent of substantive unfairness. [**354] The existence of consumer choice is relevant, but it is not determinative of the entire issue. (Ibid.) 7

6 The same day plaintiffs filed the fourth amended complaint against T-Mobile in the coordinated Cellphone Termination Fee Cases, plaintiffs' counsel filed nearly identical third consolidated amended complaints against Nextel and Sprint. The Nextel and Sprint service agreements were attached to the respective complaints; these service agreements do not include arbitration provisions with class action waivers. T-Mobile's argument is based exclusively on these pleadings. We are not

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confronted with evidence that a consumer was actually aware of the existence of alternate providers and aware or should have been aware that the contracts used by those providers lacked the challenged contractual term.

7 Notably, we believe the issue before us is properly framed as whether the existence of market choice negates the existence of oppression, not whether choice renders a contract nonadhesive. (Morris v. Redwood Empire Bancorp (2005) 128 Cal.App.4th 1305, 1319-1320 & fn. 6 [27 Cal. Rptr. 3d 797]; see also Marin Storage, supra, 89 Cal.App.4th at pp. 1054-1056; Wayne v. Staples, Inc. (2006) 135 Cal.App.4th 466, 483 [37 Cal. Rptr. 3d 544]; but see Szetela, supra, 97 Cal.App.4th at p. 1100.)

We considered market alternatives as a relevant factor in our decision in Marin Storage, supra, 89 Cal.App.4th 1042. There, a general contractor challenged the enforceability of an indemnification provision in a form subcontract created by a crane rental company. (Id. at pp. 1046-1048.) The procedural element was satisfied because the agreement at issue was "a contract of adhesion and, hence, procedurally unconscionable." (Id. at p. 1054.) But the degree of procedural unconscionability was limited because the contractor was sophisticated and had choice in selecting crane providers; in fact the plaintiff had done business with 10 other firms. (Id. at p. 1056.) We also considered substantive unconscionability and concluded that, viewed in its commercial context, the indemnification provision was not overly one-sided or unreasonable. (Id. at pp. 1055-1056.) Balancing the procedural and substantive elements, we concluded that "[i]n light of the low level of [*584] procedural unfairness ... a greater degree of substantive unfairness than has been shown here was required before the contract could be found substantively unconscionable." (Id. at p. 1056; see also Woodside Homes of Cal., Inc. v. Superior Court (2003) 107 Cal.App.4th 723, 730 [132 Cal. Rptr. 2d 35] [because plaintiff home buyers were not unsophisticated or lacking in choice, they established only a "low level" of procedural

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unconscionability and were obligated to establish "a high level of substantive unconscionability"].)

The Marin Storage approach is consistent with the instruction in Armendariz, supra, 24 Cal.4th at page 114, that the elements of procedural and substantive unconscionability "need not be present in the same degree." The court explained: " 'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (Ibid.)

In the three appellate decisions relied on by T-Mobile to support its approach to procedural unconscionability, the results would be the same under the Marin Storage reasoning. In two, the courts, like Marin Storage, actually rejected the unconscionability claims only after finding no clear substantive unfairness. (Morris v. Redwood Empire Bancorp, supra, 128 Cal.App.4th at p. 1322 ["In sum, we are able to discern little or no procedural unconscionability from the allegations of the second amended complaint. [¶] We now turn our analysis to substantive unconscionability"]; Wayne v. Staples, Inc., supra, 135 Cal.App.4th at p. 483.) Critically, any substantive unconscionability was relatively [**355] minor: Morris involved only a $150 fee charged upon termination of a credit card merchant account (Morris, at pp. 1323-1324); Staples involved allegedly excessive charges for "declared value coverage" but the charges were "comparable to the amount charged by other retailers of shipping services" (Staples, at p. 483). In the third, Dean Witter Reynolds, Inc. v. Superior Court (1989) 211 Cal. App. 3d 758, 772 [259 Cal. Rptr. 789] (Dean Witter), while the court did not reach the issue of substantive unconscionability, the challenged provision was a relatively insignificant $50 fee for terminating an individual retirement account.

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The cases are distinguishable because in each there was not a high degree of substantive unconscionability that could justify a court " 'disregard[ing] the regularity of the procedural process of the contract formation.' " (Armendariz, supra, 24 Cal.4th at p. 114.) In other words, because any substantive unconscionability was low, the sliding scale analysis did not provide a basis to refuse to enforce the provisions in light of the minimal procedural unconscionability. [*585]

The rule T-Mobile asks us to adopt disregards the sliding scale balancing required by Armendariz; in the absence of evidence of surprise, the proposed rule would allow any evidence of consumer choice to trump all other considerations, mandating courts to enforce the challenged provisions without considering the degree of substantive unfairness and the potential harm to important public policies. Although contracts of adhesion are well accepted in the law and routinely enforced, the inherent inequality of bargaining power supports an approach to unconscionability that preserves the role of the courts in reviewing the substantive fairness of challenged provisions. (Graham v. Scissor-Tail, Inc., supra, 28 Cal.3d at pp. 817-818; Marin Storage, supra, 89 Cal.App.4th at p. 1052.) Otherwise, the imbalance of power creates an opportunity for overreaching in drafting form agreements. (See Graham v. Scissor-Tail, Inc., at pp. 817-818.) The possibility of overreaching is even greater in ordinary consumer transactions involving relatively inexpensive goods or services because consumers have little incentive to carefully scrutinize the contract terms or to research whether there are adequate alternatives with different terms, and companies have every business incentive to craft the terms carefully and to their advantage. The unconscionability doctrine ensures that companies are not permitted to exploit this dynamic by imposing overly one-sided and onerous terms. (Ibid.) In sum, there are provisions so unfair or contrary to public policy that the law will not allow them to be imposed in a contract of adhesion, even if theoretically the consumer had an

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opportunity to discover and use an alternate provider for the good or service involved.

We reject the rule proposed by T-Mobile. Instead we hold that absent unusual circumstances, 8 use of a contract [**356] of adhesion establishes a minimal degree of procedural unconscionability notwithstanding the availability of market alternatives. If the challenged provision does not have a high degree of substantive unconscionability, it should be enforced. But, under Armendariz, supra, 24 Cal.4th at page 114, we conclude that courts are not obligated to enforce highly unfair provisions that undermine important public policies simply because there is some degree of consumer choice in the market.

8 Such unusual circumstances were arguably present in Dean Witter, where the court held only that the challenged provision was not procedurally unconscionable "as to the sophisticated investor-attorney specializing in class action litigation involving financial institutions, who sought and obtained appointment here as the class representative." (Dean Witter, supra, 211 Cal. App. 3d at p. 772.) Where the plaintiff is highly sophisticated and the challenged provision does not undermine important public policies, a court might be justified in denying an unconscionability claim for lack of procedural unconscionability even where the provision is within a contract of adhesion.

The Ninth Circuit, sitting en banc in Nagrampa v. MailCoups, Inc. (9th Cir. 2006) 469 F.3d 1257, reached the same conclusion. There, a franchisee [*586] contended that an arbitration provision in a contract of adhesion was unconscionable. (Id. at p. 1281.) The court rejected the franchisor's argument that the availability of other franchising opportunities could alone defeat the plaintiff's claim of procedural unconscionability. (Id. at p. 1283.) Because the franchisor had overwhelming bargaining power, drafted the contract, and presented it on a take-it-or-leave-it basis, there was "minimal" evidence of procedural unconscionability. (Id. at p. 1284.) The court reasoned that the minimal showing was "sufficient to require us, under

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California law, to reach the second prong of the unconscionability analysis. We therefore next examine the extent of substantive unconscionability to determine, whether based on the California courts' sliding scale approach, the arbitration provision is unconscionable." (Ibid.)

We conclude that plaintiffs showed a minimal degree of procedural unconscionability arising from the adhesive nature of the agreement. But this is " 'the beginning and not the end of the analysis insofar as enforceability of its terms is concerned.' " (Graham v. Scissor-Tail, Inc., supra, 28 Cal.3d at p. 819.) 9 Under the sliding scale approach, plaintiffs were obligated to make a strong showing of substantive unconscionability to render the arbitration provision unenforceable.

9 The Supreme Court continued, "Thus, a contract of adhesion is fully enforceable according to its terms [citations] unless certain other factors are present which, under established legal rules--legislative or judicial--operate to render it otherwise." (Graham v. Scissor-Tail, Inc., supra, 28 Cal.3d at pp. 819-820, fn. omitted.) One of the bases to refuse enforcement described by the Supreme Court is an "unconscionability" analysis focusing entirely on the degree of substantive unfairness of the challenged provision, which is parallel to the "substantive unconscionability" analysis in A & M Produce, supra, 135 Cal. App. 3d 473. (Graham v. Scissor-Tail, Inc., at pp. 821-828; California Grocers Assn. v. Bank of America (1994) 22 Cal.App.4th 205, 213-214 [27 Cal. Rptr. 2d 396].) The adhesive nature of the contract alone justifies scrutiny of the substantive fairness of the contractual terms. (Graham v. Scissor-Tail, Inc., at pp. 824-825.)

C. Substantive Unconscionability

(7) The substantive element of the unconscionability analysis focuses on overly harsh or one-sided results. (Armendariz, supra, 24 Cal.4th at p. 114; Flores, supra, 93 Cal.App.4th at p. 853.) In light of Discover Bank, we conclude that the challenged provision has a high degree of substantive unconscionability.

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(8) In considering whether class action waivers may be unconscionable, Discover Bank emphasized that class actions are often the only effective way to halt corporate wrongdoing and that class action [**357] waivers are "indisputably one-sided" because companies typically do not sue their customers in class action lawsuits. (Discover Bank, supra, 36 Cal.4th at p. 161.) The court did [*587] not conclude that all class action waivers are necessarily unconscionable, but the court did hold that "when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money," then the waiver is exculpatory in effect and unconscionable under California law. (Discover Bank, supra, 36 Cal.4th at pp. 162-163; see also Cohen v. DIRECTV, Inc., supra, 142 Cal.App.4th at pp. 1451-1454; Klussman v. Cross Country Bank (2005) 134 Cal.App.4th 1283, 1297-1298 [36 Cal. Rptr. 3d 728]; Aral v. Earthlink, Inc., supra, 134 Cal.App.4th at pp. 555-557; Szetela, supra, 97 Cal.App.4th at pp. 1100-1102 [cited with approval in Discover Bank].)

T-Mobile contends that this case is distinguishable from Discover Bank on two grounds. First, the amount in controversy exceeds the $29 late payment fee involved in Discover Bank. The largest monetary damage claim is the $200 early termination fee. We agree with Cohen v. DIRECTV, Inc., supra, 142 Cal.App.4th at page 1452, which rejected the same argument T-Mobile makes. The court reasoned: "While $1,000 is not an insignificant sum, many consumers of services such as those offered by DIRECTV may not view that amount as sufficient ' " ' "to warrant individual litigation," ' " ' and certainly it is not sufficient to obtain legal assistance in prosecuting the claim. (Discover Bank, supra, 36 Cal.4th at p. 157 ... .) In short, the class action device remains, in our view, the only practicable way for consumers of services such as

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DIRECTV's to deter and redress wrongdoing of the type Cohen alleges. Damages that may or may not exceed $1,000 do not take DIRECTV's class action waiver outside 'a setting in which disputes between the contracting parties predictably involve small amounts of damages . ...' " (Cohen, at p. 1452.) The same is true in this case.

Second, T-Mobile contends that the class action waiver would not exculpate the company from any wrongdoing because, unlike in Discover Bank, plaintiffs assert inarbitrable claims for public injunctive relief. However, under Discover Bank's reasoning, the class action waiver would at the very least effectively exculpate T-Mobile from the alleged fraud perpetrated on the class members, which is enough to bring this case within the scope of the Discover Bank holding. Moreover, Discover Bank rejected the argument that private lawsuits seeking injunctive relief and attorney fees awards are an adequate substitute for class actions. The court specifically stated that it was not persuaded that the problems posed by class action waivers are ameliorated by the availability of attorney fees awards in private litigation or the availability of public actions (brought by the Attorney General or other [*588] designated law enforcement officials) for injunctive relief and civil penalties. (Discover Bank, supra, 36 Cal.4th at p. 162; see also id. at p. 180 (dis. opn. of Baxter, J.).)

In the consumer context, class actions and arbitrations are "often inextricably linked to the vindication of substantive rights." (Discover Bank, supra, 36 [**358] Cal.4th at p. 161.) There is nothing extraordinary about the circumstances of this case that distinguishes it from the typical consumer class actions described in Discover Bank. Because it is directly within the scope of the holding in that case, we conclude that the class action waiver has a high degree of substantive unconscionability. Applying the sliding scale test for unconscionability, even though the evidence of procedural unconscionability is limited, the evidence of substantive unconscionability is strong enough to tip the scale and render the arbitration provision

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unconscionable. The trial court properly denied the motion to compel arbitration. 10

10 Arguably, the CLRA's nonwaiver provision, Civil Code section 1751, provides an independent basis for affirming denial of the motion to compel arbitration. (See America Online, Inc. v. Superior Court (2001) 90 Cal.App.4th 1 [108 Cal. Rptr. 2d 699]; Discover Bank, supra, 36 Cal.4th at pp. 158-159.) T-Mobile contends that the Federal Arbitration Act preempts any application of Civil Code section 1751 to deny enforcement of the arbitration provision, citing Ting v. AT&T (9th Cir. 2003) 319 F.3d 1126, 1147-1148. Because we conclude that the arbitration provision is unconscionable, we need not decide the Civil Code section 1751 issue or the other challenges to the service agreement raised by plaintiffs.

II. Federal Preemption

The order denying the motion to compel arbitration is affirmed. Costs are awarded to plaintiffs.

CONCUERDA CON ESTA OPINIÓN: JONES

Under compulsion of Discover Bank v. Superior Court (2005) 36 Cal.4th 148 [30 Cal. Rptr. 3d 76, 113 P.3d 1100] (Discover Bank), I concur in my colleagues' conclusion that the arbitration clauses before us are substantively unconscionable because of the prohibition in the mandatory arbitration provision against the pursuit of any remedy by a plaintiff as a representative of other potential claimants or class of claimants. But I cannot agree that the contracts are also procedurally unconscionable. In my view, plaintiffs do not show, on the record before us, [*589] either surprise or oppression to support their procedural unconscionability claim. In the absence of both procedural and substantive elements of unconscionability, this court should decline to exercise its discretion to refuse to enforce the disputed clause. (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 114 [99 Cal. Rptr. 2d 745, 6 P.3d 669] (Armendariz).) The trial court erred when it denied the motion to compel arbitration, and its order so holding should be reversed.

BACKGROUND

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It is undisputed that the challenged terms of the cellular telephone service agreement were drafted by cellular telephone provider T-Mobile USA, Inc., and executed by each plaintiff when he/she signed up for T-Mobile cellular telephone service. The contracts were presented on a "take-it-or-leave-it" basis, were not subject to negotiation, and were therefore adhesive contracts. As recounted by the majority, a short paragraph directly above the signature line contained a statement that the customer's signature constituted the customer's acknowledgement of receipt, review of, and agreement to be bound by "the T-Mobile Terms and Conditions," and that "All disputes are subject to mandatory arbitration in accordance with paragraph 3 of the Terms and Conditions." A [**359] second notice appeared in the introductory paragraph, cautioning subscribers in capitalized letters that "BY ACTIVATION OR USING OUR SERVICE YOU AGREE TO BE BOUND BY THE AGREEMENT ... IF YOU DON'T AGREE WITH THESE T&C'S, DON'T USE THIS SERVICE OR YOUR UNIT."

Customers were given a third notice on the closing seam of the shipping box containing the newly purchased handset. The box was sealed with a sticker that stated: "IMPORTANT Read the enclosed T-Mobile Terms & Conditions. By using T-Mobile service, you agree to be bound by the Terms & Conditions, including the mandatory arbitration and early termination fee provisions."

Once the shipping box was opened, the subscriber found a "Welcome Guide." Page 3 of the "Welcome Guide" was a table of contents, which listed "Terms and Conditions" as one of the sections of the guide. At the bottom of the table of contents was the statement: "Important Note: By using T-Mobile service, you acknowledge that you have read and agree to the terms and conditions of the Service Agreement." The "Terms and Conditions" included in the welcome guide were identical to the terms and conditions given to the customers before they signed their service agreements, including the same introductory paragraph admonishing the customer to read

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the terms and conditions carefully and not to use the service if they did not agree with all terms and conditions. [*590]

Section 5 of the terms and conditions, entitled "Cancellation and Return Policy," describes a "Return Period." It states, "[t]here is a Return Period during which you can cancel a newly activated line of Service without paying a cancellation fee. The Return Period is 14 calendar days from the date of Service activation or 30 days from the Phone's purchase date if you have not activated service. ... You may be required to pay a restocking fee. ..."

The actions brought by plaintiffs Bruce Gatton, Jeweldean Hull, Christina Nguyen and Conor Vaughn, on behalf of themselves individually and on behalf of all similarly situated California residents, challenged the term in T-Mobile's service agreement which imposed a fee for termination of the service agreement before its expiration date. The action of plaintiffs Nguyen and Adrianne Grant, brought on behalf of themselves individually and on behalf of all similarly situated California residents, concerns a locking device installed in T-Mobile handsets that prevents its subscribers from switching cell phone providers without purchasing a new handset.

DISCUSSION

It is well settled that an agreement to arbitrate is valid, irrevocable, and enforceable except when grounds exist for the revocation of any contract (Code Civ. Proc., §§ 1281, 1281.2, subd. (b)), and it is equally settled that a court can refuse to enforce an unconscionable provision in a contract. (Civ. Code, § 1670.5; Armendariz, supra, 24 Cal.4th at pp. 83, 114.)

1. Unconscionability

In Discover Bank our Supreme Court " 'briefly recapitulate[d] the principles of unconscionability' " in the context of a challenge to a mandatory arbitration clause forbidding classwide arbitration that was added to the plaintiff's bank credit card agreement 13 years after the plaintiff obtained the card. (Discover Bank, supra, 36 Cal.4th at p. 154.) The bank informed the plaintiff that continued use of the card would be deemed acceptance of

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the new terms unless the cardholder notified the bank that he did not want to accept the new terms and ceased using his account. (Id. at pp. [**360] 154, 160.) " '[T]he doctrine has " 'both a "procedural" and a "substantive" element,' the former focusing on ' "oppression" ' or ' "surprise" ' due to unequal bargaining power, the latter on ' "overly harsh" ' or ' "one-sided" ' results." [Citation.] The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, " 'which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contact or reject it.' " ... [¶] Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided.' (Little v. Auto Stiegler, Inc. (2003) 29 Cal.4th [*591] 1064, 1071 [130 Cal. Rptr. 2d 892, 63 P.3d 979] ... ." (Discover Bank, supra, 36 Cal.4th at p. 160.) 1

1 The definition of "contract of adhesion" that appears in the quote from Little--" ' "imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it" ' " (Little v. Auto Stiegler, Inc., supra, 29 Cal.4th at p. 1071 (Little))--is taken from Neal v. State Farm Ins. Cos. (1961) 188 Cal. App. 2d 690, 694 [10 Cal. Rptr. 781] (Neal). Graham v. Scissor-Tail, Inc. (1981) 28 Cal.3d 807, 817 [171 Cal. Rptr. 604, 623 P.2d 165] (Scissor-Tail), characterized it as the "serviceable general definition [that has] well stood the test of time and will bear little improvement."

Discover Bank continued: "We agree that at least some class action waivers in consumer contracts are unconscionable under California law. First, when a consumer is given an amendment to its cardholder agreement in the form of a 'bill stuffer' that he would be deemed to accept if he did not close his account, an element of procedural unconscionability is present. [quoting Szetela v. Discover Bank (2002) 97 Cal.App.4th 1094, 1100 [118 Cal. Rptr. 2d 862] (Szetela).] Moreover, although adhesive contracts are generally enforced [quoting Scissor-Tail],

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class action waivers found in such contracts may also be substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy." (Discover Bank, supra, 36 Cal.4th at pp. 160-161.)

For a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability, both procedural and substantive unconscionability must be present, although not necessarily in the same degree. (Armendariz, supra, 24 Cal.4th at p. 114; see also A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 487, 493 [186 Cal. Rptr. 114] (A & M Produce).) T-Mobile contends the service agreement at issue here is not procedurally unconscionable because there was no showing of surprise or oppression. 2 I agree.

2 In a single paragraph the trial court concluded the service agreement has "some indications" of procedural unconscionability, but "these [unidentified] indications are not particularly strong." But the court's actual references reflect the absence of procedural unconscionability. The court noted that adhesive contracts are generally enforced, that the arbitration provision is in paragraph 3 of the agreement and in capital letters (implying it was not hidden from the purchaser), that the contract comes with the phone and is accepted by use of the phone, and that use of a form contract and acceptance by using the product are not per se unconscionable. It denied the motion to compel after concluding that it was substantively unconscionable under the Discover Bank analysis.

2. Procedural Unconscionability

A. Surprise

T-Mobile argues that plaintiffs cannot claim surprise regarding the service agreement's arbitration provision because the provision was fully disclosed to [*592] potential [**361] purchasers. As the majority notes, plaintiffs conceded in their reply brief the absence of the surprise component of procedural unconscionability. Plaintiffs' efforts to resurrect this argument in supplemental briefing must fail. The record contains ample evidence of

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T-Mobile's disclosures and admonitions given to subscribers before and after the purchase. The quantity and prominence of the disclosures and the grace period of 14 days from service activation or 30 days from purchase if no activation, should a customer decide he or she did not want to accept the terms of the service agreement, demonstrate the absence of surprise to support procedural unconscionability. I turn then to the issue of oppression.

B. Oppression

T-Mobile argues the oppression element of procedural unconscionability is lacking because plaintiffs could obtain mobile phone service from other providers whose agreements did not contain a mandatory arbitration provision and because there are no other indicia of oppression. Plaintiffs counter that the service agreement "provides a maximum degree of procedural unconscionability" because it is a standard form, preprinted, nonnegotiable contract of adhesion presented to them on a "take it or leave it" basis.

The oppression component of procedural unconscionability has long been described as arising from an inequality of bargaining power of the parties to the contract which results in no real negotiation and an absence of meaningful choice on the part of the weaker party. (A & M Produce, supra, 135 Cal. App. 3d at p. 486; see also Wayne v. Staples, Inc. (2006) 135 Cal.App.4th 466, 480 [37 Cal. Rptr. 3d 544]; Crippen v. Central Valley RV Outlet (2004) 124 Cal.App.4th 1159, 1164 [22 Cal. Rptr. 3d 189]; Kinney v. United HealthCare Services, Inc. (1999) 70 Cal.App.4th 1322, 1329 [83 Cal. Rptr. 2d 348].)

The majority ascribes to the California Supreme Court a consistent position that " ' "[t]he procedural element of an unconscionable contract generally takes the form of a contract of adhesion".' " (Maj. opn., ante, at p. 582; see Discover Bank, supra, 36 Cal.4th at p. 160, quoting Little, supra, 29 Cal.4th at p. 1071; see also Armendariz, supra, 24 Cal.4th at p. 113.) While our Supreme Court has repeated the quoted statement, I cannot agree that our high court views procedural unconscionability as established based

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only on the presence of "unequal bargaining power" (Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 925, fn. 9 [216 Cal. Rptr. 345, 702 P.2d 503]) or "an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice" (Flores v. Transamerica Home First, Inc. (2001) 93 Cal.App.4th 846, 853 [113 Cal. Rptr. 2d 376] (Flores), quoting A & M Produce, supra, 135 Cal. App. 3d at p. 486). A review of the origin of these definitional statements leads me to conclude that more than the existence of an adhesive contract is required. [*593]

Critical to an unconscionability analysis is Scissor-Tail, supra, 28 Cal.3d 807, in which the plaintiff contended he should not be compelled to arbitrate a dispute because the underlying agreement, at least to the extent it required arbitration of disputes between the parties, was "an unenforceable contract of adhesion." (Id. at p. 817.) Scissor-Tail concluded the agreement was adhesive, i.e., a " 'standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere [**362] to the contract or reject it.' " (Ibid., quoting Neal, supra, 188 Cal. App. 2d at p. 694.) But Scissor-Tail continued: "To describe a contract as adhesive in character is not to indicate its legal effect. It is, rather, 'the beginning and not the end of the analysis insofar as enforceability of its terms is concerned.' [Citation.] ... Thus, a contract of adhesion is fully enforceable according to its terms [citations] unless certain other factors are present which, under established legal rules--legislative or judicial--operate to render it otherwise." (Scissor-Tail, supra, at p. 819, fns. omitted.) No subsequent case has disapproved this language. Indeed, although Discover Bank recited the A & M Produce analytic framework, Discover Bank also observed that contracts of adhesion are generally enforced, specifically quoting Scissor-Tail. (Discover Bank, supra, 36 Cal.4th at pp. 160, 161.)

Reading Scissor-Tail together with A & M Produce, and particularly the phrase in the latter decision--" 'an

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absence of meaningful choice on the part of' " the weaker party (A & M Produce, supra, 135 Cal.App.3d at p. 486)--, I conclude there is no taint of unconscionability from the bare fact that a contract is adhesive. Other factors must be present to preclude enforceability on grounds of unconscionability.

I recognize that a number of cases have implied, if not stated outright, that a contract of adhesion is inherently procedurally unconscionable. (See, e.g., Flores, supra, 93 Cal.App.4th at pp. 853-854; Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc. (2001) 89 Cal.App.4th 1042, 1053 [107 Cal. Rptr. 2d 645] (Marin Storage); Kinney v. United HealthCare Services, Inc., supra, 70 Cal.App.4th at p. 1329 (Kinney); Martinez v. Master Protection Corp. (2004) 118 Cal.App.4th 107, 114 [12 Cal. Rptr. 3d 663] (Martinez).) "Analysis of unconscionability begins with an inquiry into whether the contract was a contract of adhesion--i.e., a standardized contract, imposed upon the subscribing party without an opportunity to negotiate the terms. [Citations.] A finding of a contract of adhesion is essentially a finding of procedural unconscionability. [Citations.]" (Flores, supra, 93 Cal.App.4th at p. 853.) However, a review of the nature and/or timing of the offer of the disputed contract provisions to plaintiffs in these cases generally shows the presence of facts supporting procedural unconscionability beyond the bare existence of a contract of adhesion. [*594]

Flores, for example, concerned a "Loan Agreement and Note" and deed of trust for a reverse mortgage with a mandatory arbitration clause, which did not appear until page 11, section 20 of the 14-page agreement. (Flores, supra, 93 Cal.App.4th at p. 849.) Moreover, the "IMPORTANT INFORMATION FOR ALL BORROWERS" given to the 80- and 76-year-old plaintiffs indicated they were required to sign the standardized loan documents in order to establish the reverse mortgage; the plaintiffs were never told the loan documents were negotiable; and the mortgage company representative told them that the company was the only one in California that

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offered reverse mortgages, thereby indicating they had no real choice of alternate lenders. (Id. at pp. 851, 853.) Not only was the arbitration agreement presented on a "take it or leave it" basis, but the borrowers were affirmatively told they had no real alternative.

Marin Storage involved an indemnification clause that appeared on the reverse side of a document that described itself as a "Work Authorization and Contract," but which was more obviously an invoice for [**363] work performed than a contract. (Marin Storage, supra, 89 Cal.App.4th at p. 1047.) The reverse side was difficult to read and was presented for signature at the jobsite with no reasonable opportunity to read or consider the terms, and, according to the evidence, the document was treated by the plaintiff corporation as an invoice, not a contract purporting to modify the critical allocation of risks and liability for damages. (Id. at pp. 1053, 1054.) While we found "no error in the trial court's conclusion that the [contract] was a contract of adhesion and, hence, procedurally unconscionable," the evidence concerning the appearance and presentation of the contract readily comported with the "unfair surprise" element of procedural unconscionability, i.e., supposedly agreed-upon terms that are hidden in a prolix printed form and never brought to the attention of the weaker party. (Id. at pp. 1054, 1056; see A & M Produce, supra, 135 Cal. App. 3d at pp. 486, 488, 490.)

Kinney, supra, 70 Cal.4th 1322 involved a mandatory arbitration policy contained in an employee handbook issued by an employer health care services corporation. The employer required an employee with six years' service to sign an acknowledgment of receipt of the handbook when she returned to work after a hospitalization. (Id. at pp. 1324-1326.) The employee was pressured to sign the form acknowledging receipt of the handbook the same day she received it, precluding her from reviewing the handbook or its arbitration clause. Significantly, the language used in the policy to describe its scope was so extensive as to make it difficult for a layperson to read and understand its parameters. "... [A]fter a statement of intent extolling the

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virtues of ... the arbitration process, the policy provides, in a fairly lengthy paragraph, that United is not required to pursue any claim of its own in an [*595] arbitration setting." (Id. at p. 1330.) Moreover, while the policy was unilaterally imposed on employees, the corporation could modify it at any time without notice. (Ibid.)

In Martinez, supra, 118 Cal.App.4th 107 prospective employee Martinez indicated to the human resources representative that he preferred not to sign an arbitration agreement. He was told he could not work for the employer if he did not sign and accept it. In finding the arbitration clause procedurally unconscionable, the court cited not only the inequality of bargaining power, but also the absence of meaningful choice. (Id. at p. 114.)

The factual circumstances in which the Flores, Kinney and Martinez contracts were made provide additional grounds to support a finding of oppression apart from the bare fact that the contracts at issue were contracts of adhesion, as that term is defined in Scissor-Tail and Neal. (See fn. 1, ante, at p. 591.)

As I have noted, numerous appellate courts have defined the "oppression" component of procedural unconscionability more broadly than simply the presentation of an adhesive contract on a "take it or leave it" basis. "... [O]ur state's highest court recognized the point at which an adhesion contract becomes oppressive: 'In many cases of adhesion contracts, the weaker party lacks not only the opportunity to bargain but also any realistic opportunity to look elsewhere for a more favorable contract; he must either adhere to the standardized agreement or forego the needed service.' " (Morris v Redwood Empire Bancorp (2005) 128 Cal.App.4th 1305, 1320 [27 Cal. Rptr. 3d 797], quoting Madden v. Kaiser Foundation Hospitals (1976) 17 Cal.3d 669, 711 [**364] [131 Cal. Rptr. 882, 552 P.2d 1178] (Madden). 3

3 Villa Milano Homeowners Assn. v. Il Davorge (2000) 84 Cal.App.4th 819, 827 [102 Cal. Rptr. 2d 1], took a different view of Madden, stating: "[T]he court [in Madden] left open the possibility that, in a given case, a

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contract might be adhesive even if the weaker party could reject the terms and go elsewhere. [Citation.]"

Dean Witter Reynolds, Inc. v. Superior Court (1989) 211 Cal. App. 3d 758 [259 Cal. Rptr. 789] (Dean Witter), for example, considered at length the availability of alternative sources of financial services in deciding whether "oppression" and unconscionability had been established to support an experienced investor's challenge under the Consumers Legal Remedies Act (CLRA; Civ. Code, § 1750 et seq.) to the contract governing his individual retirement account. The court rejected the investor's contention that availability of alternate sources is irrelevant to the adhesion analysis. "[E]ven though a contract may be adhesive, the existence of 'meaningful' alternatives ... in the form of other sources of supply tends to defeat any claim of unconscionability as to the contract in issue." (Dean Witter, supra, 211 Cal. App. 3d at [*596] p. 771.) While the investor's experience and sophistication were factually significant, the court held, "[The investor] was not shown to lack a meaningful choice with respect to the termination fee, and hence the 'oppression' factor of the procedural element of unconscionability was not established." (Id. at p. 772.)

In the case before us, these precedents inform my assessment of whether and to what extent the availability of alternative sources for the goods or services offered in an indisputably adhesive contract will avoid a finding that a challenged arbitration provision is procedurally unconscionable. No case has been cited to us which considered this precise issue. Only Szetela, supra, 97 Cal.App.4th at page 1100 appears to have considered the question in the context of determining the enforceability of an arbitration clause in a contract for consumer goods or services. 4

4 In Aral v. Earthlink, Inc. (2005) 134 Cal.App.4th 544 [36 Cal. Rptr. 3d 229] the terms of the services agreement for a digital subscriber line (DSL), including a class action waiver, were presented in what Aral characterized as a " 'take it or leave it' " basis, either through the customer's

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installation of the software necessary to activate the DSL or through the materials included in the package in which the software was mailed to the customer "with no opportunity to opt out." (Id. at p. 557.) Aral concluded "[t]his is quintessential procedural unconscionability." (Ibid.,.) Aral does not assist in the resolution of the case before us because the issue of whether meaningful choices of DSL service were available to the customers was nowhere raised in Aral.

Szetela is factually similar to Discover Bank. A longtime bank cardholder received, in the form of a "bill stuffer," an amendment to his cardholder agreement that provided for mandatory arbitration and prohibited class arbitration. His choices were to accept the amendment or to close his account. Szetela specifically rejected the contention that the availability of a meaningful opportunity to obtain the offered goods or services elsewhere without the offending contract term "is the relevant test for unconscionability." (Szetela, supra, 97 Cal.App.4th at p. 1100.) "[W]hether Szetela could have found another credit card issuer who would not have required his acceptance of a similar clause is not the deciding factor." (Id. at p. 1100.) [**365] The court observed that procedural unconscionability focuses "on the manner in which the disputed clause is presented to the party in the weaker bargaining position. When the weaker party is presented the clause and told to 'take it or leave it' without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability, are present. [Citation.] These are precisely the facts in the case before us. [Plaintiff] received the amendment to the Cardholder Agreement in a bill stuffer, and under the language of the amendment, he was told to 'take it or leave it.' His only option, if he did not wish to accept the amendment, was to close his account. We agree with [plaintiff] that the oppressive nature in which the amendment was imposed establishes the necessary element of procedural unconscionability." (Ibid.) [*597]

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Read in its factual context, Szetela does not purport to dispense entirely with consideration of "absence of meaningful choice" in a procedural unconscionability analysis. Unlike the circumstances of the instant case, Szetela was conducting a procedural unconscionability analysis of a new adhesive condition imposed on an existing consumer agreement.

While the existence of a contract of adhesion is frequently the starting point for a procedural unconscionability analysis, adhesiveness and procedural unconscionability are discrete concepts. In my view, a contract of adhesion is not per se procedurally unconscionable. Even assuming the parties to the agreement do not have equal bargaining power, a realistic opportunity for the weaker party to avail him or herself of meaningful market alternatives can obviate oppression for purposes of procedural unconscionability. (Wayne v. Staples, Inc., supra, 135 Cal.App.4th at p. 482; Morris v. Redwood Empire Bancorp, supra, 128 Cal.App.4th at p. 1320.) I do not disagree with Szetela that the availability of alternate sources of a product or service without binding the consumer to the objectionable class action waiver is not the "determinative" factor. (Szetela, supra, 97 Cal.App.4th at p. 1100.) But it is a relevant factor. Indeed, the greater the number of alternatives available to the consumer, the more bargaining power is shifted to the consumer. I do not suggest that the existence of marketplace choice altogether negates the oppression aspect of procedural unconscionability. The extent and significance of meaningful alternatives must be assessed in the light of the particular circumstances of each transaction. Analyzed in this light, I conclude the service agreement herein has not been shown to be procedurally unconscionable.

As T-Mobile argues, and plaintiffs do not dispute, when plaintiffs entered into their service agreements with T-Mobile, two other nationwide wireless telephone companies, Nextel and Sprint, had service agreements that did not contain a class action waiver provision, and, in the case of Nextel, no arbitration agreement at all. 5

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5 See majority opinion, ante, at page 583, footnote 6. The referenced "third consolidated amended" complaints against Nextel and Sprint in the coordinated proceeding and the attached service agreements are in the record on appeal. Because plaintiffs failed to respond to T-Mobile's contention asserted in the trial court and on appeal that alternative sources were available, I would view the point as conceded. (Fisher v. Gibson (2001) 90 Cal.App.4th 275, 283-284 [109 Cal. Rptr. 2d 145].) Rather, plaintiffs' opposition to T-Mobile's motion to compel in the trial court and its arguments on appeal presumed that plaintiffs' allegations of a "contract of adhesion" describe "maximum procedural unconscionability" under California law. I believe California law provides otherwise.

[**366] Furthermore, this agreement was presented to the customer at the time of the initial purchase, and, even after the purchase, the customer had a 14-day return period from date of activation, or a 30-day return period from date of [*598] purchase if not activated. These facts distinguish it from Szetela and Discover Bank, in which the bank sent their existing bank card customers a mandatory arbitration/class action waiver provision as a "bill stuffer" addendum to their existing service agreements and forced the customers either to accept the new terms or to cancel their established accounts. While the T-Mobile customers may not have been able to negotiate the arbitration/class action waiver provision in the service agreement as part of their purchase negotiation, they were not confronted with a postpurchase choice of either accepting a more restrictive clause to an extant agreement, or forgoing entirely the service they had originally agreed to and enjoyed.

As Armendariz, supra, 24 Cal.4th 83 and other decisions make plain, adhesive contracts of employment present very different policy considerations from the adhesive consumer contract for a service such as a cell phone. Employment contracts that contain mandatory arbitration clauses are especially susceptible to being oppressive because "in the case of preemployment arbitration contracts, the economic pressure exerted by

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employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement." (Id. at p. 115; see also Little, supra, 29 Cal.4th at p. 1071; Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (2005) 133 Cal.App.4th 396, 410 [34 Cal. Rptr. 3d 659] [franchise agreements akin to employment contracts because franchisees' livelihoods are involved]; Fitz v. NCR Corp. (2004) 118 Cal.App.4th 702, 722 [13 Cal. Rptr. 3d 88] (Fitz).)

Nothing like the economic pressure of obtaining or retaining employment is present in this case. However useful, convenient, or necessary cell phones may be, they are qualitatively different from the offer of a job, or the offer of continued employment (see Fitz, supra, 118 Cal.App.4th at p. 722), or the imposition of a more restrictive policy to an existing employment (see Kinney, supra, 70 Cal.App.4th 1322) or after one has accepted employment (Stirlen v. Supercuts, Inc. (1997) 51 Cal.App.4th 1519, 1534 [60 Cal. Rptr. 2d 138]), for which the job seeker or employee has no realistic alternative. An employee who has no opportunity to negotiate an employer's mandatory arbitration clause in the employment contract is limited to agreeing to the clause or forfeiting a paycheck and livelihood, and often crucial attendant benefits such as health care insurance or an employer-sponsored pension program. Here, the contract at issue concerned a nonunique consumer good--mobile phone service--available new or used from several sources. There was no evidence that plaintiffs were unaware of the existence of other cell phone providers or that the services of the other providers were not available to them.

Notwithstanding the imbalance in the bargaining power between T-Mobile and its cell phone subscribers, plaintiffs have not persuaded me there is [*599] procedural unconscionability in the making of the service agreement. Plaintiffs were fully apprised of the terms of the service

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agreement, and they did not present evidence of lack of meaningful alternative sources or other arrangements [**367] to meet their cellular telephone needs. In these circumstances, T-Mobile's conduct cannot be deemed oppressive.

As I stated at the outset, the Armendariz analytic framework requires both procedural and substantive elements before a court can exercise its discretion to refuse to enforce a contract under the unconscionability doctrine. (Armendariz, supra, 24 Cal.4th at p. 114; see also A & M Produce, supra, 135 Cal. App. 3d at p. 487.) Because there is an absence on this record of both the surprise and oppression factors of procedural unconscionability, the service agreement is not unconscionable, and T-Mobile's motion to compel arbitration should be granted.

Appellant's petition for review by the Supreme Court was denied October 10, 2007, S154947.

IV. EL CONTENIDO DE LA OBLIGACIÓN

A. LOS CRITERIOS DE INTERPRETACIÓN CONTRACTUAL

LA LETRA CONTRACTUAL

LOUIS B. WEINBERG, Plaintiff, v. MARK EDELSTEIN, Doing Business under the Name of Jay-Lynn Ladies Wear, Defendant. SUPREME COURT OF NEW YORK, SPECIAL TERM, NEW YORK COUNTY 201 Misc. 343; 110 N.Y.S.2d 806 January 18, 1952

OPINIÓN POR: LEVY

[*343] [**807] The plaintiff and the defendant operate retail stores in the same building. The plaintiff's lease, [*344] entered into in June, 1949, for a five-year term, entitles him to sell "ladies dresses, coats and suits and ladies sports clothes". The landlord in that lease covenanted with the plaintiff "not to rent any other store in the same building for the retail sale of ladies dresses, coats and suits". The defendant's lease was assigned to him in June, 1950, for somewhat more than a five-year term, and authorized the defendant to sell at retail "ladies hosiery, gloves, lingerie, brassieres, girdles, bathing suits, sweaters,

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bags and accessories, blouses, skirts and beachwear". This assignment was made to and accepted by defendant after discussion and agreement among plaintiff, defendant and defendant's predecessor, as to the wording of the use clause, with knowledge on defendant's part of the restrictive covenant in plaintiff's lease, and with knowledge on plaintiff's part that the defendant's assignor had, for some time, sold skirt-blouse combinations.

Defendant is displaying, offering for sale and selling, among other items, matched skirts and blouses. Claiming that these are in reality two-piece dresses -- the sale of which is forbidden the defendant -- the plaintiff has brought this suit for an injunction to restrain the defendant from thus violating the restrictive covenant. The applicable legal principles are not in dispute. Restrictive covenants are enforced by injunction against takers with notice (Hodge v. Sloan, 107 N.Y. 244, 250, 17 N.E. 335), and one who subsequently rents premises with knowledge of a prior restrictive covenant agreed to by his lessor in favor of another tenant will also be enjoined (Waldorf-Astoria Segar Co. v. Salomon, 109 A.D. 65, 70, 95 N.Y.S. 1053, aff'd, 184 N.Y. 584, 77 N.E. 1197). The issue is the applicability of the covenant, and I must endeavor to ascertain, from the evidence before me, the meaning of the terms used in the leases so as to fulfill the intent of the parties (Bovin v. Galitzka, 250 N.Y. 228, 232, 165 N.E. 273; Kitching v. Brown, 180 N.Y. 414, 427, 73 N.E. 241; Clark v. Devoe, 124 N.Y. 120, 124, 26 N.E. 275).

Plaintiff asserted during the trial, in modification of the demand in the complaint, that he is entitled to an injunction restraining the defendant from selling one-piece or two-piece dresses of any kind, and also from selling to the same customer at the same time skirts and blouses made from the same material or otherwise co-ordinated, matched or related by ornamentation, decoration, embroidery, trim or design -- because, as claimed by the plaintiff, the combination thereby became a "dress". The defendant claims no right to sell conventional one-piece dresses, [*345] that is, garments which are manufactured in a

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variety of styles, fabrics and designs, and which have the common characteristic of being used as a single outerwear article, and of covering the woman's form [**808] from above the bust to the hemline. Nor does the defendant assert the right to sell the conventional two-piece dress, consisting of a bottom or lower garment plus an upper vest, jacket or bolero.

The problem presented here is whether, when a restrictive covenant interdicts the sale of "dresses", it also necessarily precludes the sale of a "blouse-skirt combination", sometimes also called a "dress". I cannot rely upon naked dictionary definitions. However incongruous it may seem to purists in the spheres of lexicography and logic, the legal conclusion may well be that, under certain conditions, a matched skirt-and-blouse garment, although identical with a two-piece dress of the same material, does not come within the restriction -- and so, theoretically, a "dress" is not a "dress". Whether such two-piece ensemble should be considered a dress depends in large measure on the practices and customs of the trade. To resolve the issue requires some consideration of the background of the vast and changing ladies' garment industry, and proof was presented to me in that regard.

In that industry there has been a long-established division between houses which manufacture dresses, and sportswear houses which manufacture skirts and blouses. (There are separate blouse and skirt houses also.) Organization of the manufacturing industry, whether from the angle of the trade association or of the employees' unions, has corresponded to this same division; there are a skirt union, a blouse union and a dress union -- each with separate collective bargaining machinery and contracts entered into with its own respective employers' group. Two-piece dresses have long been and now are manufactured by dress houses, and usually consist of a skirt with a bodice or other upper raiment having almost-complete unification of style, ornamentation, color and material. These two-piece dresses are sold at a single-unit price, and it is the custom of women to wear the two-piece

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costume as a unit. The sportswear houses, on the other hand, had been accustomed to manufacture unrelated skirts and blouses and to charge a separate price for each item -- skirt or blouse -- and it has been the habit of women to wear each without relation to the other.

[*346] A recent style trend, emanating from the sportswear houses, and begun some time before the execution of the present leases, has resulted in the manufacture of "separates", "mix-matches", "co-ordinates", "pair-offs", or "match-mates", as they are variously termed. These are matched skirts and blouses which can be worn together or in combination with other blouses and skirts. Such garments are generally made by other than dress manufacturers, usually sportswear houses, and comprise, as wholly separate units, skirts, blouses, sweaters and other similar articles, none of which is adapted for use as a sole article of outerwear, but must be worn together -- a skirt plus an upper garment. They are not necessarily worn in any specific combination; they may be worn either in matched pairs, in contrasting pairs, or in any combination of [**809] units, to suit the whim of the wearer. Sizes, too, may vary -- for example, a size twelve blouse may be matched with a size fourteen skirt of the same pattern, which, I am told, is a great advantage to many women; while, on the other hand, the entire costume must be of the same size when a two-piece dress is purchased. That matched skirts and blouses are considered sportswear can be noted in large metropolitan retail department stores, where blouses and skirts (although matched) are sold in the sportswear section, and not in the dress division -- and where there are separate and even competing buyers, stylists, advertisers and salesmen. As "separates" are actually blouses and skirts, manufactured and sold by sportswear, and not generally by dress, houses, the two parts of the garment are priced individually and both the retailer and the consumer can buy blouse and skirt separately or in combination.

The purpose of this style change was to permit the purchase at individual prices of various skirts and blouses,

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which, when worn together, look like dresses, and yet at the same time can be worn separately with other garments -- thus increasing the number, utility and variety of the garments which the ingenious and stylish American woman, ever desirous of being variedly well-dressed, has at her disposal -- and this, notwithstanding a limited pocketbook. The main characteristic, therefore, of "separates" is that, although approximating the outward appearance of dresses, they are really skirts and blouses that can be worn with other blouses and skirts. Because of the inability of the consumer to distinguish, at times, between the two-piece dress and the two-piece ensemble, it may be that the plaintiff will be competitively injured. But I cannot hold, [*347] under the language used and the facts proved, that the defendant must ignore an almost universal trend in the sportswear industry, even though the garments he sells tend to resemble the apparel sold by the plaintiff. At the time when the leases were made, the style change had already become established -- and the languageof the restriction in plaintiff's favor and the use clause granted defendant (both of which the plaintiff in a measure formulated) should and could have been more precise.

If the restrictive covenant did not merely employ the generic and currently ambiguous term of "dress", but clearly forbade the sale of "blouse and skirt combinations", the conclusion might be different. But the covenant is not so worded. Just as certain as it is that plaintiff has the exclusive right to sell ladies' dresses, coats and suits, equally certain is it that the defendant has the undoubted right to sell, among other things, ladies' sweaters, blouses and skirts. Reading the two leases together, as I think we should, I must endeavor to make out some construction which will not do violence to the language of either contract, and yet give appropriate effect to the words used in each. It is to be noted too that the use clause in the plaintiff's lease is broader than the restrictive covenant invoked against the defendant. While the plaintiff may [**810] sell "ladies dresses, coats and suits and ladies sports clothes" (italics supplied), the defendant is

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prohibited from selling "ladies dresses, coats and suits" only. The omission of "ladies sports clothes", it seems to me, is significant in the light of the use clause in the defendant's lease -- including, among other things, "sweaters", "blouses, skirts and beachwear" -- which provision was arranged for after discussion with the plaintiff.

Due to the policy of our law against unduly restricting the free use of land (Cook v. Murlin, 202 A.D. 552, 557, 195 N.Y.S. 793, aff'd, 236 N.Y. 611, 142 N.E. 304; Schoonmaker v. Heckscher, 171 A.D. 148, 151, 157 N.Y.S. 75, aff'd, 218 N.Y. 722, 113 N.E. 1066; Val-Kill Co. v. Cities Service Oil Co., 278 A.D. 164, 166, 103 N.Y.S.2d 681; Schuman v. Schechter, 215 A.D. 291, 294, 213 N.Y.S. 446), the covenant is construed strictly against the person seeking its enforcement, particularly when the intent of the restriction is not clear (Buffalo Academy of Sacred Heart v. Boehm Bros., 267 N.Y. 242, 249, 196 N.E. 42; Baumert v. Malkin, 235 N.Y. 115, 120, 139 N.E. 210; Johnson v. Colter, 251 A.D. 697, 699, 297 N.Y.S. 345; Private A. S. Realty Corp. v. Julian, 214 A.D. 628, 629, 212 N.Y.S. 430). I am of the view that the garments defendant has been selling are not "dresses". In any event, I am certain that they are "skirts" and "blouses". As such, I hold that they are not affected by [*348] the restrictive covenant. In my view, the two piece ensembles may truly be considered "dresses", within the meaning of the contract, only when made by a dress manufacturer, designed and styled as to be normally worn together as a single costume and not normally intended to be worn in combination with other outerwear garments, passing through the channels of trade in the dress industry as distinguished from the sportswear industry, and sold both to the dealer and to the consumer as a single unit at a single price. At the very least, the commodities overlap. The line of commercial and physical demarcation between a traditional two-piece dress on the one hand and an ensemble of matched skirt-and-blouse on the other seems to have become somewhat vague and uncertain. To the extent of such overlapping, the plaintiff is subject to

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permissible competition. Restrictive covenants have not been enforced by the courts when articles protected by the covenant and articles sold by the defendant do overlap (Peoples Trust Co. v. Schultz Novelty & SportingGoods Co., 244 N.Y. 14, 20-21, 154 N.E. 649).

The application for the injunction as prayed for is denied. However, the defendant may not compel the purchase of a skirt and blouse combination as a unit, and is to permit the purchase by his customers of skirts and blouses separately or together, as the customer wishes -- and in any case, each at an individual price.

[**811] During the trial, some issue was raised as to the right of the defendant to sell "sun-backs". These garments expose a large part of the female back, and frequently of the upper front, and are sometimes of one piece and sometimes in the form of a skirt and separate halter. They are not normally worn at business or social functions; they are sometimes worn informally at home, and generally are used at beach or camp. They have some of the physical characteristics of dresses. But they were called "sun-togs" by the defendant and are claimed by him to have been developed from beachwear garments. It is not necessary, however, to arrive at a judicial conclusion as to the status of this type of apparel, as the defendant on final submission has agreed to forego the claimed and disputed right to sell such articles.

This opinion constitutes the decision of the court. Submit judgment on notice accordingly.

RONALD VENDETTI, Plaintiff-Appellee, Cross-Appellant, v. COMPASS ENVIRONMENTAL, INC., Defendant-Appellant, Cross-Appellee and WILLIAM J. BRODERICK, Defendant, Cross-Appellee. UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 559 F.3d 731 January 13, 2009, Argued March 24, 2009, Decided

OPINIÓN POR: POSNER

[*732] Compass, the principal defendant (the other defendant need not be discussed separately), appeals from the grant of summary judgment to the plaintiff, Vendetti, in

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a suit for breach of contract governed by Illinois law. On the view we take of the case, there is no need to decide the plaintiff's cross-appeal, in which he seeks relief beyond what the district court awarded him; so we dismiss it.

The plaintiff, an accountant, was the comptroller for a company in Stone Mountain, Georgia, that was acquired by the defendant. Both companies were engaged in the business of cleaning up contaminated sites. The defendant had an office in Stone Mountain, but its headquarters was [**2] in Chicago and the plaintiff, while willing to work for the defendant, did not want to leave Stone Mountain. So he negotiated for a provision in his employment contract which stated that "Unless otherwise mutually agreed to, Executive [i.e., the plaintiff] shall be located in his current Company office location (the 'Principal Location') during the Term [of the contract] or such other office located within 45 miles of the Principal Location." The contract authorized the plaintiff to terminate it on 30 days' written notice for "Good Reason," defined as a material breach of the contract. If he did that he would be entitled to severance pay equal to a year's salary, and likewise "in the event [he] terminates this Agreement [*733] following the Company's request to move his place of employment more than 45 miles from the Principal Location." The plaintiff could even, without being guilty of a breach of contract, terminate the contract without having "Good Reason" to do so. But in that event he would have to give the defendant 90 days' written notice and he would not be entitled to any severance pay. The district court ruled that the plaintiff was entitled to the year's severance pay because the [**3] defendant had violated the location clause.

Although such a clause is a common provision in an employment contract (as is a clause allowing rather than forbidding the employer to relocate the employee, as in Gayheart v. Wilson UTC, Inc., 1999 U.S. Dist. LEXIS 4190, 1999 WL 184167 (N.D. Ill. Mar. 29, 1999), so that the employee cannot argue that relocation is a constructive discharge), we have not found an appellate decision interpreting such a clause, though an oral relocation clause

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was at issue in Jones v. Dunkirk Radiator Corp., 21 F.3d 18 (2d Cir. 1994). We give a few examples of typical location clauses: "The Executive's principal office shall be located in Central Ohio." HTTP://AGREEMENTS.REALDEALDOCS.COM/ employment-agreement/executive-employment-contract-1589748/. "The principal location of Executive's employment with the Company shall be the present location in which the Executive performs such services, although Executive understands and agrees that Executive may also be required to travel from time to time for business reasons." HTTP://CONTRACTS.ONECLE.COM/FORTRESS/ edens-emp-2007-01-17.shtml. "'Involuntary termination' shall mean . . . the relocation of you to a facility or a location more than 50 miles [**4] from your then present location, without your express written consent, except for a relocation to the Southern California area within the 12 months following the date of this Agreement." http://contracts.onecle.com/conor/shanley.emp.2002.04.15.shtml. "For purposes of this Agreement, the Employee shall have 'Good Reason' to terminate his employment during the term of this Agreement if . . . the Company requires the Employee to relocate outside the Metropolitan area of New York City and the Employee declines to do so." http://contracts.corporate.findlaw.com/agreements/barr/zeiger.emp.1999.12.13.html. "'Constructive Termination without Cause' shall mean a termination of the executive's employment at his initiative as provided in this agreement following the occurrence, without the executive's prior written consent, of one or more of the following events: . . . the relocation of company's principal office, or the Executive's own office location as assigned to him by the company, to a location more than 50 miles from the present location of the company's principal office." www.elinfonet.com/prov/41. (All these web sites were visited on March 16, 2009.)

Notice that these clauses sometimes [**5] refer to the employee and sometimes to his office, do not define "relocation," and sometimes do and sometimes do not

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mention travel. So they bristle with potential interpretive problems, as does the clause in this case, and to navigate them successfully will require the aid of common business sense. "All interpretation is contextual, and the body of knowledge that goes by the name of 'common sense' is part of the context of interpreting most documents, certainly most business documents." McElroy v. B.F. Goodrich Co., 73 F.3d 722, 726-27 (7th Cir. 1996).

The district court read the clause to forbid the defendant to send the plaintiff on a business trip more than 45 miles from his office in Stone Mountain if the plaintiff did not want to go. That is a deeply problematic interpretation. The defendant's headquarters was in Chicago and the plaintiff's boss--the defendant's chief financial officer--was located there. [*734] The plaintiff was an accountant and it must have been obvious to him when he signed the employment contract that the merger of his former company into the defendant would present accounting issues that would require trips to Chicago to resolve. It is true that the contract says [**6] that the plaintiff shall be located in Stone Mountain, rather than that the plaintiff's office shall be located there, but if we want to get really literal, we would have to interpret the contract to mean that he could not be sent beyond the 45-mile radius even if he wanted to be--which would be ridiculous.

Had the parties wanted to give the plaintiff a veto over business travel, there were many clearer ways of doing so than by the form of words they chose, which are most naturally interpreted to mean that he could not be reassigned from Stone Mountain to Chicago. He could be sent on a business trip; but if the company said to him for the next year you will work out of the Chicago office, he could terminate the contract and receive the agreed-on severance even if the company told him that it was not relocating him to Chicago, or changing his "principal location." But those are the polar cases and we must consider where the present case lies in relation to them.

Some months after acquiring the plaintiff's former employer, the defendant installed a software system to

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integrate the accounting systems of the two companies and placed the plaintiff in charge of the integration project. This [**7] required occasional trips to Chicago, which he made without protest. Later his duties were enlarged to include accounting assignments for both companies and assisting in the preparation of the end-of-the-month closing statements for the books of account. This required monthly trips of a few days' duration to Chicago, which again he made without protest.

In March 2006 the defendant's new chief financial officer told the plaintiff that two accountants in the Stone Mountain office were being discharged and the plaintiff would have to train accountants in the Chicago headquarters in the duties of the discharged employees. The chief financial officer also wanted the plaintiff to assist in the year-end audit of the company's books and in the preparation of the monthly closing statements. In an email on which the plaintiff heavily relies, the CFO told him that beginning the following month "you need to plan on being in the Chicago office the last two weeks of each month to assist with the close and other accounting work that needs to be done." The email acknowledged that the plaintiff opposed this arrangement but concluded: "I have decided the most efficient means of completing the close and [**8] working on other necessary items and projects is to have you work out of the Chicago office two weeks a month. Therefore, you need to plan on being here the last two weeks each month for the indefinite future."

After some attempts at negotiation, including the plaintiff's offering to spend "2 to 3 days (maximum) in Chicago each month," he sent a written notice to the defendant that he would terminate his employment in 30 days because the requirement that he work out of the Chicago office for two weeks a month for the indefinite future violated the location clause. The notice was sent and received on April 21, 2006. He had previously agreed to be in Chicago on April 24 to assist with the 2005 year-end audit (which was not yet complete), the monthly closing, and the training of the Chicago accountants, but now he

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refused to go, on the ground that the demand that he be in Chicago that day was "part and parcel" of the two-week-a-month order. His termination became effective on May 21; and when the company refused to give him severance pay, on the [*735] independent grounds that he had been required to give 90 days' notice in order to be allowed to terminate his employment without fault, that his [**9] refusal to come to Chicago on April 24 was insubordination warranting termination for cause, and that the two-week-a-month order was not a relocation order, he brought this suit.

If the plaintiff's decision to resign was for "Good Reason," that is, because of a material breach of the employment contract, he did not have to give 90 days' notice, but only 30 days'. It might seem that the defendant's action in changing the plaintiff's place of employment more than 45 miles from the "Principal Location" (if that is how the two-weeks-a-month order should be interpreted, a question we defer for the moment) would, by violating the location clause, be a material breach of the contract. But if so, why is there a separate provision that entitled him to severance pay "in the event [that he] terminates this Agreement following the Company's request to move his place of employment more than 45 miles from the Principal Location"? If such a request were a "Good Reason" for him to resign, there would be no need for the provision we just quoted. That provision seems to treat relocation as an independent ground for severance pay that does not, however, dispense with the requirement of giving 90 days' [**10] notice; only termination for "Good Reason" requires just 30 days' notice.

The district judge rejected this interpretation on the ground that ordering the plaintiff to spend two weeks a month in Chicago was a "demand" rather than a "request" and therefore was not within the quoted provision. But that would imply that if the company "requested" the plaintiff to relocate to Chicago and when he refused the company said, "Fine; it was only a request," the plaintiff could terminate the contract and collect a year's pay because the company

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had requested that he relocate rather than ordering him to do so.

Even if that were a correct interpretation, still, the plaintiff's refusal to show up in Chicago on April 24 was insubordinate and therefore grounds for discharge. He had not resigned yet--he couldn't, because even the 30 days' notice that he incorrectly says was all that he was required to give before resigning had not expired, for remember that he had sent the notice only three days earlier. The district court thought this irrelevant, because as we said the court had interpreted the no-relocation provision as a no-travel provision, an interpretation we reject--and for the additional reason [**11] that for at least a year the plaintiff had been making trips to the Chicago headquarters without any intimation that he could veto a travel order. The behavior of parties to a contract is a good guide to interpretation. Cloud Corp. v. Hasbro, Inc., 314 F.3d 289, 298 (7th Cir. 2002) (Illinois law). "The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning." Restatement (Second) of Contracts, § 202, comment g (1981).

Anyway there was no violation of the location clause. Relocation would mean assigning the plaintiff full time to the Chicago office, so that he would have to move his home from Stone Mountain to Chicago or a Chicago suburb. The two-week-a-month stint would have allowed the plaintiff to retain his home in Stone Mountain, especially since the defendant would be paying for both his living expenses in Chicago and his travel expenses, including the expenses of traveling back to Stone Mountain on the weekend between the two weeks of each monthly stint. Of course there is a point at which a requirement of frequent travel would amount to a de facto relocation--suppose the defendant had [*736] told the plaintiff he [**12] must spend three weeks a month in Chicago at his own expense for the next two years. That would be an extreme case, coupling an unreasonable amount of continuous absence from home with a refusal to pay living expenses. "There will come a point in time when travel to the same location from another

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city, day after day, becomes a de facto relocation. Weekly travel for parts of five days for six weeks, however, will not establish 'relocation' as a matter of law . . . . Although a six- to eight-week stay in a location over a thousand miles away might reasonably be considered a 'relocation,' a requirement of weekly travel that begins on Monday and ends on Friday morning can be distinguished." Peach v. Ultramar Diamond Shamrock, 229 F. Supp. 2d 759, 769 (E.D. Mich. 2002), aff'd, 109 Fed. Appx. 711 (6th Cir. 2004). Our case involves fully reimbursed weekday-only travel. The fact that the company was paying all living and travel expenses is significant because these costs would make the company think twice before trying to circumvent the location clause by renaming relocation "business travel."

The plaintiff puts great weight on the fact that the two-weeks-a-month stint would continue "for the [**13] indefinite future." But we read "indefinite" to mean that the company did not know how long it would need him to spend two weeks a month in Chicago, not to mean "forever." The expenses incurred by the company would, as we have pointed out, give the defendant an incentive to end the travel program as soon as possible.

The plaintiff presented evidence of bad blood between him and the chief financial officer and suggests that the latter was trying to force him to resign without the company's having to pay him severance pay. Such a maneuver, motivated (if the plaintiff's evidence is believed) by spite, would disserve the company, but organizations cannot always prevent subordinates from pursuing vendettas against their subordinates. If, however, we are right that the company did not violate the location clause, the CFO's motive in ordering the plaintiff to travel more than the latter wanted to do is irrelevant.

Ordinarily when summary judgment is reversed, the case is set for trial. But the defendant has asked us to reverse the judge's denial of its motion for summary judgment, and the plaintiff has not stated or implied that in the event we reverse the grant of summary judgment in his

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favor [**14] he wants a trial. Nor has he identified any triable issues. We therefore order the entry of summary judgment in the defendant's favor and thus the dismissal of the case.

Reversed with directions.

WILLIAM L CLARK, Appellant, v. JOHN B. WEST, Respondent. COURT OF APPEALS OF NEW YORK 193 N.Y. 349; 86 N.E. 1 September 28, 1908, Argued November 10, 1908, Decided

OPINIÓN POR: WERNER

[*355] [**3] The contract before us, stripped of all superfluous verbiage, binds the plaintiff to total abstention from the use of intoxicating liquors during the continuance of the work which he was employed to do. The stipulations relating to the plaintiff's compensation provide that if he does not observe this condition he is to be paid at the rate of $ 2 per page, and if he does comply therewith he is to receive $ 6 per page. The plaintiff has written one book under the contract [*356] known as "Clark & Marshall on Corporations," which has been accepted, published and copies sold in large numbers by the defendant. The plaintiff admits that while he was at work on this book he did not entirely abstain from the use of intoxicating liquors. He has been paid only $ 2 per page for the work he has done. He claims that, despite his breach of this condition, he is entitled to the full compensation of $ 6 per page because the defendant, with full knowledge of plaintiff's non-observance of this stipulation as to total abstinence, has waived the breach thereof and cannot now insist upon strict performance in this regard. This plea of waiver presents the underlying question which determines the answers to the questions certified.

Briefly stated, the defendant's position is that the stipulation as to plaintiff's total abstinence is the consideration for the payment of the difference between $ 2 and $ 6 per page and therefore could not be waived except by a new agreement to that effect based upon a good consideration; that the so-called waiver alleged by the plaintiff is not a waiver but a modification of the contract in

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respect of its consideration. The plaintiff on the other hand argues that the stipulation for his total abstinence was merely a condition precedent intended to work a forfeiture of the additional compensation in case of a breach and that it could be waived without any formal agreement to that effect based upon a new consideration.

The subject-matter of the contract was the writing of books by the plaintiff for the defendant. The duration of the contract was the time necessary to complete them all. The work was to be done to the satisfaction of the defendant, and the plaintiff was not to write any other books except those covered by the contract unless requested so to do by the defendant, in which latter event he was to be paid for that particular work by the year. The compensation for the work specified in the contract was to be $ 6 per page, unless the plaintiff failed to totally abstain from the use of intoxicating liquors during the continuance of the contract, in which event he was to receive only $ 2 per page. [*357] That is the obvious import of the contract construed in the light of the purpose for which it was made, and in accordance with the ordinary meaning of plain language. It is not a contract to write books [**4] in order that the plaintiff shall keep sober, but a contract containing a stipulation that he shall keep sober so that he may write satisfactory books. When we view the contract from this standpoint it will readily be perceived that the particular stipulation is not the consideration for the contract, but simply one of its conditions which fits in with those relating to time and method of delivery of manuscript, revision of proof, citation of cases, assignment of copyrights, keeping track of new cases and citations for new editions, and other details which might be waived by the defendant, if he saw fit to do so. This is made clear, it seems to us, by the provision that, "In consideration of the above promises," the defendant agrees to pay the plaintiff $ 2 per page on each book prepared by him, and if he "abstains from the use of intoxicating liquor and otherwise fulfills his agreements as hereinbefore set forth, he shall be paid an additional $ 4 per page in manner hereinbefore

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stated." The compensation of $ 2 per page, not to exceed $ 250 per month, was an advance or partial payment of the whole price of $ 6 per page, and the payment of the two-thirds which was to be withheld pending the performance of the contract, was simply made contingent upon the plaintiff's total abstention from the use of intoxicants during the life of the contract. It is possible, of course, by segregating that clause of the contract from the context, to give it a wider meaning and a different aspect than it has when read in conjunction with other stipulations. But this is also true of other paragraphs of the contract. The paragraph, for instance, which provides that after the publication of any of the books written by the plaintiff he is to receive an amount equal to one-sixth of the net receipts from the combined sales of all the books which shall have been published by the defendant under the contract, less any and all payments previously made, "until the amount of $ 6 per page of each book shall have been paid, after which the first [*358] party (plaintiff) shall have no right, title or interest in said books or the receipts from the sales thereof." That section of the contract standing alone would indicate that the plaintiff was to be entitled in any event to the $ 6 per page to be paid out of the net receipts of the copies of the book sold. The contract read as a whole, however, shows that it is modified by the preceding provisions making the compensation in excess of the $ 2 per page dependent upon the plaintiff's total abstinence, and upon the performance by him of the other conditions of the contract. It is obvious that the parties thought that the plaintiff's normal work was worth $ 6 per page. That was the sum to be paid for the work done by the plaintiff and not for total abstinence. If the plaintiff did not keep to the condition as to total abstinence, he was to lose part of that sum. Precisely the same situation would have risen if the plaintiff had disregarded any of the other essential conditions of the contract. The fact that the particular stipulation was emphasized did not change its character. It was still a condition which the defendant could have insisted upon, as he has apparently done in regard to some

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others, and one which he could waive just as he might have waived those relating to the amount of the advance payments, or the number of pages to be written each month. A breach of any of the substantial conditions of the contract would have entailed a loss or forfeiture similar to that consequent upon a breach of the one relating to total abstinence, in case of the defendant's insistence upon his right to take advantage of them. This, we think, is the fair interpretation of the contract, and it follows that the stipulation as to the plaintiff's total abstinence was nothing more nor less than a condition precedent. If that conclusion is well founded there can be no escape from the corollary that this condition could be waived; and if it was waived the defendant is clearly not in a position to insist upon the forfeiture which his waiver was intended to annihilate. The forfeiture must stand or fall with the condition. If the latter was waived, the former is no longer a part of the contract. Defendant still has the [*359] right to counterclaim for any damages which he may have sustained in consequence of the plaintiff's breach, but he cannot insist upon strict performance. (Dunn v. Steubing, 120 N. Y. 232; Parke v. Franco-American Trading Co., Id. 51, 56; Brady v. Cassidy, 145 id. 171.)

This whole discussion is predicated of course upon the theory of an express waiver. We assume that no waiver could be implied from the defendant's mere acceptance of the books and his payment of the sum of $ 2 per page without objection. It was the defendant's duty to pay that amount in any event after acceptance of the work. The plaintiff must stand upon his allegation of an express waiver and if he fails to establish that he cannot maintain his action.

The theory upon which the defendant's attitude seems to be based is that even if he has represented to the plaintiff that he would not insist upon the condition that the latter should observe total abstinence from intoxicants, he can still refuse to pay the full contract price for his work. The inequity of this position becomes apparent when we consider that this contract was to run for a period of years,

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during a large portion of which the plaintiff was to be entitled only to the advance payment of $ 2 per page, the balance being contingent, among other things, upon publication of the books and returns from sales. Upon this theory the defendant might have waived the condition while the first book was in process of production, and yet when the whole work was completed, he would still be in a position to insist upon the [**5] forfeiture because there had not been strict performance. Such a situation is possible in a case where the subject of the waiver is the very consideration of a contract (Organ v. Stewart, 60 N. Y. 413, 420), but not where the waiver relates to something that can be waived. In the case at bar, as we have seen, the waiver is not of the consideration or subject-matter, but of an incident to the method of performance. The consideration remains the same. The defendant has had the work he bargained for, and it is alleged that he has waived one of the conditions as to the manner in which it was to have [*360] been done. He might have insisted upon literal performance and then he could have stood upon the letter of his contract. If, however, he has waived that incidental condition, he has created a situation to which the doctrine of waiver very precisely applies.

The cases which present the most familiar phases of the doctrine of waiver are those which have arisen out of litigation over insurance policies where the defendants have claimed a forfeiture because of the breach of some condition in the contract (Insurance Co. v. Norton, 96 U.S. 234; Titus v. Glens Falls Ins. Co., 81 N. Y. 410; Kiernan v. Dutchess Co. Mut. Insurance Co., 150 id. 190), but it is a doctrine of general application which is confined to no particular class of cases. A waiver has been defined to be the intentional relinquishment of a known right. It is voluntary and implies an election to dispense with something of value, or forego some advantage which the party waiving it might at its option have demanded or insisted upon (Herman on Estoppel & Res Adjudicata, vol. 2, p. 954; Cowenhoven v. Ball, 118 N. Y. 234), and this definition is supported by many cases in this and other

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states. In the recent case of Draper v. Oswego Co. Fire R. Assn. (190 N. Y. 12, 16) Chief Judge Cullen, in speaking for the court upon this subject, said: "While that doctrine and the doctrine of equitable estoppel are often confused in insurance litigation, there is a clear distinction between the two. A waiver is the voluntary abandonment or relinquishment by a party of some right or advantage. As said by my brother Vann in the Kiernan Case (150 N. Y. 190): 'The law of waiver seems to be a technical doctrine, introduced and applied by the court for the purpose of defeating forfeitures. * * * While the principle may not be easily classified, it is well established that if the words and acts of the insurer reasonably justify the conclusion that with full knowledge of all the facts it intended to abandon or not to insist upon the particular defense afterwards relied upon, a verdict or finding to that effect establishes a waiver, which, if it once exists, can never be revoked.' The doctrine of equitable [*361] estoppel, or estoppel in pais, is that a party may be precluded by his acts and conduct from asserting a right to the detriment of another party who, entitled to rely on such conduct, has acted upon it. * * * As already said, the doctrine of waiver is to relieve against forfeiture; it requires no consideration for a waiver, nor any prejudice or injury to the other party." To the same effect, see Knarston v. Manhattan Life Ins. Co. (140 Cal. 57).

It remains to be determined whether the plaintiff has alleged facts which, if proven, will be sufficient to establish his claim of an express waiver by the defendant of the plaintiff's breach of the condition to observe total abstinence. In the 12th paragraph of the complaint, the plaintiff alleges facts and circumstances which we think, if established, would prove defendant's waiver of plaintiff's performance of that contract stipulation. These facts and circumstances are that long before the plaintiff had completed the manuscript of the first book undertaken under the contract, the defendant had full knowledge of the plaintiff's non-observance of that stipulation, and that with such knowledge he not only accepted the completed manuscript without objection, but "repeatedly avowed and

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represented to the plaintiff that he was entitled to and would receive said royalty payments (i. e., the additional $ 4 per page), and plaintiff believed and relied upon such representations * * * and at all times during the writing of said treatise on corporations, and after as well as before publication thereof as aforesaid, it was mutually understood, agreed and intended by the parties hereto that notwithstanding plaintiff's said use of intoxicating liquors, he was nevertheless entitled to receive and would receive said royalty as the same accrued under said contract."

The demurrer not only admits the truth of these allegations, but also all that can by reasonable and fair intendment be implied therefrom. (Marie v. Garrison, 83 N. Y. 14; Standard Fashion Co. v. Siegel-Cooper Co., 157 id. 60; Ahrens v. Jones, 169 id. 555, 559.) Under the modern rule pleadings are not to be construed against the pleader, but averments [*362] which sufficiently point out the nature of the plaintiff's claim are sufficient, if under them he would be entitled to give the necessary evidence. (Rochester Ry. Co. v. Robinson, 133 N. Y. 242, 246; Coatsworth v. Lehigh Valley R. R. Co., 156 id. 451.) Tested by these rules, we think it cannot be doubted that the allegations contained in the 12th paragraph of the complaint, if proved upon the trial, would be sufficient to establish an express waiver by the defendant of the stipulation in regard to plaintiff's total abstinence.

The three questions certified should be answered in the affirmative, the order of the Appellate Division reversed, the interlocutory judgment of the Special Term affirmed, with costs in both courts, and the defendant be [**6] permitted to answer the complaint within twenty days upon payment of costs.

KELLY BRINES, on behalf of herself and all others similarly situated, Plaintiff-Appellant, v. XTRA CORP., Defendant-Appellee. UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 304 F.3d 699 May 24, 2002, Argued September 10, 2002, Decided

OPINIÓN POR: POSNER

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[*700] This is a class action under ERISA on behalf of 55 employees terminated when their employer, XTRA, transferred the part of its business in which they worked to ContainerPort. They claim that XTRA's welfare benefits plan entitled them to severance pay even though they were offered the same employment by ContainerPort without a break on essentially the same terms. The district judge granted summary judgment for XTRA.

XTRA's 1992 plan promised severance pay in a specific amount "if the Company determines that there should be a reduction in the workforce for business reasons." The following year's plan, the one applicable to the members of the plaintiff class, replaced the severance provision in the previous plan with the following: "The company will develop and implement an appropriate separation program if business and economic conditions necessitate a reduction in force." ContainerPort hired all 55 class members at the same wages, plus [*701] 3 percent, that they had received [**2] from XTRA, with a benefits package similar though not identical, and in relatively minor respects less generous, than what they had had at XTRA.

They argue that they were the victims of a reduction in force, but that is a term used to describe a mass layoff, Bellaver v. Quanex Corp., 200 F.3d 485, 494 (7th Cir. 2000); Matthews v. Commonwealth Edison Co., 128 F.3d 1194, 1195, 1197 (7th Cir. 1997); Tiltti v. Weise, 155 F.3d 596, 601 (2d Cir. 1998), rather than the sale of a whole or the part of a business. Allen v. Adage, Inc., 967 F.2d 695, 700 (1st Cir. 1992). The curious logic of their argument is that had XTRA merely transferred the part of the business they worked in to a wholly owned subsidiary of which they then became employees, they would be entitled to severance benefits because they had been terminated by XTRA. But the problem with the suit goes deeper. The 1993 plan did not promise severance pay to workers who were terminated, whether because of a reduction in force or otherwise. The statement in the plan that "The company will develop and implement an appropriate separation program" did not create a legally [**3] enforceable

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promise. Its vagueness alone would make it impossible for a court to provide any relief to the members of the class, who are seeking after all cash rather than the establishment of a program left to the employer's discretion to establish and define at some undetermined future time. What is an "appropriate" separation program? The possibilities are endless. And by when was the company required to develop the program and put it into effect?

A court will not enforce a contract that is so vague that the court rather than the parties would have to formulate essential terms. Goldstick v. ICM Realty, 788 F.2d 456, 461 (7th Cir. 1986); Neeley v. Bankers Trust Co., 757 F.2d 621, 627-28 (5th Cir. 1985); Brookhaven Housing Coalition v. Solomon, 583 F.2d 584, 593 (2d Cir. 1978). And the vagueness of the "will develop" statement is a strong indication that it was not intended to be a promise, Western Industries, Inc. v. Newcor Canada Ltd., 739 F.2d 1198, 1205 (7th Cir. 1984); Neeley v. Bankers Trust Co., supra, 757 F.2d at 627, but merely a prediction, which creates no rights. Rexnord Corp. v. DeWolff Boberg & Associates, Inc., 286 F.3d 1001, 1005-06 (7th Cir. 2002). [**4]

The cases say that an ERISA plan need not be in writing in order to be enforceable. Diak v. Dwyer, Costello & Knox, P. C., 33 F.3d 809, 811-12 (7th Cir. 1994); Donovan v. Dillingham, 688 F.2d 1367, 1372-73 (11th Cir. 1982) (en banc); Kenney v. Roland Parson Contracting Corp., 307 U.S. App. D.C. 387, 28 F.3d 1254, 1257-58 (D. C. Cir. 1994). It just has to exist, in the sense that its essential terms are ascertainable (so that it doesn't flunk on vagueness grounds) and that it "was intended to be in effect, and not just be something for future adoption." James v. National Business Systems, Inc., 924 F.2d 718, 720 (7th Cir. 1991). The statute requires plans to be in writing, 29 U.S.C. § 1102(a)(1); Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 83, 131 L. Ed. 2d 94, 115 S. Ct. 1223 (1995), but the courts reason that a failure to comply with that requirement should not redound to the company's benefit. Memorial Hospital System v.

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Northbrook Life Ins. Co., 904 F.2d 236, 241 (5th Cir. 1990); Brown v. Ampco-Pittsburgh Corp., 876 F.2d 546, 551 (6th Cir. 1989); [**5] Donovan v. Dillingham, supra, 688 F.2d at 1372. And while oral modifications of ERISA plans are not permitted, Downs v. World Color Press, 214 F.3d 802, 805 (7th Cir. 2000); Bartholet v. Reishauer A. G., 953 F.2d 1073, 1078 (7th Cir. 1992); Nachwalter v. Christie, 805 F.2d 956, 960 (11th [*702] Cir. 1986), employers often have different plans covering different benefits, and it is conceivable that some might be written and some oral, with the oral enforceable so long as they did not (as in Anderson v. Resolution Trust Corp., 66 F.3d 956, 959-60 (8th Cir. 1995)) contradict the written plan.

What we have been calling an "oral" plan is better termed an "informal" plan, the term used in such cases as Deboard v. Sunshine Mining and Refining Co., 208 F.3d 1228, 1238-39 (10th Cir. 2000); Elmore v. Cone Mills Corp., 23 F.3d 855, 861 (4th Cir. 1994) (en banc), and Henglein v. Informal Plan for Plant Shutdown Benefits for Salaried Employees, 974 F.2d 391, 400-01 (3d Cir. 1992). For it will usually be pieced out from documents (though oral testimony may be necessary [**6] to interpret them as constituting a plan), just not set forth in a nicely wrapped package labeled "employee welfare benefits plan." And so "written plan" (in the "written" -" oral" antithesis) is better termed "express" or "formal" plan. Even so, if the informal plan, though entirely written, modifies an existing plan, the modification is an amendment and to be valid must comply with any procedural requirements for a valid amendment that are set forth in the formal plan, Downs v. World Color Press, supra, 214 F.3d at 805; Brewer v. Protexall, Inc., 50 F.3d 453, 456-57 (7th Cir. 1995); Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 58-59 (4th Cir. 1992)- the plan's counterpart to Article VI of the U.S. Constitution.

There is a fair bit of judicial skepticism about "informal plans"- specifically whether by allowing their concoction by imaginative counsel in litigation employers will actually be deterred from offering certain types of benefit. See, e.g., Sprague v. General Motors Corp., 133 F.3d 388, 403 (6th

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Cir. 1998) (en banc); Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988). [**7] Perhaps it would be better to describe informal plans as simple contracts, enforceable under state law rather than under ERISA, a distinction suggested in two of our prior cases. Frahm v. Equitable Life Assurance Society, 137 F.3d 955, 957-58 (7th Cir. 1998); Sandstrom v. Cultor Food Science, Inc., 214 F.3d 795, 797-98 (7th Cir. 2000); cf. Massachusetts v. Morash, 490 U.S. 107, 118-19, 104 L. Ed. 2d 98, 109 S. Ct. 1668 (1989). We need not pursue the matter further. Even if it is open to the plaintiff to argue that XTRA replaced its discontinued severance plan with an informal one, see Henglein v. Informal Plan for Plant Shutdown Benefits for Salaried Employees, supra, 974 F.2d at 400-01; Elmore v. Cone Mills Corp., supra, 23 F.3d at 861, his effort to show this falls short.

XTRA's statement in the 1993 plan of its intention to create a program of severance benefits could not be the informal plan that replaced the severance provision in the 1992 plan, for the reasons that we've explained. But the plaintiff points out that on a number of occasions after 1992 the company paid severance benefits to [**8] discharged workers in accordance with the formula in the 1992 plan, and he argues that this "ongoing practice and procedure to pay [severance] benefits in the past, pursuant to XTRA's standard formula," constituted a successor plan. The year before the transfer to ContainerPort, XTRA had discussed a possible merger with another company (Apollo) and had informed its employees that it would provide severance pay if they weren't offered a permanent comparable position in an affiliate of XTRA. And executives of XTRA acknowledged that they would have given the members of the plaintiff's class severance pay had they not been offered comparable jobs by ContainerPort. (The [*703] plaintiff argues that they were not really comparable, but we need not decide that.) XTRA did give severance pay-calculated by the standard formula-to the one employee to whom ContainerPort did not offer a job.

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The company's statements were not, as the plaintiff claims, "admissions" that "there was a severance benefit plan." They were merely descriptions of an acknowledged practice. Practices do sometimes have legal significance, however. A practice can be the basis for inferring a policy that can make a municipality [**9] liable for a constitutional tort under the regime of the Monell decision, Cornfield by Lewis v. Consolidated High School District No. 230, 991 F.2d 1316, 1326 (7th Cir. 1993), or for inferring that the user of another person's land has become a licensee. Wytupeck v. Camden, 25 N.J. 450, 136 A.2d 887, 894-95 (N. J. 1958). A little closer to home, a practice, under the rubric "course of dealing," can be evidence of what a contract requires. See, e.g., UCC § 1-205; Restatement (Second) of Contracts § 223 (1981); Frank Novak & Sons, Inc. v. Sommer & Maca Industries, Inc., 182 Ill. App. 3d 781, 538 N.E.2d 700, 703-05, 131 Ill. Dec. 325 (Ill. App. 1989). But the plaintiff in this case wants to use the employer's practice of paying severance pay not to explicate a contract but to create one; and a practice does not create an obligation under the principles of contract law (the principles normally and here applicable to teasing out the obligations created by a pension or welfare plan governed by ERISA) unless it creates a contract "implied in fact."

A contract implied in fact is one in which behavior takes the place of articulate [**10] acceptance, as in Hobbs v. Massasoit Whip Co., 158 Mass. 194, 33 N.E. 495 (Mass. 1893) (Holmes, J.), a suit for the price of eel skins sent by the plaintiff to the defendant, and kept by the defendant some months, until they were destroyed. It must be taken that the plaintiff received no notice that the defendants declined to accept the skins. ...The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eel skins in the same way four or five times before, and they had been accepted and paid for. ...[It] was fair to assume that if [the defendant] had admitted the eel skins to be over 22 inches in length, and fit for its business, ...it would have accepted them; that this

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was understood by the plaintiff; and, indeed, that there was a standing offer to him for such skins. In such a condition of things, the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with [**11] a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance. The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent, in the view of the law, whatever may have been the actual state of mind of the party.

See also A.E.I. Music Network, Inc. v. Business Computers, Inc., 290 F.3d 952, 956-57 (7th Cir. 2002); Dallis v. Don Cunningham & Associates, 11 F.3d 713, 715-16 (7th Cir. 1993). The plaintiff in Holmes's case had by reason of his previous dealings with the defendant good reason to believe that the defendant would not destroy the eel skins; indeed, the plaintiff would not have sent them to the defendant [*704] had he thought there was such a risk. The plaintiff in the present case, a supplier of labor albeit not of eels, did not "offer" to work in exchange for a promise of severance pay, and the defendant did not "accept" the "offer" by paying severance pay to other employees. The absence of an offer makes it impossible to construe the mute practice as acceptance. The normal [**12] understanding of severance pay (when not provided for in a written plan), as of bonuses, is that it is at the discretion of the employer; there is nothing here to upset that understanding.

Affirmed.

PAROLE EVIDENCE RULE

JOSEPH H. THOMPSON vs. ROWLAND C. LIBBY. SUPREME COURT OF MINNESOTA 34 Minn. 374; 26 N.W. 1 December 19, 1885, Decided

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OPINIÓN POR: MITCHELL

[**1] [*376] The plaintiff being the owner of a quantity of logs marked "H. C. A.," cut in the winters of 1882 and 1883, and lying in the Mississippi river, or on its banks, above Minneapolis, defendant and the plaintiff, through his agent, D. S. Mooers, having fully agreed on the terms of a sale and purchase of the logs referred to, executed the following written agreement:

[**2] "AGREEMENT.

"Hastings, Minn., June 1, 1883.

"I have this day sold to R. C. Libby, of Hastings, Minn., all my logs marked 'H. C. A.,' cut in the winters of 1882 and 1883, for ten dollars a thousand feet, boom scale at Minneapolis, Minnesota. Payments cash as fast as scale bills are produced.

[Signed] "J. H. Thompson,

"Per D. S. Mooers.

"R. C. Libby."

This action having been brought for the purchase-money, the defendant -- having pleaded a warranty of the quality of the logs, alleged to have been made at the time of the sale, and a breach of it -- offered on the trial oral testimony to prove the warranty, which was admitted, over the objection of plaintiff that it was incompetent to prove a verbal warranty, the contract of sale being in writing. This raises the only point in the case.

No ground was laid for the reformation of the written contract, and any charge of fraud on part of plaintiff or his agent in making [*377] the sale was on the trial expressly disclaimed. No rule is more familiar than that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument," and yet none has given rise to more misapprehension as to its application. It is a rule founded on the obvious inconvenience and injustice that would result if matters in writing, made with consideration and deliberation, and intended to embody the entire agreement of the parties, were liable to be controlled by what Lord Coke expressively calls "the uncertain testimony of slippery

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memory." Hence, where the parties have deliberately put their engagements into writing in such terms as to import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the manner and extent of their undertaking, was reduced to writing. 1 Greenl. Ev. § 275. Of course, the rule presupposes that the parties intended to have the terms of their complete agreement embraced in the writing, and hence it does not apply where the writing is incomplete on its face and does not purport to contain the whole agreement, as in the case of mere bills of parcels, and the like.

But in what manner shall it be ascertained whether the parties intended to express the whole of their agreement in writing? It is sometimes loosely stated that where the whole contract be not reduced to writing, parol evidence may be admitted to prove the part omitted. But to allow a party to lay the foundation for such parol evidence by oral testimony that only part of the agreement was reduced to writing, and then prove by parol the part omitted, would be to work in a circle, and to permit the very evil which the rule was designed to prevent. The only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself. If it imports on its face to be a complete expression of the whole agreement, -- that is, contains such language as imports a complete legal obligation, -- it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed. The rule forbids to add by parol where the [*378] writing is silent, as well as to vary where it speaks, -- 2 Phil. Evidence, (Cow. & H. Notes,) 669; Naumberg v. Young, 44 N.J.L. 331; Hei v. Heller, 53 Wis. 415, 10 N.W. 620, -- and the law controlling the operation of a written contract becomes a part of it, and cannot be varied by parol any more than what is written. 2 Phil. Ev. (Cow. & H. Notes,) 668; La Farge v. Rickert, 5 Wend. 187;

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Creery v. Holly, 14 Wend. 26; Stone v. Harmon, 31 Minn. 512, 19 N.W. 88.

The written agreement [**3] in the case at bar, as it appears on its face, in connection with the law controlling its construction and operation, purports to be a complete expression of the whole agreement of the parties as to the sale and purchase of these logs, solemnly executed by both parties. There is nothing on its face (and this is a question of law for the court) to indicate that it is a mere informal and incomplete memorandum. Parol evidence of extrinsic facts and circumstances would, if necessary, be admissible, as it always is, to apply the contract to its subject-matter, or in order to a more perfect understanding of its language. But in that case such evidence is used, not to contradict or vary the written instrument, but to aid, uphold, and enforce it as it stands. The language of this contract "imports a legal obligation, without any uncertainty as to its object or the extent of the engagement," and therefore "it must be conclusively presumed that the whole engagement of the parties, and the manner and extent of the undertaking, was reduced to writing." No new term, forming a mere incident to or part of the contract of sale, can be added by parol.

That in case of a sale of personal property a warranty of its quality is an item and term of the contract of sale, and not a separate and independent collateral contract, and therefore cannot be added to the written agreement by oral testimony, has been distinctly held by this court, in accordance, not only with the great weight of authority, but also, as we believe, with the soundest principles. Jones v. Alley, 17 Minn. 269, (292.)

We are referred to Healy v. Young, 21 Minn. 389, as overruling this. This is an entire misapprehension of the point decided in the latter case. In Healy v. Young the claim of defendant was that for a certain consideration plaintiff agreed verbally to release a certain [*379] debt, and also to convey certain personal property; and that, in part-performance of this prior verbal agreement, he executed a bill of sale of the property. What was decided was that the execution in writing of the bill of sale in part-

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performance of this verbal agreement did not preclude defendant from proving by parol the prior agreement. The parties had not put their original agreement in writing, and the bill of sale executed in part-performance in no way superseded it. Moreover, the promise to release the debt was a distinct collateral matter from that covered by the bill of sale, and in that view of the case it was immaterial whether the oral agreement preceded or was contemporaneous with the bill of sale.

In opposition to the doctrine of Jones v. Alley, we are referred to a few cases which seem to hold that parol evidence of a warranty is admissible on the ground that a warranty is collateral to the contract of sale, and that the rule does not exclude parol evidence of matters collateral to the subject of the written agreement. It seems to us that this is based upon a misapprehension as to the sense in which the term "collateral" is used in the rule invoked. There are a great many matters that, in a general sense, may be considered collateral to the contract; for example, in the case of leases, covenants for repairs, improvements, payment of taxes, etc., are, in a sense, collateral to a demise of the premises. But parol evidence of these would not be admissible to add to the terms of a written lease. So, in a sense, a warranty is collateral to a contract of sale, for the title would pass without a warranty. It is also collateral in the sense that its breach is no ground for a rescission of the contract by the vendor, but that he must resort to his action on the warranty for damages. But, when made, a warranty is a part of the contract of sale. The common sense of men would say, and correctly so, that when, on a sale of personal property, a warranty is given, it is one of the terms of the sale, and not a separate and independent contract. To justify the admission of a parol promise by one of the parties to a written contract, on the ground that it is collateral, the promise must relate to a subject distinct from that to which the writing relates. Dutton v. Gerrish, 9 Cush. 89; Naumberg v. Young, supra; 2 Taylor, Ev. § 1038. See Lindley v. Lacey, 34 Law J.C.P., 7.

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[*380] [**4] We have carefully examined all the cases cited in the quite exhaustive brief of counsel for defendant, and find but very few that are at all in conflict with the views already expressed, and these few do not commend themselves to our judgment. Our conclusion therefore is that the court erred in admitting parol evidence of a warranty, and therefore the order refusing a new trial must be reversed.

¿Al no existir contratación típica en el common law, la letra del contrato es más importante? ¿Cómo hace el abogado estadounidense para no omitir las cláusulas esenciales al negocio jurídico en la redacción de un contrato?

TRIDENT CENTER, Plaintiff-Appellant, v. CONNECTICUT GENERAL LIFE INSURANCE COMPANY, Defendant-Appellee. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 847 F.2d 564 March 8, 1988, Argued and Submitted May 24, 1988, Filed

OPINIÓN POR: KOZINSKI

[*565] The parties to this transaction are, by any standard, highly sophisticated business people: Plaintiff is a partnership consisting of an insurance company and two of Los Angeles' largest and most prestigious law firms; defendant is another insurance company. Dealing at arm's length and from positions of roughly equal bargaining strength, they negotiated a commercial loan amounting to more than $ 56 million. The contract documents are lengthy and detailed; they squarely address the precise issue that is the subject of this dispute; to all who read English, they appear to resolve the issue fully and conclusively.

Plaintiff nevertheless [**2] argues here, as it did below, that it is entitled to introduce extrinsic evidence that the contract means something other than what it says. This case therefore presents the question whether parties in California can ever draft a contract that is proof to parol evidence. Somewhat surprisingly, the answer is no.

[*566] Facts

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The facts are rather simple. Sometime in 1983 Security First Life Insurance Company and the law firms of Mitchell, Silberberg & Knupp and Manatt, Phelps, Rothenberg & Tunney formed a limited partnership for the purpose of constructing an office building complex on Olympic Boulevard in West Los Angeles. The partnership, Trident Center, the plaintiff herein, sought and obtained financing for the project from defendant, Connecticut General Life Insurance Company. The loan documents provide for a loan of $ 56,500,000 at 12 1/4 percent interest for a term of 15 years, secured by a deed of trust on the project. The promissory note provides that "maker shall not have the right to prepay the principal amount hereof in whole or in part" for the first 12 years. Note at 6. In years 13-15, the loan may be prepaid, subject to a sliding prepayment fee. The note also [**3] provides that in case of a default during years 1-12, Connecticut General has the option of accelerating the note and adding a 10 percent prepayment fee.

Everything was copacetic for a few years until interest rates began to drop. The 12 1/4 percent rate that had seemed reasonable in 1983 compared unfavorably with 1987 market rates and Trident started looking for ways of refinancing the loan to take advantage of the lower rates. Connecticut General was unwilling to oblige, insisting that the loan could not be prepaid for the first 12 years of its life, that is, until January 1996.

Trident then brought suit in state court seeking a declaration that it was entitled to prepay the loan now, subject only to a 10 percent prepayment fee. Connecticut General promptly removed to federal court and brought a motion to dismiss, claiming that the loan documents clearly and unambiguously precluded prepayment during the first 12 years. The district court agreed and dismissed Trident's complaint. The court also "sua sponte, sanction[ed] the plaintiff for the filing of a frivolous lawsuit." Order of Dismissal, No. CV 87-2712 JMI (Kx), at 3 (C.D.Cal.June 8, 1987). Trident appeals both aspects [**4] of the district court's ruling.

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Discussion

I Trident makes two arguments as to why the district court's ruling is wrong. First, it contends that the language of the contract is ambiguous and proffers a construction that it believes supports its position. Second, Trident argues that, under California law, even seemingly unambiguous contracts are subject to modification by parol or extrinsic evidence. Trident faults the district court for denying it the opportunity to present evidence that the contract language did not accurately reflect the parties' intentions.

A. The Contract

As noted earlier, the promissory note provides that Trident "shall not have the right to prepay the principal amount hereof in whole or in part before January 1996." Note at 6. It is difficult to imagine language that more clearly or unambiguously expresses the idea that Trident may not unilaterally prepay the loan during its first 12 years. Trident, however, argues that there is an ambiguity because another clause of the note provides that "in the event of a prepayment resulting from a default hereunder or the Deed of Trust prior to January 10, 1996 the prepayment fee will be ten percent (10%). [**5] " Note at 6-7. Trident interprets this clause as giving it the option of prepaying the loan if only it is willing to incur the prepayment fee.

We reject Trident's argument out of hand. In the first place, its proffered interpretation would result in a contradiction between two clauses of the contract; the default clause would swallow up the clause prohibiting Trident from prepaying during the first 12 years of the contract. The normal rule of construction, of course, is that courts must interpret contracts, if possible, so as to avoid internal conflict. See Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866, 872 (9th Cir.), cert. denied, 444 U.S. 981, 62 [*567] L. Ed. 2d 407, 100 S. Ct. 483 (1979) (California law); Cal. Civ. Proc. Code § 1858 (West 1983); 4 S. Williston, A Treatise on the Law of Contracts § 618, at 714-15 (3d ed. 1961); id. § 624, at 825.

In any event, the clause on which Trident relies is not on its face reasonably susceptible to Trident's proffered

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interpretation. Whether to accelerate repayment of the loan in the event of default is entirely Connecticut General's decision. The contract makes this clear [**6] at several points. See Note at 4 ("in each such event [of default], the entire principal indebtedness, or so much thereof as may remain unpaid at the time, shall, at the option of Holder, become due and payable immediately" (emphasis added)); id. at 7 ("in the event Holder exercises its option to accelerate the maturity hereof . . ." (emphasis added)); Deed of Trust para. 2.01, at 25 ("in each such event [of default], Beneficiary may declare all sums secured hereby immediately due and payable . . ." (emphasis added)). Even if Connecticut General decides to declare a default and accelerate, it "may rescind any notice of breach or default." Id. para. 2.02, at 26. Finally, Connecticut General has the option of doing nothing at all: "Beneficiary reserves the right at its sole option to waive noncompliance by Trustor with any of the conditions or covenants to be performed by Trustor hereunder." Id. para. 3.02, at 29.

Once again, it is difficult to imagine language that could more clearly assign to Connecticut General the exclusive right to decide whether to declare a default, whether and when to accelerate, and whether, having chosen to take advantage of [**7] any of its remedies, to rescind the process before its completion.

Trident nevertheless argues that it is entitled to precipitate a default and insist on acceleration by tendering the balance due on the note plus the 10 percent prepayment fee. 1 The contract language, cited above, leaves no room for this construction. It is true, of course, that Trident is free to stop making payments, which may then cause Connecticut General to declare a default and accelerate. But that is not to say that Connecticut General would be required to so respond. 2 The contract quite clearly gives Connecticut General other options: It may choose to waive the default, or to take advantage of some other remedy such as the right to collect "all the income, rents, royalties, revenue, issues, profits, and proceeds of the Property." Deed of Trust para. 1.18, at 22. 3 By interpreting the

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contract [*568] as Trident suggests, we would ignore those provisions giving Connecticut General, not Trident, the exclusive right to decide how, when and whether the contract will be terminated upon default during the first 12 years.

1 Trident's position is that the prepayment fee must either be a fee imposed as part of an "alternative method of performance" or "a liquidated damages provision specifying the amount of damages payable by Trident in the event that it defaults by prepaying the . . . loan." Appellant's Reply Brief at 12-13. Trident contends that if the prepayment fee is instead read as a provision for liquidated damages triggered by any default whatsoever, it would be invalid as a penalty because it would not be a reasonable estimate of the likely injury to Connecticut General resulting from most types of default: "If, for example, Trident were to default on the payment of a single installment, a fee of 10% of the outstanding balance of the loan would not qualify as a valid liquidated damages payment." Id. at 8.

California law is unsettled on this point and it may be that Connecticut General could not enforce the 10 percent fee in the event of certain defaults by Trident. See generally 1 H. Miller & M. Starr, Current Law of California Real Estate § 3:71 n.12 (Supp. 1987). But the contract assigns to Connecticut General alone the right to decide whether and under what circumstances to seek the prepayment fee. Connecticut General may well attempt to enforce the fee only in circumstances where it is valid. What the contract clearly does not provide is what Trident suggests. If the parties had wanted to give Trident the option of prepaying with a 10 percent fee, they certainly could have done so expressly. [**8]

2 See 1 H. Miller & M. Starr, supra note 1, § 3:62, at 428 ("when there is a default, acceleration does not occur automatically. It is merely a contractual option given to beneficiary for his benefit, and acceleration only occurs when the beneficiary affirmatively elects to declare the

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balance of the principal and interest due" (emphasis original)); id. § 3:69, at 449.

3 Trident contends that acceleration must follow a default because, under California's one-form-of-action rule, Cal. Civ. Proc. Code § 726 (West Supp. 1988), Connecticut General has but one remedy in the event of default, namely, to accelerate the loan and foreclose. Even if Trident's premise were accurate, its conclusion would not follow. Connecticut General need not seek any remedy at all for an event of default; it could simply wait and see. Connecticut General would thereby retain the valuable right of choosing when to declare a default: It could, for example, choose to wait until interest rates rise and Trident's refinancing prospects are no longer attractive.

In any event, Trident's premise is wrong. Section 726 does not prevent Connecticut General from exercising certain of its non-foreclosure remedies under the deed of trust. "By its own terms section 726 applies only where the creditor-beneficiary has brought an action against the debtor-trustor to recover a debt or to enforce some right secured by a deed of trust. It does not apply in other situations." Passanisi v. Merit McBride Realtors, Inc., 236 Cal. Rptr. 59, 65, 190 Cal. App. 3d 1496 (1987) (citation omitted) (emphasis added). Thus, for example, "a private sale under the power contained in the trust deed is not a judicial foreclosure within section 726." Walker v. Community Bank, 10 Cal. 3d 729, 736, 518 P.2d 329, 111 Cal. Rptr. 897 (1974) (emphasis original). Similarly, Connecticut General could enforce the assignment of rents provision in the deed of trust by demanding that all of Trident's tenants make rental payments to Connecticut General. See Johns v. Moore, 168 Cal. App. 2d 709, 712, 336 P.2d 579 (1959); 1 H. Miller & M. Starr, supra note 1, §§ 3:35 at 376-77, 3:69 at 449. This would not implicate section 726 because it would not be an action to enforce any right under the deed of trust. Since the deed of trust contains an absolute assignment of rents -- "Trustor hereby absolutely and unconditionally assigns and transfers to Beneficiary all the income, rents . . . and proceeds of the

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Property . . .," Deed of Trust at 22, para. 1.18 - Connecticut General has a perfected right to require that tenants pay it directly once it has given them notice of a default by Trident. See 1 H. Miller & M. Starr, § 3:35, at 377; In re Charles D. Stapp of Nevada, Inc., 641 F.2d 737, 739 (9th Cir. 1981); Great West Life Assurance Co. v. Rothman, 490 F.2d 1141, 1143-45 (9th Cir. 1974).

[**9] In effect, Trident is attempting to obtain judicial sterilization of its intended default. But defaults are messy things; they are supposed to be. Once the maker of a note secured by a deed of trust defaults, its credit rating may deteriorate; attempts at favorable refinancing may be thwarted by the need to meet the trustee's sale schedule; its cash flow may be impaired if the beneficiary takes advantage of the assignment of rents remedy; default provisions in its loan agreements with other lenders may be triggered. Fear of these repercussions is strong medicine that keeps debtors from shirking their obligations when interest rates go down and they become disenchanted with their loans. 4 That Trident is willing to suffer the cost and delay of a lawsuit, rather than simply defaulting, shows far better than anything we might say that these provisions are having their intended effect. We decline Trident's invitation to truncate the lender's remedies and deprive Connecticut General of its bargained-for protection.

4 This provides a symmetry with the situation where interest rates go up and it is the lender who is stuck with a loan it would prefer to turn over at market rates. In an economy where interest rates fluctuate, it is all but certain that one side or the other will be dissatisfied with a long-term loan at some time. Mutuality calls for enforcing the contract as written no matter whose ox is being gored.

[**10] B. Extrinsic Evidence

Trident argues in the alternative that, even if the language of the contract appears to be unambiguous, the deal the parties actually struck is in fact quite different. It wishes to offer extrinsic evidence that the parties had agreed Trident could prepay at any time within the first 12 years by tendering the full amount plus a 10 percent

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prepayment fee. As discussed above, this is an interpretation to which the contract, as written, is not reasonably susceptible. Under traditional contract principles, extrinsic evidence is inadmissible to interpret, vary or add to the terms of an unambiguous integrated written instrument. See 4 S. Williston, supra p. 5, § 631, at 948-49; 2 B. Witkin, California Evidence § 981, at 926 (3d ed. 1986).

Trident points out, however, that California does not follow the traditional rule. Two decades ago the California Supreme Court in Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968), turned its back on the notion that a contract can ever have a plain meaning discernible by a court without resort to extrinsic evidence. The court [**11] reasoned that contractual obligations flow not from the words of the contract, but from the [*569] intention of the parties. "Accordingly," the court stated, "the exclusion of relevant, extrinsic, evidence to explain the meaning of a written instrument could be justified only if it were feasible to determine the meaning the parties gave to the words from the instrument alone." 69 Cal. 2d at 38, 442 P.2d 641. This, the California Supreme Court concluded, is impossible: "If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents." Id. In the same vein, the court noted that "the exclusion of testimony that might contradict the linguistic background of the judge reflects a judicial belief in the possibility of perfect verbal expression. This belief is a remnant of a primitive faith in the inherent potency and inherent meaning of words." Id. at 37 (citation and footnotes omitted). 5

5 In an unusual footnote, the court compared the belief in the immutable meaning of words with "'the elaborate system of taboo and verbal prohibitions in primitive groups . . . [such as] the Swedish peasant custom of curing sick cattle smitten by witchcraft, by making them swallow a

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page torn out of the psalter and put in dough. . . ." Id. n.2 (quoting Ullman, The Principles of Semantics 43 (1963)).

[**12] Under Pacific Gas, it matters not how clearly a contract is written, nor how completely it is integrated, nor how carefully it is negotiated, nor how squarely it addresses the issue before the court: the contract cannot be rendered impervious to attack by parol evidence. If one side is willing to claim that the parties intended one thing but the agreement provides for another, the court must consider extrinsic evidence of possible ambiguity. If that evidence raises the specter of ambiguity where there was none before, the contract language is displaced and the intention of the parties must be divined from self-serving testimony offered by partisan witnesses whose recollection is hazy from passage of time and colored by their conflicting interests. See Delta Dynamics, Inc. v. Arioto, 69 Cal. 2d 525, 532, 446 P.2d 785, 72 Cal. Rptr. 785 (1968) (Mosk, J., dissenting). We question whether this approach is more likely to divulge the original intention of the parties than reliance on the seemingly clear words they agreed upon at the time. See generally Morta v. Korea Ins. Co., 840 F.2d 1452, 1460 (9th Cir. 1988).

Pacific Gas casts a long shadow [**13] of uncertainty over all transactions negotiated and executed under the law of California. As this case illustrates, even when the transaction is very sizeable, even if it involves only sophisticated parties, even if it was negotiated with the aid of counsel, even if it results in contract language that is devoid of ambiguity, costly and protracted litigation cannot be avoided if one party has a strong enough motive for challenging the contract. While this rule creates much business for lawyers and an occasional windfall to some clients, it leads only to frustration and delay for most litigants and clogs already overburdened courts.

It also chips away at the foundation of our legal system. By giving credence to the idea that words are inadequate to express concepts, Pacific Gas undermines the basic principle that language provides a meaningful constraint on public and private conduct. If we are unwilling to say that

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parties, dealing face to face, can come up with language that binds them, how can we send anyone to jail for violating statutes consisting of mere words lacking "absolute and constant referents"? How can courts ever enforce decrees, not written in language understandable [**14] to all, but encoded in a dialect reflecting only the "linguistic background of the judge"? Can lower courts ever be faulted for failing to carry out the mandate of higher courts when "perfect verbal expression" is impossible? Are all attempts to develop the law in a reasoned and principled fashion doomed to failure as "remnant[s] of a primitive faith in the inherent potency and inherent meaning of words"?

Be that as it may. While we have our doubts about the wisdom of Pacific Gas, we have no difficulty understanding its meaning, even without extrinsic evidence to guide us. As we read the rule in California, [*570] we must reverse and remand to the district court in order to give plaintiff an opportunity to present extrinsic evidence as to the intention of the parties in drafting the contract. 6 It may not be a wise rule we are applying, but it is a rule that binds us. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 82 L. Ed. 1188, 58 S. Ct. 817 (1938). 7

6 Nothing we say should be construed as foreclosing Connecticut General from moving for summary judgment after completion of discovery; given the unambiguous language of the contract itself, such a motion would succeed unless Trident were to come forward with extrinsic evidence sufficient to render the contract reasonably susceptible to Trident's alternate interpretation, thereby creating a genuine issue of fact resolvable only at trial.

[**15]

7 Trident also claims, in the alternative, that it is entitled to rescind the loan agreement because it entered into the contract based on a unilateral mistake of law of which Connecticut General was aware but failed to correct. Implausible though this allegation may be, it nevertheless states a claim for unilateral mistake under California law. Cal. Civ. Code §§ 1578, 1689 (West 1982, 1985). This

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cause of action therefore must also be reinstated by the district court for later resolution on summary judgment or at trial.

II In imposing sanctions on plaintiff, the district court stated:

Pursuant to Fed. R. Civ. P. 11, the Court, sua sponte, sanctions the plaintiff for the filing of a frivolous lawsuit. The Court concludes that the language in the note and deed of trust is plain and clear. No reasonable person, much less firms of able attorneys, could possibly misunderstand this crystal-clear language. Therefore, this action was brought in bad faith.

Order of Dismissal at 3. Having reversed the district court on its substantive ruling, we must, of course, also reverse [**16] it as to the award of sanctions. 8 While we share the district judge's impatience with this litigation, we would suggest that his irritation may have been misdirected. It is difficult to blame plaintiff and its lawyers for bringing this lawsuit. With this much money at stake, they would have been foolish not to pursue all remedies available to them under the applicable law. At fault, it seems to us, are not the parties and their lawyers but the legal system that encourages this kind of lawsuit. By holding that language has no objective meaning, and that contracts mean only what courts ultimately say they do, Pacific Gas invites precisely this type of lawsuit. 9 With the benefit of 20 years of hindsight, the California Supreme Court may wish to revisit the issue. If it does so, we commend to it the facts of this case as a paradigmatic example of why the traditional rule, based on centuries of experience, reflects the far wiser approach.

8 The district court apparently awarded attorney's fees under both Rule 11 and the terms of the promissory note. Trident contends that the note's attorney's fees provision is inapplicable to this case. In light of our resolution of the merits, we express no view on this issue. [**17]

9 This is not to say, of course, that all lawsuits seeking to challenge the interpretation of facially unambiguous contracts are necessarily immune from imposition of

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sanctions. Even under Pacific Gas, a party urging an interpretation lacking any objectively reasonable basis in fact might well be subject to sanctions for bringing a frivolous lawsuit.

Conclusion

The judgment of the district court is reversed. The case is remanded for reinstatement of the complaint and further proceedings in accordance with this opinion. The parties shall bear their own costs on appeal.

¿Qué relación tiene el sistema de contratación atípica con la falta de la figura del notario en el derecho estadounidense?

V. LA CONDENA POR INCUMPLIMIENTO DE CONTRATO

A. LA CONDENA MONETARIA

EXPECTATION DAMAGES

GEORGE HAWKINS v. EDWARD R. B. MCGEE. SUPREME COURT OF NEW HAMPSHIRE 84 N.H. 114; 146 A. 641 June 4, 1929

OPINIÓN POR: BRANCH

[*115] [**642] 1. The operation in question consisted in the removal of a considerable quantity of scar tissue from the palm of the plaintiff's right hand and the grafting of skin taken from the plaintiff's chest in place thereof. The scar tissue was the result of a severe burn caused by contact with an electric wire, which the plaintiff received about nine years before the time of the transactions here involved. There was evidence to the effect that before the operation was performed the plaintiff and his father went to the defendant's office and that the defendant in answer to the question, "How long will the boy be in the hospital?", replied, "Three or four days,... not over four; then the boy can go home, and it will be just a few days when he will be able to go back to work with a [**643] perfect hand." Clearly this and other testimony to the same effect would not justify a finding that the doctor contracted to complete the hospital treatment in three or four days or that the

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plaintiff would be able to go back to work within a few days thereafter. The above statements could only be construed as expressions of opinion or predictions as to the probable duration of the treatment and plaintiff's resulting disability, and the fact that these estimates were exceeded would impose no contractual liability upon the defendant. The only substantial basis for the plaintiff's claim is the testimony that the defendant also said before the operation was decided upon, "I will guarantee to make the hand a hundred per cent perfect hand" or "a hundred per cent good hand." The plaintiff was present when these words were alleged to have been spoken, and if they are to be taken at their face value, it seems obvious [*116] that proof of their utterance would establish the giving of a warranty in accordance with his contention.

The defendant argues, however, that even if these words were uttered by him, no reasonable man would understand that they were used with the intention of entering into any "contractual relation whatever," and that they could reasonably be understood only "as his expression in strong language that he believed and expected that as a result of the operation he would give the plaintiff a very good hand." It may be conceded, as the defendant contends, that before the question of the making of a contract should be submitted to a jury, there is a preliminary question of law for the trial court to pass upon, i.e. "whether the words could possibly have the meaning imputed to them by the party who founds his case upon a certain interpretation," but it cannot be held that the trial court decided this question erroneously in the present case. It is unnecessary to determine at this time whether the argument of the defendant based upon "common knowledge of the uncertainty which attends all surgical operations" and the improbability that a surgeon would ever contract to make a damaged part of the human body "one hundred per cent perfect" would, in the absence of countervailing considerations, be regarded as conclusive, for there were other factors in the present case which tended to support the contention of the plaintiff. There was

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evidence that the defendant repeatedly solicited from the plaintiff's father the opportunity to perform this operation, and the theory was advanced by plaintiff's counsel in cross-examination of defendant, that he sought an opportunity to "experiment on skin grafting" in which he had had little previous experience. If the jury accepted this part of plaintiff's contention, there would be a reasonable basis for the further conclusion that if defendant spoke the words attributed to him, he did so with the intention that they should be accepted at their face value, as an inducement for the granting of consent to the operation by the plaintiff and his father, and there was ample evidence that they were so accepted by them. The question of the making of the alleged contract was properly submitted to the jury.

2. The substance of the charge to the jury on the question of damages appears in the following quotation: "If you find the plaintiff entitled to anything, he is entitled to recover for what pain and suffering he has been made to endure and what injury he has sustained over and above the injury that he had before." To this instruction the defendant seasonably excepted. By it, the jury was permitted to consider two elements of damage, (1) pain and suffering due to the [*117] operation, and (2) positive ill effects of the operation upon the plaintiff's hand. Authority for any specific rule of damages in cases of this kind seems to be lacking, but when tested by general principle and by analogy, it appears that the foregoing instruction was erroneous.

"By "damages' as that term is used in the law of contracts, is intended compensation for a breach, measured in the terms of the contract." Davis v. Company, 77 N.H. 403, 404. The purpose of the law is to "put the plaintiff in as good a position as he would have been in had the defendant kept his contract." 3 Williston, Cont., s. 1338; Hardie etc. Co. v. Company, 150 N.C. 150. The measure of recovery "is based upon what the defendant should have given the plaintiff, not what the plaintiff has given the defendant or otherwise expended." 3 Williston, Cont., s. 1341. "The only losses that can be said fairly to come

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within the terms of a contract are such as the parties must have had in mind when the contract was made, or such as they either knew or ought to have known would probably result from a failure to comply with its terms." Davis v. Company, 77 N.H. 403, 404; Hurd v. Dunsmore, 63 N.H. 171.

The present case is closely analogous to one in which a machine is built for a certain purpose and warranted to do certain work. In such cases, the usual rule of damages for breach of warranty in the sale of chattels is applied and it is held that the measure of damages is the difference between the value of the machine if it had corresponded with the warranty and its actual value, together with such incidental losses as the parties knew or ought to have known would probably result from a failure to comply with its terms. Hooper v. Story, 155 N.Y. 171, 175; Adams etc. Co. v. Wimbish, 201 Ala. 548; Isaacs v. Company, 108 Kan. 17; Paducah etc. Co. v. Proctor, 210 Ky. 806; Pioneer etc. Co. v. McCurdy, 151 Minn. 304; Christian [**644] etc. Co. v. Goodman, 132 Miss. 786; Hardie etc. Co. v. Company, 150 N.C. 150; York Mfg. Co. v. Company, 278 Pa. 351; General Motors etc. Co. v. Company, 47 R.I. 88; Cavanagh v. Company, 24 S.D. 349; Foutty v. Company, 99 W. Va. 300. The rule thus applied is well settled in this state. "As a general rule, the measure of the vendee's damages is the difference between the value of the goods as they would have been if the warranty as to quality had been true, and the actual value at the time of the sale, including gains prevented and losses sustained, and such other damages as could be reasonably anticipated by the parties as likely to be caused by the vendor's failure to keep his agreement, and could not by reasonable care on the part of the vendee have been avoided." Union Bank v. Blanchard, 65 N.H. 21, 23; [*118] Hurd v. Dunsmore, supra; Noyes v. Blodgett, 58 N.H. 502; P. L., c. 166, s. 69, vii. We, therefore, conclude that the true measure of the plaintiff's damage in the present case is the difference between the value to him of a perfect hand or a good hand, such as the jury found the defendant promised him, and the value of his hand in its present

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condition, including any incidental consequences fairly within the contemplation of the parties when they made their contract. 1 Sutherland, Damages, (4th ed.), s. 92. Damages not thus limited, although naturally resulting, are not to be given.

The extent of the plaintiff's suffering does not measure this difference in value. The pain necessarily incident to a serious surgical operation was a part of the contribution which the plaintiff was willing to make to his joint undertaking with the defendant to produce a good hand. It was a legal detriment suffered by him which constituted a part of the consideration given by him for the contract. It represented a part of the price which he was willing to pay for a good hand, but it furnished no test of the value of a good hand or the difference between the value of the hand which the defendant promised and the one which resulted from the operation.

It was also erroneous and misleading to submit to the jury as a separate element of damage any change for the worse in the condition of the plaintiff's hand resulting from the operation, although this error was probably more prejudicial to the plaintiff than to the defendant. Any such ill effect of the operation would be included under the true rule of damages set forth above, but damages might properly be assessed for the defendant's failure to improve the condition of the hand even if there were no evidence that its condition was made worse as a result of the operation.

It must be assumed that the trial court, in setting aside the verdict, undertook to apply the same rule of damages which he had previously given to the jury, and since this rule was erroneous, it is unnecessary for us to consider whether there was any evidence to justify his finding that all damages awarded by the jury above $ 500 were excessive.

3. Defendant's requests for instructions were loosely drawn and were properly denied. A considerable number of issues of fact were raised by the evidence, and it would have been extremely misleading to instruct the jury in

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accordance with defendant's request number 2, that "The only issue on which you have to pass is whether or not there was a special contract between the plaintiff and the defendant to produce a perfect hand." Equally inaccurate was defendant's request number 5, which reads as follows: "You would have to find, in order [*119] to hold the defendant liable in this case, that Dr. McGee and the plaintiff both understood that the doctor was guaranteeing a perfect result from this operation." If the defendant said that he would guarantee a perfect result and the plaintiff relied upon that promise, any mental reservations which he may have had are immaterial. The standard by which his conduct is to be judged is not internal but external. Woburn etc. Bank v. Woods, 77 N.H. 172; McConnell v. Lamontagne, 82 N.H. 423, 425; Eleftherion v. Company, ante, 32. Defendant's request number 7 was as follows: "If you should get so far as to find that there was a special contract guaranteeing a perfect result, you would still have to find for the defendant unless you further found that a further operation would not correct the disability claimed by the plaintiff." In view of the testimony that the defendant had refused to perform a further operation, it would clearly have been erroneous to give this instruction. The evidence would have justified a verdict for an amount sufficient to cover the cost of such an operation, even if the theory underlying this request were correct.

4. It is unlikely that the questions now presented in regard to the argument of plaintiff's counsel will arise at another trial, and, therefore, they have not been considered.

New trial.

DENIS V. TONGISH, Appellee, v. DANNY THOMAS, d/b/a Northwest Seed, Defendant, and Decatur Coop Association, Third-Party Intervenor/Appellant.
SUPREME COURT OF KANSAS 251 Kan. 728; 840 P.2d 471; 20 U.C.C. Rep. Serv. 2d (Callaghan) 936 October 30, 1992, Opinion Filed

OPINIÓN POR: McFARLAND

[*728] [**472] This case presents the narrow issue of whether damages arising from the nondelivery of

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contracted-for sunflower seeds should be computed on the basis of K.S.A. 84-1-106 or [*729] K.S.A. 84-2-713. That is, whether the buyer is entitled to its actual loss of profit or the difference between the market price and the contract price. The trial court awarded damages on the basis of the buyer's actual loss of profit. The Court of Appeals reversed the judgment, holding that the difference between the market price and the contract price was the proper measure of damages (Tongish v. Thomas, 16 Kan. App. 2d 809, 829 P.2d 916 [1992]). The matter is before us on petition for review.

The pertinent facts are as follows. Denis Tongish entered into a contract on April 28, 1988, with the Decatur Coop Association (Coop) where Tongish agreed to grow 160 acres of sunflower seeds, said crop to be purchased by Coop at $ 13 per hundredweight for large seeds and $ 8 per hundredweight for small seeds. By agreement, the acreage was subsequently reduced to 116.8 acres. The crop was to be delivered in increments of one-third by December 31, 1988, March 31, 1989, and May 31, 1989.

Coop had a contract to deliver the seeds purchased to Bambino Bean & Seed, Inc. Coop was to be paid the same price it paid the farmers less a 55 cent per hundredweight handling fee. Coop's only anticipated profit was the handling fee.

In October and November 1988, Tongish delivered sunflower seeds to Coop. In January, a dispute arose over the amount of dockage charged against Tongish's seeds. Tongish's seeds were of higher quality than those of many other farmers selling to Coop, and Coop's practice of commingling seeds prior to sampling was disadvantageous to Tongish. This was resolved by Coop issuing an additional check to Tongish reflecting a lower dockage charge.

Due to a short crop, bad weather, and other factors, the market price of sunflower seeds in January 1989 was double that set forth in the Tongish/Coop contract. On January 13, Tongish notified Coop he would not deliver any more sunflower seeds.

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In May 1989, Tongish sold and delivered 82,820 pounds of sunflower seeds to Danny Thomas for approximately $ 20 per hundredweight. Tongish was to receive $ 14,714.89, which was $ 5,153.13 more than the Coop contract price. Thomas paid for approximately one-half of the seeds. Tongish brought this action to collect the balance due. Thomas paid the balance of $ 7,359.61 into court and was ultimately dismissed from the action.

[*730] Meanwhile, Coop intervened in the action, seeking damages for Tongish's breach of their contract. Following a bench trial, the district court held that Tongish had breached the contract with no basis therefor. Damages were allowed in the amount of $ 455.51, which was the computed loss of handling charges. Coop appealed from said damage award. The Court of Appeals reversed the district court and remanded the case to the district court to determine and award damages pursuant to K.S.A. 84-2-713 (the difference between the market price and the contract price).

[**473] The analyses and rationale of the Court of Appeals utilized in resolving the issue are sound and we adopt the following portion thereof:

"The trial court decided the damages to Coop should be the loss of expected profits. Coop argues that K.S.A. 84-2-713 entitles it to collect as damages the difference between the market price and the contract price. Tongish argues that the trial court was correct and cites K.S.A. 84-1-106 as support for the contention that a party should be placed in as good a position as it would be in had the other party performed. Therefore, the only disagreement is how the damages should be calculated.

"The measure of damages in this action involves two sections of the Uniform Commercial Code: K.S.A. 84-1-106 and K.S.A. 84-2-713. The issue to be determined is which statute governs the measure of damages. Stated in another way, if the statutes are in conflict, which statute should prevail? The answer involves an ongoing academic discussion of two contending positions. The issues in this case disclose the problem.

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"If Tongish had not breached the contract, he may have received under the contract terms with Coop about $ 5,153.13 less than he received from Danny Thomas. Coop in turn had an oral contract with Bambino to sell whatever seeds it received from Tongish to Bambino for the same price Coop paid for them. Therefore, if the contract had been performed, Coop would not have actually received the extra $ 5,153.13.

" We first turn our attention to the conflicting statutes and the applicable rules of statutory construction. K.S.A. 84-1-106(1) states:

'The remedies provided by this act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this act or by other rule of law.'

"If a seller breaches a contract and the buyer does not 'cover,' the buyer is free to pursue other available remedies. K.S.A. 84-2-711 and 84-2-712. One remedy, which is a complete alternative to 'cover' (K.S.A. 84-2-713, Official comment, para. 5), is K.S.A. 84-2-713(1), which provides:

'Subject to the provisions of this article with respect to proof of market price (section 84-2-723), the measure of damages for nondelivery or repudiation [*731] by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this article (section 84-2-715), but less expenses saved in consequence of the seller's breach.'

"Neither party argues that the Uniform Commercial Code is inapplicable. Both agree that the issue to be determined is which provision of the UCC should be applied. As stated by the appellee: 'This is really the essence of this appeal, i.e., whether this general rule of damages [K.S.A. 84-1-106] controls the measure of damages set forth in K.S.A. 84-2-713.' However, Tongish then offers no support that K.S.A. 84-1-106 controls over K.S.A. 84-2-713. The authority he does cite (M & W

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Development, Inc. v. El Paso Water Co., 6 Kan. App. 2d 735, 634 P.2d 166 [1981]) is not a UCC case and K.S.A. 84-2-713 was not applicable.

"The statutes do contain conflicting provisions. On the one hand, K.S.A. 84-1-106 offers a general guide of how remedies of the UCC should be applied, whereas K.S.A. 84-2-713 specifically describes a damage remedy that gives the buyer certain damages when the seller breaches a contract for the sale of goods.

" The cardinal rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature govern. State ex rel. Stephan v. Kansas Racing Comm'n, 246 Kan. 708, 719, 792 P.2d 971 (1990); Cedar Creek Properties, Inc. v. Board of Johnson County Comm'rs, 246 Kan. 412, 417, 789 P.2d 1170 (1990); and Stauffer Communications, Inc. v. Mitchell, 246 Kan. 492, Syl. para. 1, 789 P.2d 1153 (1990). When there is a [**474] conflict between a statute dealing generally with a subject and another statute dealing specifically with a certain phase of it, the specific statute controls unless it appears that the legislature intended to make the general act controlling. State v. Wilcox, 245 Kan. 76, Syl. para. 1, 775 P.2d 177 (1989). The Kansas Supreme Court stated in Kansas Racing Management, Inc. v. Kansas Racing Comm'n, 244 Kan. 343, 353, 770 P.2d 423 (1989): 'General and special statutes should be read together and harmonized whenever possible, but to the extent a conflict between them exists, the special statute will prevail unless it appears the legislature intended to make the general statute controlling.'

"K.S.A. 84-2-713 allows the buyer to collect the difference in market price and contract price for damages in a breached contract. For that reason, it seems impossible to reconcile the decision of the district court that limits damages to lost profits with this statute.

"Therefore, because it appears impractical to make K.S.A. 84-1-106 and K.S.A. 84-2-713 harmonize in this factual situation, K.S.A. 84-2-713 should prevail as the more specific statute according to statutory rules of construction.

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"As stated, however, Coop protected itself against market price fluctuations through its contract with Bambino. Other than the minimal handling [*732] charge, Coop suffered no lost profits from the breach. Should the protection require an exception to the general rule under K.S.A. 84-2-713?

"In Panhandle Agri-Service, Inc. v. Becker, 231 Kan. 291, 292, 644 P.2d 413 (1982), a farmer agreed to sell 10,000 tons of alfalfa to the buyer for $ 45 per ton. At the time the seller breached the contract, the market price was $ 62 per ton. 231 Kan. at 293. The court found, pursuant to K.S.A. 84-2-713, that the damages amounted to $ 17 per ton or the difference between the market price and the contract price. The court stated: 'We find nothing which would justify the trial court in arriving at damages using loss of business profits which are consequential damages.' 231 Kan. at 298.

"In Baker v. Ratzlaff, 1 Kan. App. 2d 285, 564 P.2d 153 (1977), the seller contracted to sell all the popcorn planted on 380 acres for $ 4.75 per hundredweight. The seller breached, and the trial court found that the market price for popcorn was $ 8 per hundredweight when the buyer learned of the breach. The court held that the proper measure of damages would be the difference between the market price and the contract price as provided in K.S.A. 84-2-713. 1 Kan. App. 2d at 290.

"Neither Panhandle nor Baker involved a conflict between the two UCC provisions. The difference between the market price and the contract price placed the nonbreaching party in as good a position as that party would have been if the contract had been performed. The decisions can be distinguished from this case, however, in that Coop protected itself against market price fluctuations with the Bambino contract.

"There is authority for appellee's position that K.S.A. 84-2-713 should not be applied in certain circumstances. In Allied Canners & Packers, Inc. v. Victor Packing Co., 162 Cal. App. 3d 905, 209 Cal. Rptr. 60 (1984), Allied contracted to purchase 375,000 pounds of raisins from

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Victor for 29.75 cents per pound with a 4% discount. Allied then contracted to sell the raisins for 29.75 cents per pound expecting a profit of $ 4,462.50 from the 4% discount it received from Victor. 162 Cal. App. 3d at 907-08.

"Heavy rains damaged the raisin crop and Victor breached its contract, being unable to fulfill the requirement. The market price of raisins had risen to about 80 cents per pound. Allied's buyers agreed to rescind their contracts so Allied was not bound to supply them with raisins at a severe loss. Therefore, the actual loss to Allied was the $ 4,462.50 profit it expected, while the difference between the market price and the contract price was about $ 150,000. 162 Cal. App. 3d at 908-09.

[**475] "The California appellate court, in writing an exception, stated: 'It has been recognized that the use of the market-price contract-price formula under section 2-713 does not, absent pure accident, result in a damage award reflecting the buyer's actual loss. [Citations omitted.]' 162 Cal. App. 3d at 912. The court indicated that section 2-713 may be more of a statutory liquidated damages clause and, therefore, conflicts with the goal of section 1-106. The court discussed that in situations where the buyer has made a resale contract for the goods, which the seller knows about, it may be appropriate to limit 2-713 damages to actual loss. However, the court cited [*733] a concern that a seller not be rewarded for a bad faith breach of contract. 162 Cal. App. 3d at 912-14.

"In Allied, the court determined that if the seller knew the buyer had a resale contract for the goods, and the seller did not breach the contract in bad faith, the buyer was limited to actual loss of damages under section 1-106. 162 Cal. App. 3d at 915.

"The similarities between the present case and Allied are that the buyer made a resale contract which the seller knew about. (Tongish knew the seeds eventually went to Bambino, although he may not have known the details of the deal.) However, in examining the breach itself, Victor could not deliver the raisins because its crop had been destroyed. Tongish testified that he breached the contract

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because he was dissatisfied with dockage tests of Coop and/or Bambino. Victor had no raisins to sell to any buyer, while Tongish took advantage of the doubling price of sunflower seeds and sold to Danny Thomas. Although the trial court had no need to find whether Tongish breached the contract in bad faith, it did find there was no valid reason for the breach. Therefore, the nature of Tongish's breach was much different than Victor's in Allied.

"Section 2-713 and the theories behind it have a lengthy and somewhat controversial history. In 1963, it was suggested that 2-713 was a statutory liquidated damages clause and not really an effort to try and accurately predict what actual damages would be. Peters, Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two, 73 Yale L.J. 199, 259 (1963).

"In 1978, Robert Childres called for the repeal of section 2-713. Childres, Buyer's Remedies: The Danger of Section 2-713, 72 Nw. U. L. Rev. 837 (1978). Childres reflected that because the market price/contract price remedy 'has been the cornerstone of Anglo-American damages' that it has been so hard to see that this remedy 'makes no sense whatever when applied to real life situations.' 72 Nw. U. L. Rev. at 841-42.

"In 1979, David Simon and Gerald A. Novack wrote a fairly objective analysis of the two arguments about section 2-713 and stated:

'For over sixty years our courts have divided on the question of which measure of damages is appropriate for the supplier's breach of his delivery obligations. The majority view, reinforced by applicable codes, would award market damages even though in excess of plaintiff's loss. A persistent minority would reduce market damages to the plaintiff's loss, without regard to whether this creates a windfall for the defendant. Strangely enough, each view has generally tended to disregard the arguments, and even the existence, of the opposing view.' Simon and Novack, Limiting the Buyer's Market Damages to Lost Profits: A

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Challenge to the Enforceability of Market Contracts, 92 Harv. L. Rev. 1395, 1397 (1979).

"Although the article discussed both sides of the issue, the authors came down on the side of market price/contract price as the preferred damages theory. The authors admit that market damages fly in the face 'of the familiar [*734] maxim that the purpose of contract damages is to make the injured party whole, not penalize the breaching party.' 92 Harv. L. Rev. at 1437. However, they argue that the market damages rule discourages the breach of contracts [**476] and encourages a more efficient market. 92 Harv. L. Rev. at 1437.

"The Allied decision in 1984, which relied on the articles cited above for its analysis to reject market price/contract price damages, has been sharply criticized. In Schneider, UCC Section 2-713: A Defense of Buyers' Expectancy Damages, 22 Cal. W. L. Rev. 233, 266 (1986), the author stated that Allied 'adopted the most restrictive [position] on buyer's damages. This Article is intended to reverse that trend.' Schneider argued that by following section 1-106, 'the court ignored the clear language of section 2-713's compensation scheme to award expectation damages in accordance with the parties' allocation of risk as measured by the difference between contract price and market price on the date set for performance.' 22 Cal. W. L. Rev. at 264.

"Recently in Scott, The Case for Market Damages: Revisiting the Lost Profits Puzzle, 57 U. Chi. L. Rev. 1155, 1200 (1990), the Allied result was called 'unfortunate.' Scott argues that section 1-106 is 'entirely consistent' with the market damages remedy of 2-713. 57 U. Chi. L. Rev. at 1201. According to Scott, it is possible to harmonize sections 1-106 and 2-713. Scott states, 'Market damages measure the expectancy ex ante, and thus reflect the value of the option; lost profits, on the other hand, measure losses ex post, and thus only reflect the value of the completed exchange.' 57 U. Chi. L. Rev. at 1174. The author argues that if the nonbreaching party has laid off part of the market risk (like Coop did) the lost profits rule creates instability

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because the other party is now encouraged to breach the contract if the market fluctuates to its advantage. 57 U. Chi. L. Rev. at 1178.

"We are not persuaded that the lost profits view under Allied should be embraced. It is a minority rule that has received only nominal support. We believe the majority rule or the market damages remedy as contained in K.S.A. 84-2-713 is more reasoned and should be followed as the preferred measure of damages. While application of the rule may not reflect the actual loss to a buyer, it encourages a more efficient market and discourages the breach of contracts." Tongish v. Thomas, 16 Kan. App. 2d at 811-17.

At first blush, the result reached herein appears unfair. However, closer scrutiny dissipates this impression. By the terms of the contract Coop was obligated to buy Tongish's large sunflower seeds at $ 13 per hundredweight whether or not it had a market for them. Had the price of sunflower seeds plummeted by delivery time, Coop's obligation to purchase at the agreed price was fixed. If loss of actual profit pursuant to K.S.A. 84-1-106(1) would be the measure of damages to be applied herein, it would enable Tongish to consider the Coop contract price of $ 13 per [*735] hundredweight plus 55 cents per hundredweight handling fee as the "floor" price for his seeds, take advantage of rapidly escalating prices, ignore his contractual obligation, and profitably sell to the highest bidder. Damages computed under K.S.A. 84-2-713 encourage the honoring of contracts and market stability.

As an additional argument, Tongish contends that the application of K.S.A. 84-2-713 would result in the unjust enrichment of Coop. This argument was not presented to the trial court.

Even if properly before us, the argument lacks merit. We discussed the doctrine of unjust enrichment in J. W. Thompson Co. v. Welles Products Corp., 243 Kan. 503, 758 P.2d 738 (1988), stating:

" The basic elements on a claim based on a theory of unjust enrichment are threefold: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or

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knowledge of the benefit by the defendant; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value." 243 Kan. at 512.

Before us is which statutory measure of damages applies. This is not a matter of one party conferring a benefit upon another.

[**477] The judgment of the Court of Appeals reversing the district court and remanding the case for the determination and award of damages pursuant to the provisions of K.S.A. 84-2-713 is affirmed. The judgment of the district court is reversed.

RELIANCE DAMAGES

L. ALBERT & SON v. ARMSTRONG RUBBER CO. UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT 178 F.2d 182; 17 A.L.R.2d 1289
October 5, 1949, Argued November 29, 1949, Decided

OPINIÓN POR: HAND

[*184] Both sides appeal from the judgment in an action brought by the Albert Company, in which we shall speak of as the Seller, against the Armstrong Company, which we shall call the Buyer. The action was to recover the agreed price of four 'Refiners,' machines designed to recondition old rubber; the contract of sale was by an exchange of letters in December, 1942, and the Seller delivered two of the four 'Refiners' in August, 1943, and the other two on either August 31st or September 8th, 1945. Because of the delay in delivery of the second two, the Buyer refused to accept all four in October, 1945- the exact day not being fixed- and it counterclaimed for the Seller's breach. The judge dismissed both the complaint and the counterclaim; but he gave judgment to the Seller for the value without interest on a part of the equipment [**2] delivered- a 300 horse-power motor and accessories- which the Buyer put into use on February 20th, 1946. On the appeal the Seller's position is that its delay was not too long; that in any event the Buyer accepted delivery of the

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four 'Refiners'; and that they were in accordance with the specifications. As an alternative it insists that the Buyer is liable, not only for the value of the motor, but for interest upon it; and, as to the counterclaim, that the Buyer proved no damages, assuming that there was a breach. The judge found that all four 'Refiners' conformed to the specifications, or could have been made to do so with slight trouble and expense; that the contract was inseparable and called for four not two and two; that the delivery of the second two was too late; and that, as the Buyer rejected all four, it was not liable on the contract at all. On the [*185] other hand, as we have said, he found that the Buyer's use for its own purposes of the motor, although not an acceptance of the 'Refiners,' made it liable for the value of the motor in quasi contract, but without interest. He dismissed the Buyer's counterclaim because it had failed to prove any damages.

The first [**3] issue is whether the Seller's delivery of the second two 'Refiners' was too late, and justified the Buyer's rejection of all four in October of that year. The Seller does not- at least on this appeal- seek to recover the purchase price of the first two 'Refiners' on the ground that the parties had at any time severed the contract into two separate ones, each for two. It follows that the Buyer was entitled in October, 1945, to reject the four, if the delivery of the second two was too late. The evidence as to this was as follows: Although the Buyer had suggested cancellation of the contract in the spring of 1943, by April first of that year it was pressing for delivery, and, when the Seller wrote at the end of July that it would ship the first two in 'a couple of weeks,' and the other two probably within four weeks, the Buyer not only did not protest against the delay, but in August accepted the two which the Seller did deliver. Moreover, when the Seller did not ship the other two within the time mentioned, the Buyer on October first, 1943, recognized the contract as still in existence. True, by the end of that year it began to complain of the performance of the two machines delivered, [**4] and it suggested that the Seller take them back; but, when the Seller answered by

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offering to put these two in proper condition, an active correspondence followed, resulting in a personal interview between the heads of the two parties in July, 1944. At this there was an inconclusive discussion of settlement, after which in August the Buyer agreed to install the two; and in September the Seller recognized the original contract as still in existence. Although in December the Buyer did declare its doubts whether it would be able 'to keep these machines in production without considerable maintenance expense,' and proposed a resale of them to the Seller, apparently the Seller did not reply; and in any event this proposal lapsed, for on February 23d, 1945, the Buyer wrote that it 'would like to have you ship the two remaining Refiners at once.' This demand the Seller answered by complaining that the two already delivered had never been paid for, to which on March 28th the Buyer rejoined that nothing was due on the contract until '30 days after the delivery of the complete order.' It continued: 'We want to complete the installation of this refiner line and are again requesting you to ship [**5] the two remaining refiners if they are in good operating condition.'

Thus it appears that, whatever may have been the Seller's delay up to that time, the Buyer would have been bound to accept a delivery of the second two within a reasonable time after March 28th, and to pay for the four, assuming that they conformed to the specifications, as the judge found that they did. As we understand it, the parties are not at variance so far, except for the finding as to conformity, just mentioned, which turns out to be irrelevant, as will appear. Since the Seller did not deliver the second two machines until five months after the demand of March 28th, the first question is whether the judge was right in holding that that was too late. When the Seller in July, 1943, said that it would ship the second two machines within four weeks, we will assume that that was the proper measure of a reasonable time for their delivery, and would have been conclusive, had it not been for the conduct of the parties during the following eighteen months. However, although during that period the Buyer

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had been in doubt whether it could make operative the two already delivered, it had never even intimated an objection [**6] to the delay in the delivery of the second two. If the circumstances had not changed as much as they did during the five months after March 28th, it might therefore be plausibly argued that the long drawn negotiations showed that further delay was not of vital consequence, in spite of the fact that in mercantile contracts, time is ordinary 'of the essence.' Restatement of Contracts, Sec. 276(b). Nevertheless, we [*186] think it impossible to excuse the delay, because the circumstances did greatly change after March 28th, 1945. The judge found that 'the great demand at the time of the commencement of this program for low-grade reclaimed rubber was of a temporary nature'; it could not compete with any other rubber if that appeared in 'sufficient' quantities. That did not mean that rubber was not still 'reclaimed' and sold in the open market; but 'obviously market conditions for second-hand rubber-machinery changed between the days of acute shortage in which the contract was made and the time of delivery.' We accept his summing up of the situation in the following words: 'at approximately the date of delivery * * * the fighting war came to an end, the prospect of future availability of rubber was altered, and any [**7] loss from change in conditions in that period may well fall upon the party whose unexcused delay prevented prompt delivery on the final demand.' We agree that the delivery was too late.

The Seller answers that in any event the Buyer accepted the 'Refiners' because (1) it 'intimated' that it had done so; (2) it had done an 'act in relation to them * * * inconsistent with the ownership of the seller'; and (3) it had without rejection retained them for more than 'a reasonable time.' Sec. 48, Uniform Sales Act; Sec. 4668, General Statutes of Connecticut, Revision of 1930. The supposed intimation was a letter of the Buyer on October 11th, 1945, in which it asked the Seller to confirm to the Buyer's accountants the amount of the Seller's claim against it as of September 30th, 1945; and in which it stated that claim as $ 25,500; the full purchase-price. It must be conceded that

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this was a most unhappy statement, vis-a-vis the Buyer, for, taken at its face, it surely presupposed acceptance of the 'Refiners.' Nor would it be any excuse that the Buyer's practise was to charge itself upon its books with the cost of goods as soon as they were delivered, and by way of precaution to check its figures with those with whom it dealt. Nevertheless, although the Buyer could not excuse [**8] the letter by any undisclosed practice or intent of its own, and although judged by itself it might have constituted an 'intimation' of acceptance, we think that, when it is read with what had passed between the parties before it was written, it is not susceptible of that understanding. These were the facts. After the Seller had delivered the first two 'Refiners' in August, 1943, the Buyer on October 1st, 1943, complained that the Seller had billed it for four machines, although it had delivered only two, and asked for 'corrected invoices covering only the portion you have shipped.' A year later, on October 24th, 1944, after the Seller had on September 2d, 1944, made it clear that it was going on with the contract, in a letter in precisely the same terms, mutatis mutandis, as the letter of October 11th, 1945, the Buyer asked the Seller to confirm the charge in its favor on the Buyer's books of $ 15,500, the price of the first two 'Refiners.' While matters stood in this posture it could be argued with considerable plausibility that the contract had been served, or 'split,' into two contracts, each for two machines, and that the letter of October 24th, 1944, was an acceptance of the [**9] first two. However, it soon transpired, if it was not already known, that the Buyer had no such intent, and that not only did the contract remain single as it had been at the start; but that the inquiry of October 24th, 1944, was not an acceptance of anything, but had been made because of the way the Buyer kept its books. Hence, when the Seller received the letter of October 11th, 1945, couched in the same terms, it had no warrant for assuming that its meaning was different from its predecessor of a year before.

Besides, the issue is irrelevant for another reason. It does not appear whether the telephone talk in which the

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Buyer repudiated the contract was before or after October 11th, 1945. If the letter was after the talk, it would not have affected the rights of the parties because, however broadly one may construe it, it certainly could not be understood as a retraction of the express repudiation; only in case it came before the talk, could it be deemed an acceptance. If the Seller had [*187] the burden of proof, it failed, for the issue remains undecided; and it is plain that it did have the burden, for the delivery, being too late, had to be excused by showing that [**10] some conduct of the Buyer condoned it.

Second, as an act inconsistent with its 'ownership,' the Seller puts forward the Buyer's write-off on its books- as a loss deductible from its income tax- of a depreciation in value of the 'Refiners.' Whether this was done before or after the telephone talk, does not appear; and, as in the case of the letter of October 11th, 1945, the question is irrelevant for that reason; but it is insufficient on the merits as well. It is of course true that, as an indication of the Buyer's state of mind, the entry was unequivocal, and could not be reconciled with any other conclusion than that the Buyer regarded the machines as its own-unless it was preparing a fraud on the Treasury which is not to be presumed. Yet that did not make the entry an act 'inconsistent' with the rights of the Seller, as we understand that word in the statute. It is true that two decisions of the intermediate court of appeals of Illinois, Telford v. Albro, 60 Ill.App. 359; Foley & Co. v. Excelsior Stove & Mfg. Co., 265 Ill.App. 78, have held that it is an acceptance for a buyer to collect insurance on the delivered goods, and it may be that that is a sufficient act of dominion. [**11] At any rate it is not the same as the Buyer's conduct here. The decisions are not very hopeful; for the most part they concern situations where the buyer has done something to the goods themselves, which would be an invasion of some interest of the seller, although apparently it is enough to offer them for sale, since that asserts a right to dispose of them. Ostman v. Lee, 91 Conn. 731, 101 A. 23; Lilly v. Devereuz, 15 Meeson & Welsly, 285; Brown v. Foster, 108

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N.Y. 387, 393, 15 N.E. 608; Eagle Manufacturing Co. v. Arkell & Douglas, Inc., 197 App.Div. 788, 189 N.Y.S. 140. Be that as it may, it does not interfere with a seller's ownership to make an entry upon the buyer's books that the goods are the buyer's. Nor would it be so, though the buyer were to claim a deduction for depreciation in his income tax return, or were even to succeed in getting the claim allowed.

A much more doubtful question arises from the Buyer's use of the motor and its accessories which began on February 20th 1946. Had that been before the telephone talk, instead of four months later, it would have brought the situation strictly within the Act; but it does not follow that the result is the same when the use follows an unequivocal rejection of all the goods. In the case at bar the use of the motor was no basis for inferring [**12] that the Buyer in fact meant to retract its rejection and to accept the goods; and that is true whether we regard as controlling the private intent of the Buyer, or the assumed intent of a 'reasonable' buyer in his circumstances. If use of the motor is to be treated as an acceptance, it is not because the Buyer so intended, but because otherwise the use was an unlawful invasion of the Seller's rights. In Connecticut two decisions, Thompson Machines & Supply Co. v. Graves, 91 Conn. 71, 98 A. 331; Loveland v. Aymett's Auto Arcade, Inc., 121 Conn. 231, 184 A. 376, have dealt with situations which, though closely akin, did not involve the point. The buyer had received the goods, had found them unsatisfactory, but had continued to use a part of them- all before he rejected them as eventually he did. In such cases the use of the goods is merely one circumstances- perhaps enough in itself- among those facts which together constitute acceptance. However, in Modern Home Utilities, Inc. v. Garrity, 121 Conn. 651, 186 A. 639, although the buyer had rejected a beer cooling apparatus as not in conformity with the contract, she continued to make use of one part of it- a beer pump- and she was held for the price of the whole apparatus. This was on two grounds: that her original rejection was in any event unjustified; and, as an

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alternate, that, [**13] even if it had not been, the rejection made her a bailee, and, 'if she used the equipment or a part of it she ceased to be bailee and made that part her own and could not claim rescission.' [*188] The contract being indivisible, the buyer 'had no right to accept one part and to reject the rest.' It must be owned that, if this is to be understood to lay down an absolute doctrine, the Buyer's use of the motor in the case at bar constituted a retraction of its rejection.

The Uniform Sales Act § 44, subd. 3 has somewhat modified the consequences of a buyer's acceptance of any part of the goods (Portfolio v. Rubin, 233 N.Y. 439, 135 N.E. 843.) ; and we are disposed to believe that there may be situations, in which the buyer's eventual use of a part, even though it may be strictly a violation of his duties as bailee, will not impose upon him in invitum a retraction of an earlier rejection. In the case at bar any other result would be to the last degree harsh; for, as has already appeared, the Seller had delayed delivery until the 'Refiners' had lost the greater part of their value anyway; and after the Buyer had unequivocally rejected them the Seller [**14] had allowed them to lie unclaimed for four months. When the Buyer finally did use the motor, it was not for its intended purpose, but in salvage of what would otherwise have been a total loss. Finally, the Seller's indifference for the four months, although it may not have altogether justified the inference that it had abandoned the property, at least gave some color for that conclusion. Considering that the retraction of a buyer's rejection is not derived from his consent, but is a legal duty imposed upon him as a consequence of the wrong of meddling with goods of which he is only a bailee, we hold that in the circumstances at bar that consequences should not follow. To impose a liability of $ 25,500 for goods which had certainly by February 20th, 1946, become substantially valueless, seems to us to impose a penalty.

Third, is the question whether the Buyer should have allowed the 'Refiners' to remain in its possession for a month 'without intimating' that it had 'rejected them.' We

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limit the time to a month because, as we have said, the Seller had the burden, because the 'Refiners' were delivered at least not before the end of August, and because the repudiation may have been [**15] at the beginning of October. On the whole we are disposed to agree with the judge that the Buyer's delay in declaring its position did not prejudice, and could not have prejudiced, the Seller, because, the prime market for the 'Refiners' having already gone when delivery was made, with it disappeared any immediate call upon the Buyer to declare itself. We hold therefore that the Seller failed to excuse its breach under any of the three statutory grounds for imputing acceptance to the Buyer. The dismissal of its complaint upon the contract was correct.

Upon the Seller's appeal there remains only the question whether it was entitled to interest upon the value of the motor and its accessories, which the judge denied. The Buyer's use of this property was indeed a conversion, for which the Seller might sue in quasi-contract, as it did; and the judge found that the motor, although it was secondhand machinery originally, had a 'fair market value of $ 4,590.' We follow the law of Connecticut upon the point, and we read Regan v. New York & New England R. Co., 60 Conn. 124, 22 A. 503, 25 Am.St.Rep. 306, and Healy v. Fallon, 69 Conn. 228, 37 A. 495, as establishing the principle that, [**16] when the value of goods can be 'ascertained with reasonable certainty as of a definite time,' interest should be recovered. Hence we hold that the Seller should have been awarded interest on the value of the motor and its accessories from the date of the Buyer's appropriation- February 20th, 1946.

Coming next to the Buyer's appeal, it does not claim any loss of profit, but it does claim the expenses which it incurred in reliance upon the Seller's promise. These were of three kinds: its whole investment in its 'reclaim department,' $ 118,478; the cost of its 'rubber scrap,' $ 27,555.63; the cost of the foundation which it laid for the 'Refiners,' $ 3,000. The judge in his opinion held that the Buyer had not proved that 'the lack of production' of the

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[*189] reclaim department 'was caused by the delay in delivery of plaintiffs' refiners'; but that that was 'only one of several possible causes. Such a possibility is not sufficient proof of causation to impose liability on the plaintiffs for the cost of all machinery and supplies for the reclaim department.' The record certainly would not warrant our holding that this holding was 'clearly erroneous'; indeed, the evidence preponderates [**17] in its favor. The Buyer disposed of all its 'scrap rubber' in April and May, 1945; and, so far as appears, until it filed its counterclaim in May, 1947, it never suggested that the failure to deliver two of the four 'Refiners' was the cause of the collapse of its 'reclaim department.' The counterclaim for these items has every appearance of being an afterthought, which can scarcely have been put forward with any hope of success.

The claim for the cost of the foundation which the Buyer built for the 'Refiners,' stands upon a different footing. Normally a promisee's damages for breach of contract are the value of the promised performance, less his outlay, which includes, not only what he must pay to the promisor, but any expenses necessary to prepare for the performance; and in the case at bar the cost of the foundation was such an expense. The sum which would restore the Buyer to the position it would have been in, had the Seller performed, would therefore be the prospective net earnings of the 'Refiners' while they were used (together with any value they might have as scrap after they [**18] were discarded), less their price- $ 25,500- together with $ 3,000, the cost of installing them. The Buyer did not indeed prove the net earnings of the 'Refiners' or their scrap value; but it asserts that it is nonetheless entitled to recover the cost of the foundation upon the theory that what it expended in reliance upon the Seller's performance was a recoverable loss. In cases where the venture would have proved profitable to the promisee, there is no reason why he should not recover his expenses. On the other hand, on those occasions in which the performance would not have covered the promisee's outlay, such a result imposes the risk of the promisee's contract upon the promisor. We

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cannot agree that the promisor's default in performance should under this guise make him an insurer of the promisee's venture; yet it does not follow that the breach should not throw upon him the duty of showing that the value of the performance would in fact have been less than the promisee's outlay. It is often very hard to learn what the value of the performance would have been; and it is a common expedient, and a just one, in such situations to put the peril of the answer upon that party who by [**19] his wrong has made the issue relevant to the rights of the other. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, 51 S.Ct. 248, 75 L.Ed. 544. On principle therefore the proper solution would seem to be that the promisee may recover his outlay in preparation for the performance, subject to the privilege of the promisor to reduce it by as much as he can show that the promisee would have lost, if the contract had been performed.

The decisions leave much to be desired. There is language in United States v. Behan, 110 U.S. 338, 345, 346, 4 S.Ct. 81, 28 L.Ed. 168, which, read literally, would allow the promisee to recover his outlay in all cases: the promisor is said to be 'estopped' to deny that the value of the performance would not equal it. We doubt whether the Supreme Court would today accept the explanation, although the result was rught under the rule which we propose. Moreover, in spite of the authority properly accorded to any decision of that court, we are here concerned only with Connecticut law; and the decisions in that state do not seem to be in entire accord. In the early case of Bush v. Canfield, 2 Conn. 485, the buyer sued to recover a payment of $ 5,000 made in advance for the purchase of 2,000 barrels [**20] of flour at.$ 7.00 a barrel. Although at the time set for delivery the value of the flour had fallen to $ 5.50, the seller for some undisclosed reason failed to perform. The action was on the case for the bench, not in indebitatus [*190] assumpsit, and the court, Hosmer, J., dissenting, allowed the buyer to recover the full amount of his payment over the seller's objection that recovery should be reduced by the buyer's loss. The chief justice

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gave the following reason for his decision which we take to be that of the court, 2 Conn.page 488: 'The defendant has violated his contract; and it is not for him to say that if he had fulfilled it, the plaintiffs would have sustained a great loss, and that this ought to be deducted from the money advanced.' If there is no difference between the recovery of money received by a promisor who later defaults, and a promisee's outlay preparatory to performance, this decision is in the Buyer's favor. However, when the promisor has received any benefit, the promisee's recovery always depends upon whether the promisor has been 'unjustly enriched'; and, judged by that nebulous standard, there may be a distinction between imposing the promisee's [**21] loss on the promisor by compelling him to disgorge what he has received and compelling him to pay what he never has received. It is quite true that the only difference is between allowing the promisee to recover what he has paid to the promisor and what he has paid to others; but many persons would probably think that difference vital.

In any event, unless this be a valid distinction, it appears to us that Santoro v. Mack (108 Conn. 683, 145 A. 273) must be read as taking the opposite view. The plaintiff, the vendee under a contract for the sale of land, had paid an electrician and an architect whom he had employed in reliance upon the promised conveyance. These payments he sought to recover, and was unsuccessful on the ground that they had not benefited the vendor, and that they had been incurred without the vendor's knowledge or consent. Yet it would seem that such expenses were as much in reasonable preparation for the use of the land, as the cost of the foundation was for the use of the 'Refiners.' The point now before us was apparently not raised, but the decision, as it stands, seems to deny any recovery whatever. Three other Connecticut decisions- the only ones which at all approach the question- [**22] do not throw any light upon the point. Edward DeV. Tomplins, Inc. v. City of Bridgeport, 94 Conn. 659, 110 A. 183, 191; Kastner v. Beacon Oil Co., 114 Conn. 190, 158 A. 214, 81 A.L.R. 97; Jordan v. Patterson, 67 Conn. 473, 35 A. 521.

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The result is equally inconclusive if we consider the few decisions in other jurisdictions. The New Jersey Court of Errors and Appeals in Holt v. United Security Life Insurance & Trust Co., 76 N.J.L. 585, 72 A. 301, 21 L.R.A.,N.S., 691, recognized as the proper rule that, although the promisor had the burden of proving that the value of the performance was less than the promisee's outlay, if he succeeded in doing so, the recovery would be correspondingly limited. In Bernstein v. Meech, 130 N.Y. 354, 360, 29 N.E. 255, 257, the promisee recovered his full outlay, and no limitation upon it appears to have been recognized, as may be inferred from the following sentence: 'It cannot be assumed that any part of this loss would have been sustained by the plaintiff if he had been permitted to perform his contract.' In Reynolds v. Levi, 122 Mich. 115, 80 N.W. 999, the promisee was a well digger, who had made three unsuccessful efforts to reach water, and the promisor- a farmer-stopped him before he had completed his fourth. The court limited the recovery to the amount earned on the fourth attempt, but for reasons that are not apparent. It appears to us therefore that the reported decisions leave it open to us to adopt the rule we have stated. Moreover, [**23] there is support for this result in the writings of scholars. The Restatement of Contracts § 333(d) allows recovery of the promisee's outlay 'in necessary preparation' for the performance, subject to several limitations, of which one is that the promisor may deduct whatever he can prove the promisee would have lost, if the contract had been fully performed. Professor McCormick [*191] thinks (McCormick on Damages, Sec. 142, . 584.) that 'the jury should be instructed not to go beyond the probable yield' of the performance to the promisee, but he does not consider the burden of proof. Much the fullest discussion of the whole subject is Professor Fuller's in the Yale Law Journal. 46 Yale Law Journal, 752, pp. 75-80. The situation at bar was among those which he calls cases of 'essential reliance,' and for which he favors the rule we are adopting. It is one instance of his 'very simple formula: We will not in a suit for

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reimbursement of losses incurred in reliance on a contract knowingly put the plaintiff in a better position than he would have occupied, had the contract been fully performed.'

The judgment will therefore be affirmed with the following modification. [**24] To the allowance for the motor and accessories will be added interest from February 20th, 1946. The Buyer will be allowed to set off $ 3,000 against the Seller's recovery with interest from October, 1945, subject to the Seller's privilege to deduct from that amount any sum which upon a further hearing it can prove would have been the Buyer's loss upon the contract, had the 'Refiners' been delivered on or before May 1st, 1945.

Judgment modified as above, and affirmed as so modified.

ANGLIA TELEVISION LTD. v. REED. COURT OF APPEAL, CIVIL DIVISION 1 QB 60 29th JULY 1971

OPINIÓN POR: LORD DENNING

Anglia Television Ltd were minded in 1968 to make a film of a ply for television entitled 'The Man in the Wood'. It portrayed an American married to an English woman. The American has an adventure in an English wood. The film was to last for 90 minutes. Anglia Television made many arrangements in advance. They arranged for a place where the play was to be filmed. They employed a director, a designer and a stage manager, and so forth. They involved themselves in much expense. All this was done before they got the leading man. They required a strong actor capable of holding the play together. He was to be on the scene the whole time. Anglia Television eventually found the man. He was Mr Robert Reed, an American who has a very high reputation as an actor. He was very suitable for this part. By telephone conversation on 30th August 1968 it was agreed by Mr Reed through his agent that he would come to England and be available between 9th September and 11th October 1968 to rehearse and play in this film. He was to get a performance fee of £ 1,050, living expenses of £ 100 a week, his first class faresto and from the United States, and so forth. It was all subject to the

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permit of the Ministry of Labour for him to come here. That was duly given on 2nd September 1968. So the contract was concluded. But unfortunately there was some muddle with the bookings. It appears that Mr Reed's agent had already booked him in America for some other play. So on 3rd September 1968 the agent said that Mr Reed would not come to England to perform in this play. He repudiated his contract. Anglia Television tried hard to find a substitute but could not do so. So on 11th September they accepted his repudiation. They abandoned the proposed film. They gave notice to the people whom they had engaged and so forth.

Anglia Television then sued Mr Reed for damages. He did not dispute his liability, but a question arose as to the damages. Anglia Television do not claim their profit. They cannot say what their profit would have been on this contract if Mr Reed had come here and performed it. So, instead of claim for loss or profits, they claim for the wasted expenditure. They had incurred the director's fees, the designer's fees, the stage manager's and assistant manager's fees, and so on. It comes in all to £ 2,750. Anglia Television say that all that money was wasted because Mr Reed did not perform his contract.

Mr Reed's advisers take a point of law. They submit that Anglia Television cannot recover for expenditure incurred before the contract was concluded with Mr Reed. They can only recover the expenditure after the contract was concluded. They say that the expenditure after the contract was only £ 854.65, and that is all that Anglia Television can recover. The master rejected that contention; he held that Anglia Television could recover the whole £ 2,750; and now Mr Reed appeals to this court.

Counsel for Mr Reed has referred us to the the recent unreported case of Perestrello & Compania Limitada v United Paint Co Ltd (No 2) n1, in which Thesiger J quoted the words of Lord Tindal CJ in 1835 in Hodges v Earl of Litchfield n2:

n1 (1969) 113 Sol Jo 324

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n2 (1835) 1 Bing NC 492 at 498, [1835-42] All Eng. Rep. Rep 551 at 552, 553

'The expenses preliminary to the contract ought not to be allowed. The party enters into them for his own benefit as a time when it is uncertain whether there will be any contract or not.'

Thesiger J applied those words, saying: 'In my judgment pre-contract expenditure, though thrown away, is not recoverable...'

I cannot accept the proposition as stated. It seems to me that a plaintiff in such a case as this had an election: he can either claim for his loss of profit; or for his wasted expenditure. But he must elect between them. He cannot claim both. If he has not suffered any loss of profits -- or if he cannot prove what his profits would have been -- he can claim in the alternative the expenditure which has been thrown away, that is, wasted, by reasaon of the breach. That is shown by Cullinane v British 'Rema' Manufacturing Co Ltd n3.

n3 [1953] 2 All Eng. Rep. 1257 at 1261, 1264, 1265, [1954] 1 QB 292 at 303, 308

If the plaintiff claims the wasted expenditure, he is not limited to the expenditure incurred after the contract was concluded. He can claim also the expenditure incurred before the contract, provided that it was such as would reasonably be in the contemplation of the parties as likely to be wasted if the contract was broken. Applying that principle here, it is plain that, when Mr Reed entered into this contract, he must have known perfectly well that much expenditure had already been incurred on director's fees and the like. He must have contemplated -- or, at any rate, it is reasonably to be imputed to him -- that if he broke his contract, all that expenditure would be wasted, whether or not it was incurred before or after the contract. He must pay damages for all the expenditure so wasted and thrown away. This view is supported by the recent decision of Brightman J in Lloyd v Stanbury n4. There was a contract for the sale of land. In anticipation of the contract -- and before it was concluded -- the purchaser went to much

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expense in moving a caravan to the site and in getting his furniture there. The seller afterwards entered into a contract to sell the land to the purchaser, but afterwards broke his contract. The land had not increased in value, so the purchaser could not claim for any loss of profit. But Brightman J held that he could recover the cost of moving the caravan and furniture, because it was n5 'within the contemplation of the parties when the contract was signed'. That decision is in accord with correct principle, namely, that wasted expenditure can be recovered when it iw wasted by reason of the defendant's breach of contract. It is true that, if the defendant had never entered into the contract, he would not be liable, and the expenditure would have been incurred by the plaintiff without redress; but, the defendant having made his contract and broken it, it does not lie in his mouth to say he is not liable, when it was because of his breach that the expenditure has been wasted.

n4 [1971] 2 All Eng. Rep. 267, [1971] 1 WLR 535

n5 [1971] 2 All Eng. Rep. at 276, [1971] 1 WLR at 547

I think the master was quite right and this appeal should be dismissed.

OPINIÓN POR: PHILLIMORE

I agree.

OPINIÓN POR: MEGAW.

I also agree.

RESTITUTION DAMAGES

BOONE, et al. v. COE. COURT OF APPEALS OF KENTUCKY 153 Ky. 233; 154 S.W. 900 March 28, 1913, Decided

OPINIÓN POR: CLAY

[**900] [*234] Plaintiffs, W. H. Boone and J. T. Coe, brought this action against defendant, J. F. Coe, to recover certain damages alleged to have resulted from defendant's breach of a parol contract of lease for one year to commence at a future date. It appears from the petition that the defendant was the owner of a large and valuable farm in Ford County, Texas, Plaintiffs were farmers, and were living with their families in Monroe County, Kentucky. In

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the fall of 1909, defendant made a verbal contract with plaintiffs whereby he rented to them his farm in Texas for a period of twelve months, to commence from the date of plaintiffs' arrival at defendant's farm. Defendant agreed that if plaintiffs would leave their said homes and businesses in Kentucky, and with their families, horses and wagons, move to defendant's farm in Texas, and take charge of, manage and cultivate same in wheat, corn and cotton for the twelve months next following plaintiffs' arrival at said farm, the defendant would have a dwelling completed on said farm and ready for occupancy upon their arrival, which dwelling plaintiffs would occupy as a residence during the period of said tenancy. Defendant also agreed that he would furnish necessary material at a convenient place on said farm out of which to erect a good and commodious stock and grain barn, to be used by plaintiffs. The petition further alleges that plaintiffs were to cultivate certain portions of the farm and were to receive certain portions of the crops raised, and that plaintiffs, in conformity with their said agreement, did move from Kentucky to the farm in Texas, and carried with them their families, wagons, horses and camping outfit, and in going to Texas [**901] they traveled for a period of 55 days. It is also charged that defendant broke his contract, in that he failed to have ready and completed on the farm a dwelling house in which plaintiffs and their families could move, and also failed to furnish the necessary material for the erection of a suitable barn; that on December 6th, defendant refused to permit plaintiffs to occupy the house and premises, and failed and refused to permit them to cultivate the land or any part thereof; that on the. . . . day of December, 1909, they started for their home in Kentucky, and arrived there after traveling for a period of four days. It is charged that plaintiffs spent in going to Texas, in cash, the sum of $ 150; that the loss of time to plaintiffs and their teams in making the trip to Texas was reasonably worth $ 8 a [*235] day for a period of 55 days, or the sum of $ 440; that the loss of time to them and their teams during the period they remained in Texas was $ 8 a day for 22 days, or $ 176; that they paid out in actual cash

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for transportation for themselves, families and teams from Texas to Kentucky, the sum of $ 211.80; that the loss of time to them and their teams in making the last named trip was reasonably worth the sum of $ 100; that in abandoning and giving up their homes and businesses in Kentucky, they had been damaged in the sum of $ 150, making a total damage of $ 1,387.80, for which judgment was asked. Defendant's demurrer to the petition was sustained and the petition dismissed. Plaintiffs appeal.

Under the rule in force in this State, the statute of frauds relates to the remedy or mode of procedure, and not to the validity of the contract. Though the land is located in Texas, the parol contract of lease was made here, and here it is sought to enforce it. If unenforceable under our statute, it cannot be enforced here. Kleeman & Co. v. Collins, 9 Bush 460. If the statute requires the contract to be in writing, and the petition does not allege it to be in writing, defense may be presented by demurrer. Bull v. McCrea, 8 B. Mon. 422; Smith v. Fah, 15 B. Mon. 443; Smith v. Theobald, 86 Ky. 141, 5 S.W. 394.

The statute of frauds, section 470, sub-sections 6 and 7, Kentucky Statutes, provides as follows:

"No action shall be brought to charge any person:

"6. Upon any contract for the sale of real estate, or any lease thereof, for longer term than one year; nor

"7. Upon any agreement which is not to be performed within one year from the making thereof, unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or by his authorized agent; but the consideration need not be expressed in the writing; it may be proved when necessary, or disproved by parol or other evidence."

A parol lease of land for one year, to commence at a future date, is within the statute. Greenwood v. Strother, 91 Ky. 482, 16 S.W. 138.

The question sharply presented is: May plaintiffs recover for expenses incurred and time lost on the faith of a contract that is unenforceable under the statute of frauds?

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[*236] In the case of Hurley v. Woodsides, 21 Ky. L. Rep. 1073, 54 S.W. 8, Woodsides made a parol lease with Hurley for 25 acres of timber land for a period of five years. Under the contract Hurley was to clear five acres of the land in the winter of 1897 and 1898, ten acres in the winter of 1898 and 1899, and ten acres in the winter of 1899 and 1900, and was to have free use of the land so cleared up for three years thereafter. Woodsides agreed to erect a dwelling house, smoke house, kitchen and stable on the leased premises for Hurley's occupancy, and was to furnish a team of oxen with which to break up the land as soon as it was cleared. He was also to remove the logs lying upon the land at the time of the lease and to erect a tobacco barn for Hurley's use. Moreover, it was a part of the agreement that the contract was to be put in writing. Relying upon Woodsides' promise to do so, Hurley moved his personal effects into an old house located upon the land, which he was to occupy until the new house was finished, and gave up the premises previously occupied by him. After such removal, Woodsides denied that he had agreed to furnish cattle to break up the land or to remove the logs or to erect a tobacco barn, and refused to sign a contract embracing these stipulations. This refusal necessitated Hurley's abandonment of the leased premises. Alleging that as a result of Woodsides' failure to carry out the contract, he had been damaged in the sum of $ 100, the cost of removing his effects; $ 50 for time lost in hunting up another place; $ 200 in prospective profits which he would have realized by reason of his bargain, and $ 300 by reason of having been induced to surrender the premises formerly occupied by him. Hurley brought suit against Woodsides to recover the aforesaid item of damages, aggregating the sum of $ 650. The trial court sustained a demurrer to the petition, and the petition was dismissed. On appeal here the judgment was affirmed. After setting out the statute of frauds, the court said:

"Under this provision of the statute the alleged verbal contract was not binding or enforceable upon the parties thereto for the reason that it was a contract for the lease of

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real estate for a longer term than one year from the making thereof; and as the contract itself was not enforceable between the parties, no action for damages for refusing to execute it or to reduce it to writing can be maintained, as 'it would leave but little, if anything, of the statute of frauds to hold that a party might [*237] be mulcted in damages for refusing to execute in writing a verbal agreement, [**902] which, unless in writing is invalid under the statute of frauds.' (Chase v. Fitz, 132 Mass. 359; Lawrence v. Chase, 54 Me. 196.)"

In the case of Bromley, et al. v. Broyles, 58 S.W. 984, it was held that a tenant with a parol agreement for a lease for another year, which was within the statute of frauds, could not recover as damages for breach of the contract the loss sustained by him in making preparations for raising a crop.

In the case of King v. Cheatham, 31 Ky. L. Rep. 1176, 104 S.W. 751, King sued upon a writing signed by himself alone, in which he bound himself to buy from Cheatham certain trees standing on her land, to be severed in the future. It appears that he cut some 263 trees from the land before he was ousted. He asked damages for his labor and profit. There was a judgment below for defendant. On appeal the judgment was affirmed. In discussing the validity of the contract, and the right of plaintiff to recover damages thereon, the court said:

"The statute merely withholds a right of action upon them as against the party who has not signed them. The prohibition of the statute must reach the spirit of its purpose. As a suit to recover damages for the breach of such a contract would be an indirect enforcement, such actions are held to be within the inhibition of the statute. (M'Campbell v. M'Campbell, 5 Litt. 92; Bromley v. Broyles, 58 S.W. 984.) Nor does part performance of the party signing affect the matter. (Hunter v. Simrall, 5 Litt. 62; Hambell v. Hamilton, 3 Dana 501; Montague v. Garnett, 3 Bush 297; Mannen v. Bradbury, 4 Ky. L. Rep., 951, 81 Ky. 153; Graves Co. Water Co. v. Ligon, 23 Ky. L. Rep., 2149; 112 Ky. 775.)

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"Although a recovery of purchase money paid on such contract may be recovered if the party not bound refused to execute it, that is not in any sense an action upon the contract, but is for money had and received for which the consideration has failed, and for which the law implies a promise to repay. But nothing was paid by appellant as consideration on this contract."

The same doctrine is applied in the case of Greenwood v. Strother, supra.

Indeed, it is the general rule that damages cannot be recovered for violation of a contract within the statute of frauds. Alabama Mineral Land Co. v. Jackson, 121 Ala. 172, 25 So. 709, [*238] 25 So. 709, 77 Am. St. Rep., 464; Dunphy v. Ryan, 116 U.S. 491, 6 S. Ct. 486, 29 L. Ed. 703; Franklin v. Matoa Gold Mining Co., 158 F. 941, 86 C.C.A. 145, 16 L. R. A. (N. S.), 381, 14 Am. & Eng. Ann. Cas., 302.

To this general rule there are certain well recognized exceptions. Thus, in Speers v. Sewell, 4 Bush 239; Myles v. Myles, 6 Bush 237; Usher v. Flood, 83 Ky. 552; Thomas v. Feese, 21 Ky. L. Rep. 206, 51 S.W. 150; Story v. Story, 61 S.W. 279, 22 Ky. L. Rep. 1731; Doty v. Doty, 118 Ky. 204, 80 S.W. 803, 26 Ky, L. Rep., 63, 2 L. R. A. (N. S.), 713; and in a number of other cases, it has been held that where services have been rendered during the life of another, on the promise that the person rendering the service should receive at the death of the person served a legacy, and the contract so made is within the statute of frauds, a reasonable compensation may be recovered for the services actually rendered. It has also been held that the vendee of land under a parol contract is entitled to recover any portion of the purchase money he may have paid, and is also entitled to compensation for improvements. Fox v. Longley, 1 Mar., 388; McCracken, v. Saunders, 4 Bibb 511; Grimes v. Shrieve, 6 T.B. Mon. 557; Dean v. Cassiday, 88 Ky. 572, 11 S.W. 601.

And under a contract for personal services within the statute, an action may be maintained on a quantum meruit. Kleeman v. Collins, 9 Bush 460; Myers v. Korb, 21 Ky. L.

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Rep. 163, 50 S.W. 1108. The doctrine of these cases proceeds upon the theory that the defendant has actually received some benefits from the acts of part performance, and the law, therefore, implied a promise to pay. In 29 Am. & Eng. Encyc., 836, the rule is thus stated:

"Although part performance by one of the parties to a contract within the statute of frauds will not, at law entitle such party to recover upon the contract itself, he may nevertheless recover for money paid by him, or property delivered, or services rendered in accordance with and upon the faith of the contract. The law will raise an implied promise on the part of the other party to pay for what has been done in the way of part performance. But this right of recovery is not absolute. The plaintiff is entitled to compensation only under such circumstances as would warrant a recovery in case there was no express contract, and hence it must appear that [*239] the defendant has actually received or will receive some benefit from the acts of part performance. It is immaterial that the plaintiff may have suffered a loss because he is unable to enforce his contract."

In Brown on Statute of Frauds, section 118-a, the rule is announced in the following language:

"The rule that, where one person pays money or performs services for another upon a contract void under the statute of frauds, he may recover the money upon account for money paid, or recover for the services upon a quantum meruit, applies only to cases where the defendant has received and holds the money paid or the benefit of the services rendered. It does not apply to cases of money paid by the plaintiff to a third person in execution of a verbal contract between the plaintiff and defendant, such as by the statute of frauds must be in writing."

The foregoing rule is supported by the following [**903] cases: Kimmins v. Oldham, 27 W. Va. 258; Emery v. Smith, 46 N.H. 151; Marcey v. Marcey, 9 Allen (Mass.) 8; Pierce v. Paine, 28 Vt. 34; Hambell v. Hamilton, 3 Dana 501; Montague v. Garnett, 3 Bush 297; Mannen v. Bradbury, 81 Ky. 153.

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In the case under consideration, the plaintiffs merely sustained a loss. Defendant received no benefit. Had he received a benefit, the law would imply an obligation to pay therefor. Having received no benefit, no obligation to pay is implied. The statute says that the contract of defendant made with plaintiffs is unenforceable. Defendant, therefore, had the legal right to decline to carry it out. To require him to pay plaintiffs for losses and expenses incurred on the faith of the contract without any benefit accruing to him would, in effect, uphold a contract upon which the statute expressly declares no action shall be brought. The statute was enacted for the purpose of preventing frauds and perjuries. That it is a valuable statute is shown by the fact that similar statutes are in force in practically all, if not all, of the states of the union. Being a valuable statute, the purpose of the law-makers in its enactment should not be defeated by permitting recoveries in cases to which its provisions were intended to apply.

The contrary rule was announced by this court in the case of McDaniel v. Hutchinson, 136 Ky. 412. There the plaintiff lived in the State of Illinois. The defendant owned a farm in Mercer County, Kentucky. The defendant [*240] agreed with plaintiff that if plaintiff and his family would come to Kentucky and live with defendant, the defendant would furnish the plaintiff a home during defendant's life, and upon his death, would give plaintiff his farm. It was held that although the contract was within the statute of frauds, plaintiff could recover his reasonable expenses in moving to Kentucky, and reasonable compensation for loss sustained in giving up his business elsewhere. Upon reconsideration of the question involved, we conclude that the doctrine announced in that case is not in accord with the weight of authority, and should be no longer adhered to. It is therefore overruled.

Judgment affirmed.

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B. EL CÓMPUTO DEL DAÑO

LOS PERJUICIOS O DAÑOS INDIRECTOS

HADLEY & Another v BAXENDALE & Others. IN THE COURTS OF EXCHEQUERRd 156 Eng. Rep. 145
23rd February 1854

OPINIÓN POR: ALDERSON

We think that there ought to be a new trial in this case; but, in so doing, we deem it to be expedient and necessary to state explicitly the rule which the Judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is. Indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. The Courts have done this on several occasions; and in Blake v. Midland Railway Company (18 Q. B. 93), the Court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned Judge at Nisi Prius.

"There are certain establishing rules", this Court says, in Alder v. Keighley (15 M. & W. 117), "according to which the jury ought to find". And the Court, in that case, adds: "and here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."

Now we think the proper rule is such as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made where communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from

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the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The Judge ought, therefore, to have told the jury, that, upon the fats then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case.

Rule absolute.

Note 1 Broom's Legal Maxims, p. 95;Davies v. Jenkins, 11 M. & W. 755.

Bill MORROW and Charles R. GOSLEE v. FIRST NATIONAL BANK OF HOT SPRINGS. SUPREME COURT OF ARKANSAS 261 Ark. 568; 550 S.W.2d 429; 21 U.C.C. Rep. Serv. (Callaghan) 1060 May 16, 1977, Opinion delivered

OPINIÓN POR: SMITH

[*569] [**429] For a number of years before 1971 the two plaintiffs, Morrow and Goslee, collected coins, individually and as partners. In 1971 a substantial part of the collection was kept at Morrow's home in Hot Springs. On September [**430] 4 of that year someone broke into the house and stole coins valued at $ 32,155.17. Almost three years later the plaintiffs brought this action against the defendant bank to recover the value of the stolen coins. The complaint alleges a breach of contract, in that the bank

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failed to notify the plaintiffs of the availability, on August 30, 1971, of safetydeposit boxes in a new bank building. This appeal is from a summary judgment in favor of the bank.

We state the facts most favorably to the plaintiffs. Morrow collected coins for many years. In about 1964 he had metal cabinets built in a closet in his house, so arranged that a burglar would have to go through eleven sets of locks to reach the coins. In about 1969, as insurance rates were [*570] becoming prohibitive, the two plaintiffs began to look for large safety-deposit boxes in which to keep their coins. No boxes were available in Hot Springs. From time to time Morrow discussed the problem with one or more employees of the defendant bank, where he was a regular customer.

In the summer of 1971 the bank was planning to move into its new building. Safety-deposit boxes were advertised. On June 25 the plaintiffs reserved three large boxes in the new building, paying $ 25 for each box. It was expected that the boxes would be available in from 30 to 60 days. Morrow explained his need for the boxes, adding that he particularly wanted them by September 1, when his husky teenage son would leave for college. The bank was perhaps on notice, through a loan application to a different department, that the coins were worth at least $ 12,000.

One or two employees of the bank promised to notify Morrow as soon as the boxes were available. The burglary occurred on the evening of Saturday, September 4, while Morrow and his wife were out to dinner. When Morrow inquired about the safety-deposit boxes on the following Tuesday, after Labor Day, he learned that the boxes had become available on August 30. An employee of the bank explained that "we just didn't have time" to notify Morrow that the boxes were ready. The plaintiffs immediately moved the rest of their coins into the safety-deposit boxes. We do not reach the bank's argument that the plaintiffs' acceptance of the rental contract was a waiver of their right to claim a breach.

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We consider this case to be controlled by our holding in Hooks Smelting Co. v. Planters' Compress Co., 72 Ark. 275, 79 S.W. 1052 (1904). There we adopted what is now known as the "tacit agreement test" for the recovery of consequential damages for a breach of contract. By that test the plaintiff must prove more than the defendant's mere knowledge that a breach of contract will entail special damages to the plaintiff. It must also appear that the defendant at least tacitly agreed to assume responsibility. Justice Riddick's entire opinion in Hooks is enlightening, but we emphasize this particular language:

It seems then that mere notice is not always sufficient [*571] to impose on the party who breaks a contract damages arising by reason of special circumstances, and the reason why this is so was referred to in a recent decision by the supreme court of the United States. In that case Mr. Justice Holmes, who delivered the opinion of the court, after remarking that one who makes a contract usually contemplates performance, not a breach, of his contract, said: "The extent of liability in such cases is likely to be within his contemplation, and whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind." Globe Refining Co. v. Landa Oil Co., 190 U.S. 540.

Now, where the damages arise from special circumstances, and are so large as to be out of proportion to the consideration agreed to be paid for the services to be rendered under the contract, it raises a doubt at once as to whether the party would have assented to such a liability had it been called to his attention at the making of the contract unless the consideration to be paid was also raised so as to [**431] correspond in some respect to the liability assumed. To make him liable for the special damages in such a case, there must not only be knowledge of the special circumstances, but such knowledge "must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the

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contract with the special condition attached to it." In other words, where there is no express contract to pay such special damages, the facts and circumstances in proof must be such as to make it reasonable for the judge or jury trying the case to believe that the party at the time of the contract tacitly consented to be bound to more than ordinary damages in case of default on his part. Wills, J., in British Columbia Sawmill Co. v. Nettleship, L. R. 3 C.P. 235; Globe Refining Co. v. Landa Oil Co., 190 U.S. 540; McKinnon v. McEwan, 48 Mich. 106, 11 N.W. 828; Snell v. Cottingham, 72 Ill. 161; Horne v. Midland R. Co., L. R. 8 C. P. 131; Booth v. Mill Co., 60 N. Y. 487; Wood's Mayne on Damages (1st Am. Ed.), p. 50; 1 Sutherland on Damages, § 52; 8 Am. & Eng. Enc. Law (2d Ed.), 593.

[*572] that the bank, in return for box rentals of $ 75, agreed in effect to issue a burglary insurance policy to the plaintiffs in the amount of at least $ 32,155.17 and probably much more, as the actual loss was only partial. The bank's bare promise to notify the plaintiffs as soon as the boxes were available did not amount to a tacit agreement that the bank, for no consideration in addition to its regular rental for the boxes, would be liable for as much as $ 32,000 if the promised notice was not given.

The tacit agreement rule is a minority rule, but we think it to be sound. We did not lightly adopt it. To the contrary, we relied upon three textbooks and a number of decisions, including one written by Justice Holmes. This language from the Hooks opinion expresses what Holmes described as "common sense":

Suppose, for instance, that a large manufacturing establishment is driven by power from a single engine, and that, by reason of an accident to some small but important part of the engine or machinery, it becomes necessary to stop the operation of the whole plant until a new part can be made or the old one repaired. If thereupon a blacksmith or machinist is called in, and, for the price of a few dollars, undertakes to make the repairs, but through some mistake or unskillfulness the part supplied by him should fail to fit, requiring it to be remade and entailing still further delay,

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would any court hold that the blacksmith or machinist could be held liable for all the damages entailed by the delay when they were large, in the absence of a contract on his part to be thus liable, unless the notice and the circumstances under which he made the contract were such that he ought reasonably to have known that in the event of his failure to perform his contract the other party would look to him to make good the loss?

The tacit agreement test, to be sure, has been questioned and was rejected by the draftsmen of the Uniform Commercial Code. Ark. Stat. Ann. § 85-2-715 and Comment 2 (Add. 1961); Williston, Contracts, § 1357 (3d ed., 1968); Casenote, 18 Ark. L. Rev. 169 (1964). We do not attach great importance [*573] to the Commercial Code provision, simply because the legislature, in adopting a uniform act containing hundreds of sections, certainly did not specifically and consciously decide that the rule of the Hooks case should be changed in all situations. We adhere to that decision.

Alternatively, the plaintiffs argue that the bank's breach of its contract should be treated as a tort, for which liability may be imposed without regard to the tacit agreement test. As Prosser points out, a breach of contract is not treated as a tort if it consists merely of a failure to act (nonfeasance) as distinguished from an affirmatively wrongful act (misfeasance). Prosser, [**432] Torts, § 92 (4th ed., 1971). Prosser notes that there is an exception with regard to a person such as an innkeeper or public warehouseman, who is under a duty to serve all comers. A bank, however, may do business with whom it pleases. Michie, Banks and Banking, Ch. 9, § 13 (rev. ed., 1973).

Affirmed.

ANTHONY NERI et al., Respondents, v. RETAIL MARINE CORPORATION, Doing Business as Emmette Marine Corporation, Appellant. COURT OF APPEALS OF NEW YORK 30 N.Y.2d 393; 285 N.E.2d 311; 334 N.Y.S.2d 165; 10 U.C.C. Rep. Serv. (Callaghan) 950 April 27, 1972, Argued June 1, 1972, Decided

OPINIÓN POR: GIBSON

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[*395] [**312] The appeal concerns the right of a retail dealer to recover loss of profits and incidental damages upon the buyer's repudiation of a contract governed by the Uniform Commercial Code. This is, indeed, the correct measure of damage in an appropriate case and to this extent the code (§ 2-708, subsection [2]) effected a substantial change from prior law, whereby damages were ordinarily limited to "the difference [*396] between the contract price and the market or current price". 1 Upon the record before us, the courts below erred in declining to give effect to the new statute and so the order appealed from must be reversed.

1 Personal Property Law, § 145, repealed by Uniform Commercial Code, § 10-102 (L. 1962, ch. 553, eff. Sept. 27, 1964); Lenobel, Inc. v. Senif, 252 App. Div. 533.

The plaintiffs contracted to purchase from defendant a new boat of a specified model for the price of $ 12,587.40, against which they made a deposit of $ 40. They shortly increased the deposit to $ 4,250 in consideration of the defendant dealer's agreement to arrange with the manufacturer for immediate delivery on the basis of "a firm sale", instead of the delivery within approximately four to six weeks originally specified. Some six days after the date of the contract plaintiffs' lawyer sent to defendant a letter rescinding the sales contract for the reason that plaintiff Neri was about to undergo hospitalization and surgery, in consequence of which, according to the letter, it would be "impossible for Mr. Neri to make any payments". The boat had already been ordered from the manufacturer and was delivered to defendant at or before the time the attorney's letter was received. Defendant declined to refund plaintiffs' deposit and this action to recover it was commenced. Defendant counterclaimed, alleging plaintiffs' breach of the contract and defendant's resultant damage in the amount of $ 4,250, for which sum defendant demanded judgment. Upon motion, defendant had summary judgment on the issue of liability tendered by its counterclaim; and Special Term directed an assessment of damages, upon which it

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would be determined whether plaintiffs were entitled to the return of any portion of their down payment.

Upon the trial so directed, it was shown that the boat ordered and received by defendant in accordance with plaintiffs' contract of purchase was sold some four months later to another buyer for the same price as that negotiated with plaintiffs. From this proof the plaintiffs argue that defendant's loss on its contract was recouped, while defendant argues that but for plaintiffs' default, it would have sold two boats and have earned two profits instead of one. Defendant proved, without contradiction, that its profit on the sale under the contract in suit would [*397] have been $ 2,579 and that during the period the boat remained unsold incidental expenses aggregating $ 674 for storage, upkeep, finance charges and insurance were incurred. Additionally, defendant proved and sought to brecover attorneys' fees of $ 1,250.

[**313] The trial court found "untenable" defendant's claim for loss of profit, inasmuch as the boat was later sold for the same price that plaintiffs had contracted to pay; found, too, that defendant had failed to prove any incidental damages; further found "that the terms of section 2-718, sub section 2(b), of the Uniform Commercial Code are applicable and same make adequate and fair provision to place the sellers in as good a position as performance would have done" and, in accordance with paragraph (b) of subsection (2) thus relied upon, awarded defendant $ 500 upon its counterclaim and directed that plaintiffs recover the balance of their deposit, amounting to $ 3,750. The ensuing judgment was affirmed, without opinion, at the Appellate Division and defendant's appeal to this court was taken by our leave.

The issue is governed in the first instance by section 2-718 of the Uniform Commercial Code which provides, among other things, that the buyer, despite his breach, may have restitution of the amount by which his payment exceeds: (a) reasonable liquidated damages stipulated by the contract or (b) absent such stipulation, 20% of the value of the buyer's total performance or $ 500, whichever is

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smaller (§ 2-718, subsection [2], pars. [a], [b]). As above noted, the trial court awarded defendant an offset in the amount of $ 500 under paragraph (b) and directed restitution to plaintiffs of the balance. Section 2-718, however, establishes, in paragraph (a) of subsection (3), an alternative right of offset in favor of the seller, as follows: "(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes (a) a right to recover damages under the provisions of this Article other than subsection (1)".

Among "the provisions of this Article other than subsection (1)" are those to be found in section 2-708, which the courts below did not apply. Subsection (1) of that section provides that "the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price [*398] at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach." However, this provision is made expressly subject to subsection (2), providing: "(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale."

The provision of the code upon which the decision at Trial Term rested (§ 2-718, subsection [2], par. [b]) does not differ greatly from the corresponding provisions of the prior statute (Personal Property Law, § 145-a, subd. 1, par. [b]) except as the new act includes the alternative remedy of a lump sum award of $ 500. Neither does the present reference (in § 2-718, subsection [3], par. [a]) to the recovery of damages pursuant to other provisions of the article differ from a like reference in the prior statute (Personal Property Law, § 145-a, subd. 2, par. [a]) to an

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alternative measure of damages under section 145 of that act; but section 145 made no provision for recovery of lost profits as does section 2-708 (subsection [2]) of the code. The new statute is thus innovative and significant and its analysis is necessary to the determination of the issues here presented.

Prior to the code, the New York cases "applied the 'profit' test, contract price less cost of manufacture, only in cases where the seller [was] a manufacturer or an agent for a manufacturer" (1955 Report of N. Y. Law Rev. Comm., vol. 1, p. 693). Its extension to retail sales was "designed to eliminate the unfair and economically [**314] wasteful results arising under the older law when fixed price articles were involved. This section permits the recovery of lost profits in all appropriate cases, which would include all standard priced goods." (Official Comment 2, McKinney's Cons. Laws of N. Y., Book 62 1/2, Part 1, p. 605, under Uniform Commercial Code, § 2-708.) Additionally, and "[in] all cases the seller may recover incidental damages" (id., Comment 3). The buyer's right to restitution was established [*399] at Special Term upon the motion for summary judgment, as was the seller's right to proper offsets, in each case pursuant to section 2-718; and, as the parties concede, the only question before us, following the assessment of damages at Special Term, is that as to the proper measure of damage to be applied. The conclusion is clear from the record -- indeed with mathematical certainty -- that "the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done" (Uniform Commercial Code, § 2-708, sub section [2]) and hence -- again under subsection (2) -- that the seller is entitled to its "profit (including reasonable overhead) * * * together with any incidental damages * * *, due allowance for costs reasonably incurred and due credit for payments or proceeds of resale."

It is evident, first, that this retail seller is entitled to its profit and, second, that the last sentence of subsection (2), as hereinbefore quoted, referring to "due credit for

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payments or proceeds of resale" is inapplicable to this retail sales contract. 2 Closely parallel to the factual situation now before us is that hypothesized by Dean Hawkland as illustrative of the operation of the rules: "Thus, if a private party agrees to sell his automobile to a buyer for $ 2,000, a breach by the buyer would cause the seller no loss (except incidental damages, i.e., expense of a new sale) if the seller was able to sell the automobile to another buyer for $ 2000. But the situation is different with [*400] dealers having an unlimited supply of standard-priced goods. Thus, if an automobile dealer agrees to sell a car to a buyer at the standard price of $ 2000, a breach by the buyer injures the dealer, even though he is able to sell the automobile to another for $ 2000. If the dealer has an inexhaustible supply of cars, the resale to replace the breaching buyer costs the dealer a sale, because, had the breaching buyer performed, the dealer would have made two sales instead of one. The buyer's breach, in such a case, depletes the dealer's sales to the extent of one, and the measure of damages should be the dealer's profit on one sale. Section 2-708 recognizes this, and it rejects the rule developed under the Uniform Sales Act by many courts that the profit cannot be recovered in this case." (Hawkland, Sales and Bulk Sales [1958 ed.], pp. 153-154; and see Comment, 31 Fordham L. Rev. 749, 755-756.)

2 The concluding clause, "due credit for payments or proceeds of resale", is intended to refer to "the privilege of the seller to realize junk value when it is manifestly useless to complete the operation of manufacture" (Supp. No. 1 to the 1952 Official Draft of Text and Comments of the Uniform Commercial Code, as Amended by the Action of the American Law Institute of the National Conference of Commissioners on Uniform Laws [1954], p. 14). The commentators who have considered the language have uniformly concluded that "the reference is to a resale as scrap under * * * Section 2-704" (1956 Report of N. Y. Law Rev. Comm., p. 397; 1955 Report of N. Y. Law Rev. Comm., vol. 1, p. 761; New York Annotations, McKinney's Cons. Laws of N. Y., Book 62 1/2, Part 1, p. 606, under

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Uniform Commercial Code, § 2-708; 1 Willier and Hart, Bender's Uniform Commercial Code Service, § 2-708, pp. 1-180 -- 1-181). Another writer, reaching the same conclusion, after detailing the history of the clause, says that "'proceeds of resale' previously meant the resale value of the goods in finished form; now it means the resale value of the components on hand at the time plaintiff learns of breach" (Harris, Seller's Damages, 18 Stanf. L. Rev. 66, 104).

The record which in this case establishes defendant's entitlement to damages in the [**315] amount of its prospective profit, at the same time confirms defendant's cognate right to "any incidental damages provided in this Article (Section 2-710)" 3 (Uniform Commercial Code, § 2-708, sub section [2]). From the language employed it is too clear to require discussion that the seller's right to recover loss of profits is not exclusive and that he may recoup his "incidental" expenses as well (Procter & Gamble Distr. Co. v. Lawrence Amer. Field Warehousing Corp., 16 N Y 2d 344, 354). Although the trial court's denial of incidental damages in the uncontroverted amount of $674 was made in the context of its erroneous conclusion that paragraph (b) of subsection (2) of section 2-718 was applicable and was "adequate * * * to place the sellers in as good a position as performance would have done", the denial seems not to have rested entirely on the court's mistaken application of the law, as there was an explicit finding "that defendant completely failed to show that it suffered any incidental damages." We find no basis for the court's conclusion with respect to a deficiency of proof inasmuch as the proper items of the $ 674 [*401] expenses (being for storage, upkeep, finance charges and insurance for the period between the date performance was due and the time of the resale) were proven without objection and were in no way controverted, impeached or otherwise challenged, at the trial or on appeal. Thus the court's finding of a failure of proof cannot be supported upon the record and, therefore, and contrary to plaintiffs'

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contention, the affirmance at the Appellate Division was ineffective to save it.

3 "Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach" (Uniform Commercial Code, § 2-710).

The trial court correctly denied defendant's claim for recovery of attorney's fees incurred by it in this action. Attorney's fees incurred in an action such as this are not in the nature of the protective expenses contemplated by the statute (Uniform Commercial Code, § 1-106, subd. [1]; § 2-710; § 2-708, subsection [2]) and by our reference to "legal expense" in Procter & Gamble Distr. Co. v. Lawrence Amer. Field Warehousing Corp. (16 N Y 2d 344, 354-355, supra), upon which defendant's reliance is in this respect misplaced.

It follows that plaintiffs are entitled to restitution of the sum of $ 4,250 paid by them on account of the contract price less an offset to defendant in the amount of $ 3,253 on account of its lost profit of $ 2,579 and its incidental damages of $ 674.

The order of the Appellate Division should be modified, with costs in all courts, in accordance with this opinion, and, as so modified, affirmed.

Ordered accordingly.

ILLINOIS CENTRAL RAILROAD COMPANY v. CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY. SUPREME COURT OF THE UNITED STATES 281 U.S. 57; 50 S. Ct. 180; 74 L. Ed. 699; 67 A.L.R. 1423 January 10, 1930, Argued February 24, 1930, Decided

OPINIÓN POR: STONE

[*62] [**180] In this case certiorari was granted May 27, 1929, to review a ruling of the Court of Appeals for the Eighth Circuit upon the measure of damages recoverable in a suit brought under the Cummins Amendment of March 4,

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1915, 38 Stat. 1197, as amended 41 Stat. 494 [49 U. S. C., § 20(11),] against a rail carrier for failure to deliver a part of an interstate shipment of coal.

Respondent, plaintiff below, a coal dealer in Minneapolis, purchased, while in transit, a carload of coal weighing at shipment 88,700 pounds. On delivery at destination, the respondent's industrial siding, there was a shortage of 5,500 pounds. At the time of [**181] arrival, respondent had not resold any of the coal. It was intended to be, and was, added to his stock of coal for resale, but the shortage did not interfere with the maintenance of his usual stock. He lost no sales by reason of it, and purchased no coal to replace the shortage, except in carload lots. In the course of his business, respondent could and did, both before and after the present shipment, purchase coal of like quality in carload lots of 60,000 pounds or more, delivered at his siding, at $ 5.50 per ton, plus freight. The market price in Minneapolis for like coal sold at retail in less than carload lots was $ 13.00 per ton, including $ 3.30 freight.

The case was twice tried. On the first trial, the District Court gave judgment for the wholesale value of the coal not delivered. 2 F.2d 287. The Court of Appeals reversed the judgment, holding that it should have been for the retail value of the coal. 13 F.2d 459. Upon [*63] retrial, the District Court gave judgment accordingly, 21 F.2d 831, which was affirmed below. 31 F.2d 111.

By the Cummins Amendment the holder of a bill of lading issued for an interstate rail shipment is entitled to recover for failure to make delivery of any part of the shipment without legal excuse, "the full actual loss, damage or injury to such property" at point of destination. Chicago, M. & St. P. Ry. Co. v. McCaull-Dinsmore Co., 253 U.S. 97.

It is not denied that a recovery measured by the wholesale market price of the coal would fully compensate the respondent, or that the retail price, taken as the measure of the recovery allowed below, includes costs of delivery to retail consumers which respondent did not incur, and a retail profit which he had not earned by any contract of

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resale. But respondent contends, as was held below, that the established measure of damage for non-delivery of a shipment of merchandise is the sum required to replace the exact amount of the shortage at the stipulated time and place of delivery, which, in this case, would be its retail value, and that convenience and the necessity for a uniform rule require its application here.

This contention ignores the basic principle underlying common law remedies that they shall afford only compensation for the injury suffered, Milwaukee & St. Paul R. Co. v. Arms, 91 U.S. 489, 492;Chicago, M. & St. P. Ry. Co. v. McCaull-Dinsmore Co., supra, 100;Robinson v. Harman, 1 Exch. 850, 855; Sedgwick, Damages (9th Ed.), 25; Sutherland, Damages (4th Ed.,) § 12; Williston on Contracts, § 1338, and leaves out of account the language of the amendment, which likewise gives only a right of recovery for "actual loss." The rule urged by respondents was applied below in literal accordance with its conventional statement. As so stated, when applied to cases as they usually arise, it is a convenient and accurate method of arriving at an amount of recovery which is [*64] compensatory. As so stated, it would have been applicable here if there had been a failure to deliver the entire carload of coal, since the wholesale price, at which a full carload could have been procured at point of destination, would have afforded full compensation, Chicago, M. & St. P. Ry. Co. v. McCaull-Dinsmore Co., supra; Central of Georgia Ry. Co. v. American Coal Co., 28 Ga. App. 95; Wendnagel v. Houston, 155 Ill. App. 664; Lake Erie, etc. R. R. Co. v. Frantz, 85 Ind. App. 569; Cutting v. Grand Trunk Ry., 13 Allen 381; Crutchfield & Woolfolk v. Director General of R. R., 239 Mass. 84; Smith v. N. Y. O. & Western Ry. Co., 119 Misc. Rep. (N. Y.) 506; Yazoo & M. V. R. Co. v. Delta Grocer Co., 134 Miss. 846; Chicago, R. I. & Pac. Ry. Co. v. Broe, 16 Okla. 25; Roth Coal Co. v. Louisville & Nashville R. R., 142 Tenn. 52; Quanah A. & P. Co. v. Novitt, 199 S. W. 496 (Tex. Civ. App.), or, in some circumstances, if respondent had been under any constraint to purchase less than a carload lot to repair his loss or carry

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on his business, for in that event the measure of his loss would have been the retail market cost of the necessary replacement. Haskell v. Hunter, 23 Mich. 305, 309. But in the actual circumstances the cost of replacing the exact shortage at retail price was not the measure of the loss, since it was capable of replacement and was, in fact, replaced in the course of respondent's business from purchases made in carload lots at wholesale market price without added expense.

There is no greater inconvenience in the application of the one standard of value than the other and we perceive no advantage to be gained from an adherence to a rigid uniformity, which would justify sacrificing the reason of the rule, to its letter. The test of market value is at best but a convenient means of getting at the loss suffered. It may be discarded and other more accurate means resorted to if, for special reasons, it is not exact or otherwise [*65] not applicable. See Wilmoth v. Hamilton, 127 Fed. 48, 51; Theiss v. Weiss, 166 Pa. St. 9, 19; Pittsburg Sheet Mfg. Co. v. West Penn Sheet Steel Co., 201 Pa. St. 150; Williston on Contracts, §§ 1384, 1385. In the absence of special circumstances, the damage for shortage in delivery by the seller of fungible goods sold by quantity is measured by the bulk price rather than the price for smaller quantities, both at common law, see Morgan v. Gath, 3 H. & C. 748; Avery v. Wilson, 81 N. Y. 341, and under § 44 of the Uniform Sales Act. Likewise, we think that the wholesale market price is to be preferred as a test over [**182] the retail when in circumstances like the present, it is clearly the more accurate measure, Brown Coal Co. v. Illinois Central R. R. Co., 196 Iowa 562; see State v. Smith, 31 Mo. 566; Wendnagel v. Houston, supra, 666, 667; Wood Co. v. Chicago, Milwaukee & St. Paul Ry. Co., 320 Ill. 341. Compare Heidritter Lumber Co. v. Central R. R. of N. J., 100 N. J. Law, 402, Leominster Fuel Co. v. New York, N. H. & H. Ry. Co., 258 Mass. 149, cited as supporting the conclusion of the court below. In these cases it does not clearly appear whether the consignee suffered special damage by reason of the shortage, measured by the retail

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price, or whether he did or could replace it at the wholesale price in the ordinary course of business.

The court below thought that the fact that the award to respondent of the expense and profit, included in the retail price to consumers, did not militate against the rule it applied, for the reason that the wholesale price, as is often the case where market price is the measure of loss, likewise included a profit over mine cost plus freight. But respondent had done every act and incurred every expense prerequisite to procuring delivery at destination. Any profit included in its market value at the stipulated time and place of arrival was, therefore, appropriately included in the measure of his loss. In this respect it is [*66] distinguishable from the expense and prospective profit not actually incurred or earned by respondent, represented by the retail price. See Central of Georgia R. R. Co. v. American Coal Co., supra; Yazoo & M. V. R. Co. v. Delta Grocer Co., supra, 146. Compare Cincinnati, N. O. & T. P. Ry. Co. v. Hansford, 125 Ky. 37; Smith v. N. Y. O. & Western Ry. Co., supra; Quanah A. & P. Co. v. Novitt, supra. Reversed.

Willie PEEVYHOUSE and Lucille Peevyhouse, Plaintiffs in Error, v. GARLAND COAL & MINING COMPANY, Defendant in Error. SUPREME COURT OF OKLAHOMA 382 P.2d 109 December 11, 1962

OPINIÓN POR: JACKSON

[*110] In the trial court, plaintiffs Willie and Lucille Peevyhouse sued the defendant, Garland Coal and Mining Company, for damages for breach of contract. Judgment was for plaintiffs in an amount considerably less than was sued for. Plaintiffs appeal and defendant cross-appeals.

In the briefs on appeal, the parties present their argument and contentions under several propositions; however, they all [*111] stem from the basic question of whether the trial court properly instructed the jury on the measure of damages.

Briefly stated, the facts are as follows: plaintiffs owned a farm containing coal deposits, and in November, 1954, leased the premises to defendant for a period of five years

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for coal mining purposes. A 'strip-mining' operation was contemplated in which the coal would be taken from pits on the surface of the ground, instead of from underground mine shafts. In addition to the [**3] usual covenants found in a coal mining lease, defendant specifically agreed to perform certain restorative and remedial work at the end of the lease period. It is unnecessary to set out the details of the work to be done, other than to say that it would involve the moving of many thousands of cubic yards of dirt, at a cost estimated by expert witnesses at about $ 29,000.00. However, plaintiffs sued for only $ 25,000.00.

During the trial, it was stipulated that all covenants and agreements in the lease contract had been fully carried out by both parties, except the remedial work mentioned above; defendant conceded that this work had not been done.

Plaintiffs introduced expert testimony as to the amount and nature of the work to be done, and its estimated cost. Over plaintiffs' objections, defendant thereafter introduced expert testimony as to the 'diminution in value' of plaintiffs' farm resulting from the failure of defendant to render performance as agreed in the contract -- that is, the difference between the present value of the farm, and what its value would have been if defendant had done what it agreed to do.

At the conclusion of the trial, the court instructed the jury [**4] that it must return a verdict for plaintiffs, and left the amount of damages for jury determination. On the measure of damages, the court instructed the jury that it might consider the cost of performance of the work defendant agreed to do, 'together with all of the evidence offered on behalf of either party'.

It thus appears that the jury was at liberty to consider the 'diminution in value' of plaintiffs' farm as well as the cost of 'repair work' in determining the amount of damages.

It returned a verdict for plaintiffs for $ 5000.00 -- only a fraction of the 'cost of performance', but more than the total value of the farm even after the remedial work is done.

On appeal, the issue is sharply drawn. Plaintiffs contend that the true measure of damages in this case is what it will

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cost plaintiffs to obtain performance of the work that was not done because of defendant's default. Defendant argues that the measure of damages is the cost of performance 'limited, however, to the total difference in the market value before and after the work was performed'.

It appears that this precise question has not heretofore been presented to this court. In Ardizonne v. Archer, 72 Okl. [**5] 70, 178 P. 263, this court held that the measure of damages for breach of a contract to drill an oil well was the reasonable cost of drilling the well, but here a slightly different factual situation exists. The drilling of an oil well will yield valuable geological information, even if no oil or gas is found, and of course if the well is a producer, the value of the premises increases. In the case before us, it is argued by defendant with some force that the performance of the remedial work defendant agreed to do will add at the most only a few hundred dollars to the value of plaintiffs' farm, and that the damages should be limited to that amount because that is all plaintiffs have lost.

Plaintiffs rely on Groves v. John Wunder Co., 205 Minn. 163, 286 N.W. 235, 123 A.L.R. 502. In that case, the Minnesota court, in a substantially similar situation, adopted the 'cost of performance' rule as-opposed to the 'value' rule. The result was to authorize a jury to give plaintiff damages in the amount of $ 60,000, where the real estate concerned would have been worth only $ 12,160, even if the work contracted for had been done.

[*112] It may be observed that Groves v. John Wunder [**6] Co., supra, is the only case which has come to our attention in which the cost of performance rule has been followed under circumstances where the cost of performance greatly exceeded the diminution in value resulting from the breach of contract. Incidentally, it appears that this case was decided by a plurality rather than a majority of the members of the court.

Defendant relies principally upon Sandy Valley & E. R. Co., v. Hughes, 175 Ky. 320, 194 S.W. 344; Bigham v. Wabash-Pittsburg Terminal Ry. Co., 223 Pa. 106, 72 A. 318; and Sweeney v. Lewis Const. Co., 66 Wash. 490, 119

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P. 1108. These were all cases in which, under similar circumstances, the appellate courts followed the 'value' rule instead of the 'cost of performance' rule. Plaintiff points out that in the earliest of these cases (Bigham) the court cites as authority on the measure of damages an earlier Pennsylvania tort case, and that the other two cases follow the first, with no explanation as to why a measure of damages ordinarily followed in cases sounding in tort should be used in contract cases. Nevertheless, it is of some significance that three out of four appellate courts have followed the diminution in value [**7] rule under circumstances where, as here, the cost of performance greatly exceeds the diminution in value.

The explanation may be found in the fact that the situations presented are artificial ones. It is highly unlikely that the ordinary property owner would agree to pay $ 29,000 (or its equivalent) for the construction of 'improvements' upon his property that would increase its value only about ($ 300) three hundred dollars. The result is that we are called upon to apply principles of law theoretically based upon reason and reality to a situation which is basically unreasonable and unrealistic.

In Groves v. John Wunder Co., supra, in arriving at its conclusions, the Minnesota court apparently considered the contract involved to be analogous to a building and construction contract, and cited authority for the proposition that the cost of performance or completion of the building as contracted is ordinarily the measure of damages in actions for damages for the breach of such a contract.

In an annotation following the Minnesota case beginning at 123 A.L.R. 515, the annotator places the three cases relied on by defendant (Sandy Valley, Bigham and Sweeney) under the classification [**8] of cases involving 'grading and excavation contracts'.

We do not think either analogy is strictly applicable to the case now before us. The primary purpose of the lease contract between plaintiffs and defendant was neither 'building and construction' nor 'grading and excavation'. It

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was merely to accomplish the economical recovery and marketing of coal from the premises, to the profit of all parties. The special provisions of the lease contract pertaining to remedial work were incidental to the main object involved.

Even in the case of contracts that are unquestionably building and construction contracts, the authorities are not in agreement as to the factors to be considered in determining whether the cost of performance rule or the value rule should be applied. The American Law Institute's Restatement of the Law, Contracts, Volume 1, Sections 346(1)(a)(i) and (ii) submits the proposition that the cost of performance is the proper measure of damages 'if this is possible and does not involve unreasonable economic waste'; and that the diminution in value caused by the breach is the proper measure 'if construction and completion in accordance with the contract would involve [**9] unreasonable economic waste'. (Emphasis supplied.) In an explanatory comment immediately following the text, the Restatement makes it clear that the 'economic waste' referred to consists of the destruction of a substantially completed building or other structure. Of course no such destruction is involved in the case now before us.

[*113] On the other hand, in McCormick, Damages, Section 168, it is said with regard to building and construction contracts that '* * * in cases where the defect is one that can be repaired or cured without undue expense' the cost of performance is the proper measure of damages, but where '* * * the defect in material or construction is one that cannot be remedied without an expenditure for reconstruction disproportionate to the end to be attained' (emphasis supplied) the value rule should be followed. The same idea was expressed in Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 129 N.E. 889, 23 A.L.R. 1429, as follows:

'The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference [**10] in value.'

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It thus appears that the prime consideration in the Restatement was 'economic waste'; and that the prime consideration in McCormick, Damages, and in Jacob & Youngs, Inc. v. Kent, supra, was the relationship between the expense involved and the 'end to be attained' -- in other words, the 'relative economic benefit'.

In view of the unrealistic fact situation in the instant case, and certain Oklahoma statutes to be hereinafter noted, we are of the opinion that the 'relative economic benefit' is a proper consideration here. This is in accord with the recent case of Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78, where, in applying the cost rule, the Virginia court specifically noted that '* * * the defects are remediable from a practical standpoint and the costs are not grossly disproportionate to the results to be obtained' (Emphasis supplied).

23 O.S.1961 §§ 96 and 97 provide as follows:

'§ 96. * * * Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation, than he would have gained by the full performance thereof on both sides * * *.

'§ 97. * * * Damages must, in all cases, be reasonable, [**11] and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice no more than reasonable damages can be recovered.'

Although it is true that the above sections of the statute are applied most often in tort cases, they are by their own terms, and the decisions of this court, also applicable in actions for damages for breach of contract. It would seem that they are peculiarly applicable here where, under the 'cost of performance' rule, plaintiffs might recover an amount about nine times the total value of their farm. Such would seem to be 'unconscionable and grossly oppressive damages, contrary to substantial justice' within the meaning of the statute. Also, it can hardly be denied that if plaintiffs here are permitted to recover under the 'cost of performance' rule, they will receive a greater benefit from

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the breach than could be gained from full performance, contrary to the provisions of Sec. 96.

An analogy may be drawn between the cited sections, and the provisions of 15 O.S.1961 §§ 214 and 215. These sections tend to render void any provisions of a contract which attempt to fix the amount of stipulated [**12] damages to be paid in case of a breach, except where it is impracticable or extremely difficult to determine the actual damages. This results in spite of the agreement of the parties, and the obvious and well known rationale is that insofar as they exceed the actual damages suffered, the stipulated damages amount to a penalty or forfeiture which the law does not favor.

23 O.S.1961 §§ 96 and 97 have the same effect in the case now before us. In spite of the agreement of the parties, these sections limit the damages recoverable to a reasonable amount not 'contrary to substantial justice'; they prevent plaintiffs from recovering a 'greater amount in damages for the breach of an obligation' than [*114] they would have 'gained by the full performance thereof'.

We therefore hold that where, in a coal mining lease, lessee agrees to perform certain remedial work on the premises concerned at the end of the lease period, and thereafter the contract is fully performed by both parties except that the remedial work is not done, the measure of damages in an action by lessor against lessee for damages for breach of contract is ordinarily the reasonable cost of performance of the work; [**13] however, where the contract provision breached was merely incidental to the main purpose in view, and where the economic benefit which would result to lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of the non-performance.

We believe the above holding is in conformity with the intention of the Legislature as expressed in the statutes mentioned, and in harmony with the better-reasoned cases from the other jurisdictions where analogous fact situations

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have been considered. It should be noted that the rule as stated does not interfere with the property owner's right to 'do what he will with his own' Chamberlain v. Parker, 45 N.Y. 569), or his right, if he chooses, to contract for 'improvements' which will actually have the effect of reducing his property's value. Where such result is in fact contemplated by the parties, and is a main or principal purpose of those contracting, it would seem that the measure of damages for breach would ordinarily be the cost of performance.

The above holding disposes of all of the arguments raised [**14] by the parties on appeal.

Under the most liberal view of the evidence herein, the diminution in value resulting to the premises because of non-performance of the remedial work was $ 300.00. After a careful search of the record, we have found no evidence of a higher figure, and plaintiffs do not argue in their briefs that a greater diminution in value was sustained. It thus appears that the judgment was clearly excessive, and that the amount for which judgment should have been rendered is definitely and satisfactorily shown by the record.

We are asked by each party to modify the judgment in accordance with the respective theories advanced, and it is conceded that we have authority to do so. 12 O.S.1961 § 952; Busboom v. Smith, 199 Okl. 688, 191 P.2d 198; Stumpf v. Stumpf, 173 Okl. 1, 46 P.2d 315.

We are of the opinion that the judgment of the trial court for plaintiffs should be, and it is hereby, modified and reduced to the sum of $ 300.00, and as so modified it is affirmed.

DISCREPA DEL FUNDAMENTO: IRWIN

By the specific provisions in the coal mining [**15] lease under consideration, the defendant agreed as follows:

'* * * '7b Lessee agrees to make fills in the pits dug on said premises on the property line in such manner that fences can be placed thereon and access had to opposite sides of the pits.

'c Lessee agrees to smooth off the top of the spoil banks on the above premises.

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'7d Lessee agrees to leave the creek crossing the above premises in such a condition that it will not interfere with the crossings to be made in pits as set out in 7b.

'7f Lessee further agrees to leave no shale or dirt on the high wall of said pits. * * *'

[*115] Following the expiration of the lease, plaintiffs made demand upon defendant that it carry out the provisions of the contract and to perform those covenants contained therein.

Defendant admits that it failed to perform its obligations that it agreed and contracted to perform under the lease contract and there is nothing in the record which indicates that defendant could not perform its obligations. Therefore, in my opinion defendant's breach of the contract was wilful and not in good faith.

Although the contract speaks for itself, there were several negotiations between the plaintiffs [**16] and defendant before the contract was executed. Defendant admitted in the trial of the action, that plaintiffs insisted that the above provisions be included in the contract and that they would not agree to the coal mining lease unless the above provisions were included.

In consideration for the lease contract, plaintiffs were to receive a certain amount as royalty for the coal produced and marketed and in addition thereto their land was to be restored as provided in the contract.

Defendant received as consideration for the contract, its proportionate share of the coal produced and marketed and in addition thereto, the right to use plaintiffs' land in the furtherance of its mining operations.

The cost for performing the contract in question could have been reasonably approximated when the contract was negotiated and executed and there are no conditions now existing which could not have been reasonably anticipated by the parties. Therefore, defendant had knowledge, when it prevailed upon the plaintiffs to execute the lease, that the cost of performance might be disproportionate to the value or benefits received by plaintiff for the performance.

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Defendant has received its benefits [**17] under the contract and now urges, in substance, that plaintiffs' measure of damages for its failure to perform should be the economic value of performance to the plaintiffs and not the cost of performance.

If a peculiar set of facts should exist where the above rule should be applied as the proper measure of damages, (and in my judgment those facts do not exist in the instant case) before such rule should be applied, consideration should be given to the benefits received or contracted for by the party who asserts the application of the rule.

Defendant did not have the right to mine plaintiffs' coal or to use plaintiffs' property for its mining operations without the consent of plaintiffs. Defendant had knowledge of the benefits that it would receive under the contract and the approximate cost of performing the contract. With this knowledge, it must be presumed that defendant thought that it would be to its economic advantage to enter into the contract with plaintiffs and that it would reap benefits from the contract, or it would have not entered into the contract.

Therefore, if the value of the performance of a contract should be considered in determining the measure of damages [**18] for breach of a contract, the value of the benefits received under the contract by a party who breaches a contract should also be considered. However, in my judgment, to give consideration to either in the instant action, completely rescinds and holds for naught the solemnity of the contract before us and makes an entirely new contract for the parties.

In Goble v. Bell Oil & Gas Co., 97 Okl. 261, 223 P. 371, we held:

'Even though the contract contains harsh and burdensome terms which the court does not in all respects approve, it is the province of the parties in relation to lawful subject matter to fix their rights and obligations, and the court will give the contract effect according to its expressed provisions, unless it be shown by competent evidence proof that the written agreement as executed is the result of fraud, mistake, or accident.'

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[*116] In Cities Service Oil Co. v. Geolograph Co. Inc., 208 Okl. 179, 254 P.2d 775, we said:

'While we do not agree that the contract as presently written is an onerous one, we think the short answer is that the folly or wisdom of a contract is not for the court to pass on.'

In Great Western Oil & Gas Company v. Mitchell, Okl., [**19] 326 P.2d 794, we held:

'The law will not make a better contract for parties than they themselves have seen fit to enter into, or alter it for the benefit of one party and to the detriment of the others; the judicial function of a court of law is to enforce a contract as it is written.'

I am mindful of Title 23 O.S.1961 § 96, which provides that no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in cases not applicable herein. However, in my judgment, the above statutory provision is not applicable here.

In my judgment, we should follow the case of Groves v. John Wunder Company, 205 Minn. 163, 286 N.W. 235, 123 A.L.R. 502, which defendant agrees 'that the fact situation is apparently similar to the one in the case at bar', and where the Supreme Court of Minnesota held:

'The owner's or employer's damages for such a breach (i. e. breach hypothesized in 2d syllabus) are to be measured, not in respect to the value of the land to be improved, but by the reasonable cost of doing that which the contractor promised to do and which he left undone.'

The hypothesized breach referred [**20] to states that where the contractor's breach of a contract is wilful, that is, in bad faith, he is not entitled to any benefit of the equitable doctrine of substantial performance.

In the instant action defendant has made no attempt to even substantially perform. The contract in question is not immoral, is not tainted with fraud, and was not entered into through mistake or accident and is not contrary to public policy. It is clear and unambiguous and the parties understood the terms thereof, and the approximate cost of

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fulfilling the obligations could have been approximately ascertained. There are no conditions existing now which could not have been reasonably anticipated when the contract was negotiated and executed. The defendant could have performed the contract if it desired. It has accepted and reaped the benefits of its contract and now urges that plaintiffs' benefits under the contract be denied. If plaintiffs' benefits are denied, such benefits would inure to the direct benefit of the defendant.

Therefore, in my opinion, the plaintiffs were entitled to specific performance of the contract and since defendant has failed to perform, the proper measure of damages should [**21] be the cost of performance. Any other measure of damage would be holding for naught the express provisions of the contract; would be taking from the plaintiffs the benefits of the contract and placing those benefits in defendant which has failed to perform its obligations; would be granting benefits to defendant without a resulting obligation; and would be completely rescinding the solemn obligation of the contract for the benefit of the defendant to the detriment of the plaintiffs by making an entirely new contract for the parties.

I therefore respectfully dissent to the opinion promulgated by a majority of my associates.

ZAPATA HERMANOS SUCESORES, S.A., Plaintiff-Appellee, v. HEARTHSIDE BAKING COMPANY, INC., d/b/a MAURICE LENELL COOKY COMPANY, Defendant-Appellant. UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
313 F.3d 385; 54 Fed. R. Serv. 3d (Callaghan) 409
September 13, 2002, Argued November 19, 2002, Decided

OPINIÓN POR: POSNER

[*387] Zapata, a Mexican corporation that supplied Lenell, a U.S. wholesale baker of cookies, with cookie tins, sued Lenell for breach of contract and won. The district judge ordered Lenell to pay Zapata $ 550,000 in attorneys' fees. From that order, which the judge based both on a provision of the Convention on Contracts for the International Sale of Goods, Jan. 1, 1988, 15 U.S.C. App.,

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and on the inherent authority of the courts to punish the conduct of litigation in bad faith, Lenell appeals.

The Convention, of which both the U.S. and Mexico are signatories, provides, as its name indicates, remedies for breach of international contracts for the sale of goods. Zapata brought suit under the Convention for money due under 110 invoices, amounting to some $ 900,000 (we round liberally), and also sought prejudgment interest plus attorneys' fees, which it contended are "losses" within the meaning of the Convention and are therefore [**2] an automatic entitlement of a plaintiff who prevails in a suit under the Convention. At the close of the evidence in a one-week trial, the judge granted judgment as a matter of law for Zapata on 93 of the 110 invoices, totaling $ 850,000. Zapata's claim for money due under the remaining invoices was submitted to the jury, which found in favor of Lenell. Lenell had filed several counterclaims; the judge dismissed some of them and the jury ruled for Zapata on the others. The jury also awarded Zapata $ 350,000 in prejudgment interest with respect [*388] to the 93 invoices with respect to which Zapata had prevailed, and the judge then tacked on the attorneys' fees--the entire attorneys' fees that Zapata had incurred during the litigation.

Article 74 of the Convention provides that "damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach," provided the consequence was foreseeable at the time the contract was made. Article 7(2) provides that "questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles [**3] on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law [i.e., conflicts of law rules]." There is no suggestion in the background of the Convention or the cases under it that "loss" was intended to include attorneys' fees, but no suggestion to the contrary either. Nevertheless it seems apparent that "loss" does not include attorneys' fees

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incurred in the litigation of a suit for breach of contract, though certain pre-litigation legal expenditures, for example expenditures designed to mitigate the plaintiff's damages, would probably be covered as "incidental" damages. Sorenson v. Fio Rito, 90 Ill. App. 3d 368, 413 N.E.2d 47, 50-52, 45 Ill. Dec. 714 (Ill. App. 1980); cf. Tull v. Gundersons, Inc., 709 P.2d 940, 946 (Colo. 1985); Restatement (Second) of Contracts § 347, comment c (1981).

The Convention is about contracts, not about procedure. The principles for determining when a losing party must reimburse the winner for the latter's expense of litigation are usually not a part of a substantive body of law, such as contract law, but a part of procedural [**4] law. For example, the "American rule," that the winner must bear his own litigation expenses, and the "English rule" (followed in most other countries as well), that he is entitled to reimbursement, are rules of general applicability. They are not field-specific. There are, however, numerous exceptions to the principle that provisions regarding attorneys' fees are part of general procedure law. For example, federal antidiscrimination, antitrust, copyright, pension, and securities laws all contain field-specific provisions modifying the American rule (as do many other field-specific statutes). An international convention on contract law could do the same. But not only is the question of attorneys' fees not "expressly settled" in the Convention, it is not even mentioned. And there are no "principles" that can be drawn out of the provisions of the Convention for determining whether "loss" includes attorneys' fees; so by the terms of the Convention itself the matter must be left to domestic law (i.e., the law picked out by "the rules of private international law," which means the rules governing choice of law in international legal disputes).

U.S. contract law is different from, say, [**5] French contract law, and the general U.S. rule on attorneys' fee shifting (the "American rule") is different from the French rule (loser pays). But no one would say that French contract law differs from U.S. because the winner of a contract suit

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in France is entitled to be reimbursed by the loser, and in the U.S. not. That's an important difference but not a contract-law difference. It is a difference resulting from differing procedural rules of general applicability.

The interpretation of "loss" for which Zapata contends would produce anomalies, which is another reason to reject the interpretation. On Zapata's view the prevailing plaintiff in a suit under the Convention would (though presumably subject to the [*389] general contract duty to mitigate damages, to which we referred earlier) get his attorneys' fees reimbursed more or less automatically (the reason for the "more or less" qualification will become evident in a moment). But what if the defendant won? Could he invoke the domestic law, if as is likely other than in the United States that law entitled either side that wins to reimbursement of his fees by the loser? Well, if so, could the plaintiff waive his right to attorneys' [**6] fees under the Convention in favor of domestic law, which might be more or less generous than Article 74, since Article 74 requires that any loss must, to be recoverable, be foreseeable, which beyond some level attorneys' fees, though reasonable ex post, might not be? And how likely is it that the United States would have signed the Convention had it thought that in doing so it was abandoning the hallowed American rule? To the vast majority of the signatories of the Convention, being nations in which loser pays is the rule anyway, the question whether "loss" includes attorneys' fees would have held little interest; there is no reason to suppose they thought about the question at all.

For these reasons, we conclude that "loss" in Article 74 does not include attorneys' fees, and we move on to the question of a district court's inherent authority to punish a litigant or the litigant's lawyers for litigating in bad faith. The district judge made clear that he was basing his award of attorneys' fees to Zapata in part on his indignation at Lenell's having failed to pay money conceded to be owed to Zapata. Although the precise amount was in dispute, Lenell concedes that it owed Zapata at [**7] least half of

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the $ 1.2 million that Zapata obtained in damages (not counting the attorneys' fees) and prejudgment interest. Lenell had no excuse for not paying that amount, and this upset the judge.

Firms should pay their debts when they have no legal defense to them. Pacta sunt servanda, as the saying goes ("contracts are to be obeyed"). In the civil law (that is, the legal regime of Continental Europe), this principle is taken very seriously, as illustrated by the fact that the civil law grants specific performance in breach of contract cases as a matter of course. But under the common law (including the common law of Illinois, which is the law that choice of law principles make applicable in this case to any issues not covered in express terms by the Convention), a breach of contract is not considered wrongful activity in the sense that a tort or a crime is wrongful. When we delve for reasons, we encounter Holmes's argument that practically speaking the duty created by a contract is really just to perform or pay damages, for only if damages are inadequate relief in the particular circumstances of the case will specific performance be ordered. In other words, and subject to [**8] the qualification just mentioned, the entire practical effect of signing a contract is that by doing so one obtains an option to break it. The damages one must pay for breaking the contract are simply the price if the option is exercised. See Oliver Wendell Holmes, Jr., The Common Law 300-02 (1881); Holmes, "The Path of the Law," 10 Harv. L. Rev. 457, 462 (1897).

Why such lenity? Perhaps because breach of contract is a form of strict liability. Many breaches are involuntary and so inapt occasions for punishment. Even deliberate breaches are not necessarily culpable, as they may enable an improvement in efficiency--suppose Lenell had a contract to take a certain quantity of tins from Zapata and found that it could buy them for half the price from someone else. Some breaches of contract, it is true, are [*390] not only deliberate but culpable, and maybe this was one--Lenell offers no excuse for failing to pay for tins that it had taken delivery of and presumably resold with its

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cookies in them. Refusing to pay the contract price after the other party has performed is not the kind of option that the performing party would willingly have granted when the contract was negotiated. [**9] The option of which Holmes spoke was the option not to perform because performance was impossible or because some more valuable use of the resources required for performance arose after the contract was signed. Zapata argues, moreover, perhaps correctly (we need not decide), that Lenell refused to pay in an effort to extract a favorable modification of the terms of the parties' dealings, which would be a form of duress if Zapata somehow lacked an effective legal remedy. Professional Service Network, Inc. v. American Alliance Holding Co., 238 F.3d 897, 900-01 (7th Cir. 2001); Alaska Packers' Ass'n v. Domenico, 117 Fed. 99, 100-04 (9th Cir. 1902). But Zapata did not charge duress, and probably couldn't, since it had a good remedy--this suit.

It is true that nowadays common law courts will sometimes award punitive damages for breach of contract in bad faith. But outside the field of insurance, where refusals in bad faith to indemnify or defend have long been punishable by awards of punitive damages to the insured, the plaintiff must show that the breach of contract involved tortious misconduct, such as duress or fraud or abuse of fiduciary duty. See, [**10] e.g., Miller Brewing Co. v. Best Beers of Bloomington, Inc., 608 N.E.2d 975, 982-83 (Ind. 1993); Story v. City of Bozeman, 242 Mont. 436, 791 P.2d 767, 776 (Mont. 1990); E. Allan Farnsworth, Contracts § 12.8, pp. 788-89 (3d ed. 1999). This is the rule in Illinois, Morrow v. L.A. Goldschmidt Associates, Inc., 112 Ill. 2d 87, 492 N.E.2d 181, 183-86, 96 Ill. Dec. 939 (Ill. 1986), and Zapata has not tried to come within it. For that matter, it did not ask for punitive damages, and the judge had no authority to award attorneys' fees in lieu of such damages. He could not have awarded punitive damages if Zapata had asked for them but had been unable to prove tortious misconduct by Lenell, and even more clearly he could not award them when they had not been requested.

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The decision whether punitive damages shall be a sanction for a breach of contract is an issue of substantive law, and under the Erie doctrine a federal court is not authorized to apply a different substantive law of contracts in a diversity case from the law that a state court would apply were the case being litigated in a state court instead. And obviously that rule [**11] must not be circumvented by renaming punitive damages "attorneys' fees." United States ex rel. Treat Bros. Co. v. Fidelity & Deposit Co. of Maryland, 986 F.2d 1110, 1119-20 (7th Cir. 1993); see also Chambers v. NASCO, Inc., 501 U.S. 32, 52-55, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991); Association of Flight Attendants, AFL-CIO v. Horizon Air Industries, Inc., 976 F.2d 541, 548-50 (9th Cir. 1992). It is true that this is not a diversity case, but the Erie doctrine applies to any case in which state law supplies the rule of decision, see, e.g., O'Melveny & Myers v. FDIC, 512 U.S. 79, 83-85, 87-88, 129 L. Ed. 2d 67, 114 S. Ct. 2048 (1994), here by incorporation in the Convention.

The inherent authority of federal courts to punish misconduct before them is not a grant of authority to do good, rectify shortcomings of the common law (as by using an award of attorneys' fees to make up for an absence that the judge may deem regrettable of punitive damages for certain breaches of contract), or undermine the American rule on the award of [*391] attorneys' fees to the prevailing party in the absence of statute. Morganroth & Morganroth v. DeLorean, 213 F.3d 1301, 1318 (10th Cir. 2000); [**12] Association of Flight Attendants, AFL-CIO v. Horizon Air Industries, Inc., supra, 976 F.2d at 548-50 (9th Cir. 1992); Shimman v. International Union of Operating Engineers, Local 18, 744 F.2d 1226, 1232-33 and n. 9 (6th Cir. 1984) (en banc). These cases and others we could cite make clear that it is a residual authority, to be exercised sparingly, to punish misconduct (1) occurring in the litigation itself, not in the events giving rise to the litigation (for then the punishment would be a product of substantive law--designed, for example, to deter breaches of contract), and (2) not adequately dealt with by other rules, most

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pertinently here Rules 11 and 37 of the Federal Rules of Civil Procedure, which Lenell has not been accused of violating.

Insofar as he focused on Lenell's behavior in the litigation itself, which, to repeat, is the only lawful domain of the relevant concept of "inherent authority"--the authority could not constitutionally be extended to give parties remedies not available to them under the law of the state that furnishes the substantive rules of decision in the case--the judge punished Lenell for having failed to acknowledge [**13] liability and spare Zapata and the judge and the jury and the witnesses and so on the burden of a trial. But as it happens, the fault here was in no small measure the judge's. Well before the trial, and long, long before Zapata's lawyers had run the tab up to $ 550,000, they had moved for partial summary judgment, claiming that Lenell in answer to Zapata's requests for admission had acknowledged liability for $ 858,000 of the $ 890,000 sought in the complaint. The judge had denied the motion on the ground that partial summary judgment cannot be granted unless the grant would give rise to an appealable judgment. This was error. Rule 56(d) of the civil rules is explicit in allowing the judge to grant summary judgment on less than the plaintiff's whole claim, and there is no hint of any requirement that the grant carve at a joint that would permit the judge to enter a final judgment under Rule 54(b). If the plaintiff had two separate claims, and the judge granted summary judgment on one and set the other for trial, he could also if he wanted enter final judgment on the first dismissal, enabling the defendant to appeal immediately under Rule 54(b). If instead the plaintiff had as here [**14] one claim, and the judge granted it in part, the defendant could not appeal--the conditions of Rule 54(b) would not be satisfied--yet it is evident from the wording of Rule 56(d) that this would be a proper partial summary judgment, for the rule expressly authorizes an order "specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy." No purpose

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would be served by confining the rule as the district judge did. If anything, judicial economy is better served by a partial summary judgment that is not appealable, since a Rule 54(b) appeal normally interrupts the proceedings in the district court.

Since the challenged award of $ 550,000 in attorneys' fees cannot stand, we need not pick through the record to see whether some of the counterclaims or other moves by Lenell during the trial were sanctionable apart from Rule 11 and Rule 37. But it may be useful by way of guiding further proceedings on remand to point out that to the extent that those rules place limits on the award of sanctions under them (for example by the provision of safe harbors in Rule 11), those limitations are equally [**15] limitations on inherent authority, which may not be used to amend the rules. Kovilic Construction Co. v. Missbrenner, [*392] 106 F.3d 768, 772-73 (7th Cir. 1997). For federal rules of procedure have the force of statutes. See id.; 28 U.S.C. § 2072(b).

One issue remains for discussion. Although we have treated the appeal so far as if the only issues concerned attorneys' fees, Lenell also argues that the jury verdict should be set aside because the judge by his comments in open court signaled to the jury his scorn for Lenell's case. There were only a couple of such comments (many more, however, at sidebars outside the jury's hearing), and we do not think they could have changed the outcome. But we also think that judges should be very cautious about making comments in the hearing of a jury about the quality of a party's case or lawyers. For if he signals to the jury the judge's opinion as to how the case should be decided, he undermines the authority of the jury. Collins v. Kibort, 143 F.3d 331, 336 (7th Cir. 1998); Nationwide Mutual Fire Ins. Co. v. Ford Motor Co., 174 F.3d 801, 805, 808 (6th Cir. 1999); see also [**16] Ross v. Black & Decker, Inc., 977 F.2d 1178, 1187 (7th Cir. 1992).

From what we have just reported about the judge's statements during the trial and from the tone of a number of other statements that he made in the course of this

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litigation, we think it best that the further proceedings that we are ordering be conducted before a different judge, in accordance with 7th Cir. R. 36.

Affirmed in part, reversed in part, and remanded.

EL DEBER DE MITIGAR EL DAÑO

ROCKINGHAM COUNTY v. LUTEN BRIDGE CO. CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT 35 F.2d 301; 66 A.L.R. 735 October 15, 1929

OPINIÓN POR: PARKER

This was an action at law instituted in the court below by the Luten Bridge Company, as plaintiff, to recover of Rockingham county, North Carolina, an amount alleged to be due under a contract for the construction of a bridge. The county admits the execution and breach of the contract, but contends that notice of cancellation was given the bridge company before the erection of the bridge was commenced, and that it is liable only for the damages which the company would have sustained, if it had abandoned construction at that time. The judge below refused to strike out an answer filed by certain members of the board of commissioners of the county, admitting liability in accordance with the prayer of the complaint, allowed this pleading to be introduced in evidence as the answer of the county, excluded evidence offered by the county in support of its contentions as to notice of cancellation and damages, and instructed a verdict [**2] for plaintiff for the full amount of its claim. From the judgment on this verdict the county has appealed.

The facts out of which the case arises, as shown by the affidavits and offers of proof appearing in the record, are as follows: On January 7, 1924, the board of commissioners of Rockingham county voted to award to plaintiff a contract for the construction of the bridge in controversy.Three of the five commissioners favored the awarding of the contract and two opposed it. Much feeling was engendered over the matter, with the result that on February 11, 1924, W. K. Pruitt, one of the commissioners who had voted in the affirmative, sent his resignation to the

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clerk of the superior court of the county. The clerk received this resignation on the same day, and immediately accepted same and noted his acceptance thereon. Later in the day, Pruitt called him over the telephone and stated that he wished to withdraw the resignation, and later sent him written notice [*303] to the same effect. The clerk, however, paid no attention to the attempted withdrawal, and proceeded on the next day to appoint one W. W. Hampton as a member of the board to succeed him.

After his resignation, [**3] Pruitt attended no further meetings of the board, and did nothing further as a commissioner of the county. Likewise Pratt and McCollum, the other two members of the board who had voted with him in favor of the contract, attended no further meetings. Hampton, on the other hand, took the oath of office immediately upon his appointment and entered upon the discharge of the duties of a commissioner. He met regularly with the two remaining members of the board, Martin and Barber, in the courthouse at the county seat, and with them attended to all of the business of the county.Between the 12th of February and the first Monday in December following, these three attended, in all, 25 meetings of the board.

At one of these meetings, a regularly advertised called meeting held on February 21st, a resolution was unanimously adopted declaring that the contract for the building of the bridge was not legal and valid, and directing the clerk of the board to notify plaintiff that it refused to recognize same as a valid contract, and that plaintiff should proceed no further thereunder. This resolution also rescinded action of the board theretofore taken looking to the construction of a hard-surfaced [**4] road, in which the bridge was to be a mere connecting link. The clerk duly sent a certified copy of this resolution to plaintiff.

At the regular monthly meeting of the board on March 3d, a resolution was passed directing that plaintiff be notified that any work done on the bridge would be done by it at its own risk and hazard, that the board was of the opinion that the contract for the construction of the bridge

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was not valid and legal, and that, even if the board were mistaken as to this, it did not desire to construct the bridge, and would contest payment for same if constructed. A copy of this resolution was also sent to plaintiff. At the regular monthly meeting on April 7th, a resolution was passed, reciting that the board had been informed that one of its members was privately insisting that the bridge be constructed. It repudiated this action on the part of the member and gave notice that it would not be recognized. At the September meeting, a resolution was passed to the effect that the board would pay no bills presented by plaintiff or any one connected with the bridge. At the time of the passage of the first resolution, very little work toward the construction of [**5] the bridge had been done, it being estimated that the total cost of labor done and material on the ground was around $ 1,900; but, notwithstanding the repudiation of the contract by the county, the bridge company continued with the work of construction.

On November 24, 1924, plaintiff instituted this action against Rockingham county, and against Pruitt, Pratt, McCollum, Martin, and Barber, as constituting its board of commissioners. Complaint was filed, setting forth the execution of the contract and the doing of work by plaintiff thereunder, and alleging that for work done up until November 3, 1924, the county was indebted in the sum of $ 18,301.07. On November 27th, three days after the filing of the complaint, and only three days before the expiration of the term of office of the members of the old board of commissioners, Pruitt, Pratt, and McCollum met with an attorney at the county seat, and, without notice to or consultation with the other members of the board, so far as appears, had the attorney prepare for them an answer admitting the allegations of the complaint. This answer, which was filed in the cause on the following day, did not purport to be an answer of the county, [**6] or of its board of commissioners, but of the three commissioners named.

On December 1, 1924, the newly elected board of commissioners held its first meeting and employed

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attorneys to defend the action which had been instituted by plaintiff against the county. These attorneys immediately moved to strike out the answer which had been filed by Pruitt, Pratt, and McCollum, and entered into an agreement with opposing counsel that the county should have 30 days from the action of the court on the motion within which to file answer. The court denied the motion on June 2, 1927, and held the answer filed by Pruitt, Pratt, and McCollum to be the answer of the county. An order was then entered allowing the county until August 1st to file answer, pursuant to stipulation, within which time the answer of the county was filed. This answer denied that the contract sued on was legal or binding, and for a further defense set forth the resolutions of the commissioners with regard to the building of the bridge, to which we have referred, and their communication to plaintiff. A reply was filed to this, and the case finally came to trial.

At the trial, plaintiff, over the objection [*304] [**7] of the county, was allowed to introduce in evidence the answer filed by Pruitt, Pratt, and McCollum, the contract was introduced, and proof was made of the value under the terms of the contract of the work done up to November 3, 1924. The county elicited on cross-examination proof as to the state of the work at the time of the passage of the resolutions to which we have referred. It then offered these resolutions in evidence, together with evidence as to the resignation of Pruitt, the acceptance of his resignation, and the appointment of Hampton; but all of this evidence was excluded, and the jury was instructed to return a verdict for plaintiff for the full amount of its claim. The county preserved exceptions to the rulings which were adverse to it, and contends that there was error on the part of the judge below in denying the motion to strike out the answer filed by Pruitt, Pratt, and McCollum; in allowing same to be introduced in evidence; in excluding the evidence offered of the resignation of Pruitt, the acceptance of his resignation, and the appointment of Hampton, and of the resolutions attempting to cancel the contract and the notices

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sent plaintiff pursuant thereto; and [**8] in directing a verdict for plaintiff in accordance with its claim.

As the county now admits the execution and validity of the contract, and the breach on its part, the ultimate question in the case is one as to the measure of plaintiff's recovery, and the exceptions must be considered with this in mind. Upon these exceptions, three principal questions arise for our consideration, viz.: (1) Whether the answer filed by Pruitt, Pratt, and McCollum was the answer of the county. If it was, the lower court properly refused to strike it out, and properly admitted it in evidence. (2) Whether, in the light of the evidence offerd and excluded, the resolutions to which we have referred, and the notices sent pursuant thereto, are to be deemed action on the part of the county. If they are not, the county has nothing upon which to base its position as to minimizing damages, and the evidence offered was properly excluded. And (3) whether plaintiff, if the notices are to be deemed action by the county, can recover under the contract for work done after they were received, or is limited to the recovery of damages for breach of contract as of that date.

With regard to the first question the [**9] learned District Judge held that the answer of Pruitt, Pratt, and McCollum was the answer of the county, but we think that this holding was based upon an erroneous view of the law. It appears, without contradiction, not only that their answer purports to have been filed by them individually, and not in behalf of the county or of the board of commissioners, but also that it was not authorized by the board of commissioners, acting as a board at a meeting regularly held. It appears that Pruitt, Pratt, and McCollum merely met at the county seat to consider the filing of an answer to plaintiff's complaint. This was not a "regular" meeting of the board, held on the first Mondays of December and June. It was not a "special" meeting held on the first Monday in some other month. It was not shown to be a meeting "called" by the chairman upon the written request of a member of the board, and advertised at the courthouse door and in a newspaper as provided by statute. Consol. St. §

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1296. And between the filing of the complaint and the filing of the answer there was not sufficient time for the advertising of a called meeting of the board. Consequently any action taken by Pruitt, Pratt, [**10] and McCollum with regard to filing an answer was not taken at a meeting of the board in legal session. Even if it be assumed that Pruitt continued to be a member of the board, and that he, Pratt, and McCollum constituted a majority thereof, nevertheless such majority could bind the county only by action taken at a meeting regularly held. The rule is well settled that the governing board of a county can act only as a body and when in legal session as such. 7 R. C. L. 941; 15 C. J. 460 and cases cited; O'Neal v. Wake County, 196 N. C. 184, 145 S. E. 28, 29; Grand Island & N. W. R. Co. v. Baker, 6 Wyo. 369, 45 P. 494, 34 L. R. A. 835, 71 Am. St. Rep. 926; Board of Com'rs of Jasper County v. Allman, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58, 68; Campbell County v. Howard & Lee, 133 Va. 19, 112 S. E. 876; Paola, etc., R. Co. v. Anderson County Com'rs, 16 Kan. 302, 310. As said in the case last cited: "* * * Commissioners casually meeting have no power to act for the county. There must be a session of the 'board.' This single entity, the 'board,' alone can by its action bind the county. And it exists only when legally convened."

The North Carolina case of Cleveland Cotton-Mills v. [**11] Commissioners, 108 N. C. 678, 13 S. E. 271, 274, established the rule in North Carolina.That case arose under the old law, which required bridge contracts involving more than $ 500 to be made with the concurrence of a majority of the justices [*305] of the peace of the county.Such a contract was made, and a majority of the justices of the county, who were not then in session, executed a written instrument approving it. Afterwards, at a regular meeting of the justices with the board of commissioners, a majority of the quorum of the justices present voted to ratify the contract. A divided court held that this ratification at the regular meeting was sufficient, although the majority of the quorum which voted for ratification was less than a majority of all of the justices of

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the county; but all of the members of the court agreed that the execution of the instrument by a majority of the justices when not in session was without effect. As to this, it was said in the majority opinion:

"We attach no importance to the paper signed by an actual majority of the whole number of justices of the peace of the county. The action contemplated by the law was that of the justices of the peace [**12] in a lawfully constituted meeting as a body, as in cases where the validity of an agreement made by the governing officials of any other corporation is drawn in question. Duke v. Markham, 105 N. C. 131, 10 S. E. 1017 [18 Am. St. Rep. 889]."

It will be seen that the court applied to this case, where the validity of the action of the governing officials of a public corporation was drawn in question, the rule laid down in Duke v. Markham, which is, of course, the well-settled rule in the case of private corporations, viz. that such officials can exercise their powers as members of the governing board only at a meeting regularly held. See, also, First National Bank v. Warlick, 125 N. C. 593, 34 S. E. 687; Everett v. Staton, 192 N. C. 216, 134 S. E. 492.

But in the case of O'Neal v. Wake County, supra, decided in 1928, the Supreme Court of North Carolina set at rest any doubt which may have existed in that state as to the question here involved. In holding that the county could not be held liable on a contract made at a joint meeting of the county commissioners, the county board of education, and a representative of the insurance department, the court said:

"A county makes it [**13] contracts through the agency of its board of commissioners; but to make a contract which shall be binding upon the county the board must act as a body convened in legal session, regular, adjourned, or special.A contract made by members composing the board when acting in their individual and not in their corporate capacity while assembled in a lawful meeting is not the contract of the county. As a rule authorized meetings are prerequisite to corporate action based upon deliberate conference and intelligent discussion of proposed

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measures. 7 R. C. L. 941; 15 C. J. 460; 43 C. J. 497; P. & F. R. Ry. Co. v. Com'rs of Anderson County, 16 Kan. 302; Kirkland v. State, 86 Fla. 84, 97 So. 502. The principle applies to corporations generally, and by the express terms of our statute, as stated above, every county is a corporate body."

We think, therefore, that Pruitt, Pratt, and McCollum, even if they constituted a majority of the board of commissioners, did not bind the county by their action in filing an answer admitting its liability, where no meeting of the board of commissioners was held according to law, and where, so far as appears, the other commissionrs were not even notified of what [**14] was being attempted. It is unthinkable that the county should be held bound by such action, especially where the commissioners attempting to bind it had taken no part in its government for nearly 10 months, and where the answer filed did not defend it in any particular, but, on the contrary, asserted its liability. If, therefore, the answer be considered as an attempt to answer on behalf of the county, it must be stricken out, because not authorized by its governing board; if considered as the answer of Pruitt, Pratt, and McCollum individually, it must go out because, having been sued in their official capacity, they had no right to answer individually. And, of course, not having been authorized by the county, the answer was not admissible as evidence against it on the trial of the cause.

Coming to the second inquiry -- i. e., whether the resolutions to which we have referred and the notices sent pursuant thereto are to be deemed the action of the county, and hence admissible in evidence on the question of damages -- it is to be observed that, along with the evidence of the resolutions and notices, the county offered evidence to the effect that Pruitt's resignation had been accepted [**15] before he attempted to withdraw same, and that thereafter Hampton was appointed, took the oath of office, entered upon the discharge of the duties of the office, and with Martin and Barber transacted the business of the board of commissioners until the coming into office of the new

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board. We think that this evidence, if true, shows (1) that Hampton, upon his appointment and qualification, became a member of the board in place of Pruitt, and that he, Martin, and [*306] Barber constituted a quorum for the transaction of its business; and (2) that, even if this were not true, Hampton was a de facto commissioner, and that his presence at meetings of the board with that of the other two commissioners was sufficient to constitute a quorum, so as to give validity to its proceedings.

The North Carolina statutes make no provision for resignations by members of the boards of county commissioners. A public officer, however, has at common law the right to resign his office, provided his resignation is accepted by the proper authority. Hoke v. Henderson, 15 N. C. 1, 25 Am. Dec. 677; U. S. v. Wright, Fed. Cas. No. 16,775; Rowe v. Tuck, 149 Ga. 88, 99 S. E. 303, 5 A. L. R. 113; Van Orsdall [**16] v. Hazard, 3 Hill (N. Y.) 243; Philadelphia v. Marcer, 8 Phila. (Pa.) 319; Gates v. Delaware County, 12 Iowa, 405; 22 R. C. L. 556, 557; note, 19 A. L. R. 39, and cases there cited. And, in the absence of statute regulating the matter, his resignation should be tendered to the tribunal or officer having power to appoint his successor. 22 R. C. L. 558; State v. Popejoy, 165 Ind. 177, 74 N. E. 994, 6 Ann. Cas. 687, and note; State ex rel. Conley v. Thompson, 100 W. Va. 253, 130 S. E. 456; State v. Huff, 172 Ind. 1, 87 N. E. 141, 139 Am. St. Rep. 355; State v. Augustine, 113 Mo. 21, 20 S. W. 651, 35 Am. St. Rep. 696. In the case last cited it is said:

"It is well-established law that, in the absence of express statutory enactment, the authority to accept the resignation of a public officer rests with the power to appoint a successor to fill the vacancy. The right to accept a resignation is said to be incidental to the power of appointment. 1 Dillon on Municipal Corporations (3d Ed.) § 224; Mechem on Public Offices, § 413; Van Orsdall v. Hazard, 3 Hill (N. Y.) 243; State v. Boecker, 56 Mo. 17."

In North Carolina, the officer having power to appoint the successor of a member of [**17] the board of county commissioners is the clerk of the superior court of the

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county. Consolidated Statutes of North Carolina, § 1294. It is clear, therefore, that, when Pruitt tendered his resignation to the clerk of the superior court, he tendered it to the proper authority.

The mere filing of the resignation with the clerk of the superior court did not of itself vacate the office of Pruitt, it was necessary that his resignation be accepted. Hoke v. Henderson, supra; Edwards v. U. S., 103 U. S. 471, 26 L. Ed. 314. But, after its acceptance, he had power to withdraw it. Mimmack v. U. S., 97 U. S. 426, 24 L. Ed. 1067; Murray v. State, 115 Tenn. 303, 89 S. W. 101, 5 Ann. Cas. 687, and note; State v. Augustine, supra; Gates v. Delaware County, supra; 22 R. C. L. 559. If, as the offer of proof seems to indicate, the resignation of Pruitt was accepted by the clerk prior to his attempt to withdraw it, the appointment of Hampton was unquestionably valid, and the latter, with Martin and Barber, constituted a quorum of the board of commissioners, with the result that action taken by them in meetings of the board regularly held was action by the county.

But, irrespective of the validity [**18] of Hampton's appointment, we think that he must be treated as a de facto officer, and that the action taken by him, Martin, and Barber in meetings regularly held is binding upon the county and upon those dealing with it. Hampton was appointed by the lawful appointing power. He took the oath of office and entered upon the discharge of the duties of a commissioner.The only government which the county had for a period of nearly 10 months was that which he and his associates, Martin and Barber, administered. If their action respecting this contract is to be ignored, then, for the same reason, their tax levy for the year must be treated as void, and the many transactions carried through at their 25 meetings, which were not attended by Pruitt, Pratt, or McCollum, must be set aside. This cannot be the law. It ought not be the law anywhere; it certainly is not the law in North Carolina. Section 3204 of the Consolidated Statutes provides:

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"3204. Persons admitted to office deemed to hold lawfully. Any person who shall, by the proper authority, be admitted and sworn into any office, shall be held, deemed, and taken, by force of such admission, to be rightfully in such office until, [**19] by judicial sentence, upon a proper proceeding, he shall be ousted therefrom, or his admission thereto be, in due course of law, declared void."

In the case of State v. Lewis, 107 N. C. 967, 12 S. E. 457, 458, 13 S. E. 247, 111 L. R. A. 105, the court quotes with approval the widely accepted definition and classification of de facto officers by Chief Justice Butler in the case of State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409, as follows:

"An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised -- First, without a known appointment or election, [*307] but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; second, under color of a known and valid appointment or election, but where the officer failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like; third, under color of a known election [**20] or appointment, void because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; fourth, under color of an election or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such."

It is clear that, if the appointment of Hampton be considered invalid, the case falls under the third class in the above classification; for Hampton was discharging the duties of a county commissioner under color of a known appointment, the invalidity of which, if invalid, arose from a want of power or irregularity unknown to the public.

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Other North Carolina cases supporting this conclusion are Burke v. Elliott, 26 N. C. 355, 42 Am. Dec. 142; Burton v. Patton, 47 N. C. 124, 62 Am. Dec. 194; Norfleet v. Staton, 73 N. C. 546, 21 Am. Rep. 479; Markham v. Simpson, 175 N. C. 135, 95 S. E. 106; State v. Harden, 177 N. C. 580, 98 S. E. 782; 22 R. C. L. 596, 597. This is not a case like Baker v. Hobgood, 126 N. C. 149, 35 S. E. 253, where there were rival boards, both attempting to discharge the duties of office; for, upon the [**21] appointment of Hampton, Pruitt attended no further meetings and left him in the unchallenged possession of the office.

The rule is well settled in North Carolina, as it is elsewhere, that the acts of a de facto officer will be held valid in respect to the public whom he represents and to third persons with whom he deals officially, notwithstanding there was a want of power to appoint him in the person or body which professed to do so. Norfleet v. Staton, supra; Markham v. Simpson, supra; 22 R. C. L. 601, 602, and cases cited.

Coming, then, to the third question -- i. e., as to the measure of plaintiff's recovery -- we do not think that, after the county had given notice, while the contract was still executory, that it did not desire the bridge built and would not pay for it, plaintiff could proceed to build it and recover the contract price. It is true that the county had no right to rescind the contract, and the notice given plaintiff amounted to a breach on its part; but, after plaintiff had received notice of the breach, it was its duty to do nothing to increase the damages flowing therefrom. If A enters into a binding contract to build a house for B, B, of course, has [**22] no right to rescind the contract without A's consent. But if, before the house is built, he decides that he does not want it, and notifies A to that effect, A has no right to proceed with the building and thus pile up damages. His remedy is to treat the contract as broken when he receives the notice, and sue for the recovery of such damages, as he may have sustained from the breach, including any profit which he would have realized upon performance, as well as any other losses which may have resulted to him. In the

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case at bar, the county decided not to build the road of which the bridge was to be a part, and did not build it. The bridge, built in the midst of the forest, is of no value to the county because of this change of circumstances.When, therefore, the county gave notice to the plaintiff that it would not proceed with the project, plaintiff should have desisted from further work. It had no right thus to pile up damages by proceeding with the erection of a useless bridge.

The contrary view was expressed by Lord Cockburn in Frost v. Knight, L. R. 7 Ex. 111, but, as pointed out by Prof. Williston (Williston on Contracts, vol. 3, p. 2347), it is not in harmony with the [**23] decisions in this country.The American rule and the reasons supporting it are well stated by Prof. Williston as follows:

"There is a line of cases running back to 1845 which holds that, after an absolute repudiation or refusal to perform by one party to a contract, the other party cannot continue to perform and recover damages based on full performance. This rule is only a particular application of the general rule of damages that a plaintiff cannot hold a defendant liable for damages which need not have been incurred; or, as it is often stated, the plaintiff must, so far as he can without loss to himself, mitigate the damages caused by the defendant's wrongful act. The application of this rule to the matter in question is obvious. If a man engages to have work done, and afterwards repudiates his contract before the work has been begun or when it had been only partially done, it is inflicting damage on the defendant without benefit to the plaintiff to allow the latter to insist on proceeding with the contract. The work may be useless to the defendant, and yet he would be forced to pay the full contract price. On [*308] the other hand, the plaintiff is interested only in [**24] the profit he will make out of the contract. If he receives this it is equally advantageous for him to use his time otherwise."

The leading case on the subject in this country is the New York case of Clark v. Marsiglia, 1 Denio (N. Y.) 317, 43 Am. Dec. 670. In that case defendant had employed

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plaintiff to paint certain pictures for him, but countermanded the order before the work was finished. Plaintiff, however, went on and completed the work and sued for the contract price. In reversing a judgment for plaintiff, the court said:

"The plaintiff was allowed to recover as though there had been no countermand of the order; and in this the court erred. The defendant, by requiring the plaintiff to stop work upon the paintings, violated his contract, and thereby incurred a liability to pay such damages as the plaintiff should sustain. Such damages would include a recompense for the labor done and materials used, and such further sum in damages as might, upon legal principles, be assessed for the breach of the contract; but the plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been."

And the [**25] rule as established by the great weight of authority in America is summed up in the following statement in 6 R. C. L. 1029, which is quoted with approval by the Supreme Court of North Carolina in the recent case of Novelty Advertising Co. v. Farmers' Mut. Tobacco Warehouse Co., 186 N. C. 197, 119 S. E. 196, 198:

"While a contract is executory a party has the power to stop performance on the other side by an explicit direction to that effect, subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that stage in the execution of the contract. The party thus forbidden cannot afterwards go on, and thereby increase the damages, and then recover such damages from the other party. The legal right of either party to violate, abandon, or renounce his contract, on the usual terms of compensation to the other for the damages which the law recognizes and allows, subject to the jurisdiction of equity to decree specific performance in proper cases, is universally recognized and acted upon."

This is in accord with the earlier North Carolina decision of Heiser v. Mears, 120 N. C. 443, 27 S. E. 117, in which it was held that, where [**26] a buyer countermands his order for goods to be manufactured for him under an

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executory contract, before the work is completed, it is notice to the seller that he elects to rescind his contract and submit to the legal measure of damages, and that in such case the seller cannot complete the goods and recover the contract price.See, also, Kingman & Co. v. Western Mfg. Co. (C. C. A. 8th) 92 F. 486; Davis v. Bronson, 2 N. D. 300, 50 N. W. 836, 16 L. R. A. 655 and note, 33 Am. St. Rep. 783, and note; Richards v. Manitowoc & Northern Traction Co., 140 Wis. 85, 121 N. W. 837, 133 Am. St. Rep. 1063.

We have carefully considered the cases of Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953, Roller v. George H. Leonard & Co. (C. C. A. 4th) 229 F. 607, and McCoy v. Justices of Harnett County, 53 N. C. 272, upon which plaintiff relies; but we do not think that they are at all in point. Roehm v. Horst merely follows the rule of Hockster v. De La Tour, 2 El. & Bl. 678, to the effect that where one party to any executory contract refuses to perform in advance of the time fixed for performance, the other party, without waiting for the time of performance, may sue at once for damages occasioned [**27] by the breach. The same rule is followed in Roller v. Leonard. In McCoy v. Justices of Harnett County the decision was that mandamus to require the justices of a county to pay for a jail would be denied, where it appeared that the contractor in building same departed from the plans and specifications. In the opinions in all of these some language was used which lends support to plaintiff's position, but in none of them was the point involved which is involved here, viz. whether, in application of the rule which requires that the party to a contract who is not in default do nothing to aggravate the damages arising from breach, he should not desist from performance of an executory contract for the erection of a structure when notified of the other party's repudiation, instead of piling up damages by proceeding with the work. As stated above, we think that reason and authority require that this question be answered in the affirmative. It follows that there was error in directing a verdict for plaintiff for the full amount of its claim. The

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measure of plaintiff's damage, upon its appearing that notice was duly given not to build the bridge, is an amount sufficient to compensate plaintiff [**28] for labor and materials expended and expense incurred in the part performance of the contract, prior to its repudiation, plus the profit which would have been realized if it had been carried out in accordance with its terms. See [*309] Novelty Advertising Co. v. Farmers' Mut. Tobacco Warehouse Co., supra.

Our conclusion, on the whole case, is that there was error in failing to strike out the answer of Pruitt, Pratt, and McCollum, and in admitting same as evidence against the county, in excluding the testimony offered by the county to which we have referred, and in directing a verdict for plaintiff. The judgment below will accordingly be reversed, and the case remanded for a new trial.

Reversed.

SHIRLEY MacLAINE PARKER, Plaintiff and Respondent, v. TWENTIETH CENTURY-FOX FILM CORPORATION, Defendant and Appellant. SUPREME COURT OF CALIFORNIA 3 Cal. 3d 176; 474 P.2d 689; 89 Cal. Rptr. 737; 44 A.L.R.3d 615 September 30, 1970

OPINIÓN POR: BURKE

[*179] [**690] Defendant Twentieth Century-Fox Film Corporation appeals from a summary judgment granting to plaintiff the recovery of agreed compensation under a written contract for her services as an actress in a motion picture. As will appear, we have concluded that the trial court correctly ruled in plaintiff's favor and that the judgment should be affirmed.

Plaintiff is well known as an actress, and in the contract between plaintiff and defendant is sometimes referred to as the "Artist." Under the contract, dated August 6, 1965, plaintiff was to play the female lead in defendant's contemplated production of a motion picture entitled "Bloomer Girl." The contract provided that defendant would pay plaintiff a minimum "guaranteed compensation" of $ 53,571.42 per week for 14 weeks commencing May 23, 1966, for a total of $ 750,000. Prior to May 1966

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defendant decided not to produce the picture and by a letter dated April 4, 1966, it notified plaintiff of that decision and that it would not "comply with our obligations to you under" the written contract.

By the same letter and with the professed purpose "to avoid any damage to you," defendant instead offered to employ [**691] plaintiff as the leading actress in another film tentatively entitled "Big Country, Big Man" (hereinafter, "Big Country"). The compensation offered was identical, as were 31 of [*180] the 34 numbered provisions or articles of the original contract. 1 Unlike "Bloomer Girl," however, which was to have been a musical production, "Big Country" was a dramatic "western type" movie. "Bloomer Girl" was to have been filmed in California; "Big Country" was to be produced in Australia. Also, certain terms in the proffered contract varied from those of the original. 2 Plaintiff was given one week within which to accept; she did not and the offer lapsed. Plaintiff then commenced this action seeking recovery of the agreed guaranteed compensation.

1 Among the identical provisions was the following found in the last paragraph of Article 2 of the original contract: "We [defendant] shall not be obligated to utilize your [plaintiff's] services in or in connection with the Photoplay hereunder, our sole obligation, subject to the terms and conditions of this Agreement, being to pay you the guaranteed compensation herein provided for."

2 Article 29 of the original contract specified that plaintiff approved the director already chosen for "Bloomer Girl" and that in case he failed to act as director plaintiff was to have approval rights of any substitute director. Article 31 provided that plaintiff was to have the right of approval of the "Bloomer Girl" dance director, and Article 32 gave her the right of approval of the screenplay.

Defendant's letter of April 4 to plaintiff, which contained both defendant's notice of breach of the "Bloomer Girl" contract and offer of the lead in "Big Country," eliminated or impaired each of those rights. It read in part as follows: "The terms and conditions of our

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offer of employment are identical to those set forth in the 'Bloomer Girl' Agreement, Articles 1 through 34 and Exhibit A to the Agreement, except as follows:

"1. Article 31 of said Agreement will not be included in any contract of employment regarding 'Big Country, Big Man' as it is not a musical and it thus will not need a dance director.

"2. In the 'Bloomer Girl' agreement, in Articles 29 and 32, you were given certain director and screenplay approvals and you had preapproved certain matters. Since there simply is insufficient time to negotiate with you regarding your choice of director and regarding the screenplay and since you already expressed an interest in performing the role in 'Big Country, Big Man,' we must exclude from our offer of employment in 'Big Country, Big Man' any approval rights as are contained in said Articles 29 and 32; however, we shall consult with you respecting the director to be selected to direct the photoplay and will further consult with you with respect to the screenplay and any revisions or changes therein, provided, however, that if we fail to agree . . . the decision of . . . [defendant] with respect to the selection of a director and to revisions and changes in the said screenplay shall be binding upon the parties to said agreement."

The complaint sets forth two causes of action. The first is for money due under the contract; the second, based upon the same allegations as the first, is for damages resulting from defendant's breach of contract. Defendant in its answer admits the existence and validity of the contract, that plaintiff complied with all the conditions, covenants and promises and stood ready to complete the performance, and that defendant breached and "anticipatorily repudiated" the contract. It denies, however, that any money is due to plaintiff either under the contract or as a result of its breach, and pleads as an affirmative defense to both causes of action plaintiff's [*181] allegedly deliberate failure to mitigate damages, asserting that she unreasonably refused to accept its offer of the leading role in "Big Country."

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Plaintiff moved for summary judgment under Code of Civil Procedure section 437c, the motion was granted, and summary judgment for $ 750,000 plus interest was entered in plaintiff's favor. This appeal by defendant followed.

(1a) The familiar rules are that the matter to be determined by the trial court on a motion for summary judgment is whether facts have been presented which give rise to a triable factual issue. The [**692] court may not pass upon the issue itself. (2) Summary judgment is proper only if the affidavits or declarations 3 in support of the moving party would be sufficient to sustain a judgment in his favor and his opponent does not by affidavit show facts sufficient to present a triable issue of fact. The affidavits of the moving party are strictly construed, and doubts as to the propriety of summary judgment should be resolved against granting the motion. Such summary procedure is drastic and should be used with caution so that it does not become a substitute for the open trial method of determining facts. (3) The moving party cannot depend upon allegations in his own pleadings to cure dificient affidavits, nor can his adversary rely upon his own pleadings in lieu or in support of affidavits in opposition to a motion; however, a party can rely on his adversary's pleadings to establish facts not contained in his own affidavits. (Slobojan v. Western Travelers Life Ins. Co. (1969) 70 Cal.2d 432, 436-437 [74 Cal.Rptr. 895, 450 P.2d 271]; and cases cited.) (1b) Also, the court may consider facts stipulated to by the parties and facts which are properly the subject of judicial notice. (Ahmanson Bank & Trust Co. v. Tepper (1969) 269 Cal.App.2d 333, 342 [74 Cal.Rptr. 774]; Martin v. General Finance Co. (1966) 239 Cal.App.2d 438, 442 [48 Cal.Rptr. 773]; Goldstein v. Hoffman (1963) 213 Cal.App.2d 803, 814 [29 Cal.Rptr. 334]; Thomson v. Honer (1960) 179 Cal.App.2d 197, 203 [3 Cal.Rptr. 791].)

3 In this opinion "affidavits" includes "declarations under penalty of perjury." (See Code Civ. Proc., § 2015.5.)

As stated, defendant's sole defense to this action which resulted from its deliberate breach of contract is that in

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rejecting defendant's substitute offer of employment plaintiff unreasonably refused to mitigate damages.

(4) The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. (W. F. Boardman Co. v. Petch (1921) 186 Cal. 476, 484 [*182] [199 P. 1047]; De Angeles v. Roos Bros., Inc. (1966) 244 Cal.App.2d 434, 441-442 [52 Cal.Rptr. 783]; de la Falaise v. Gaumont-British Picture Corp. (1940) 39 Cal.App.2d 461, 469 [103 P.2d 447], and cases cited; see also Wise v. Southern Pac. Co. (1970) 1 Cal.3d 600, 607-608 [83 Cal.Rptr. 202, 463 P.2d 426].) 4 (5) However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages. (Gonzales v. Internat. Assn. of Machinists (1963) 213 Cal.App.2d 817, 822-824 [29 Cal.Rptr. 190]; Harris v. Nat. Union etc. Cooks, Stewards (1953) 116 Cal.App.2d 759, 761 [254 P.2d 673]; Crillo v. Curtola (1949) 91 Cal.App.2d 263, 275 [204 P.2d 941]; de la Falaise v. Gaumont-British Picture Corp., supra, 39 Cal.App.2d 461, 469; Schiller v. Keuffel & Esser Co. (1963) 21 Wis.2d 545 [124 N.W.2d 646, 651]; 28 A.L.R. 736, 749; 22 Am.Jur.2d, Damages, §§ 71- 72, p. 106.)

4 Although it would appear that plaintiff was not discharged by defendant in the customary sense of the term, as she was not permitted by defendant to enter upon performance of the "Bloomer Girl" contract, nevertheless the motion for summary judgment was submitted for decision upon a stipulation by the parties that "plaintiff Parker was discharged."

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In the present case defendant has raised no issue of reasonableness of efforts by plaintiffs to obtain other employment; the sole issue is whether plaintiff's refusal of defendant's substitute offer of "Big Country" may be used in [**693] mitigation. Nor, if the "Big Country" offer was of employment different or inferior when compared with the original "Bloomer Girl" employment, is there an issue as to whether or not plaintiff acted reasonably in refusing the substitute offer. Despite defendant's arguments to the contrary, no case cited or which our research has discovered holds or suggests that reasonableness is an element of a wrongfully discharged employee's option to reject, or fail to seek, different or inferior employment lest the possible earnings therefrom be charged against him in mitigation of damages. 5

5 Instead, in each case the reasonableness referred to was that of the efforts of the employee to obtain other employment that was not different or inferior; his right to reject the latter was declared as an unqualified rule of law. Thus, Gonzales v. Internat. Assn. of Machinists, supra, 213 Cal.App.2d 817, 823-824, holds that the trial court correctly instructed the jury that plaintiff union member, a machinist, was required to make "such efforts as the average [member of his union] desiring employment would make at that particular time and place" (italics added); but, further, that the court properly rejected defendant's offer of proof of the availability of other kinds of employment at the same or higher pay than plaintiff usually received and all outside the jurisdiction of his union, as plaintiff could not be required to accept different employment or a nonunion job.

In Harris v. Nat. Union etc. Cooks, Stewards, supra, 116 Cal.App.2d 759, 761, the issues were stated to be, inter alia, whether comparable employment was open to each plaintiff employee, and if so whether each plaintiff made a reasonable effort to secure such employment. It was held that the trial court properly sustained an objection to an offer to prove a custom of accepting a job in a lower rank when work in the higher rank was not available, as "The

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duty of mitigation of damages . . . does not require the plaintiff 'to seek or to accept other employment of a different or inferior kind.'" (P. 764 [5].)

See also: Lewis v. Protective Security Life Ins. Co. (1962) 208 Cal.App.2d 582, 584 [25 Cal.Rptr. 213]: "honest effort to find similar employment . . . ." (Italics added.)

de la Falaise v. Gaumont-British Picture Corp., supra, 39 Cal.App.2d 461, 469: "reasonable effort."

Erler v. Five Points Motors, Inc. (1967) 249 Cal.App.2d 560, 562 [57 Cal.Rptr. 516]: Damages may be mitigated "by a showing that the employee, by the exercise of reasonable diligence and effort, could have procured comparable employment . . . ." (Italics added.)

Savitz v. Gallaccio (1955) 179 Pa.Super. 589 [118 A.2d 282, 286]; Atholwood Dev. Co. v. Houston (1941) 179 Md. 441 [19 A.2d 706, 708]; Harcourt & Co. v. Heller (1933) 250 Ky. 321 [62 S.W.2d 1056]; Alaska Airlines, Inc. v. Stephenson (1954) 217 F.2d 295, 299 [15 Alaska 272]; United Protective Workers v. Ford Motor Co. (7th Cir. 1955) 223 F.2d 49, 52 [48 A.L.R.2d 1285]; Chisholm v. Preferred Bankers' Life Assur. Co. (1897) 112 Mich. 50 [70 N.W. 415]; each of which held that the reasonableness of the employee's efforts, or his excuses for failure, to find other similar employment was properly submitted to the jury as a question of fact. NB: Chisholm additionally approved a jury instruction that a substitute offer of the employer to work for a lesser compensation was not to be considered in mitigation, as the employee was not required to accept it.

Williams v. National Organization, Masters, etc. (1956) 384 Pa. 413 [120 A.2d 896, 901 [13]]: "Even assuming that plaintiff . . . could have obtained employment in ports other than . . . where he resided, legally he was not compelled to do so in order to mitigate his damages." (Italics added.)

[*183] (6) Applying the foregoing rules to the record in the present case, with all intendments in favor of the party opposing the summary judgment motion -- here, defendant

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-- it is clear that the trial court correctly ruled that plaintiff's failure to accept defendant's tendered substitute employment could not be applied in mitigation of damages because the offer of the "Big Country" lead was of employment both different and inferior, and that no factual dispute was presented on that issue. The mere circumstance that "Bloomer Girl" was to be a musical review calling upon plaintiff's talents as a dancer as [**694] well as an actress, and was to be produced in the City of Los Angeles, whereas "Big Country" was a straight dramatic role in a "Western Type" story taking place in an opal mine in Australia, demonstrates the difference in kind between the two employments; the female lead as a dramatic actress in a western style motion picture can by no stretch of imagination be considered the equivalent of or substantially similar to the lead in a song-and-dance production.

[*184] (7) Additionally, the substitute "Big Country" offer proposed to eliminate or impair the director and screenplay approvals accorded to plaintiff under the original "Bloomer Girl" contract (see fn. 2, ante), and thus constituted an offer of inferior employment. No expertise or judicial notice is required in order to hold that the deprivation or infringement of an employee's rights held under an original employment contract converts the available "other employment" relied upon by the employer to mitigate damages, into inferior employment which the employee need not seek or accept. (See Gonzales v. Internat. Assn. of Machinists, supra, 213 Cal.App.2d 817, 823-824; and fn. 5, post.)

(8) Statements found in affidavits submitted by defendant in opposition to plaintiff's summary judgment motion, to the effect that the "Big County" offer was not of employment different from or inferior to that under the "Bloomer Girl" contract, merely repeat the allegations of defendant's answer to the complaint in this action, constitute only conclusionary assertions with respect to undisputed facts, and do not give rise to a triable factual issue so as to defeat the motion for summary judgment. (See Colvig v. KSFO (1964) 224 Cal.App.2d 357, 364 [36

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Cal.Rptr. 701]; Dashew v. Dashew Business Machines, Inc. (1963) 218 Cal.App.2d 711, 715 [32 Cal.Rptr. 682]; Hatch v. Bush (1963) 215 Cal.App.2d 692, 707 [30 Cal.Rptr. 397, 13 A.L.R.3d 503]; Barry v. Rodgers (1956) 141 Cal.App.2d 340, 342 [296 P.2d 898].)

In view of the determination that defendant failed to present any facts showing the existence of a factual issue with respect to its sole defense -- plaintiff's rejection of its substitute employment offer in mitigation of damages -- we need not consider plaintiff's further contention that for various reasons, including the provisions of the original contract set forth in footnote 1, ante, plaintiff was excused from attempting to mitigate damages.

The judgment is affirmed.

DISCREPA DEL FUNDAMENTO: SULLIVAN

The basic question in this case is whether or not plaintiff acted reasonably in rejecting defendant's offer of alternate employment. The answer depends upon whether that offer (starring in "Big Country, Big Man") was an offer of work that was substantially similar to her former employment (starring in "Bloomer Girl") or of work that was of a different or inferior kind. To my mind this is a factual issue which the trial court should not have determined on a motion for summary judgment. [*185] The majority have not only repeated this error but have compounded it by applying the rules governing mitigation of damages in the employer-employee context in a misleading fashion. Accordingly, I respectfully dissent.

The familiar rule requiring a plaintiff in a tort or contract action to mitigate damages embodies notions of fairness and socially responsible behavior which are fundamental to our jurisprudence. Most broadly stated, it precludes the recovery of damages which, through the exercise of due diligence, could have been avoided. Thus, in essence, it is a rule requiring reasonable conduct in commercial affairs. [**695] This general principle governs the obligations of an employee after his employer has wrongfully repudiated or terminated the employment contract. Rather than permitting the employee simply to

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remain idle during the balance of the contract period, the law requires him to make a reasonable effort to secure other employment. 1 He is not obliged, however, to seek or accept any and all types of work which may be available. Only work which is in the same field and which is of the same quality need be accepted. 2

1 The issue is generally discussed in terms of a duty on the part of the employee to minimize loss. The practice is long-established and there is little reason to change despite Judge Cardozo's observation of its subtle inaccuracy. "The servant is free to accept employment or reject it according to his uncensored pleasure. What is meant by the supposed duty is merely this, that if he unreasonably reject, he will not be heard to say that the loss of wages from then on shall be deemed the jural consequence of the earlier discharge. He has broken the chain of causation, and loss resulting to him thereafter is suffered through his own act." (McClelland v. Climax Hosiery Mills (1930) 252 N.Y. 347, 359 [169 N.E. 605, 609], concurring opinion.)

2 This qualification of the rule seems to reflect the simple and humane attitude that it is too severe to demand of a person that he attempt to find and perform work for which he has no training or experience. Many of the older cases hold that one need not accept work in an inferior rank or position nor work which is more menial or arduous. This suggests that the rule may have had its origin in the bourgeois fear of resubmergence in lower economic classes.

Over the years the courts have employed various phrases to define the type of employment which the employee, upon his wrongful discharge, is under an obligation to accept. Thus in California alone it has been held that he must accept employment which is "substantially similar" (Lewis v. Protective Security Life Ins. Co. (1962) 208 Cal.App.2d 582, 584 [25 Cal.Rptr. 213]; de la Falaise v. Gaumont-British Picture Corp. (1940) 39 Cal.App.2d 461, 469 [103 P.2d 447]); "comparable employment" (Erler v. Five Points Motors, Inc. (1967) 249 Cal.App.2d 560, 562 [57 Cal.Rptr. 516]; Harris v. Nat.

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Union etc. Cooks, Stewards (1953) 116 Cal.App.2d 759, 761 [254 P.2d 673]); employment "in the same general line of the first employment" (Rotter v. Stationers Corp. (1960) 186 Cal.App.2d 170, 172 [8 Cal.Rptr. 690]); "equivalent to his prior position" (De Angeles v. Roos Bros., Inc. (1966) 244 Cal.App.2d 434, 443 [52 Cal.Rptr. 783]); "employment in a similar capacity" (Silva v. McCoy (1968) 259 Cal.App.2d 256, 260 [*186] [66 Cal.Rptr. 364]); employment which is "not . . . of a different or inferior kind. . . ." (Gonzales v. Internat. Assn. of Machinists (1963) 213 Cal.App.2d 817, 822 [29 Cal.Rptr. 190].) 3

3 See also 28 A.L.R. 736, 740-742; 15 Am.Jur. 431.

For reasons which are unexplained, the majority cite several of these cases yet select from among the various judicial formulations which they contain one particular phrase, "Not of a different or inferior kind," with which to analyze this case. I have discovered no historical or theoretical reason to adopt this phrase, which is simply a negative restatement of the affirmative standards set out in the above cases, as the exclusive standard. Indeed, its emergence is an example of the dubious phenomenon of the law responding not to rational judicial choice or changing social conditions, but to unrecognized changes in the language of opinions or legal treatises. 4 However, the [**696] phrase is a serviceable one and my concern is not with its use as the standard but rather with what I consider its distortion.

4 The earliest California case which the majority cite is de la Falaise v. Gaumont-British Picture Corp., supra, 39 Cal.App.2d at p. 469. de la Falaise states "The 'other employment' which the discharged employee is bound to seek is employment of a character substantially similar to that of which he has been deprived; he need not enter upon service of a different or inferior kind, . . ." de la Falaise cites, in turn, two sources as authority for this proposition. The first is 18 R.C.L. (Ruling Case Law) 529. That digest, however, states only that the "discharged employee . . . need not enter upon service of a more menial kind." (Italics added.) It was in this form that the rule entered California

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law explicitly, Gregg v. McDonald (1925) 73 Cal.App. 748, 757 [239 P. 373], quoting the text verbatim. The second citation is to 28 A.L.R. 737. The author of the annotation states: "The principal question with which this annotation is concerned is the kind of employment which the employee is under a duty to seek or accept in order to reduce the damages caused by his wrongful discharge. Must one who is skilled in some special work he is employed to do, as an actor, musician, accountant, etc., seek or accept employment of an entirely different nature?" (Italics added.) (28 A.L.R. 736.) In answering that question in the negative, the annotation employs the language adopted by the majority: The employee is "not obliged to seek or accept other employment of a different or inferior kind, . . ." (Id. at p. 737.) Rather than a restatement of a generally agreed upon rule, however, the phrase is an epitomization of the varied formulations found in the cases cited. (See 28 A.L.R. 740-742.)

The relevant language excuses acceptance only of employment which is of a different kind. (Gonzales v. Internat. Assn. of Machinists, supra, 213 Cal.App.2d 817, 822; Harris v. Nat. Union etc. Cooks, Stewards, supra, 116 Cal.App.2d 759, 761; de la Falaise v. Gaumont-British Picture Corp., supra, 39 Cal.App.2d 461, 469.) It has never been the law that the mere existence of differences between two jobs in the same field is sufficient, as a matter of law, to excuse an employee wrongfully discharged from one from accepting the other in order to mitigate damages. Such an approach would effectively eliminate any obligation of an employee to attempt to [*187] minimize damage arising from a wrongful discharge. The only alternative job offer an employee would be required to accept would be an offer of his former job by his former employer.

Although the majority appear to hold that there was a difference "in kind" between the employment offered plaintiff in "Bloomer Girl" and that offered in "Big Country" (ante, at p. 183), an examination of the opinion makes crystal clear that the majority merely point out differences between the two films (an obvious

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circumstance) and then apodically assert that these constitute a difference in the kind of employment. The entire rationale of the majority boils down to this: that the "mere circumstances" that "Bloomer Girl" was to be a musical review while "Big Country" was a straight drama "demonstrates the difference in kind" since a female lead in a western is not "the equivalent of or substantially similar to" a lead in a musical. This is merely attempting to prove the proposition by repeating it. It shows that the vehicles for the display of the star's talents are different but it does not prove that her employment as a star in such vehicles is of necessity different in kind and either inferior or superior.

I believe that the approach taken by the majority (a superficial listing of differences with no attempt to assess their significance) may subvert a valuable legal doctrine. 5 The inquiry in cases such as this should not be whether differences between the two jobs exist (there will always be differences) but whether the differences which are present are substantial enough to constitute differences in the kind of employment or, alternatively, whether they render the substitute work employment of an inferior kind.

5 The values of the doctrine of mitigation of damages in this context are that it minimizes the unnecessary personal and social (e.g., nonproductive use of labor, litigation) costs of contractual failure. If a wrongfully discharged employee can, through his own action and without suffering financial or psychological loss in the process, reduce the damages accruing from the breach of contract, the most sensible policy is to require him to do so. I fear the majority opinion will encourage precisely opposite conduct.

It seems to me that this inquiry involves, in the instant case at least, factual determinations which are improper on a motion [**697] for summary judgment. Resolving whether or not one job is substantially similar to another or whether, on the other hand, it is of a different or inferior kind, will often (as here) require a critical appraisal of the similarities and differences between them in light of the importance of these differences to the employee. This necessitates a weighing of the evidence, and it is precisely

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this undertaking which is forbidden on summary judgment. (Garlock v. Cole (1962) 199 Cal.App.2d 11, 14 [18 Cal.Rptr. 393].)

[*188] This is not to say that summary judgment would never be available in an action by an employee in which the employer raises the defense of failure to mitigate damages. No case has come to my attention, however, in which summary judgment has been granted on the issue of whether an employee was obliged to accept available alternate employment. Nevertheless, there may well be cases in which the substitute employment is so manifestly of a dissimilar or inferior sort, the declarations of the plaintiff so complete and those of the defendant so conclusionary and inadequate that no factual issues exist for which a trial is required. This, however, is not such a case.

It is not intuitively obvious, to me at least, that the leading female role in a dramatic motion picture is a radically different endeavor from the leading female role in a musical comedy film. Nor is it plain to me that the rather qualified rights of director and screenplay approval contained in the first contract are highly significant matters either in the entertainment industry in general or to this plaintiff in particular. Certainly, none of the declarations introduced by plaintiff in support of her motion shed any light on these issues. 6 Nor do they attempt to explain why she declined the offer of starring in "Big Country, Big Man." Nevertheless, the trial court granted the motion, declaring that these approval rights were "critical" and that their elimination altered "the essential nature of the employment."

6 Plaintiff's declaration states simply that she has not received any payment from defendant under the "Bloomer Girl" contract and that the only persons authorized to collect money for her are her attorney and her agent.

The declaration of Herman Citron, plaintiff's theatrical agent, alleges that prior to the formation of the "Bloomer Girl" contract he discussed with Richard Zanuck, defendant's vice president, the conditions under which

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plaintiff might be interested in doing "Big Country"; that it was Zanuck who informed him of Fox's decision to cancel production of "Bloomer Girl" and queried him as to plaintiff's continued interest in "Big Country"; that he informed Zanuck that plaintiff was shocked by the decision, had turned down other offers because of her commitment to defendant for "Bloomer Girl" and was not interested in "Big Country." It further alleges that "Bloomer Girl" was to have been a musical review which would have given plaintiff an opportunity to exhibit her talent as a dancer as well as an actress and that "Big Country" was a straight dramatic role; the former to have been produced in California, the latter in Australia. Citron's declaration concludes by stating that he has not received any payment from defendant for plaintiff under the "Bloomer Girl" contract.

Benjamin Neuman's declaration states that he is plaintiff's attorney; that after receiving notice of defendant's breach he requested Citron to make every effort to obtain other suitable employment for plaintiff; that he (Neuman) rejected defendant's offer to settle for $ 400,000 and that he has not received any payment from defendant for plaintiff under the "Bloomer Girl" contract. It also sets forth correspondence between Neuman and Fox which culminated in Fox's final rejection of plaintiff's demand for full payment.

The plaintiff's declarations were of no assistance to the trial court in its effort to justify reaching this conclusion on summary judgment. Instead, it was forced to rely on judicial notice of the definitions of "motion picture," "screenplay" and "director" (Evid. Code, § 451, subd. (e)) and then on [*189] judicial notice of practices in the film industry which were purportedly of "common knowledge." (Evid. Code, § 451, subd. (f) or § 452, subd. (g).) This use of [**698] judicial notice was error. Evidence Code section 451, subdivision (e) was never intended to authorize resort to the dictionary to solve essentially factual questions which do not turn upon conventional linguistic usage. More important, however, the trial court's notice of "facts

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commonly known" violated Evidence Code section 455, subdivision (a). 7 Before this section was enacted there were no procedural safeguards affording litigants an opportunity to be heard as to the propriety of taking judicial notice of a matter or as to the tenor of the matter to be noticed. Section 455 makes such an opportunity (which may be an element of due process, see Evid. Code, § 455, Law Revision Com. Comment (a)) mandatory and its provisions should be scrupulously adhered to. "[Judicial] notice can be a valuable tool in the adversary system for the lawyer as well as the court" (Kongsgaard, Judicial Notice (1966) 18 Hastings L.J. 117, 140) and its use is appropriate on motions for summary judgment. Its use in this case, however, to determine on summary judgment issues fundamental to the litigation without complying with statutory requirements of notice and hearing is a highly improper effort to "cut the Gordion knot of involved litigation." (Silver Land & Dev. Co. v. California Land Title Co. (1967) 248 Cal.App.2d 241, 242 [56 Cal.Rptr. 178].)

7 Evidence Code section 455 provides in relevant part: "With respect to any matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action: (a) If the trial court has been requested to take or has taken or proposes to take judicial notice of such matter, the court shall afford each party reasonable opportunity, before the jury is instructed or before the cause is submitted for decision by the court, to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed."

The majority do not confront the trial court's misuse of judicial notice. They avoid this issue through the expedient of declaring that neither judicial notice nor expert opinion (such as that contained in the declarations in opposition to the motion) 8 is necessary to reach the trial court's conclusion. [*190] Something, however, clearly is needed to support this conclusion. Nevertheless, the majority make no effort to justify the judgment through an examination of

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the plaintiff's declarations. Ignoring the obvious insufficiency of these declarations, [**699] the majority announce that "the deprivation or infringement of an employee's rights held under an original employment contract" changes the alternate employment offered or available into employment of an inferior kind.

8 Fox filed two declarations in opposition to the motion; the first is that of Frank Ferguson, Fox's chief resident counsel. It alleges, in substance, that he has handled the negotiations surrounding the "Bloomer Girl" contract and its breach; that the offer to employ plaintiff in "Big Country" was made in good faith and that Fox would have produced the film if plaintiff had accepted; that by accepting the second offer plaintiff was not required to surrender any rights under the first (breached) contract nor would such acceptance have resulted in a modification of the first contract; that the compensation under the second contract was identical; that the terms and conditions of the employment were substantially the same and not inferior to the first; that the employment was in the same general line of work and comparable to that under the first contract; that plaintiff often makes pictures on location in various parts of the world; that article 2 of the original contract which provides that Fox is not required to use the artist's services is a standard provision in artists' contracts designed to negate any implied covenant that the film producer promises to play the artist in or produce the film; that it is not intended to be an advance waiver by the producer of the doctrine of mitigation of damages.

The second declaration is that of Richard Zanuck. It avers that he is Fox's vice president in charge of production; that he has final responsibility for casting decisions; that he is familiar with plaintiff's ability and previous artistic history; that the offer of employment for "Big Country" was in the same general line and comparable to that of "Bloomer Girl"; that plaintiff would not have suffered any detriment to her image or reputation by appearing in it; that elimination of director and script approval rights would not injure plaintiff; that plaintiff has

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appeared in dramatic and western roles previously and has not limited herself to musicals; and that Fox would have complied with the terms of its offer if plaintiff had accepted it.

I cannot accept the proposition that an offer which eliminates any contract right, regardless of its significance, is, as a matter of law, an offer of employment of an inferior kind. Such an absolute rule seems no more sensible than the majority's earlier suggestion that the mere existence of differences between two jobs is sufficient to render them employment of different kinds. Application of such per se rules will severely undermine the principle of mitigation of damages in the employer-employee context.

I remain convinced that the relevant question in such cases is whether or not a particular contract provision is so significant that its omission creates employment of an inferior kind. This question is, of course, intimately bound up in what I consider the ultimate issue: whether or not the employee acted reasonably. This will generally involve a factual inquiry to ascertain the importance of the particular contract term and a process of weighing the absence of that term against the countervailing advantages of the alternate employment. In the typical case, this will mean that summary judgment must be withheld.

In the instant case, there was nothing properly before the trial court by which the importance of the approval rights could be ascertained, much less evaluated. Thus, in order to grant the motion for summary judgment, the trial court misused judicial notice. In upholding the summary judgment, the majority here rely upon per se rules which distort the process [*191] of determining whether or not an employee is obliged to accept particular employment in mitigation of damages.

I believe that the judgment should be reversed so that the issue of whether or not the offer of the lead role in "Big Country, Big Man" was of employment comparable to that of the lead role in "Bloomer Girl" may be determined at trial.

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DONALD WASSENAAR, Plaintiff-Respondent-Petitioner, v. THEANNE PANOS, d/b/a THE TOWNE HOTEL, Defendant-Appellant. SUPREME COURT OF WISCONSIN 111 Wis. 2d 518; 331 N.W.2d 357; 40 A.L.R.4th 266 February 4, 1983, Argued March 29, 1983, Decided

OPINIÓN POR: ABRAHAMSON

[*520] [**359] This is a review of an unpublished decision of the court of appeals filed May 6, 1982, reversing a judgment of the circuit court for Milwaukee county, Louis J. Ceci, Circuit Judge. The circuit court entered a judgment in favor of an employee, Donald Wassenaar, against his former employer, Theanne Panos, d/b/a The Towne Hotel, enforcing the stipulated damages clause in the employment contract and confirming a $ 24,640 jury award. The circuit court interpreted the stipulated damage clause in the contract as providing that in the event of wrongful discharge the employee was to be paid a sum equal to his salary for the unexpired term of the contract. The court of appeals reversed, holding the stipulated damages clause unenforceable as a penalty and remanding the cause to the circuit court for a new trial on the issue of damages only.

This court granted the employee's petition for review limiting the issue on review to whether the clause in the [*521] employment contract stipulating damages is a valid and enforceable liquidated damages provision or is, as a matter of public policy, an unenforceable penalty. We use the term "stipulated damages" herein to refer to the contract and the term "liquidated damages" to refer to stipulated damages which a court holds to be reasonable and will enforce. This court also asked the parties to address the sub-issue of whether a liquidated damages clause in an employment contract may serve to eliminate the employee's duty to mitigate damages, a question the court of appeals did not address. We conclude that where the stipulated damages clause is a valid provision for liquidated damages, the doctrine of mitigation of damages is not applicable to

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determine the damages awarded the nonbreaching party. In this case we hold that the stipulated damages clause is a valid provision for liquidated damages, not a penalty, and that the employee's earnings after the breach do not reduce the damages award. Accordingly, we reverse the decision of the court of appeals and affirm the judgment of the circuit court.

The dispute centers on the stipulated damages clause of a written employment contract by which the employee-plaintiff, Donald Wassenaar, was hired as general manager of the employer-defendant, Towne Hotel. The employment contract is brief. It sets forth the employee's duties, his beginning salary, and his periodic pay increases. The contract further provides for a three-year term of employment beginning on January 1, 1977, renewable at the employee's option, and stipulates damages in case the employer terminates the employee's employment before the expiration of the contract. The stipulated damages clause in issue here reads as follows:

"IT IS FURTHER UNDERSTOOD, that should this contract be terminated by the Towne Hotel prior to its expiration date, the Towne Hotel will be responsible for [*522] fulfilling the entire financial obligation as set forth within this agreement for the full period of three (3) years." 1

1 The clause can be interpreted to provide that the employee will receive the entire salary for three years regardless of when the employment was terminated. We reject this interpretation of the clause, as did the employee and the circuit court.

The employer terminated Wassenaar's employment as of March 31, 1978, 21 months prior to the contract's expiration date. Wassenaar was unemployed from April 1, 1978, until June 14, 1978, when he obtained employment in a Milwaukee area hotel where he remained employed at least until the time of trial in May, 1981.

The employee sued for damages. The employer answered the complaint and as an affirmative defense asserted that the employee had failed to mitigate damages.

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In a pretrial motion to strike the employer's affirmative defense that the employee had failed to mitigate damages, the employee argued that mitigation was irrelevant because the contract contained a valid stipulated damages clause. The circuit court struck the employer's affirmative defense, ruling that the employee had no duty to mitigate damages, apparently inferentially [**360] ruling that the stipulated damages clause was valid.

After a trial on the remaining issues and in response to special verdict questions, the jury found that the person negotiating the contract on behalf of the employer was authorized as the employer's agent to enter into the employment contract and that the employer terminated the employment without just cause. The circuit court, over the employee's objection, submitted to the jury the question of what sum of money would compensate the employee for his losses resulting from the breach of the employment agreement. 2 The jury answered $ 24,640, [*523] which is the sum the employee had calculated as his damages on the basis of the stipulated damages clause of the contract, that is, his salary for 21 months, the unexpired term of the contract.

2 The circuit court submitted the following question to the jury and instructed the jury that the employee had the burden of proving compensatory damages:

"Question No. 5: What sum of money will compensate the plaintiff, Donald Wassenaar, for his losses resulting from the breach of his employment agreement?

"Answer: $ 24,640.00 (12 votes)."

The employee objected to inclusion of the damages question in the special verdict, arguing that once the circuit court had ruled on the validity of the liquidated damages clause the calculation under the clause could easily be done by the court. The employee was correct. Since the circuit court inferentially ruled that the stipulated damages clause was valid, the jury's function to determine damages was superceded by the agreement, and special question number 5 was superfluous. Any error was, however, harmless. 5 Corbin, Contracts, sec. 1061, p. 353 (1964).

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If the circuit court had invalidated the stipulated damages clause, the issue of damages would be for the jury. Restatement (Second) of Contracts, sec. 356, comment a, p. 157 (1979).

On review, the court of appeals characterized the question of whether a stipulated damages clause should be held void as a penalty because it fixes unreasonably large damages as a question of law to be determined independently by the reviewing court. It then scrutinized the stipulated damages clause and decided that the clause was void as a penalty. The court of appeals reached that conclusion reasoning that the amount of damages for breach of an employment contract could easily be measured and proved at trial and that the contractual formula fixing damages at full salary without considering how long the employee would need to find a new job or the probable earnings from substitute employment was unreasonable on its face. In its analysis, the court of appeals did not consider any facts other than the actual contract language and the black-letter law relating to the measure of damages for breach of employment contracts.

We agree with the court of appeals that the validity of a stipulated damages clause is a question of law for the trial judge rather than a mixed question of fact and law [*524] for the jury. 3 The validity of a stipulated damages clause is a matter of public policy, and as in other contract cases the question of contractual validity as a matter of public policy is an issue the trial judge initially decides. 4 But we disagree [**361] with the court of appeals that the label of "question of law" automatically relieves the trial court from its duty to consider evidence or gives the appellate court free rein in reviewing the trial court's decision.

3 McConnell v. L.C.L. Transit Co., 42 Wis. 2d 429, 438, 167 N.W.2d 226 (1969); Lake Geneva v. States Improvement Co., 45 Wis. 2d 50, 56, 172 N.W.2d 176 (1969); United Leasing & Financial Services, Inc. v. R.F. Optical, Inc., 103 Wis. 2d 488, 492, 309 N.W.2d 23 (Ct. App. 1981); Fields Foundation, Ltd. v. Christensen, 103 Wis. 2d 465, 475, 309 N.W.2d 125 (Ct. App. 1981).

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4 McCormick, Damages, sec. 157, p. 622 (1935); cf. Corbin, Contracts, sec. 554B, p. 451-52 (1982 Supplement, pt. 1) (unconscionability is a question of public policy reserved to the judge); 6A Corbin, Contracts, sec. 1375, p. 10 (1962) (illegality is a question of public policy reserved to the judge).

It has been suggested that the issue of the validity of a stipulated damages provision be treated as a question of fact for the jury at the trial and as a fact issue in appellate review. This treatment could conserve judicial appellate resources. See Layton Mfg. Co. v. Dulien Steel, Inc., 277 Ore. 343, 560 P.2d 1058, 1065 (1977) (Lent, J. concurring); Dean Vincent, Inc. v. McDonough, 281 Ore. 239, 574 P.2d 1096, 1101 n. 7, 1103 (1978). The Oregon court appears to hold that the defendant has the burden to prove unreasonableness. But if the defendant fails, and the jury must determine damages, it is unclear who has the burden to prove those damages.

Even though the trial court's conclusion regarding the validity of the stipulated damages clause is a legal conclusion [*525] -- a policy judgment -- that legal conclusion will frequently be derived from a resolution of disputed facts or inferences. 5 The trial judge, not the jury, determines these facts and inferences. In deciding whether a stipulated damages clause is valid, then, the trial judge should inquire into all relevant circumstances, including such matters as the existence and extent of the anticipated and actual injury to the nonbreaching party.

5 See McConnell v. L.C.L. Transit Co., 42 Wis. 2d 429, 439, 167 N.W.2d 226 (1969); Fields Foundation, Ltd. v. Christensen, 103 Wis. 2d 465, 475, 309 N.W.2d 125 (Ct. App. 1981); McCormick, Damages, sec. 157, p. 622 (1935).

The trial court's decision that a clause is or is not valid involves determinations of fact and law and will be reviewed as such. The reviewing court will uphold the factual determinations underlying its legal conclusion unless they are contrary to the great weight and clear preponderance of the evidence. Fields Foundation, Ltd. v.

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Christensen, 103 Wis. 2d 465, 475, 309 N.W.2d 125 (Ct. App. 1981). Whether the facts fulfill the legal standard, here reasonableness, is a determination of law, id., and ordinarily the appellate court need not defer to the trial court's determination of a question of law. United Leasing & Financial Services, Inc. v. R.F. Optical, 103 Wis. 2d 488, 492, 309 N.W.2d 23 (Ct. App. 1981). Nevertheless, because the trial court's legal conclusion, that is, whether the clause is reasonable, is so intertwined with the factual findings supporting that conclusion, the appellate court should give weight to the trial court's decision, although the trial court's decision is not controlling. See Wright, The Doubtful Omniscence of Appellate Courts, 41 Minn. L. Rev. 751, 778-82 (1956); Morris, Law and Fact, 55 Harv L. Rev 1303, 1304 (1942).

To facilitate review, the trial court should separately state, on the record, its findings of fact and conclusions of law on the validity of the stipulated damages clause. [*526] The circuit court in this case did not state findings of fact and only inferentially ruled that the clause was valid when it ruled on the mitigation of damages issue. This court shall review the record to determine whether it supports the circuit court's legal conclusion.

Because the employer sought to set aside the bargained-for contractual provision stipulating damages, it had the burden of proving facts which would justify the trial court's concluding that the clause should not be enforced. Northwestern Motor Car, Inc. v. Pope, 51 Wis. 2d 292, 295, 187 N.W.2d 200 (1971). Placing the burden of proof on the challenger is consistent with giving the non-breaching party the advantage inherent in stipulated damages clauses of eliminating the need to prove damages, and with the general principle that the law assumes that bargains are enforceable and that the party asking the court to intervene to invalidate a bargain should demonstrate the justice of his or her position. 6 As we discuss below, we conclude that the employer failed to carry its burden, and we affirm the circuit court's conclusion that the stipulated damages clause is valid.

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6 McCormick, Damages, sec. 157 (1935); Note, Liquidated Damages as Prima Facie Evidence, 51 Ind. L.J. 189, 205 (1975). But see 5 Corbin, Contracts, sec. 1062, p. 355 (1964).

We turn now to the test that the trial court (and the appellate court) should apply in deciding whether a stipulated damages clause is valid. The overall single test of validity is whether the clause is reasonable under the totality of circumstances. 7 [**362] See sec. 356(1), Restatement [*527] (Second) of Contracts (1979), 8 and sec. 402.718 (1), Stats. 1979-80. 9

7 Seeman v. Biemann, 108 Wis. 365, 375, 84 N.W. 490 (1900); Sheffield-King Milling Co. v. Jacobs, 170 Wis. 389, 398, 175 N.W. 796 (1920); Dekowski v. Stachura, 176 Wis. 154, 156-57, 185 N.W. 549 (1922); Dick v. Heisler, 184 Wis. 77, 82, 198 N.W. 734 (1924); Fields Foundation, Ltd. v. Christensen, 103 Wis. 2d 465, 475, 309 N.W.2d 125 (Ct. App. 1981).

See McCormick, Damages, sec. 149, p. 606 (1935); 5 Williston, Contracts, sec. 779, p. 695 (Jaeger 3d ed. 1961); 5 Corbin, Contracts, sec. 1059, p. 346 (1964); Calamari and Perillo, Law of Contracts, sec. 14-31, p. 565 (2d ed. 1977); Restatement (Second) of Contracts, sec. 356(1) (1979); 3 Hawkland, Uniform Commercial Code Series, sec. 2-718:01, p. 426 (1982).

See also Clarkson, Miller, and Muris, Liquidated Damages v. Penalties: Sense or Nonsense?, 1978 Wis. L. Rev. 351, 356; Goetz and Scott, Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach, 77 Colum. L. Rev. 554 (1977); Macneil, Power of Contract and Agreed Remedies, 47 Cornell L.Q. 495, 503 (1962); Comment, Liquidated Damages: A Comparison of the Common Law and the Uniform Commercial Code, 45 Fordham L. Rev. 1349, 1350 (1977); Note, Liquidated Damages and Penalties under the Uniform Commercial Code and the Common Law: An Economic Analysis of Contract Damages, 72 Nw. U.L. Rev. 1055, 1065 (1978).

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8 Sec. 356(1), Restatement (Second) of Contracts (1979), sets forth the test as follows:

"Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty."

9 Sec. 402.718(1), Stats. 1979-80, which is U.C.C. sec. 2-718(1), provides that liquidated damages may be agreed upon, "but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty." For discussion of the meaning of this provision see Comment, Liquidated Damages: A Comparison of the Common Law and the Uniform Commercial Code, 45 Fordham L. Rev. 1349 (1977); Note, Liquidated Damages and Penalties under the Uniform Commercial Code and the Common Law: An Economic Analysis of Contract Damages, 72 Nw. U.L. Rev. 1055, 1069-77 (1978).

[*528] The reasonableness test is a compromise the courts have struck between two competing viewpoints toward stipulated damages clauses, one favoring enforcement of stipulated damages clauses and the other disfavoring such clauses.

Enforcement of stipulated damages clauses is urged because the clauses serve several purposes. The clauses allow the parties to control their exposure to risk by setting the payment for breach in advance. They avoid the uncertainty, delay, and expense of using the judicial process to determine actual damages. They allow the parties to fashion a remedy consistent with economic efficiency in a competitive market, and they enable the parties to correct what the parties perceive to be inadequate judicial remedies by agreeing upon a formula which may include damage elements too uncertain or remote to be

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recovered under rules of damages applied by the courts. In addition to these policies specifically relating to stipulated damages clauses, considerations of judicial economy and freedom of contract favor enforcement of stipulated damages clauses.

A competing set of policies disfavors stipulated damages clauses, and thus courts have not been willing to enforce stipulated damages clauses blindly without carefully scrutinizing them. Public law, not private law, ordinarily defines the remedies of the parties. Stipulated damages are an exception to this rule. Stipulated damages allow private parties to perform the judicial function of providing the remedy in breach of contract cases, namely, compensation of the nonbreaching party, and courts must ensure that the private remedy does not stray too far from the legal principle of allowing compensatory damages. Stipulated damages substantially in excess of injury may justify an inference of unfairness in bargaining or an objectionable in terrorem agreement to deter a party from breaching the contract, to secure [*529] performance, and to punish the breaching party if the deterrent is ineffective.

The reasonableness test strikes a balance between the two competing sets of policies by ensuring that the court respects the parties' bargain but prevents abuse. See Macneil, Power of Contract and Agreed Remedies, 47 Cornell L.Q. 495 (1962).

Over time, the cases and commentators have established several factors to help determine [**363] whether a particular clause is reasonable: 10 (1) Did the parties intend to provide for damages or for a penalty? 11 (2) Is the injury caused by the breach one that is difficult or incapable [*530] of accurate estimation at the time of contract? 12 and (3) Are the stipulated damages a reasonable forecast of the harm caused by the breach? 13

10 Acknowledging as early as 1859 that the tests for distinguishing between liquidated damages and a penalty are ambiguous and that the court decisions are not uniform, Pierce v. Jung, 10 Wis. *30 (1859), this court in 1862 described the tests, which have remained substantially the

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same today, as follows: "where the damages were uncertain and incapable of definite ascertainment, the damages fixed in the contract . . . might be recovered. But . . . where, from the very nature of the provisions of the contract, it appeared that the actual damage might be accurately ascertained, and that it might be of trifling importance as compared with the amount fixed as stipulated damages, there it would be considered as a penalty." Fitzpatrick v. Cottingham, 14 Wis. *219, 221 (1862), citing Pierce v. Jung, supra.

Sec. 339, Restatement of Contracts (1932), set forth the test as follows:

"339. Liquidated Damages and Penalties.

"(1) An agreement, made in advance of breach, fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless

"(a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and

"(b) the harm that is caused by the breach is one that is incapable or very difficult or accurate estimation."

Compare sec. 356(1), Restatement (Second) of Contracts (1979), note 8 supra.

11 City of Madison v. American Sanitary Engineering Co., 118 Wis. 480, 503-504, 95 N.W. 1097 (1903); Davis v. La Crosse Hospital Association, 121 Wis. 579, 588, 99 N.W. 351 (1904); Grant Marble Co. v. Marshall & Ilsley Bank, 166 Wis. 547, 555, 165 N.W. 14 (1918); McConnell v. L.C.L. Transit Co., 42 Wis. 2d 429, 438, 167 N.W.2d 226 (1969).

12 Pierce v. Jung, 10 Wis. *30, 33 (1859); Fitzpatrick v. Cottingham, 14 Wis. *219, 221 (1862); Seeman v. Biemann, 108 Wis. 365, 374, 84 N.W. 490 (1900); Sheffield-King Milling Co. v. Jacobs, 170 Wis. 389, 399, 175 N.W. 796 (1920).

See also United Order of American Bricklayers and Stone Masons v. Thorleif Larsen and Son, Inc., 519 F.2d 331, 337 (7th Cir. 1975); 5 Corbin, Contracts, sec. 1060, p. 348 (1964); Calamari and Perillo, Law of Contracts, sec.

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14-31, p. 565 (2d ed. 1977); Restatement (Second) of Contracts, sec. 356(1), comment b (1979).

13 Davis v. La Crosse Hospital Association, 121 Wis. 579, 589, 99 N.W. 351 (1904); United Leasing & Financial Services, Inc. v. R.F. Optical, 103 Wis. 2d 488, 492, 309 N.W.2d 23 (Ct. App. 1981).

See also McCormick, Damages, sec. 150, p. 608 (1935); 5 Corbin, Contracts, sec. 1059, p. 345 (1964).

Recent discussions of the test of reasonableness have generally discarded the first factor, subjective intent of the parties, because subjective intent has little bearing on whether the clause is objectively reasonable. 14 The label the parties apply to the clause, which might indicate their intent, has some evidentiary value, but it is not conclusive. Seeman v. Biemann, 108 Wis. 365, 374, 84 N.W. 490 (1900).

14 5 Williston, Contracts, sec. 778, p. 687, 693 (Jaeger 3d ed. 1961); 5 Corbin, Contracts, sec. 1058, p. 337 (1964); Calamari and Perillo, Law of Contracts, sec. 14-31, p. 565 (2d ed. 1977); Restatement (Second) of Contracts, sec. 356(1), comment c (1979).

The second factor, sometimes referred to as the "difficulty of ascertainment" test, is generally viewed as helpful in assessing the reasonableness of the clause. The greater the difficulty of estimating or proving damages, [*531] the more likely the stipulated damages will appear reasonable. Sheffield-King Milling Co. v. Jacobs, 170 Wis. 389, 402-403, 175 N.W. 796 (1920). If damages are readily ascertainable, a significant deviation between the stipulated amount and the ascertainable amount will appear unreasonable. City of Madison v. American Sanitary Engineering Co., 118 Wis. 480, 503-504, 95 N.W. 1097 (1903). The "difficulty of ascertainment" test has several facets, depending on whether the stipulated damages clause is viewed from the perspective of the time of contracting or the time of breach (or trial). These facets include the difficulty of producing proof of damages at trial; the difficulty of determining what damages the breach caused; the difficulty of ascertaining what damages the parties

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contemplated when they contracted; the absence of a standardized [**364] measure of damages for the breach; and the difficulty of forecasting, when the contract is made, all the possible damages which may be caused or occasioned by the various possible breaches. 15

15 For a discussion of the "difficulty of ascertainment" factor, see Macneil, Power of Contract and Agreed Remedies, 47 Cornell L.Q. 495, 502 (1962); Sweet, Liquidated Damages in California, 60 Calif. L. Rev. 84, 131 (1972); Clarkson, Miller, and Muris, Liquidated Damages v. Penalties: Sense or Nonsense?, 1978 Wis. L. Rev. 351, 354-56; Note, Liquidated Damages and Penalties under the Uniform Commercial Code and the Common Law: An Economic Analysis of Contract Damages, 72 Nw. U.L. Rev. 1055, 1063-65 (1978).

The third factor concerns whether the stipulated damages provision is a reasonable forecast of compensatory damages. Courts test the reasonableness of the parties' forecast, as they test the "difficulty of ascertainment" by looking at the stipulated damages clause from the perspective of both the time of contracting and the time of the breach (or trial).

The second and third factors are intertwined, and both use a combined prospective-retrospective approach. [*532] Although courts have frequently said that the reasonableness of the stipulated damages clause must be judged as of the time of contract formation (the prospective approach) and that the amount or existence of actual loss at the time of breach or trial is irrelevant, except as evidence helpful in determining what was reasonable at the time of contracting (the retrospective approach), the cases demonstrate that the facts available at trial significantly affect the courts' determination of the reasonableness of the stipulated damages clause. If the damages provided for in the contract are grossly disproportionate to the actual harm sustained, the courts usually conclude that the parties' original expectations were unreasonable. 16 Our prior decisions indicate that this court has employed the prospective-retrospective approach in determining the

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reasonableness of the stipulated damages clauses and has looked at the harm anticipated at the time of contract formation and the actual harm at the time of breach (or trial). See, e.g., Fields Foundation, Ltd. v. Christensen, 103 Wis. 2d 465, 475-76, 309 N.W.2d 125 (Ct. App. 1981); Seeman v. Biemann, 108 Wis. 365, 374-75, 84 N.W. 490 (1900).

16 5 Corbin, Contracts, sec. 1063, p. 362-64 (1964), states:

"The probable injury that the parties had reason to foresee is a fact that largely determines the question whether they made a genuine pre-estimate of that injury; but the justice and equity of enforcement depend also upon the amount of injury that has actually occurred. It is to be observed that hindsight is frequently better than foresight, and that, in passing judgment upon the honesty and genuineness of the pre-estimate made by the parties, the court cannot help but be influenced by its knowledge of subsequent events."

See also Note, Liquidated Damages and Penalties under the Uniform Commercial Code and the Common Law: An Economic Analysis of Contract Damages, 72 Nw. U.L. Rev. 1055, 1065-69 (1978); 3 Hawkland, Uniform Commercial Code Series, sec. 2-718:02, p. 428 (1982).

[*533] As the above discussion demonstrates, the various factors and approaches to determine reasonableness are not separate tests, each of which must be satisfied for a stipulated damages clause to stand. Reasonableness of the stipulated damages clause cannot be determined by a mechanical application of the three factors cited above. 3 Hawkland, Uniform Commercial Code Series, sec. 2-718:01, p. 426 (1982). Courts may give different interpretations to or importance to the various factors in particular cases. Sweet, Liquidated Damages in California, 60 Calif. L. Rev. 84, 131-36 (1972); Clarkson, Miller, and Muris, Liquidated Damages v. Penalties: Sense or Nonsense?, 1978 Wis. L. Rev. 351, 378-83.

In ruling on the reasonableness of a stipulated damages clause, the trial judge should take into account not only

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these factors but also the policies that gave rise to the adoption of the reasonableness test as the test for distinguishing between enforceable liquidated damages provisions and unenforceable penalty provisions. 17

17 For a discussion of policies favoring judicial acceptance of stipulated damages and those justifying the courts' scrutiny of such clauses, see generally: Restatement (Second) of Contracts, sec. 356, comment a (1979); Dobbs, Law of Remedies, sec. 12.5, p. 823 (1973); Clarkson, Miller, and Muris, Liquidated Damages v. Penalties: Sense or Nonsense?, 1978 Wis. L. Rev. 351; Goetz and Scott, Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach, 77 Colum. L. Rev. 554 (1977); Sweet, Liquidated Damages in California, 60 Calif. L. Rev. 84 (1972); Macneil, Power of Contract and Agreed Remedies, 47 Cornell L.Q. 495 (1962); Note, Liquidated Damages as Prima Facie Evidence, 51 Ind. L.J. 189 (1975).

[**365] With the reasonableness test and the policies underlying the test in mind, we now consider the circuit court's conclusion that the stipulated damages clause is reasonable. The employer argues that the stipulated damages clause is void as a penalty because the harm to the employee [*534] was capable of estimation at the formation of the contract and was relatively easy to prove at trial. The employer further contends that calculating damages based on the entire wage for the unexpired term of the employment contract does not reasonably forecast the loss caused by the breach because such a calculation gives the employee a windfall recovery. The employer's arguments are not without merit. Under the rules of appellate review we will review the record for facts which support the circuit court's conclusion that the stipulated damages clause is reasonable.

When the parties to an employment contract estimate the harm which might result from the employer's breach, they do not know when a breach might occur, whether the employee will find a comparable job, and if he or she does, where the job will be or what hardship the employee will

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suffer. Nevertheless, the standard measure of damages provides, as the court of appeals noted in its opinion, a simple formula which is generally fairly easy to apply. According to black-letter law, when an employee is wrongfully discharged, damages are the salary the employee would have received during the unexpired term of the contract plus the expenses of securing other employment reduced by the income which he or she has earned, will earn, or could with reasonable diligence earn, during the unexpired term. 18 These damages are usually easily ascertainable at the time of trial.

18 Tetzlaff v. Pilot Press, 270 Wis. 214, 217, 70 N.W.2d 678 (1955); Gauf v. Milwaukee Athletic Club, 151 Wis. 333, 334-35, 139 N.W. 207 (1912).

The measure of damages in Smith v. Beloit Corp., 40 Wis. 2d 550, 559-60, 162 N.W.2d 585 (1968), to which the court of appeals refers, appears inconsistent with the general rule, since the period of wage loss up to the beginning of successor employment was used by the court to fix damages. No deduction was made for earnings for the remainder of the one-year employment period, even though plaintiff's subsequent earnings were noted as slightly higher than wages paid in the position from which he was discharged. However, the court substantially reduced the original jury verdict from $ 35,000 to $ 2,920; and no written contract existed fixing a definite term. These distinguishing facts may explain the measure of damages used in the case.

[*535] The standard calculation of damages after breach, however, may not reflect the actual harm suffered because of the breach. In addition to the damages reflected in the black-letter formulation, an employee may suffer consequential damages, including permanent injury to professional reputation, loss of career development opportunities, and emotional stress. When calculating damages for wrongful discharge courts strictly apply the rules of foreseeability, mitigation, and certainty and rarely award consequential damages. Damages for injury to the employee's reputation, for example, are generally

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considered too remote and not in the parties' contemplation. 19 Thus, [**366] actual harm suffered and damages that [*536] would be awarded in a legal action for breach of contract may not be the same. Nevertheless, in providing for stipulated damages, the parties to the contract could anticipate the types of damages not usually awarded by law. 20 The usual arguments against allowing recovery for consequential damages -- that they are not foreseeable and that no dollar value can be set by a court -- fail when the parties foresee the possibility of such harm and agree on an estimated amount.

19 Smith v. Beloit Corp., 40 Wis. 2d 550, 559, 162 N.W.2d 585 (1968); O'Leary v. Sterling Extruder Corp., 533 F. Supp. 1205, 1209-1210 (E.D. Wis. 1982); Calamari and Perillo, Law of Contracts, sec. 14-18, p. 546 (2d ed. 1977); McCormick, Damages, sec. 163, p. 635 (1935); Dobbs, Law of Remedies, sec. 12.25, p. 927 (1973).

Apparently some jurisdictions do allow recovery of consequential damages for breach of certain employment contracts. See cases in Annot., Recovery by Writer, Artist, or Entertainer for Loss of Publicity or Reputation Resulting from Breach of Contract, 96 ALR3d 437 (1979).

Dean McCormick, in his 1935 treatise on damages, foreshadowed the inadequacy of the measure of damages for wrongful discharge: "[T]he courts might expand their measure of compensation for breach of the employment contract by recognizing that deprivation of a job, if more than a casual one, not only affects usually a man's reputation and prestige, but ordinarily may so shake his sense of security as to inspire, even in men of firmness, deep fear and distress. It is a question of judicial statesmanship whether interests such as these should come to be recognized in measuring damages for wrongful discharge." McCormick, Damages, sec. 163, p. 639.

20 See United Order of American Bricklayers and Stone Masons v. Thorleif Larsen & Son, Inc., 519 F.2d 331, 337 (7th Cir. 1975), where in discussing the

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reasonableness of the stipulated sum the court considered noncompensable harms resulting from breach as follows:

"While the difficulties of the advance accurate estimation of damages are otherwise adequately demonstrated . . . we do note the difficulty, if not impossibility, of quantifying the intangible damages to labor-management harmony resulting from failure to comply with provisions which have been hammered out in bargaining sessions."

See also Clarkson, Miller, and Muris, Liquidated Damages v. Penalties: Sense or Nonsense?, 1978 Wis. L. Rev. 351, 375-76; Goetz and Scott, Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach, 77 Colum. L. Rev. 554, 572-75 (1977).

We do not know in the case at bar how the parties calculated the stipulated amount, but we do know that both the employee and employer were concerned about job security. The employee desired a steady, long-term job and the employer wanted the employee, who was experienced in managing the Towne Hotel, to remain on the job. The parties did not suggest that the stipulated damages clause resulted from unequal bargaining power. The contract drafted by the employer provided for a fixed term of employment with a provision for stipulated damages in the amount of unpaid wages if the employer breached. Under these circumstances it is not unreasonable [*537] to assume that the parties might have anticipated elements of consequential damages and drafted the stipulated damages clause to include salary lost while out of work, expenses of finding a new job, lower salary on the new job, and consequential damages.

In examining the instant stipulated damages clause and the record, we conclude that the parties' estimate at the time of contract formation of anticipated damages was reasonable when consequential damages are taken into account. Consequential damages may be difficult to ascertain at the time of contracting or breach and are difficult to prove at trial. The contract formula of full salary

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for the period after breach seems to be a simple and fair way of calculating all damages.

The employer argues that even if the stipulated amount is a reasonable forecast at the time of contract formation of anticipated loss, the amount is unreasonable from the perspective of the time of trial because the employee suffered no loss whatsoever, or if he suffered any loss it is disproportionate to (that is, significantly less than) the stipulated damages.

This court appears to have adopted the position that if the nonbreaching party suffers no damage the stipulated damages clause is a penalty. See Hathaway v. Lynn, 75 Wis. 186, 43 N.W. 956 (1889). 21 Apparently [**367] the court [*538] reasons, first, that if there is no damage, awarding stipulated damages violates the compensation principle of contract damages, and, second, that since one way to test reasonableness of stipulated damages is by comparing the estimated damages with actual harm suffered, if there is no harm the stipulated damages is automatically disproportionate to the harm. The court of appeals recently indicated approval of this doctrine in Fields Foundation, Ltd. v. Christensen, 103 Wis. 2d 465, 476, 309 N.W.2d 125 (Ct. App. 1981), stating that "[a] defendant against whom a liquidated damages clause is sought to be enforced 'should be allowed to show that there has in fact been no injury at all.'" (Citing 5 Corbin Contracts sec. 1063, p. 368 (1964).)

21 See also Norwalk Door Closer Co. v. Eagle Lock and Screw Co., 153 Conn. 681, 220 A.2d 263, 268 (1966); Massman Construction Co. v. City of Greenville, 147 F.2d 925 (5th Cir. 1945); Restatement (Second) of Contracts, sec. 356(1), comment b (1979); 5 Corbin, Contracts, sec. 1063, p. 365, n. 60 (1964); Calamari and Perillo, Law of Contracts, sec. 14-31, p. 566, n. 97 (2d ed. 1977); Clarkson, Miller, and Muris, Liquidated Damages v. Penalties: Sense or Nonsense?, 1978 Wis. L. Rev. 351, 380, n. 82; Annot., Right to Amount Stipulated in Contract for Breach Where It Appears There Were No Actual Damages or There Was

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No Proof of Such Damages, 34 ALR 1336 (1925). But see McCormick, Damages, sec. 150, p. 610 (1935).

In this case we find it difficult to uphold the employer's position that the employee suffered no harm, because there is evidence in the record that the employee did suffer harm in being unemployed for approximately two and a half months after his discharge. At the end of this time, the employee obtained employment at another hotel, but there is no evidence that the jobs he held were comparable in terms of salary, opportunity for advancement, etc., to the job he held as manager of the Towne Hotel. There is no evidence that the employee's total compensation from the new job was equal to or exceeded the salary under the breached contract, and the record does not reveal whether the employee suffered consequential damages. All we know is that the employee appears to have suffered some harm. This case is therefore distinguishable from Fields Foundation, Ltd. v. Christensen, 103 Wis. 2d 465, 476, 309 N.W.2d 125 (Ct. App. 1981), upon which the employer relies, where the court held the stipulated damages clause unenforceable when the record established that the nonbreaching party suffered no harm.

[*539] Since the record in this case can be read to show that the employee suffered some harm, the question remains whether the stipulated damages are so much greater than the loss suffered by the employee that the stipulated damages constitute a penalty.

The employer has repeatedly asserted that this clause is a penalty because it does not take into account the amount the employee earned during the unexpired term of the contract. The employer argues that allowing the employee to recover the stipulated damages in this case gives the employee a windfall because he receives both the agreed upon salary and the ability to sell his services to another employer during the unexpired term of the contract: the employee will receive 21 months salary from the defendant employer and 18 months salary from the new employer. Ordinarily the circuit court would, in this type of stipulated damages case, use evidence of the employee's actual or

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potential earnings in assessing the overall reasonableness of the clause, since subsequent earnings would be relevant to the issue of the employee's actual loss resulting from the breach. In this case, as we discuss further below, there is no evidence in the record showing the employee's subsequent earnings, so there is no evidence supporting the employer's position that the employee would get a windfall from enforcement of the stipulated damages clause. 22

22 Courts in other jurisdictions have upheld employment contract stipulated damages clauses similar to the one in issue here. Zeppenfeld v. Morgan, 185 S.W.2d 898 (Mo. App. 1945); Anderson v. Cactus Heights Country Club, 80 S. Dak. 417, 125 N.W.2d 491 (1963); Musman v. Modern Deb, Inc., 50 A.D.2d 761, 377 N.Y.S.2d 17 (1975); Seco Chemicals, Inc. v. Stewart, 169 Ind. App. 624, 349 N.E.2d 733 (1976).

As we said previously, the employer, the party challenging the contract, carries the burden of proving that the stipulated amount of damages is grossly disproportionate to the actual harm and thus unreasonable. Northwestern [*540] Motor Car, Inc. v. Pope, 51 Wis. 2d 292, 295, 187 N.W.2d 200 (1971). The employer has failed to carry the burden of production and persuasion in this case. When the employee challenged the employer's affirmative defense of failure [**368] to mitigate damages in a pretrial motion to strike the defense, he pointed out the effect of the stipulated damages clause and clearly set forth the applicable law concerning the test to be applied to determine the validity of the clause. The employer did not directly refute the clause's validity in it's reply brief at the pretrial motion, and neither party offered evidence concerning reasonableness. The employer insisted that the employee had a duty to mitigate despite the stipulated damages clause. The circuit court granted the employee's motion to strike the defense on the basis of pretrial briefs, ruling that the employee had no duty to mitigate damages because the parties had stipulated their damages as part of their bargain. The circuit court thus inferentially upheld the validity of the clause.

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At trial the employer attempted to put in evidence regarding the employee's salary at his new job. The circuit court refused to admit this evidence indicating that it had already ruled on the mitigation issue.

Even if this court could say that the circuit court erred in not directly considering the issue of reasonableness in its pretrial ruling and in not admitting evidence at pretrial or trial of the employee's earnings after discharge, this court could not reverse the circuit court on this record. At trial the employer took the erroneous position that the burden was on the employee to prove the reasonableness of the stipulated damages clause, not on the employer to prove the unreasonableness of the clause. 23 Although the employer attempted to elicit [*541] testimony from the employee regarding how much he earned on the new job, in order to prove the unreasonableness of the damages clause, the employer made no offer of proof as to what the testimony would be. An offer of proof is needed to preserve the facts underlying the objection for the record, sec. 901.03(1) (b), Stats. 1979-80.

23 The employer proposed the following special verdict question and instruction relating to the validity of the liquidated damages clause which the circuit court refused to submit to the jury:

"Q: Is the amount claimed by Donald Wassenaar as liquidated damages greatly disproportionate to any loss or injury resulting from the termination of his employment with the Towne Hotel?

"J.I.: A plaintiff seeking enforcement of a liquidated damages clause has the burden of establishing that at the time the contract was entered into the nature of the agreement was such that it would be impracticable or extremely difficult for a court to fix the actual damage in the event of a breach. Rice v. Schmid, 18 Cal. 2d 382, 385, 115 P.2d 498, 499 (1941)."

The employer failed to get facts into the record showing that the employee suffered no damages or that his damages were significantly less than the stipulated amount. In short, the employer did not meet his burden of proof on

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the unreasonableness of the stipulated damages clause. Since we conclude that the record shows that the employee suffered some actual injury and that the record does not show that actual damages are disproportionate to the stipulated damages, we affirm the circuit court's ruling that the stipulated damages provision is reasonable and enforceable.

This court asked the parties to brief what it characterized as a sub-issue, namely, the employee's duty to mitigate damages. In breach of contract cases not involving liquidated damages clauses, this court has consistently held that a discharged employee has a duty to use ordinary care and reasonable efforts to seek other comparable employment and that in calculating damages the employer should be credited to the extent that the employee obtains work and earns wages or might have [*542] done so. Klug v. Flambeau Plastics Corp., 62 Wis. 2d 141, 155, 214 N.W.2d 281 (1974); State ex rel. Schilling and Klinger v. Baird, 65 Wis. 2d 394, 397, 222 N.W.2d 666 (1974); Tetzlaff v. Pilot Press, 270 Wis. 214, 217, 70 N.W.2d 678 (1955); Dobbs, Remedies, sec. 12.25, p. 925 (1973); McCormick, Damages, secs. 159-60, pp. 627-30 (1935).

The employer relies on United Leasing & Financial Services, Inc. v. R.F. Optical, 103 Wis. 2d 488, 309 N.W.2d 23 (Ct. App. 1981), to support its position that a liquidated damages clause requires the nonbreaching party [**369] to mitigate his losses. United Leasing is inapposite since in that case the liquidated damages clause itself provided that the defaulting lessee could be credited with the proceeds received by the lessor from re-rentals or resale of the equipment after repossession, reducing the lessee's liability for accelerated rents. The court of appeals did not decide in United Leasing that a liquidated damage clause which did not provide for such a credit would be unenforceable. 103 Wis. 2d at 494, n. 2.

While evidence of the employee's earnings after the employer's breach may be relevant in meeting the employer's burden of proving that the stipulated damages

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clause is unreasonable, once the court determines that the clause is reasonable, proof of the employee's actual loss (including what he earned or might have earned on another job) is no longer relevant. See 5 Corbin Contracts sec. 1062, p. 355 (1964). We hold that once a stipulated damages clause is found reasonable, the liquidated damages should not be reduced at trial by an amount the employee did earn or could have earned. See Tollefson v. Green Bay Packers, Inc., 256 Wis. 318, 41 N.W.2d 201 (1950). Recalculating liquidated damages to credit the breaching party with the amount the employee earned or could have earned is antithetical to [*543] the policies favoring liquidated damages clauses. Our holding comports with the rule in other jurisdictions where courts have not required employees to reduce the amount recovered under a liquidated damages provision by other earnings. Musman v. Modern Deb, Inc., 50 A.D.2d 761, 377 N.Y.S.2d 17 (1975); Seco Chemicals, Inc. v. Stewart, 169 Ind. App. 624, 349 N.E.2d 733 (1976).

For the reasons set forth, we conclude that the judgment of the circuit court should be affirmed.

By the Court. -- The decision of the court of appeals is reversed; the judgment of the circuit court is affirmed.

¿Por qué casi nunca encontrarás cláusulas penales en los instrumentos contractuales del país del norte?

XCO INTERNATIONAL INC., Plaintiff-Appellant/Cross-Appellee, v. PACIFIC SCIENTIFIC COMPANY, Defendant-Appellee/Cross-Appellant. UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 369 F.3d 998 December 3, 2003, Argued May 24, 2004, Decided

OPINIÓN POR: POSNER

[*999] The appeal in this diversity breach of contract suit governed mainly by Illinois law presents issues involving the enforceability of a liquidated damages clause (found by the district judge to be a penalty), contract interpretation, patent law, and sanctions for making frivolous claims.

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The plaintiff, XCO, owned U.S. and foreign (mainly European) patents on heat-sensitive cables. In 1991 it assigned the patents to the defendant, PacSci, which wanted to use them in making products for fire control and related uses. PacSci agreed to pay XCO $ 725,000 down, plus $ 100,000 or 5 percent of PacSci's sales of products utilizing the patented technology -- whichever amount was greater -- annually from 1995 through 2000; after that it would pay 5 percent of annual sales until the patents expired. As part of the deal, PacSci licensed the patents that it had just bought back to XCO for use in making heat-sensitive cables for lining refractory [**2] process vessels (used for processing petroleum products), which was the core of XCO's business, its principal market being in Europe. As the consideration for this license XCO agreed to pay PacSci $ 100,000 plus royalties on sales of the cables for the licensed use. The parties further agreed that PacSci would be "responsible for all expenses of any kind relating to" the patent rights that it was buying, including the fees charged by European patent authorities to maintain patents in effect. The U.S. Patent and Trademark Office charges patent-maintenance fees for U.S. patents, but payment of those fees is not in issue.

The agreement was to continue until the last of the patents expired in 2003. Beginning in 1993, however, just two years after the agreement had been signed, PacSci stopped paying maintenance fees on those patents that it wasn't using. It took the position that notwithstanding the "responsibility" [*1000] clause of the contract, it could pick and choose which patents to keep alive. As a result, by 1998 a number of the patents had lapsed. XCO declared a breach that year and terminated the contract, as it was entitled to do (without liability) if in fact PacSci had committed a [**3] breach. A provision in a section of the contract captioned "Breach and Liquidated Damages" states that in the event of such a termination all money owed XCO by PacSci, "including such amounts which constitute overdue, delinquent or otherwise unpaid amounts . . . plus one hundred thousand dollars ($ 100,000) per year from

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and including the year of such termination to and including the year of the last to expire of the patent rights, shall then constitute liquidated damages under this Agreement." Another provision, also in the "Breach and Liquidated Damages" section, states that if XCO breaks the contract, PacSci will have no further obligations except to pay XCO any amounts that came due before the breach; in other words, from the date of a breach by XCO forward, PacSci would have a royalty-free license. So damages were specified for a breach by either party.

Because XCO terminated the contract in 1998 and the last patent expired in 2003, and because the $ 100,000 in liquidated damages was due in both the year in which the contract was terminated and the year in which the last patent expired, as well as in all the intermediate years, the clause, if valid, entitles XCO to $ 600,000 [**4] in damages. The district judge held that it is a penalty clause, hence invalid. He ruled so on summary judgment, while rejecting PacSci's interpretation of the "responsibility" clause. He found, in other words, that PacSci had broken the contract; but since XCO did not attempt to prove its actual damages, instead seeking only liquidated damages, XCO got no relief for the breach.

There is also a counterclaim. Beginning in 1998 XCO had begun manufacturing a somewhat different kind of heat-sensitive cable, for which it has applied for a patent. PacSci counterclaimed for royalties on XCO's sales of the new cable, citing a clause in the contract which states that PacSci is purchasing not only the patents listed in the contract but also "all purchasing, manufacturing, marketing, sales and installation information and materials including know-how, drawings, sketches, plans, designs, specifications, data, methods, processes, techniques, inventions or discoveries whether patentable or not which relate in any way to the Products covered by the Patent Rights" (emphasis added). Another clause, however, provides that if "any such additional proprietary subject matter is first conceived [**5] and/or reduced to practice by or on behalf of [XCO] during the term of this Agreement,

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then title thereto shall vest in and remain [XCO's] exclusive property." The district judge rejected the counterclaim, and PacSci has appealed that ruling. But the judge also rejected XCO's request for sanctions for the filing of the counterclaim; XCO had argued that the counterclaim was frivolous and in addition that PacSci was trying to inject into the case an issue of patent law -- namely whether XCO's new patent (if issued) would infringe patents that it had assigned to PacSci -- without complying with the standards laid down by the Federal Circuit for proving infringement. XCO claims to have incurred nearly $ 400,000 in legal fees and other expenses to defend against the counterclaim.

XCO's appeal challenges the district judge's denial of its motion for sanctions as well as his refusal to enforce the liquidated damages clause. In defending the latter ruling PacSci not only embraces the judge's penalty-clause determination but also argues that letting the patents lapse was not a breach of contract after all.

[*1001] When damages for breach of contract would be difficult for a court to determine [**6] after the breach occurs, it makes sense for the parties to specify in the contract itself what the damages for a breach shall be; this reduces uncertainty and litigation costs and economizes on judicial resources as well. Indeed, even if damages wouldn't be difficult to determine after the fact, it is hard to see why the parties shouldn't be allowed to substitute their own ex ante determination for the ex post determination of a court. Damages would be just another contract provision that parties would be permitted to negotiate under the general rubric of freedom of contract. One could even think of a liquidated damages clause as a partial settlement, as in cases in which damages are stipulated and trial confined to liability issues. And of course settlements are favored.

Yet it is a rule of the common law of contracts, in Illinois as elsewhere, that unless the parties' ex ante estimate of damages is reasonable, their liquidated damages provision is unenforceable as a penalty intended to "force" performance. Bauer v. Sawyer, 8 Ill. 2d 351, 134 N.E.2d

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329, 333 (Ill. 1956); Checkers Eight Ltd. Partnership v. Hawkins, 241 F.3d 558, 561-62 (7th Cir. 2001) [**7] (Illinois law); Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1289-90 (7th Cir. 1985) (same); Med+Plus Neck & Back Pain Center, S.C. v. Noffsinger, 311 Ill. App. 3d 853, 726 N.E.2d 687, 693, 244 Ill. Dec. 712 (Ill. App. 2000); see also Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc., 41 N.Y.2d 420, 361 N.E.2d 1015, 1017-19, 393 N.Y.S.2d 365 (N.Y. 1977). The reason for the rule is mysterious; it is one of the abiding mysteries of the common law. At least in a case such as this, where both parties are substantial commercial enterprises (ironically, it is the larger firm, PacSci, that is crying "penalty clause"), and where damages are liquidated for breach by either party, making an inference of fraud or duress implausible, it is difficult to see why the law should take an interest in whether the estimate of harm underlying the liquidation of damages is reasonable. Courts don't review the other provisions of contracts for reasonableness; why this one?

It is true that if there is a very stiff penalty for breach, parties will be discouraged from committing "efficient" breaches, that is, breaches that confer a greater benefit on the contract breaker [**8] than on the victim of the breach, in which event breach plus compensation for the victim produces a net gain with no losers and should be encouraged. (This is a reason why injunctions are not routinely granted in contract cases -- why, in other words, the party who breaks his contract is usually allowed to walk away from it, provided only that he compensates the other party for the cost of the breach to that party.) But against this consideration must be set the worthwhile effect of a penalty as a signal that the party subject to it is likely to perform his contract promise. This makes him a more attractive contract partner, since if he doesn't perform he will be punished severely. His willingness to assume that risk signals his confidence that he will be able to perform and thus avoid the penalty. It makes him a credible person to do business with, and thus promotes commerce.

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Granted, the case for a contractual specification of damages is stronger the more difficult it is to estimate damages and so the greater the expense to the parties and the judiciary, and hence to society, of determining the plaintiff's damages by the clumsy and costly methods of litigation. That presumably is [**9] why the enforceability of liquidated damages clauses depends on the difficulty of estimating, when the contract is signed, what the damages will be if [*1002] the contract is broken. Yet in such cases the plaintiff will often be able to obtain injunctive relief instead of damages, on the ground that his damages remedy is inadequate, that being the standard criterion for injunctive relief; and an injunction often has a punitive effect because the cost to the defendant of complying with it will often exceed the harm to the plaintiff from the enjoined conduct. The fact that injunctions are sometimes granted in contract cases shows, therefore, that "punishment" is not wholly alien to contractual remedies. At a minimum one might suppose penalty clauses tolerable to the extent that the penalty portion approximated the costs in attorneys' fees and other expenses of proving damages for breach of contract.

The explanation for the rule against penalty clauses may be purely historical -- and "it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." O. W. Holmes, "The Path of the Law," 10 Harv. L. Rev. 457, 469 (1897). The slow [**10] pace at which the common law changes makes it inevitable that some common law rules will be vestigial, even fossilized. When a person comes into court seeking relief, the court naturally is inclined to ask why it should get involved in the matter. The court is busy, its resources limited. It wants to see some potential benefit from judicial intervention before it will lift a finger. The rules of contract law have remote origins, predating the era of freedom of contract and the ideology of free markets. Thus, when parties to contracts first sought damages for breach in cases in which the contract when broken had still been executory, courts declined to oblige; they couldn't see what harm had

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been done when the victim of the breach hadn't yet paid anything or begun to perform. Flureau v. Thornhill, 96 Eng. Rep. 635 (C.P. 1776); Basiliko v. Pargo Corp., 532 A.2d 1346, 1348-49 (D.C. 1987); 3 E. Allan Farnsworth, Farnsworth on Contracts § 12.8, p. 192 (3d ed. 2004); Morton J. Horwitz, "The Historical Foundations of Modern Contract Law," 87 Harv. L. Rev. 917 (1974). They were not moved by the fact that the parties, presumably rational, [**11] had thought it in their mutual interest to be able to enter into an enforceable executory contract.

Similarly -- though here the historical record is murkier because there was an early period in which penal bonds were enforced, 3 Farnsworth, supra, § 12.18, pp. 302-04; Horwitz, supra, 87 Harv. L. Rev. at 936-37; William H. Loyd, "Penalties and Forfeitures," 29 Harv. L. Rev. 117 (1915) -- courts have had difficulty seeing what benefit would be conferred by awarding in effect punitive damages for breach of contract. Because liability for breach is strict (though the strictness is somewhat ameliorated by such defenses as impossibility and frustration), contract breakers often are innocent in a moral sense. Breach of contract is not a tort, so should not be punished -- or so the reasoning goes.

The rule against penalty clauses, though it lingers, has come to seem rather an anachronism, especially in cases in which commercial enterprises are on both sides of the contract. As we noted in Operating Engineers Local139 Health Benefit Fund v. Gustafson Construction Corp., 258 F.3d 645, 655 (7th Cir. 2001), "it is easy to assign nonexploitive [**12] reasons for contractual penalties and hard to give convincing reasons why in the absence of fraud or unconscionability consenting adults that are, moreover, substantial organizations rather than mere consumers should be prohibited from agreeing to such provisions." See also Lawyers Title Ins. Corp. v. Dearborn Title Corp., 118 F.3d 1157, 1160-61 (7th Cir. 1997); Lake River Corp. v. Carborundum Co., supra, 769 F.2d at 1288-89. The rule [*1003] hangs on, but is chastened by an emerging presumption against interpreting liquidated

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damages clauses as penalty clauses. MetLife Capital Financial Corp. v. Washington Ave. Associates L.P., 159 N.J. 484, 732 A.2d 493, 499-500 (N.J. 1999); Circle B Enterprises, Inc. v. Steinke, 1998 ND 164, 584 N.W.2d 97, 101 (N.D. 1998); Wallace Real Estate Investments, Inc. v. Groves, 881 P.2d 1010, 1013-14, 124 Wn.2d 881 (Wash. 1994); Rohlin Construction Co. v. City of Hinton, 476 N.W.2d 78, 79-80 (Iowa 1991); Pierce v. B & C Electric, Inc., 104 Ill. App. 3d 309, 432 N.E.2d 964, 966, 60 Ill. Dec. 65 (Ill. App. 1982); 24 Richard A. Lord, Williston on Contracts [**13] , § 65:13 (4th ed. 2004); cf. Penske Truck Leasing Co. v. Chemetco, Inc., 311 Ill. App. 3d 447, 725 N.E.2d 13, 20, 244 Ill. Dec. 218 (Ill. App. 2000); Pav-Saver Corp. v. Vasso Corp., 143 Ill. App. 3d 1013, 493 N.E.2d 423, 427-28, 97 Ill. Dec. 760 (Ill. App. 1986); but cf. Checkers Eight Ltd. Partnership v. Hawkins, supra, 241 F.3d at 563 (Illinois law).

Whatever the strength and contours of the rule in Illinois today, PacSci is wholly in error in arguing that a liquidated damages clause is invalid unless it recites, or extrinsic evidence shows, that the parties determined that, yes, it really would be difficult to determine damages for breach after the breach occurred. No case in Illinois or anywhere else so holds or implies, and the rejection of the argument is implicit in the numerous cases that hold such clauses valid which do not contain such recitals, even when there is no extrinsic evidence to fill the gap. See, e.g., First National Bank v. Atlantic Tele-Network Co., 946 F.2d 516, 518, 521-22 (7th Cir. 1991); Penske Truck Leasing Co. v. Chemetco, Inc., supra, 725 N.E.2d at 18-20; [**14] In re Graham Square), Inc., 126 F.3d 823, 828-30 (6th Cir. 1997). PacSci has tried to reverse the burden of proof, which, as in the case of other affirmative defenses, rests on the party resisting enforcement of a liquidated damages clause to show that the agreed-upon damages are clearly disproportionate to a reasonable estimate of the actual damages likely to be caused by a breach. E.g., Weiss v. United States Fidelity & Guaranty Co., 300 Ill. 11, 132 N.E. 749, 751 (Ill. 1921); Pace Communications, Inc. v.

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Moonlight Design, Inc., 31 F.3d 587, 594 (7th Cir. 1994); First National Bank v. Atlantic Tele-Network Co., supra, 946 F.2d at 521-22; Pav-Saver Corp. v. Vasso Corp., supra, 493 N.E.2d at 427; Honey Dew Associates, Inc. v. M & K Food Corp., 241 F.3d 23, 26-27 (1st Cir. 2001); Joseph F. Sanson Investment Co. v. 268 Ltd., 106 Nev. 429, 795 P.2d 493, 497 (Nev. 1990).

The burden of proving the invalidity of the liquidated damages clause in the contract with XCO thus remained on PacSci and it is apparent from the nature of the breach of contract -- failing to pay patent-maintenance [**15] fees, as a predictable result of which the patents lapsed -- that PacSci failed to carry it. And breach it was; PacSci's argument that because it was made "responsible" for the fees it could decide not to pay them -- an interpretation that deprives the "responsibility" clause of all force, as well as wreaking semantic havoc ("responsibility" signifies duty, not right) -- does not merit discussion.

The premature lapse of XCO's European patents exposed XCO to competition that the patents, had they remained valid, might well have prevented -- or might not have. That would be a costly and uncertain issue for a court to resolve. About all the court could say would be that given the scale of XCO's operations, $ 100,000 a year from the breach to the termination of the last patent was not an outlandish estimate of the damages that XCO might sustain as a result of PacSci's allowing the patents to lapse. This case thus illustrates how a [*1004] liquidated damages clause can spare the parties and the court the anxiety and expense of protracted and uncertain remedy proceedings. Cf. First National Bank v. Atlantic Tele-Network Co., supra, 946 F.2d at 521-22; JKC Holding Co. LLC v. Washington Sports Ventures, Inc., 264 F.3d 459, 468 (4th Cir. 2001); [**16] Farmers Export Co. v. M/V Georgis Prois, Etc., 799 F.2d 159, 164-65 (5th Cir. 1986).

The element common to most liquidated damages clauses that get struck down as penalty clauses is that they specify the same damages regardless of the severity of the breach. Checkers Eight Ltd. Partnership v. Hawkins, supra,

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241 F.3d at 562; Lake River Corp. v. Carborundum Co., supra, 769 F.2d at 1290; M.I.G. Investments, Inc. v. Marsala, 92 Ill. App. 3d 400, 414 N.E.2d 1381, 1386, 47 Ill. Dec. 265 (Ill. App. 1981); Kalenka v. Taylor, 896 P.2d 222, 228-29 (Alaska 1995). One can see the problem: if a contract provides that breaches of different gravity shall be sanctioned with equal severity, it is highly likely that the sanction specified for the mildest breach is a penalty (that, or the sanctions for all the other possible breaches must be inadequate). That would have been the case here if instead of fixing the damages at $ 100,000 per year, the damages clause had recited for example that in the event of breach PacSci must pay XCO $ 500,000, period. Then if PacSci failed to pay only the maintenance fee due [**17] six months before the last patent expired, it would owe the same damages that it would owe had it never paid any of the maintenance fees and as a result all of XCO's patents had lapsed within a year after the contract was signed. That isn't how the clause works. Instead, by proportioning damages to the remaining life of the patents, it sanctions PacSci more heavily the longer the life that remained to them when PacSci allowed them to lapse. American National Bank & Trust Co. v. Regional Transportation Authority, 125 F.3d 420, 439-40 (7th Cir. 1997); Penske Truck Leasing Co. v. Chemetco, Inc., supra, 725 N.E.2d at 19-20; Builders Concrete Co. v. Fred Faubel & Sons, Inc., 58 Ill. App. 3d 100, 373 N.E.2d 863, 869, 15 Ill. Dec. 517 (Ill. App. 1978); Information Systems & Networks Corp. v. City of Kansas City, 147 F.3d 711, 715 (8th Cir. 1998).

Yet the proportionality of the damages specification highlights by way of contrast the only halfway decent argument that PacSci has against the validity of the liquidated damages clause. This is that the clause fails to differentiate between different kinds of breach, some [**18] more serious than others, as distinct from different degrees of seriousness within a given kind. Suppose the breach had taken the form of PacSci's failing not to keep the patents in force but to make a royalty payment of $ 1,000 when it was due. The liquidated damages clause read

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literally would require PacSci not only to pay the $ 1,000 but to pay $ 100,000 on top of it for each year from the breach to the expiration of the last patent. That would be pretty outlandish -- depending on the date of breach it could cost PacSci more than $ 1 million though it had harmed XCO to the tune of $ 1,000 at most -- but it is an argument not for invalidating the clause but for interpreting it reasonably. It is apparent from the reference in the clause to the date of expiration of the last patent that the $ 100,000 a year damages provision is intended only for the case in which a breach by PacSci endangers the patents. It is not intended for other breaches, such as failure to pay agreed-upon amounts.

Even if the clause were read literally, and as a result would be deemed a penalty if invoked in a case in which the breach consisted merely of a failure to pay royalties or other amounts due under [**19] the contract [*1005] to XCO, the proper judicial remedy would be to reform the clause to limit it to those breaches, such as the one that occurred in this case, for which it constituted a reasonable specification of damages. There would be no reason to invalidate the clause in its entirety. See United Air Lines, Inc. v. Austin Travel Corp., 867 F.2d 737, 741 (2d Cir. 1989); American Multi-Cinema, Inc. v. Southroads, L.L.C., 119 F. Supp. 2d 1190, 1205-07 (D. Kan. 2000); 24 Williston on Contracts, supra, § 65:18.

We turn to PacSci's counterclaim and the connected issue of sanctions for its filing. The district judge was correct to reject the counterclaim. It is true that the first proprietary rights clause that we quoted early in this opinion is extremely broad, but it is qualified by the subsequent clause that entitles XCO to obtain and retain new proprietary matter, including new patents, as distinct from the patents transferred by the agreement and the associated know-how to enable PacSci to practice those patents as well as such associated inventions as would enable PacSci to obtain the maximum benefit from the patents that it was buying. Not [**20] only is the contract reasonably clear when the two provisions are read together,

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but XCO, which is an inventor rather than a producer (it contracts out production), would be unlikely to agree to give up all its future inventions for the entire 12-year life of the contract, however remotely related they were to the subject matter of the transferred patents. Cf. Ingersoll-Rand Co. v. Ciavatta, 110 N.J. 609, 542 A.2d 879, 887, 895-96 (N.J. 1988); Dispatch Automation, Inc. v. Richards, 280 F.3d 1116, 1117-19 (7th Cir. 2002); New Britain Machinery Co. v. Yeo, 358 F.2d 397, 405 (6th Cir. 1966). That would pretty much put XCO out of business, as it would have no incentive to be inventing for the benefit of PacSci without being compensated. There is no indication that XCO was intending to commit corporate suicide. Contract interpretations that produce commercially unreasonable results are disfavored, not as a matter of policy but simply because they are implausible to impute to the parties. FutureSource LLC v. Reuters Ltd., 312 F.3d 281, 284-85 (7th Cir. 2002); Level 3 Communications, Inc. v. Federal Ins. Co., 168 F.3d 956, 958 (7th Cir. 1999); [**21] Outlet Embroidery Co. v. Derwent Mills, 254 N.Y. 179, 172 N.E. 462, 463 (N.Y. 1930) (Cardozo, C.J.); McMahon v. Chicago Mercantile Exchange, 221 Ill. App. 3d 935, 582 N.E.2d 1313, 1320, 164 Ill. Dec. 369 (Ill. App. 1991).

This principle of interpretation must be used cautiously because there is always a danger that what seems commercially unreasonable to a court did not seem so to the parties. PacSci might have tried to show that the consideration it gave XCO for the patents was so generous in relation to the scale, profitability, and prospects of XCO's business that it must surely have covered future inventions. PacSci presented no such evidence.

But what if XCO, seeking to defeat PacSci's contract rights, sought a patent on a "new" invention that wasn't really new -- that duplicated and thus infringed one or more of the patents that it had sold PacSci -- and claimed the right to sell, use, or license the new invention? The patent would not be granted, or if granted would be invalidated by a court; and just the attempt to patent such an invention

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would violate the requirement of good-faith dealing that Illinois law reads into every contract. Cramer v. Insurance Exchange Agency, 174 Ill. 2d 513, 675 N.E.2d 897, 902-03, 221 Ill. Dec. 473 (Ill. 1996); [**22] Wolf v. Federal Republic of Germany, 95 F.3d 536, 543 (7th Cir. 1996) (Illinois law); Beraha v. Baxter Health Care Corp., 956 F.2d 1436, 1443-45 (7th Cir. 1992) (same).

[*1006] Under the patent doctrine of equivalents, a subsequent inventor cannot escape a finding of infringement by pointing to immaterial variations between his invention and an already patented one. Warner-Jenkinson Co. v. Hilton Davis Chemical Co., 520 U.S. 17, 137 L. Ed. 2d 146, 117 S. Ct. 1040 (1997); Riles v. Shell Exploration & Production Co., 298 F.3d 1302, 1309-11 (Fed. Cir. 2002). Thus in International Nickel Co. v. Ford Motor Co., 166 F. Supp. 551, 563-65 (S.D.N.Y. 1958), the plaintiff had a patent on "nodular iron," an alloy that was .04 percent magnesium. Ford began making its own version of nodular iron, which differed from the plaintiff's only in containing half as much magnesium. The court held that Ford had infringed the plaintiff's patent; Ford's variant was "equivalent" to the patented product. XCO, however, points out that the components, proportions, production methods, and so forth specified in its new patent application differ from those [**23] in the patents assigned to PacSci, yet PacSci made no effort to show that the differences were immaterial and thus that XCO was seeking to circumvent its transfer of the old inventions to PacSci.

We note parenthetically that if PacSci were challenging in a complaint for breach of contract the validity of an issued patent, this appeal would have to go to the Federal Circuit rather than to this court. 28 U.S.C. §§ 1295(a)(1), 1338(a); U.S. Valves, Inc. v. Dray, 212 F.3d 1368, 1372 (Fed. Cir. 2000); U.S. Valves, Inc. v. Dray, 190 F.3d 811, 813-14 (7th Cir. 1999). But a challenge to the validity of a patent made in a counterclaim instead of a complaint is not within the Federal Circuit's exclusive jurisdiction, Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc., 535 U.S. 826, 829-32, 153 L. Ed. 2d 13, 122 S. Ct. 1889 (2002)

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-- and anyway the new XCO patent hasn't, as far as we can tell, been issued yet, and it may never be. PacSci rightly insists that it is not challenging the validity of any patent (though it confuses the issue horribly by referring to "claims construction" in its reply brief, which is patent talk, though [**24] PacSci apparently meant to refer rather to the "claims" made in its counterclaim); it is only contending that the contract requires that if any patent issues it must be assigned to PacSci and that the filing of the patent application shows bad faith on XCO's part. The first argument misreads the proprietary-rights clauses (if the invention sought to be patented is a genuine improvement, it belongs to XCO, and if it's not, it's not patentable), and the second founders on PacSci's failure to prove that the new invention steps on the toes of any of the transferred patents.

The counterclaim is thin, to say the least; it borders on the frivolous. But it does not quite cross the line -- or so at least the district judge was entitled to conclude without being thought to have abused his discretion. The proprietaryrights language in the contract is not entirely clear, and PacSci had at least some ground for suspicion that the development of the new product was intended to circumvent the assignment of the old patents to it. PacSci failed to substantiate its theory, so it lost, but that does not mean that the theory and claim were frivolous.

The theory underlying the counterclaim has a bearing [**25] on the issue of the validity of the liquidated damages clause, and so we return to that issue briefly. After PacSci allowed XCO's European patents to lapse, a European company called Thermocoax started selling a product that competed with XCO's refractory-vessel cables (the major market for which, we said, is European), and as a result XCO's revenues plummeted by hundreds of thousands of dollars a year. XCO used this episode to argue that the liquidated damages clause [*1007] was valid even if the clause didn't estimate damages reasonably at the time the contract was made, because it estimated them reasonably at the time of breach, and the trend in contract

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law is -- very sensibly, as it seems to us -- to allow a showing of ex post reasonableness to save the clause. Restatement (Second) of Contracts § 356(1) (1981); 3 Farnsworth, supra, § 12.18, pp. 309-10; Lawyers Title Ins. Corp. v. Dearborn Title Corp., supra, 118 F.3d at 1161-62 (Illinois law); Yockey v. Horn, 880 F.2d 945, 951-54 (7th Cir. 1989) (same); Pav-Saver Corp. v. Vasso Corp., supra, 493 N.E.2d at 427. PacSci counters that [**26] since by the time Thermocoax entered the European market XCO was selling the product that is the subject of its new patent application, the lapse of its old patents could not have harmed it. But that doesn't follow, since we are told nothing about Thermocoax's product. And although the filing of a patent application provides some protection, at least under U.S. law, 35 U.S.C. § 154(d); 1 John Gladstone Mills III, Donald C. Reiley III & Robert C. Highley, Patent Law Fundamentals § 1:38 (2d ed. 2004), the protection evaporates if the patent is not granted. For all we know, Thermocoax's product would have infringed one of the old patents that had, however, by this time lapsed through PacSci's breach of contract, opening the way for Thermocoax to enter the market and clobber XCO.

We conclude that XCO is entitled to its liquidated damages but not to sanctions and that the rejection of PacSci's counterclaim must stand. The judgment is affirmed in part and reversed in part and the case is remanded to the district court for the entry of a new judgment consistent with this opinion.

C. LA VIABILIDAD DE LAS MEDIDAS EQUITATIVAS CUANDO NO EXISTEN MEDIDAS JURÍDICAS ADECUADAS

SPECIFIC PERFORMANCE

LOVELESS v. DIEHL. SUPREME COURT OF ARKANSAS 236 Ark. 129; 364 S.W.2d 317 February 18, 1963

OPINIÓN POR: SMITH

[*130] [**320] Supplemental Opinion on rehearing delivered

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This is an appeal by the sellers from a decree directing specific performance of a contract for the sale of land. In our original opinion, in the belief that we were achieving substantial justice, we set aside the chancellor's award of specific performance and instead limited the purchasers to their monetary damages, which we fixed as the difference between the contract price and the slightly greater sum for which the purchasers had agreed to sell the property to a third person, 235 Ark. 805.

This possibility of substituting damages for specific performance was not mentioned in the original briefs. In their petition for rehearing the appellees earnestly insist that our decision did not in fact reach a completely just result. Briefing the legal point for the first time, counsel contend that the court's denial of specific performance is not warranted in the circumstances of this case.

After reconsidering the question we have concluded that the petition for rehearing is well-founded.

Our prior decisions recognize the possibility that in a few unusual situations a court of equity may in its discretion deny the plaintiff the right of specific performance. But the remedy of specific performance, in giving the complaining party exactly what he bargained for, ordinarily affords complete and perfect relief and therefore is usually to be awarded as a matter of course.

The point was discussed in Sims v. Best, 140 Ark. 384, 215 S. W. 519, where we said: "Finally, it is insisted that the right to specific performance is not absolute, but is a matter of discretion with the chancellor. While this is true, the discretion is a sound judicial discretion, controlled by established principles of equity, and where the contract is in writing, is certain in its terms, is for a valuable [*131] consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach." (Italics added.) It will be noted that every one of the conditions just

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mentioned (a written contract, certainty, etc.) is present in the case at bar.

Much to the same effect is this holding in Dollar v. Knight, 145 Ark. 522, 224 S. W. 983: "Where land or any estate or interest in land is the subject-matter of the agreement, the jurisdiction to enforce specific performance is undisputed, and does not depend upon the inadequacy of the remedy in the particular case. It is as much a matter of course for courts of equity to decree a specific performance of a contract for the conveyance of real estate, which is in its nature unobjectionable, as it is for courts of law to give damages for its breach." (Italics added.)

In the present case we find no valid reason for a denial of specific performance. To the contrary, the equities in the case strongly demand that this remedy be afforded. The purchasers, according to the great weight of the evidence, expended some $ 5,000 or more, in money or in labor, in improving the property. Apparently the land in its improved state is worth more than the contract price, for otherwise the sellers would hardly be so strenuously resisting this suit for enforcement of the agreement. To deny specific performance, and to award instead an amount of damages far below the buyers' expenditures in improving the property, would result in the sellers' being unjustly enriched for their culpable refusal to carry out their promise.

The only reason that occurs to us for a denial of specific performance is the fact that the buyers entered into an agreement to sell the land to Dr. Hart. It is plain enough, however, that they had a perfect [**321] right to resell the land if they wanted to. Whether they kept it, sold it, or gave it away was of no concern to the sellers. To [*132] refuse specific relief on account of the proposed resale would establish an unsound precedent, diminishing the transferability of property, since in similar situations prospective buyers would be reluctant to bind themselves to a purchase contract, for fear that it might prove to be unenforceable.

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Now that the appellees' right to specific performance has been reinstated there remain three issues which were argued in the original briefs but which we did not find it necessary to decide in our original opinion.

First, the appellants insist that the purchasers are not entitled to prevail, for the reason that they failed to make a physical tender of $ 21,000 in cash within the period allowed for the exercise of their option to buy the property.

This argument fails to distinguish the two meanings which the term tender may have. When a duty of performance rests upon only one of the contracting parties, as in the case of an open account or promissory note, an actual offer of the money owed is essential to a valid tender. But the law is otherwise when both parties are under a duty to perform, and the question is whether one of them has made a sufficient offer of performance to put the other in default. Williston discusses this distinction clearly and accurately:

"It is said that the strict rules of tender are not applicable to a conditional offer to perform a concurrent condition; that what is essential is that it shall appear to the court and shall have been made clear to the other party to the contract that the exchange agreed upon would be carried out immediately if the latter would do his part. This requirement involves both ability on the part of the plaintiff to perform and an indication of that ability to the other party. The actual production of the money or other thing which the plaintiff is to give is said to be unnecessary.

"As the courts have said 'the word "tender," as used in connection with such a transaction, does not mean [*133] the same thing as when used with reference to the offer to pay money where it is absolutely due, but only a readiness and willingness to perform in case of the concurrent performance by the other party, with present ability to do so, and notice to the other party of such readiness.'" Williston on Contracts (3d Ed.), § 833.

Diehl testified that about two weeks before the expiration of his lease he told Loveless that he was exercising his option to purchase, that he had a man who

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was ready to pay for the property, and that he wanted a deed. Loveless promised to execute the deed and voluntarily added that the Federal Land Bank had a loan against the land and that he would get the abstract of title from the Land Bank so that it could be examined. Thereafter Loveless failed to make any move toward carrying out his agreement to sell, and as soon as the time expired he refused to consider the matter further. At no time during the life of the option did Loveless either demand or put himself in a position to demand that the purchase money be physically tendered. The chancellor's finding that the purchasers made a sufficient offer of performance is not against the preponderance of the evidence.

Secondly, the appellants contend that the chancellor should not have charged them with $ 2,600 as the rental value of the land, at the rate of $ 100 a month, during the period between the expiration of the lease and the entry of the decree. The complaint was filed sixteen days after the termination of the lease and of course did not contain a prayer for rents, as none had then accrued. The undisputed proof showed that the land was rented for $ 100 a month both under the Loveless-Diehl lease and thereafter, and, further, that this was the fair rental value of the property. [**322] When the chancellor entered his decree 26 months after the inception of the controversy he treated the complaint as having been amended to conform to the proof and awarded the buyers a judgment for the rental value of the land.

[*134] The court was right in charging the sellers with the rental value of the land while they were in possession, but he should have gone farther and charged the purchasers with interest at the legal rate upon the unpaid purchase price during the same period. The two charges are equitably offsetting and should go together. The sellers are charged with the rental value because they have had the use of the buyers' land, and the buyers are charged with interest because they have had the use of the sellers' money. Both charges are ordinarily made in situations where the

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creditor, such as a mortgagee, for example, has been in possession of the debtor's property. Holcomb v. Bowe, 154 Ark. 543, 243 S. W. 803; Hamner v. Starling, 185 Ark. 948, 50 S. W. 2d 615; Zini v. First Nat. Bk., 228 Ark. 325, 307 S. W. 2d 874; Hughes, Arkansas Mortgages, §§ 521 and 525. To make either charge without the other is evidently unwarranted, for it gives the favored party the use of both the land and the money. On this point the decree must be modified to require the purchasers to pay interest upon the purchase price and to require the sellers to pay interest upon each monthly installment of rent from its accrual.

Finally, by cross appeal the Diehls contend that the Lovelesses waived their right to collect the milking equipment note by repossessing that property. We think the chancellor was right in holding that the repossession was merely incidental to the sellers' action in taking control of the farm as a whole and so did not amount to a waiver of their right to enforce the note. Inasmuch as the purchasers had been deprived of the use of their property the chancellor absolved them from payment of interest upon the note, which we think to be a proper balancing of the equities. When the purchasers obtain specific performance of the contract they will be entitled to the milking equipment and will be under a duty to pay for it.

The decree is modified as indicated, and the cause is remanded so that the account may be stated in accordance with this opinion and a final decree be entered.

DISCREPA DEL FUNDAMENTO: HARRIS

[*135] I originally voted to reverse this case because of the fact that, in my opinion, no proper tender of the $ 21,000.00 was made to Loveless by Diehl, or anyone in the latter's behalf. However, with the same feeling as that expressed in the present majority opinion (the belief that we were achieving substantial justice), I joined in the original opinion handed down by this court.

It is true that the substitution of damages for specific performance was not argued in the original briefs; however,

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the complaint filed by appellees, after asking for specific performance, prays, in the alternative, for damages.

I am still of the view that no proper tender was made and I think this true even under the discussion by Williston, quoted by the majority. A portion of that quotation reads as follows:

"'As the courts have said "the word 'tender,' as used in connection with such a transaction, does not mean the same thing as when used with reference to the offer to pay money where it is absolutely due, but only a readiness and willingness to perform in case of the concurrent performance by the other party, with present ability to do [**323] so, 1 and notice to the other party of such readiness.""

1 Emphasis supplied.

I cannot ascertain from the record that either Diehl or Dr. Hart had the "present ability" to make the payment of $ 21,000.00. In fact, there is no contention that Diehl was able to make the payment himself, but he testified, as stated by the majority, that "he had a man who was ready to pay for the property." This, of course, was a reference to Dr. Hart. Let us, therefore, examine the record for the purpose of determining Hart's ability to pay that amount.

Dr. Hart first testified that he could have raised the money "in a matter of 48 hours." But he then became more specific in his testimony as follows:

[*136] "You were talking about whether I had the money. I had some money available. I had some property both in Kansas and in Arkansas and I was wanting to use this property in Arkansas as collateral and had hoped to borrow enough money locally with this collateral, which was a three hundred acre farm in Conway County, to purchase the lands here locally without having to jeopardize the business venture in Kansas. I would rather have had that locally. I had talked to the bank, The First State Bank, Mr. Tom Wilson and he had approved a loan of $ 10,000.00 to me if I needed it and I asked several people. I had talked with Mr. Atchison about it. I had done some banking with both banks and I talked to him about it to see

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what he thought and, of course, we discussed the value of the real estate, whether it was worth so much money. Then, I went over to see Mr. Ligon. I've had some experience with Federal Land Bank in Kansas and familiar, more or less, with their interest rates and I was asking Mr. Jimmy Ligon about the possibility if they would like to finance it and he told me that it might be valuable for me to contact Mr. Loveless and talk with him; that he was of the opinion that Mr. Loveless, possibly, would carry part of the note; 2 that he might be interested in carrying part of the note for me to purchase the property from Mr. Diehl and that was the reason that I went to see Mr. Loveless."

2 Emphasis supplied.

Further, from Dr. Hart's testimony:

"Q. All right. Now, have you at all times since then been ready, willing and able to go on and purchase it if -- at the price you agreed on then?

A. Yes, sir, I have.

Q. You are willing and able now?

A. Yes, sir.

Q. Within a reasonable time, perhaps a very few days, 3 you can raise the money and pay Mr. Diehl so he can pay Mr. Loveless in cash?

[*137] A. That's correct. Yes, sir."

3 Emphasis supplied.

The transcript reflects the following testimony by Mrs. M. Coburn, a real estate broker, with whom the property had been listed for sale:

"Q. Now, did you ever have any conversation with Dr. Hart that was here on the stand about the purchase of the place?

A. Yes. Dr. Hart came to my office with --. It was along about Thanksgiving and they wanted to know if the place was listed and I told them we had it listed and he said he would like to buy the place and I thought we were going to perhaps negotiate a deal for it, but he mentioned that he had to --. I mentioned that the way it was set up, it would have to be all cash and he said he could raise the all cash, but he'd have to sell some property [**324] or make

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arrangements on other property 4 and that he was going back to Kansas and that he would see us a little later. Well, I tried repeatedly to call him on the phone and I never could get him and I didn't know what happened to him and I heard later that he was trying to buy it through Speaker, so I don't know if that was a true rumor or not."

4 Emphasis supplied.

Dr. Hart denied the pertinent statements of this particular conversation, but, to me, his own testimony is sufficient to establish that he did not have $ 21,000.00 in cash ready for payment to Loveless before December 15, 1959. Under the contract, Diehl had until that date to exercise his option. Loveless testified that Dr. Hart talked with him on December 12 or 13 and discussed buying the place by paying $ 7,000.00 down, and the balance on terms, but no agreement was reached. Hart did not again talk with Loveless about purchasing the property until after the lease agreement (and option) had expired. Dr. Hart likewise testified that he did not talk with Loveless the second time until December 16.

The majority state,

[*138] "The purchasers, according to the great weight of the evidence, expended some $ 5,000 or more, in money or in labor, in improving the property. Apparently the land in its improved state is worth more than the contract price, for otherwise the sellers would hardly be so strenuously resisting this suit for enforcement of the agreement. To deny specific performance, and to award instead an amount of damages far below the buyers' expenditures in improving the property, would result in the sellers' being unjustly enriched for their culpable refusal to carry out their promise."

I should like to point out that Diehl, entirely voluntarily, wanted to sell this property to Dr. Hart for $ 22,000.00, which means, according to the majority statement just quoted, that he would lose $ 4,000.00 by making the sale. In other words, since he was willing to lose $ 4,000.00 (if he expended $ 5,000.00 on the place) there certainly was no reason for this court to go beyond

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the figure that he was willing to accept himself. Diehl was willing to accept $ 1,000 more than his purchase price, which was the amount of damages we awarded him. Nor can I see that specific performance is called for either legally or equitably, when the sole beneficiary of this holding by the court will be Dr. Hart, a rank outsider -- who never had a contract -- who was not a party to the litigation -- who suffered no loss -- and who, according to my view, never did tender to Loveless the $ 21,000.00 in cash.

I, therefore, respectfully dissent to the granting of the rehearing.

DISCREPA DEL FUNDAMENTO: MCFADDIN

I dissent from the opinion of this Court granting a rehearing; and stoutly maintain that the opinion of December 3, 1962, was correct and should stand. In that opinion there was this language:

"Under the situation as it existed in December 1959, the judgment of $ 1,000.00 gives the Diehls all the relief that a deed from the Lovelesses would have given them. The Diehls admitted that they could not have purchased [*139] the property except by obtaining the money through resale to Dr. Hart. He was ready, able, and willing to purchase in December 1959, but was not bound to do so thereafter. Furthermore, the Diehls prayed for damages in the alternative to specific performance, and we conclude that the amount of $ 1,000.00 is the amount of damages they established in connection with the option to purchase; and this conclusion eliminates any rental claims [**325] of the Diehls after December 15, 1959. In thus awarding the clearly established damages in lieu of specific performance, we are exercising the sound discretion which a court of equity has in cases involving specific performance. Such discretion has been recognized in: Orr v. Orr, 206 Ark. 844, 177 S. W. 2d 915; Cole v. Salyers, 190 Ark. 53, 76 S. W. 2d 669; and Simms v. Best, 140 Ark. 384, 215 S. W. 519. See also Jamison Coal Co. v. Goltra (8th Cir.), 143 F. 2d 889; 154 A. L. R. 1191; and see also 49 Am. Jur. p. 13 et seq., 'Specific Performance' § 8 and § 9."

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The present opinion granting the rehearing uses this language:

"Our prior decisions recognize the possibility that in a few unusual situations a court of equity may in its discretion deny the plaintiff the right of specific performance. But the remedy of specific performance, in giving the complaining party exactly what he bargained for, ordinarily affords complete and perfect relief and therefore is usually to be awarded as a matter of course."

The opinion quotes from Simms v. Best, 140 Ark. 384, 215 S. W. 519, and Dollar v. Knight, 145 Ark. 522, 224 S. W. 983, following the above quoted language. But the opinion on rehearing fails to quote this language from Dollar v. Knight:

"It is allowable in the exercise of a sound discretion to deny specific performance 'where the case is not clear, or where the complainant is in the wrong, or there are considerable countervailing equities.' Watkins v. Turner, supra."

[*140] The case at bar comes within the last quotation from Dollar v. Knight, because (a) the case is not clear; and (b) there are considerable countervailing equities. The dissenting opinion of the Chief Justice in this case shows that it is not entirely clear that the Diehls made a sufficient tender of any kind; and there are certainly countervailing equities because the sum of $ 1,000.00 is all that the Diehls would have gained if they had received the deed under the contract; and to grant them judgment for that amount is to end the litigation. In Watkins v. Turner, 34 Ark. 663, Judge Eakin denied specific performance because the case was not clear.

Furthermore, I desire to make reference to the case of Cole v. Salyers, 190 Ark. 53, 76 S. W. 2d 669, which is more recent than any of the cases cited in the opinion that is granting a rehearing. Cole brought suit for specific performance; there was uncertainty as to the power of the agent to give time for Cole to act. In denying specific

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performance because of such uncertainty, this Court used this language:

"'Courts of equity have always reserved the right of exercising a sound discretion in suits for specific performance and generally refuse relief where the case is not clear, or where the complainant is in the wrong, or there are considerable countervailing equities. In such cases equity refuses to interfere, and leaves the parties to their rights and remedies at law.' Watkins v. Turner, 34 Ark. 663; Smith v. Price, 125 Ark. 589, 189 S. W. 167; Dollar v. Knight, 145 Ark. 522, 224 S. W. 983."

Also in Cole v. Salyers, Cole as plaintiff had, as an alternative to specific performance, prayed for damages. This Court refused damages, not because of the absence of the right of specific performance, but because no damages were shown. The Court said:

"The appellant asked in the alternative, in the event he should not be able to procure specific performance, that he have damages. The proof indicates that, under the prevailing conditions, the value of the property was not substantially in excess of $ 900. That being true, there [*141] could be no damages, even if there were a breach of contract."

[**326] The plaintiffs' prayer to the complaint in the case at bar was in this language:

"WHEREFORE, Plaintiffs pray that defendants be required to specifically perform said lease agreement and the option therein contained, and that plaintiffs be adjudged to be entitled to conveyance of said lands from defendants; that, in the alternative, defendants be required to reimburse plaintiffs for expenditures made by plaintiffs in making permanent improvements to and upon said lands in the sum of $ 7,000.00, and for judgment against defendants for breach of contract in the sum of $ 2,000.00; for the costs herein, and for all other relief to which they may be entitled."

When the plaintiffs prayed for damages as an alternative to specific performance, the court of equity has the right to decide whether to award specific performance

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or damages; certainly when the case is not clear and when there are countervailing equities, as in the case at bar. Without prolonging this dissent, it is sufficient to say that I stoutly maintain that the opinion of December 3, 1962 reached a practical result in giving the Diehls $ 1,000.00 as damages, which is all they would have received if the deed had been delivered to them; and the opinion of December 3, 1962, therefore, would have ended the litigation. Now the majority is continuing the litigation by remanding it for further consideration by the Chancery Court.

DONALD RONNIE CUMBEST v. BEDFORD HARRIS. SUPREME COURT OF MISSISSIPPI 363 So. 2d 294 October 18, 1978

OPINIÓN POR: WALKER

[*295] This is an appeal from an order of the Chancery Court of Jackson County, Mississippi, dismissing appellant Cumbest's bill of complaint.

The sole question presented is whether the personal property, which was the subject of the controversy, is of such peculiar, sentimental or unique value as to come within the exception to the general rule that a chancery court will not ordinarily decree specific performance of a contract involving personal property.

Cumbest's bill of complaint and exhibits attached thereto aver, among other things, that on May 19, 1976, Donald Ronnie Cumbest and Bedford Harris, respectively, contracted for the sale and purchase of certain hi-fi equipment via a bill of sale. An option agreement was also signed on the same date allowing Cumbest to repurchase the audio equipment on or before 5:00 p.m., Monday, June [**2] 7, 1976. The language of these two instruments is clear and unambiguous and both were signed and notarized.

The complainant averred that the transaction was intended to be a loan, in substance, and that the audio equipment was to serve as collateral. It also states that from early morning on Monday, June 7, 1976, until late that evening every effort humanly possible was made to pay the required amount of money to the defendant. The defendant purposely avoided meeting with him at various places

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during the day, thereby fraudulently and deliberately evading the receipt of the money as contracted for in The Option to Repurchase Agreement. In desperation the complainant deposited the required amount of money with the defendant's landlord on the evening of June 7, 1976, and approximately a week later initiated this lawsuit seeking equitable relief. Subsequently, the landlord, Mrs. Neuhaus, turned the money over to her attorney, Mr. Schroeder. Both of these parties have been joined as defendants in this lawsuit and the money paid into the registry of the court.

[*296] The amended complaint further averred that the complete assemblage of the audio equipment took several years [**3] for the appellant to acquire and because of the unique nature and irreplaceability of much of the equipment the court should assert jurisdiction of the case and grant such equitable relief as it deems appropriate. Finally, the complainant prays for the defendant to be enjoined against the disposition, sale or removal of the property and for the court to mandate specific performance of the contract to reconvey.

The chancellor allowed a hearing solely on the question of whether the property was of such sentimental value or so unique as to come within the exception to the general rule that the chancery court will not ordinarily decree specific performance of a contract involving personal property.

Cumbest was the only witness to testify at the proceeding. The property involved was a stereo system allegedly valued at $10,000. The system consisted of twenty separate parts accumulated over a period of fifteen years. There was testimony that Cumbest had acquired experience in stereophonic and recording equipment over the years by working in hi-fi stores in Oxford and Gulfport. He also did some recording of a professional nature. According to him, the items involved were a part of [**4] a recording studio which consisted of carefully matched parts, rather than a mere stereo set as contended by the defendant. The parts involved could not function alone, and could not be matched to just any standard stereo system.

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Cumbest testified that many of the integral parts of the system could no longer be replaced, e. g., the main reel to reel recorder; a stereo quadraphonic four channel logic decoder which, according to Cumbest, was originally on order for two years; a stereo three channel crossover preamplifier with base boost and turn over frequency control; some speaker components, and the particular diamond needle in the turntable system. Other equipment was personally designed and built by Cumbest himself. He testified that he purchased the parts and assembled the speakers to accommodate his particular system, and that the cabinets were designed and handmade by him after extensive study and research to meet the needs of his particular system.

I designed and built each one of the [7] speakers myself. I ordered each part and component and especially ordered the cross-over preamplifier and there isn't another one like it, and the speakers I built.

[**5] In explaining construction of certain speaker systems, Cumbest testified:

I designed and read over 15 articles on midfrequency sound and quadrosonic sound and what would produce the best and I ordered the speakers and built the cabinets to match the speakers. I cut each piece of wood. They are covered with rosewood type material and made specially to place in each corner for quadraphonic sound.

In other testimony he pointed out that even those items which are still available are of the type which require special order purchases and that in obtaining them originally there were six months to two years waiting periods. As to sentimental value, Cumbest testified:

As far as the snetimental [sic] value of the equipment, it is very great, blood sweat and tears have gone into it, I spent 15 years acquiring it piece by piece and I would never sell it at any price

Defendant put on no witnesses to contradict Cumbest's testimony.

As the chancellor recited in his order, the general rule is that, ordinarily, specific performance will not be decreed if

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the subject matter of the contract sought to be enforced is personalty. However, this general principle [**6] is subject to several well recognized exceptions, such as: (1) Where there is no adequate remedy at law; (2) Where the specific articles or property are of peculiar, sentimental or unique value; and (3) Where due to scarcity the chattel is not readily obtainable. 81 C.J.S. Specific Performance §§ 81-83 (1977). These exceptions are partly founded on the principle of the inadequacy of a remedy at law and the remedy may, in a proper case, be allowed [*297] where damages are not readily ascertainable.

"The tests to determine whether or not specific performance of a contract should be granted are the same in case of contracts for the sale of personalty as in the case of contracts for the sale of realty, namely, whether the damages for the breach are the equivalent of the promised performance, and whether the remedy at law is inadequate." 81 C.J.S. Specific Performance § 80 (1977). Such equitable relief is justified by the fact that the legal remedy of replevin is subject to defects of procedure which prevent the successful plaintiff from invariably recovering possession of the chattel. There is also considerable authority, old and new, showing liberality in the granting of [**7] an equitable remedy. 11 Williston Contracts § 1419 (3d ed. 1968); Miss. Code Ann. § 75-2-716 (1972).

In the present case, there was uncontradicted testimony that some components of the system were irreplaceable. Other components were replaceable but only with difficulty and long waiting periods. Additionally, Cumbest testified that the system was acquired over a fifteen-year span and that he personally designed and built parts of it specifically to match that particular system. Based on that testimony, we must conclude the property had both a unique value and falls into the category of property which is not readily obtainable due to scarcity.

For the above reasons, we hold that the chancellor erred in not finding that the property was sufficiently unique to justify the equitable jurisdiction of a chancery court. The cause will be remanded for a hearing on the merits.

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Reversed and remanded for a hearing on the merits.

INJUNCTIONS

LUMLEY v. WAGNER. LORD CHANCELLOR'S COURT 42 Eng. Rep. 687 26th May 1852

OPINIÓN POR: LORD ST. LEONARDS

The question which I have to decide in the present case arises out of a very simple contract, the effect of which is, that the defendant Johanna Warner should sing at Her Majesty's Theatre for a certain number of nights, and that she should not sing elsewhere (for that is the true construction) during that period. As I understand the points taken by the defendants' counsel in support of this appeal they in effect come to this, namely, that a court of equity ought not to grant an injunction except in cases connected with specific performance, or where the injunction, being to compel a party to forbear from committing an act (and not to perform an act) that injunction will complete the whole of the agreement remaining unexecuted.

I have to consider how the question stands on principle and on authority, and in so doing I shall observe upon some of the cases which have been referred to and commented upon by the defendants in support of their contention. The first was Martin v Nutkin is which the court issued an injunction restraining an act from being done where it clearly could not have granted any specific performante, but it was said that that case fell within one of the exceptions which the defendants admit are proper cases for the interference of the court, because there the ringing of the bells, sought to be restrained, had been agreed to be suspended by the defendant in consideration of the erection by the plaintiffs of a cupola and clock, the agreement being in effect the price stipulated for the defendant's relinquishing bell-ringing at stated periods. The defendant having accepted the benefit, but rejected the corresponding obligation, LORD MACCLESFIELD first granted the injunction which the Lords Commissioners, at the hearing of the cause, continued for the lives of the plaintiffs. That case, therefore, however it may be explained as one of the

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exceptional cases, is nevertheless a clear authority showing that this court has granted an injunction prohibiting the commission of an act in respect of which the court could never have interfered by way of specific performance.

The next case referred to was Barret v Blagrave which came first before LORD LOUGHBOROUGH, and afterwards before LORD ELDON. There a lease had originally been granted by the plaintiffs, the proprietors of Vauxhall Gardens, of an adjoining house, under an express covenant that the lessee would not carry on the trade of a victualler or retailer of wines or generally any employment that would be to the damage of the proprietors of Vauxhall Gardens. An underlease having been made to the defendants, who were violating the covenant by the sale of liquors, the proprietors of Vauxhall Gardens filed a bill for an injunction, which was granted by LORD LOUGHBOROUGH. It has been observed in the argument here that in granting the injunction LORD LOUGHBOROUGH said: "It is in the nature of specific performance," and that, therefore, that case also falls under one of the exceptional cases. When that case came before LORD ELDON, he dissolved the injunction. but upon a different ground, namely, on that of acquiescence for many years, and in a sense he treated it as a case of specific performance. As far as the words go, the observations of those two eminent judges would seem to justify the argument which has been addressed to me; in effect, however, it was only specific performance, because a prohibition, preventing the commission of an act may as effectually perform an agreement as an order for the performance of the act agreed to be done. The agreement in that case being that the house should not be opened for the purposes of entertainment to the detriment of Vauxhall Gardens, the court granted the injunction. That was a performance of the agreement in substance, and the term "specific performance" is aptly applied in such a case, but not in the sense in which it has been used before me.

It was also contended that the plaintiff's remedy, if any, was at law, but it is no objection to the exercise of the

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jurisdiction by injunction that the plaintiff may have a legal remedy. [Now, by s 36 of the Supreme Court of Judicature Act, 1925, law and equity are administered concurrently in the High Court.] Robinson v Lord Byron before LORD THURLOW, so very often commented upon by succeeding judges, is a clear illustration of that proposition, because in that case the defendant, Lord Byron, who had large pieces of water in his park which supplied the plaintiff's mills, was abusing his right by preventing a regular supply to the plaintiff's mill, and although the plaintiff had a remedy at law, yet this court felt no difficulty in restraining Lord Byron by injunction from preventing the regular flow of the water. Undoubtedly, there are cases such as that cited for the defendants of Collins v Plumb before LORD ELDON, in which this court has declined to exercise the power (which in that instance it was assumed to have had) of preventing the commission of an act, because such power could not be properly and beneficially exercised. In that case the negative covenant not to sell water to the prejudice of the plaintiffs was not enforced by LORD ELDON, not because he had any doubt about the jurisdiction of the court (for upon that point he had no doubt) but because it was impossible to ascertain every time the water was supplied by the defendants, whether it was or not to the damage of the plaintiffs, but, whether right or wrong, that learned judge, in refusing to exercise the jurisdiction on very sufficient grounds, meant in no respect to break in on the general rules deducible from the previous authorities.

At an early stage of the argument I adverted to the familiar cases of attorneys' clerks, and surgeons' and apothecaries' apprentices, and the like, in which this court has constantly interfered, simply to prevent the violation of negative covenants, but it was said that in such cases the court only acted on the principle that the clerk or apprentice had received all the benefit and that the prohibition operated upon a concluded contract, and, therefore, the injunction fell within one of the exceptional cases. I do not, however, apprehend that the jurisdiction of the court depends upon any such principle. It is obvious that in those

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cases the negative covenant does not come into operation until the servitude is ended, and therefore, that the injunction cannot be required or applied for before that period. The familiar case of a tenant covenanting not to do a particular act was also put during the argument, but it was said that in such a case the jurisdiction springs

out of the relation of landlord and tenant and that, the tenant having received the benefit of an executed lease, the injunction operates only so as to give effect to the whole contract. That, however, cannot be the principle on which this court interferes, for, beyond all doubt, where a lease is executed containing affirmative and negative covenants, this court will not attempt to enforce the execution of the affirmative covenants, either on the part of the landlord or the tenant, but will leave it entirely to a court of law to measure the damages, though, with respect to the negative covenants, if the tenant, for example, has stipulated not to cut or lop timber, or any other given act of forbearance, the court does not ask how many of the affirmative covenants on either side remain to be performed under the lease, but acts at once by giving effect to the negative covenant, specifically executing it by prohibiting the commission of acts which have been stipulated not to be done. So far, then, each of the cases to which I have referred appears to me to be in direct contravention of the rules which have been so elaborately pressed upon me by the defendants' counsel.

The present is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff and the other by the defendants, which state of facts may have and in some cases has introduced a very important difference, but of an act to be done by Johanna Wagner alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant - the one being ancillary to, and concurrent and operating together with the other. The agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract. It is, in effect, one contract, and though beyond all doubt this court could not

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interfere to enforce the specific performance of the whole of this contract, yet in all sound construction and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre. It was clearly intended that Johanna Wagner was to exert her vocal abilities to the utmost to aid the theatre to which she agreed to attach herself. I am of opinion that if she had attempted, even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered. Wherever this court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements, and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other, and, although the jurisdiction is not to be extended, yet a judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity.

It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant Johanna Wagner from performing at any other theatre while this court had no power to compel her to perform at Her Majesty's Theatre. It is true that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement. The jurisdiction which I now exercise is wholly within the power of the court, and, being of opinion that it is a proper case for interfering, I shall leave nothing unsatisfied by the

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judgment I pronounce. The effect, too, of the injunction, in restraining Johanna Wagner from singing elsewhere may, in the event of an action being brought against her by the plaintiff, prevent any such amount of vindictive damages being given against her as a jury might probably be inclined to give if she had carried her talents and exercised them at the rival

theatre. The injunction may also, as I have said, tend to the fulfilment of her engagement, though, in continuing the injunction, I disclaim doing indirectly what I cannot do directly.

Referring again to the authorities, I am well aware that they have not been uniform, and that there undoubtedly has been a difference of decision on the question now revived before me, but, after the best consideration which I have been enabled to give to the subject, the conclusion at which I have arrived is, I conceive, supported by the greatest weight of authority. The earliest case most directly bearing on the point is that of Morris v Colman. There Mr Colman was a part proprietor with Mr Morris of the Haymarket Theatre; they were partners in that concern, and by the deed of partnership Mr Colman agreed that he would not exercise his dramatic abilities for any other theatre than the Haymarket. He did not, however, covenant that he would write for the Haymarket, but it was merely a negative covenant that he would not write for any other theatre than the Haymarket. LORD ELDON granted an injunction against Mr Colman writing for any other theatre than the Haymarket, and the ground on which LORD ELDON assumed that jurisdiction was the subject of some discussion at the Bar. It was truly said for the defendants that that was a case of partnership, and it was said, moreover, that LORD COTTENHAM was mistaken in Dietrichsen v Cabburn when he said that LORD ELDON had not decided Morris v Colman on the ground of there being a partnership. I agree that the observations which fell from LORD ELDON in the subsequent case of Clarke v Price show that he did mainly decide it on the ground of partnership; but he did not decide it exclusively on that

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ground. In the argument of Morris v Colman Sir Samuel Romilly suggested a case almost identical with the present. He contended that the clause restraining Mr Colman from writing for any other theatre was no more against public policy than a stipulation that Mr Garrick should not perform at any other theatre than that at which he was engaged would have been. LORD ELDON, adverting in his judgment to the case put at the Bar, said (18 Ves at p 438):

"If Mr Garrick was now living, would it be unreasonable that he should contract with Mr Colman to perform only at the Haymarket Theatre, and Mr Colman with him to write for the theatre alone? Why should they not thus engage for the talents of each other?"

He gives the clearest enunciation of his opinion that that would be an agreement which this court would enforce by way of injunction.

SHADWELL, V-C., of whom I always wish to be understood to speak with the greatest respect, decided in a different way in Kemble v Kean and Kimberley v Jennings on which I shall presently make a few observations. In the former case, he observed that LORD ELDON must be understood, in Morris v Colman to have spoken according to the subject-matter before him, and must there be considered to be addressing himself to a case in which Colman and Garrick would both have had a partnership interest in the theatre. I must, however, entirely dissent from that interpretation. LORD ELDON's words are perfectly plain, they want no comment upon them, they speak for themselves. He was alluding to a case in which Garrick, as a performer, would have had nothing to do with the theatre beyond the implied engagement that he would not perform anywhere else, and I have come to a very clear conclusion that LORD ELDON would have granted the injunction in that case, although there had been no partnership.

The authority of Clarke v Price was much pressed upon me by the learned counsel for the defendants, but that is a case which does not properly belong to their argument because there there was no negative stipulation, and I quite

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admit that this court cannot enforce the performance of such an affirmative stipulation as is to be found in that case. There the defendant having agreed to take notes of cases in the Court of Exchequer and compose reports for the plaintiff, and having failed to do so, the plaintiff, Mr. Clarke, filed a bill for an injunction, and LORD ELDON, when refusing the injunction, in effect said, I cannot compel Mr. Price to

sit in the Court of Exchequer and take notes and compose reports. The whole of his judgment shows that he proceeded (and so it has been considered in later cases) on the ground that there was no covenant on the part of the defendant that he would not compose reports for any other person. The expressions in the judgment are [Morris v Colman]:

"I cannot, as in the other case, say that I will induce him to write for the plaintiff by preventing him from writing for any other person,"

and then come these important words, "for that is not the nature of the agreement." Lorm ELDON, therefore, was of opinion, upon the construction of that agreement, that it would be against its meaning to affix to it a negative quality and import a covenant into it by implication, and he, therefore, very properly as I conceive, refused that injunction. That case, therefore, in no respect touches the question now before me, and I may at once declare that if I had only to deal with the affirmative covenant of the defendant Johanna Wagner that she would perform at Her Majesty's Theatre, I should not have granted any injunction.

Thus far, I think, the authorities are very strong against the defendants' contention, but Kemble v Keen is the first case which has in point of fact introduced all the difficulties on this part of the law. There Mr Kean entered into an agreement precisely similar to the present: he agreed that he would perform for Mr Kemble at Drury Lane, and that he would not perform anywhere else during the time that he had stipulated to perform for Mr Kemble. Mr Kean broke his engagement, a bill was filed, and SHADWELL, V-C,

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was of opinion that he could not grant an injunction to restrain Mr Kean from performing elsewhere, which he was either about to do or actually doing, because the court could not enforce the performance of the affirmative covenant that he would perform at Drury Lane for Mr. Kemble. Being pressed by that passage which I have read from in the Lord Chancellor's judgment in Morris v Colman he put that paraphrase or commentary upon it which I have referred to, ie., he says: "LORD ELDON is speaking of a case where the parties are in partnership together." I have come to a different conclusion, and I am bound to say that, in my apprehension, Kemble v Kean was wrongly decided and cannot be maintained. The same learned judge followed up his decision in that case in the subsequent one of Kimberley v Jennings. That was a case of hiring and service, and the vice-chancellor there virtually admitted that a negative covenant might be enforced in this court, and quoted an instance to that effect within his own knowledge. He said (6 Sim at p 351):

"I remember a case in which a nephew wished to go on the stage, and his uncle gave him a large sum of money in consideration of his covenanting not to perform within a particular district; the court would execute such a covenant, on the ground that a valuable consideration had been given for it."

He admits, therefore, the jurisdiction of the court, if nothing but that covenant remained to be executed. The learned judge, however, adds (6 Sim at pp 351, 352):

"but here the negative covenant does not stand by itself: it is coupled with the agreement for service for a certain number of years, and then, for taking the defendant into partnership: ... this agreement cannot be performed in the whole, and therefore this court cannot perform any part of it."

Whatever may have been the mutual obligations in that case which prevented the court from giving effect to the negative covenant, I am not embarrassed with any such difficulties here, because, as I have already shown, both the covenants are on the part of the defendants.

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Hooper v Broderick was cited as an instance in which the court had refused an injunction under circumstances like the present, but in that case the lessee of an inn had covenanted to use and keep it open as an inn during a certain time and not to do sty act whereby the licence might become forfeited. In point of

fact the application was that be might be compelled to keep it open, and the vice- chancellor makes this observation (11 Sim. at p. 49):

"The court ought not to have restrained the defendant from discontinuing to use and keep open the demised premises as an inn, which is the same in effect as ordering him to carry on the business of an innkeeper; but it might have restrained him from doing, or causing or permitting to be done, any act which would have put it out of his power, or the power of any other person, to carry on that business on the premises. It is not, however, shown that the defendant has threatened, or intends to do, or to cause or permit to be done, any act whereby the licences may become forfeited or be refused; and therefore the injunction must be dissolved."

That, therefore, is an authority directly against the defendants because it shows that, if there had been an intention to break the negative covenant, this court would have granted the injunction.

Smith v Fromont was also relied upon by the defendants as an instance where the injunction had been refused, but there there was no negative covenant. It was an attempt to restrain by injunction a man from supplying horses to a coach for a part of a road when the party who was applying for the injunction was himself incapable of performing his obligation to horse his part of the road. LORD ELDON, in refusing the injunction and deprecating the interference of the court in such cases, there said (2 Swan. at p. 332):

"The only instance I recollect of an application to this court to restrain the driving of coaches occurred in the case of a person who, having sold the business of a coach proprietor from Reading to London, and undertaking to

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drive no coach on that road, afterwards established one. With some doubt, whether I was not degrading the dignity of this court by interfering, I saw my way in that case; because one party had there covenanted absolutely against interfering with the business which he had sold to the other."

That again is a direct authority, therefore, against the defendants, as LORD ELDON expressly says he had interfered in the case of a negative Covenant, although he could not interfere on that occasion because there was no such covenant.

Some observations have been made upon a decision of my own in Ireland in Gervais v Edwards. That decision I believe to be right, but it is quoted to show that I was of opinion that this court cannot interfere to enforce specific. performance, unless it can execute the whole of an agreement. I abide by the opinion I there expressed, and I mean to do nothing in this case which shall in any manner interfere with that opinion. That was properly a case for specific performance, but from the nature of the contract itself there was a portion of it which could not be executed. I said in effect: I cannot execute this contract which is intended to be binding on both parties. I cannot execute a portion of this contract for one, and leave the other portion of the contract unexecuted for the other, and, therefore, as I cannot execute the whole of the contract, I am bound to execute no part of it. That, however, has no bearing on the present case, for here I leave nothing unperformed which the court can ever be called upon to perform.

In Hills v Croll LORD LYNDHURST refused to enforce an injunction to restrain the violation of a negative covenant. It was a case in which A had given to B a sum of money, and B covenanted that he would buy all the acids he wanted from the manufactory of A, who covenanted that he would supply the acids, and B also covenanted that he would buy his acids from no other person. LORD LYNDHURST refused to prohibit B from obtaining acids from any other quarter, both because the covenants were correlative and because he could not Compel A to supply B

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with acids. If, therefore, he had restrained B from taking acids from any other quarter, he might have ruined him in the event of A breaking his affirmative covenant to supply the acids. That case has never

been rightly understood. It is supposed that LORD LYNDHURST's decision was based upon a wrong principle; that he followed the authority of Gervais v Edwards and such cases, and that he improperly applied the rule which was in that class of cases properly applied, but under the circumstances of the case before him I think the rule was not improperly applied.

The next case which has been so much observed upon was that, before LORD COTTENHAM, of Dietrichsen v Cabburn. That was a very simple case, and the question upon what principle it was decided, formed the subject of discussion before me. A man, in order to obtain a great circulation of his patent medicine, entered into a contract with a vendor of such articles, giving him a general agency for the sale of the medicine, with 40 per cent. discount, and stipulating that he would not supply anybody else at a larger discount than 25 per cent. He violated his contract and was proceeding to employ other agents with a larger discount than 25 per cent.; an injunction was applied for and was granted; and it was said that it was properly granted because it was a case of partnership. This, however, was not the fact. It was not a case of partnership, but was strictly one of principal and agent, and it was only because there was the negative covenant that the court gave effect to it. It is impossible to read LORD COTTENHAM'S judgment without being satisfied that be did not consider it to be a partnership, though he said it was in the nature of a partnership, and in a popular sense it might be so called, because the parties were there both dealing with respect to the same subject, from which each was to have a benefit, but in no legal sense was it a partnership.

Up to the period when Dietrichsen v Cabburn was decided, I apprehend that there could have been no doubt on the law as applicable to this case, except for the authority of SHADWELL, V-C, but with great submission

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it appears to me that the whole of that learned judge's authority is removed by himself by his decision in the later case of Rolfe v Rolfe. In that case A, B and C were partners as tailors. A. and B. went out of the trade on consideration of receiving 1,000 pounds each, and C was to continue the business on his own account. A entered into a covenant that he would not carry on the trade of a tailor which he had just sold, within certain limits, and C entered into a covenant that he would employ A. as cutter at a certain allowance. The bill was filed simply for an injunction to prevent A. from setting up as a tailor within the prescribed limit, and the vice-chancellor granted that injunction. It was objected that this court could not grant the injunction when there was something remaining to be performed, for that A. had a right to be employed as a cutter, which right this court would not even attempt to deal with or enforce as against C. That case, therefore, was open to a difficulty which does not occur here. In fact the same difficulty which might have arisen in Hills v Croll before LORD LYNDHURST. But the vicechancellor held that to be no difficulty at all, observing that the bill simply asked for an injunction which he would grant, although he could not give effect to the affirmative covenant to do the act in respect of which no specific performance was asked. His own decisions in Kemble v Kean and in Kimberley v. JenU) were pressed upon him, but he observed (15 Sim at p 89):

"that the bills in the cases cited asked for specific performance of the agreement, and that the injunctions were sought as only ancillary to that relief; but the bill in the present case asked merely for an injunction."

He no longer put it on the inability of the court to enforce a negative covenant, but be put it on the form of the pleadings. Whether that form was sufficient to justify his opinion is a question with which I need not deal, but I am very clearly of opinion that Rolfe v Rolfe does remove the whole weight of that learned judge's authority on this subject. It was said in argument that the injunction prayed in Rolfe v Rolfe was merely ancillary to the relief, but it will be seen that that was not so, and that the prayer

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extended only to the injunction and had nothing to do with relief in the shape of specific performance. And the

learned judge himself stated that, if it had gone to that extent, he, following his former decisions, would not have granted the injunction.

From a careful examination of all these authorities I am of opinion that the principles and rules deducible from them are in direct contravention of those principles and rules which were so elaborately pressed upon me during the argument, and I wish it to be distinctly understood that I entertain no doubt whatever that the point of law has been properly decided in the court below. It was, nevertheless, and with some reason, said, that although the point of law should be decided in the plaintiff's favour, still he might be excluded from having the benefit of it on the merits of the case.

[HIS LORDSHIP examined the statements in the answers and affidavits as to the unauthorised addition of the restrictive clause and as to the non-fulfilment by the plaintiff of his portion of the agreement. His LORDSHIP concluded by saying that, looking at the merits and circumstances of the case as well as at the point of law raised, be must refuse this motion with costs.

Motion refused.

DUFF v. RUSSELL. SUPERIOR COURT OF NEW YORK, SPECIAL TERM 14 N.Y.S. 134; 60 J. & S. 80 March 9, 1891, Decided

OPINIÓN POR: FREEDMAN

[*135] This action is brought by the plaintiff, a theatrical and operatic manager, to restrain the defendant from appearing as a singer or actress upon the stage of the Casino, in the city of New York, during the period of her contract with the plaintiff. A preliminary injunction having been granted, and it appearing, upon the hearing of the motion for the continuance of the injunction during the pendency of the action, that the defendant had made a contract in writing with the manager of the Casino, and had been extensively advertised to appear at that theater within a few days thereafter, it was arranged between the parties,

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but without prejudice to the rights of either, that the defendant, upon giving an undertaking in the sum of $ 2,000, conditioned to pay that sum as liquidated damages in case it should be finally determined that the plaintiff is entitled to an injunction herein, might go on and fulfill her contract at the Casino. The undertaking having been given as agreed, [**2] and the rights of both parties having been expressly preserved, the fact that plaintiff's contract with defendant has since that time expired is not to be considered, and the case still calls upon the court to determine plaintiff's original right to injunctive relief. The material facts, as they appear from the pleadings and the evidence, are that by written contract the defendant agreed with the plaintiff to appear in the [*136] soprano roles of such operas as the plaintiff might produce during the seasons of 1887-88 and 1888-89, and in such cities in the United States as he might select; that in the production of each opera the plaintiff was to supply the costumes; that in New York seven performances were to be given each week, exclusive of Sundays; that each season was to commence in the month of October or November of each year, and to last until May or June of the following year; that the plaintiff was to have the right to terminate each season by giving two weeks' notice; and that the defendant, for the faithful performance of her part of the said contract, was to receive the sum of $ 300 per week; that the defendant was and is an actress and singer distinguished in her [**3] profession and a great artistic acquisition, both in name and dramatic and operatic service, to any theater where comic operas are produced; that the plaintiff, relying upon his contract, announced the defendant at large expense in the daily newspapers of this city, and widely throughout the United States, as a member of his company, to the end of the season of 1889; that the defendant refused to perform in plaintiff's opera, which was produced at the Standard Theater, in the city of New York, on Monday evening, January 7, 1889, and which was to be continued for some weeks; that at that time the defendant had agreed to perform as an actress and singer at the Casino, a rival of

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and competitor with the theater, so far as the production of operas are concerned, which the plaintiff had engaged for his company, and had been announced with her consent to appear at the said Casino on Monday, January 14, 1889, and to continue to the end of the operatic season; that the plaintiff unsuccessfully protested against it; that it was not possible for the plaintiff to replace the defendant for the remainder of the season by any other actress and singer of equal repute; and that in consequence thereof [**4] the plaintiff was likely to, and in fact did, sustain irreparable damage. The proof on the part of the plaintiff that in this and other cities he did sustain large damages in consequence of defendant's act, and that the extent of such damages cannot be accurately measured, is unusually clear and convincing.

The facts, so far referred to, contain all the elements necessary to sustain, within the rule laid down in Daly v. Smith, 38 N.Y. Super. Ct. 158, and followed in several cases since that time, an injunction against defendant's appearance at the Casino. It therefore remains to be seen whether there is anything else in the case which calls for a different conclusion. The defendant's counsel insists that, inasmuch as there is no negative stipulation in the contract by which the defendant agreed not to appear elsewhere, the court cannot interfere. But, as was shown in Daly v. Smith, supra, the court is bound to look to the substance, and not to the form, of the contract. As the defendant had agreed to appear in seven performances in each week (exclusive of Sundays) which the plaintiff's company might give in New York, it was not possible for her to perform elsewhere [**5] in New York without a violation of her contract with the plaintiff, and a negative clause was unnecessary to secure to the plaintiff exclusively the services of the defendant.

It is also insisted that the contract is inequitable in its terms, because it provides that two weeks' notice of the termination of the season might be given by the plaintiff. It did not enable the plaintiff to discharge the defendant on two weeks' notice, but a notice of two weeks of the

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termination of the season was to be given. So long as the company remained together and performances were given, the plaintiff was bound to pay to the defendant the $ 300 per week, provided the defendant fulfilled her part of the contract. By the pleadings it stands admitted that the season of 1888-89 was to close about June 1, 1889, and in point of fact the plaintiff by letter notified the defendant that the said season would terminate not before the middle of May or June 1, 1889. The point is therefore untenable.

And finally it is insisted that the defendant was justified in breaking her contract with the plaintiff because the plaintiff had refused to substitute a [*137] more healthful costume for the tights in which [**6] the defendant had appeared in a certain opera, and the wearing of which she had objected to on the ground of danger to her health. It appears that the opera in question was called "The Queen's Mate." In this opera the defendant was to appear in a part which required her to wear tights. Before the production of the opera she was consulted by the plaintiff with regard to it, and informed that it would be necessary for her to wear tights, and she agreed that she would so appear. This had been admitted by her, but at the same time she claimed that she agreed to do so only during the summer. But in point of fact the plaintiff did appear in tights during cold weather, and never claimed exemption by agreement during such weather; and inasmuch as the plaintiff had not only the right to prescribe the costumes, but also the duty to furnish them, and no evidence has been adduced that the costumes of an opera change with the seasons of the year, or that the defendant ever claimed any right to such a change, I cannot find that the claim now advanced by the defendant in this respect has any foundation in fact. In point of fact the defendant did appear in this part and in tights for at least 150 [**7] nights, and from 20 to 30 chorus girls appeared in the same costume during each performance. Any change which might have been made in the costume of the defendant would have necessitated a corresponding change in the costumes of from 20 to 30 other persons. The controversy is therefore narrowed down to the question

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whether the plaintiff so unreasonably insisted upon his rights under the contract to the detriment of the health of the defendant that, in equity and good conscience, the defendant was justified in breaking off her engagement. Upon a careful consideration of all the facts and circumstances, as disclosed by the evidence on both sides, I cannot find that he did. The defendant undoubtedly at several times caught cold; but the real cause has not been proved. When, in answer to her claims that the cold was caused by the wearing of tights, she was advised by her own physicians, who, however, were not informed of the fact that she wore them only for about 10 minutes during each performance, that she should wear something underneath them which would protect her, she refused at once, not because the plaintiff objected to it, but because, in her judgment, it would ruin her outlines [**8] to do so. In fact, she never discussed the matter with the plaintiff with a view to compromise the difficulty, if any there was. If she had done so, and had made an honest attempt to convince the plaintiff that the wearing of tights, for ever so short a time, seriously affected her health or voice, it is reasonable to suppose that the plaintiff, who had a direct interest in her appearing as often as possible, would have met her half way. She made no such attempt. But the proof in this case goes much further. It justifies the conclusion that this excuse of the defendant was in a great measure a mere pretense. It was shown by the testimony of Mr. Aronson and the plaintiff, and finally admitted by the defendant, that while the defendant played for the plaintiff in the city of Chicago, during the latter part of October, 1888, Mr. Aronson, manager of the Casino, communicated with her by telegram, offering her an engagement with his company. Thereafter Aronson went from New York to Chicago, and had an interview with the defendant, without the knowledge of the plaintiff, and of which the latter was never informed. During that interview Mr. Aronson was informed by the defendant that she was [**9] at liberty to accept an engagement from the 1st day of May, 1889, but that she might be able to begin her engagement earlier, if it

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was in his power to make an earlier engagement with her. From that time the defendant tried to bring about a change in her relations with the plaintiff. Up to that time no difficulty had arisen concerning the wearing of tights. On Thursday, November 22, 1888, at the city of Philadelphia, the defendant addressed a note to the plaintiff, in which she said: "I will leave on this coming Saturday night, and rest two weeks. My voice shows wear, and, as that is my first consideration, I must not trifle [*138] with it." At the same time she complained of having a cold, and with reference to that she said: "I attribute my cold almost entirely to wearing tights, and you must arrange some other costume in place of them. I shall never appear in tights again." And in the same note she suggested a change of costume so great and radical as to necessitate, if an attempt had been made to carry it out, a change of the costumes of the entire company. Moreover, the proposed change involved great expense and great loss of time. This was the first distinct notice which, [**10] according to the testimony which I find worthy of belief, the plaintiff received as to the objection of the defendant to wear tights, and the defendant, without waiting for an answer or seeking an interview with the plaintiff, on Saturday, November 24, 1888, left Philadelphia and came to New York, and on the same day entered into a contract with Mr. Aronson to appear at the Casino. That contract, on its face, appears to have at first been made to commence May 6, 1889. It was subsequently altered to commence January 14, 1889. The defendant undertook to state that that alteration was not made until after the injunction had been granted in this case, but finally she conceded that it was probably before. Mr. Aronson declared that it was made at least as early as December 24, 1888. Defendant's own communication, admitted to be in her handwriting, dated December 24, 1888, states that she had made arrangements to play with Mr. Aronson at the Casino. That contract made it her duty to give her services gratis at rehearsals for a period of four weeks prior to the commencement of her regular engagement at the Casino, and to furnish her own tights,

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wigs, shoes, and stockings, but costumes and [**11] boots were to be furnished to her. A further circumstance of great significance is that on December 5, 1888, the defendant wrote to the plaintiff that she was ready and willing to assume her part in the said opera in Boston for two weeks, and to appear in tights for that period, provided the plaintiff would pay her the additional sum of $ 150 per week. Other incidents might be referred to, but it is not necessary to go any further. The conclusion is unavoidable that the excuse now advanced by the defendant for the breach of her contract with the plaintiff should not be sustained. Upon the whole case the plaintiff is entitled to judgment, with costs.

AMERICAN HOSPITAL SUPPLY CORPORATION and AMERICAN V. MUELLER, a division of American Hospital Supply Corporation, Plaintiffs-Appellees, v. HOSPITAL PRODUCTS LIMITED and SURGEONS CHOICE, INC., Defendants-Appellants. UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 780 F.2d 589 September 23, 1985, Argued January 2, 1986, Decided

OPINIÓN POR: POSNER

[*592] A supplier terminated a distributor, who sued for breach of contract and got a preliminary injunction. The supplier has appealed under 28 U.S.C. § 1292(a)(1). The appeal raises issues of procedure and contract law.

The supplier, Hospital Products (as we shall call the affiliated corporations that are the defendants), a small firm now undergoing reorganization in bankruptcy, is one of the world's two principal manufacturers of "reusable surgical stapling systems for internal surgical procedures" ("surgical stapling systems," for short). The terminated distributor, American Hospital Supply Corporation, the world's largest distributor of medical and surgical supplies, [**2] in 1982 became the exclusive distributor in the United States of Hospital Products' surgical stapling systems. The contract of distribution was for three years initially, but provided that it would be renewed automatically for successive one-year periods (to a limit of ten years) unless American Hospital Supply notified Hospital Products at least 90 days

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before the three years were up (or any successive one-year period for which the contract had been renewed) that it wanted to terminate the contract; and this meant, by June 3, 1985.

On that day Hospital Products hand-delivered a letter to American Hospital Supply demanding to know whether it intended to renew the contract and reminding it that if it failed to respond by the end of the day this would mean that the contract had been renewed. American Hospital Supply responded the same day in a letter which pointed out that since it wasn't terminating, the contract was, indeed, renewed. But on the next day Hospital Products announced that it was going to treat the contract as having been terminated, and on June 7 it sent a telegram to American Hospital Supply's dealers informing them that effective June 3 American Hospital Supply was [**3] "no longer the authorized distributor of [Hospital Products'] stapling products."

American Hospital Supply forthwith brought this diversity breach of contract suit against Hospital Products and moved for a preliminary injunction, which was granted on July 8 after an evidentiary hearing. The injunction forbids Hospital [*593] Products to take any action in derogation of American Hospital Supply's contract rights so long as the injunction is in force (i.e., pending the outcome of the trial). It also requires Hospital Products to notify American Hospital Supply's dealers that American Hospital Supply is still Hospital Products' authorized distributor, and this has been done. Hospital Products counterclaimed, alleging breach of contract, fraud, and unfair competition.

Two months after the entry of the injunction, Hospital Products, which had been in parlous financial state even before this litigation began, filed a petition for bankruptcy under Chapter 11 of the Bankruptcy Act (reorganization). The bankruptcy court suspended the automatic stay of litigation against a bankrupt, see 11 U.S.C. §§ 362(a), (d); 2 Collier on Bankruptcy paras. 362.04[1], 362.07 [**4] (15th ed., King ed., 1985), to permit this appeal. Hospital Products moved the bankruptcy court to disaffirm (i.e.,

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cancel) the renewed contract that went into effect on September 1, 1985, upon the expiration of the original contract. Its ground was that the renewed contract was still executory when Hospital Products declared bankruptcy, and hence was subject to disaffirmance under 11 U.S.C. § 365. See In re Minges, 602 F.2d 38, 41 (2d Cir. 1979). The bankruptcy court has not yet acted on the motion. Hospital Products has not asked the district court to dissolve the preliminary injunction on the basis of events, notably the bankruptcy, since the injunction was entered.

A district judge asked to decide whether to grant or deny a preliminary injunction must choose the course of action that will minimize the costs of being mistaken. Because he is forced to act on an incomplete record, the danger of a mistake is substantial. And a mistake can be costly. If the judge grants the preliminary injunction to a plaintiff who it later turns out is not entitled to any judicial relief -- whose legal rights have not been violated -- the judge commits a [**5] mistake whose gravity is measured by the irreparable harm, if any, that the injunction causes to the defendant while it is in effect. If the judge denies the preliminary injunction to a plaintiff who it later turns out is entitled to judicial relief, the judge commits a mistake whose gravity is measured by the irreparable harm, if any, that the denial of the preliminary injunction does to the plaintiff.

These mistakes can be compared, and the one likely to be less costly can be selected, with the help of a simple formula, grant the preliminary injunction if but only if P x Hp > (1-P) x Hd, or, in words, only if the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial would be an error (that the plaintiff, in other words, will win at trial), exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error. That probability is simply one minus the probability that the plaintiff will win at trial; for if the plaintiff has, say, a 40 percent chance of winning, the defendant must have a 60 percent chance of winning (1.00 -.40 =.60). The left-

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hand side of the formula [**6] is simply the probability of an erroneous denial weighted by the cost of denial to the plaintiff, and the right-hand side simply the probability of an erroneous grant weighted by the cost of grant to the defendant.

This formula, a procedural counterpart to Judge Learned Hand's famous negligence formula, see United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947); United States Fidelity & Guaranty Co. v. Jadranska Slobodna Plovidba, 683 F.2d 1022, 1026 (7th Cir. 1982), is not offered as a new legal standard; it is intended not to force analysis into a quantitative straitjacket but to assist analysis by presenting succinctly the factors that the court must consider in making its decision and by articulating the relationship among the factors. It is actually just a distillation of the familiar four (sometimes five) factor test that courts use in deciding whether to grant a preliminary injunction. The court asks whether the plaintiff will be irreparably harmed if the preliminary injunction is denied (sometimes also whether the plaintiff [*594] has an adequate remedy at law), whether the harm to the plaintiff if the preliminary injunction [**7] is denied will exceed the harm to the defendant if it is granted, whether the plaintiff is reasonably likely to prevail at trial, and whether the public interest will be affected by granting or denying the injunction (i.e., whether third parties will be harmed -- and these harms can then be added to Hp or Hd as the case may be). See, e.g., Palmer v. City of Chicago, 755 F.2d 560, 576 (7th Cir. 1985). The court undertakes these inquiries to help it figure out whether granting the injunction would be the error-minimizing course of action, which depends on the probability that the plaintiff is in the right and on the costs to the plaintiff, the defendant, or others of granting or denying the injunction. All this is explained at length in Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 382-88 (7th Cir. 1984), where a panel of this court applied the verbal counterpart to an algebraic formula, as did a different panel in Maxim's Ltd. v. Badonsky, 772 F.2d 388, 391 (7th Cir. 1985). See also Leubsdorf, The

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Standard for Preliminary Injunctions, 91 Harv. L. Rev. 525 (1978). The formula is new; the analysis [**8] it capsulizes is standard.

The formula does not depend on the legal basis of the plaintiff's claim, whether it is antitrust law (Roland) or trademark law (Badonsky) or, as here, the common law of contract, although the nature of the right asserted by the plaintiff may affect the weighting of the harms, see, e.g., Shondel v. McDermott, 775 F.2d 859, 866-67 (7th Cir. 1985). So may the nature of the permanent remedy to which the plaintiff would be entitled if he prevailed at trial. For example, prevailing parties in breach of contract cases normally are not awarded specific performance, that is, a mandatory injunction to perform. Since many breaches of contract are involuntary, implying that performance would be very costly, routinely ordering specific performance would create situations where the defendant was forced to bargain desperately to buy his way out of the injunction. The high bargaining costs that would result are a deadweight cost of equitable relief. To the extent that those costs attend a preliminary injunction, they are of course relevant to the decision whether to issue such an injunction. But the formula takes account of this; the case we [**9] have described would be one where the harm to the defendant from granting the injunction would be very great. Thus the fact that a plaintiff might have no hope of getting specific performance ordered at the conclusion of the trial need not prevent him from obtaining a preliminary injunction. Cf. Roland v. Dresser Industries, Inc., supra, 749 F.2d at 386. The premise of the preliminary injunction is that the remedy available at the end of trial will not make the plaintiff whole; and, in a sense, the more limited that remedy, the stronger the argument for a preliminary injunction -- provided the remedy is not limited for reasons that would make a preliminary injunction equally inappropriate.

As explained in Roland, the scope of judicial review of a district judge's decision to grant or deny a preliminary injunction is limited. See 749 F.2d at 384-85, 388-91. The

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usual formulation is that the decision will be reversed only if it is found to be an "abuse of discretion." Unfortunately this phrase covers a family of review standards rather than a single standard, and a family whose members differ greatly in the actual stringency of review. See, e.g. [**10] , id. at 388-91; Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 831-32 (7th Cir. 1985); Friendly, Indiscretion About Discretion, 31 Emory L.J. 747 (1982). For example, when we review an order granting or denying a preliminary injunction, we do not do so with as much deference (virtually complete deference) as when reviewing a criminal sentence that is within legal limits but is challenged as too harsh; we do "not simply engage in a perfunctory rubber-stamping of the district court's decision." Olin Water Services v. Midland Research Laboratories, Inc., 774 F.2d 303, 307 n.7 (8th Cir. 1985). But we do give that decision substantial deference, bearing in mind that the district judge had [*595] to act in haste, that he had to balance factors which, though they can be related in a neat formula, usually cannot be quantified, and that in dealing with the parties and their witnesses and counsel in the hectic atmosphere of a preliminary-injunction proceeding the judge may have developed a feel for the facts and the equities that remote appellate judges cannot obtain from a transcript. To preserve an order granting [**11] or denying a preliminary injunction, therefore, it is not enough that we think we would have acted differently in the district judge's shoes; we must have a strong conviction that he exceeded the permissible bounds of judgment. And although recognizing that the order granting such an injunction must set forth the judge's reasons, see Fed. R. Civ. P. 65(d), we also recognize that the haste with which the judge must act precludes as full a statement of reasons as could reasonably be demanded of a final decision.

We have now to apply these precepts, and we begin with the balance of harms. Hospital Products points out, irrelevantly as it seems to us, that American Hospital Supply did not prove more than a handful of lost sales as a

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result of the mailgram of June 7 which announced the termination of American Hospital Supply's distributorship to its dealers. The reason is simply that American Hospital Supply promptly asked for and promptly received a preliminary injunction to head off any losses by restoring its distributorship. The question is not whether there was an actual loss but whether there was an impending loss that the preliminary injunction prevented, how great it was, and whether [**12] it could have been made up by a judgment for damages after trial.

Although American Hospital Supply was able to replace Hospital Products' line of surgical stapling systems in the interval between the mailgram of June 7 and the entry of the preliminary injunction a month later, the mailgram, unless retracted as ordered by the injunction, might have impaired American Hospital Supply's goodwill, a factor emphasized in other cases where terminated dealers sought preliminary injunctions, see, e.g., Menominee Rubber Co. v. Gould, Inc., 657 F.2d 164, 167 (7th Cir. 1981). The suddenness of the termination and the urgent mode of announcement might have made the dealers think that American Hospital Supply must have engaged in unethical or unreasonable conduct. We do not put much weight on this point, however. It is speculative, and any harm may have been cured by the retraction, in which event the harm could not support the rest of the injunction.

But in addition, on June 7 American Hospital Supply was holding a large unsold inventory of Hospital Products' surgical stapling systems. To help Hospital Products overcome serious financial problems, American Hospital Supply [**13] had advanced it millions of dollars -- part in loans, part by buying more of the product than it needed and keeping the excess in inventory. The mailgram jeopardized its investment because dealers might be reluctant to buy Hospital Products' goods from American Hospital Supply, not wanting to become enmeshed in a legal dispute between it and its supplier or perhaps even fearing that there might be some defect in the particular items being sold by American Hospital Supply. True, its

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investment would probably not be totally wiped out. American Hospital Supply might be able to sell the product to its dealers immediately at a sharp mark-down or with extra warranties or with promises of indemnity; or if it waited till it prevailed on the merits against Hospital Products, at no mark-down, in which event its loss would be just the interest and storage costs of keeping the product in inventory longer than expected. (If it didn't prevail, its losses would not be recoverable anyway.) No effort was made to quantify the loss to American Hospital Supply caused by the alleged breach of contract. But in the nature of things reliable estimation may have been infeasible; and since the estimates of [**14] the size of the unsold inventory range from $10 million to almost $30 million, probably the threatened loss was substantial.

[*596] What made the loss (whatever exactly it was in dollar terms) irreparable was not only or mainly the difficulty that American Hospital Supply might encounter down the road in quantifying its loss, although this difficulty has been stressed in other cases where a distributor sought a preliminary injunction in part to protect goodwill, see, e.g., Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., 550 F.2d 189, 197 (4th Cir. 1977); it was Hospital Products' insolvency, which was apparent when the district judge granted the preliminary injunction, even though the firm had not yet declared bankruptcy. The victim of a breach of contract, certainly one committed before the contract breaker declares bankruptcy, is just another general creditor, see In re Minges, supra, 602 F.2d at 41, and it is well known that general creditors fare poorly in most bankruptcy proceedings. This is true whether the proceeding ends in liquidation or in reorganization, though as a matter of fact most bankruptcies that start [**15] in reorganization nonetheless end in liquidation. Maybe, as Hospital Products argues, if only it could get the injunction lifted it would soon recover its solvency, even to the point of being able to pay any damages that American Hospital Supply is awarded in the trial of this case. But if Hospital Products

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really believes that, it ought to have gone to the district judge and asked him to dissolve the injunction, and it did not -- an omission that makes us profoundly skeptical of Hospital Products' claim that the grant of the injunction precipitated its declaration of bankruptcy.

Although a defendant's insolvency is a standard ground for concluding that a plaintiff's harm if the preliminary injunction is denied will not be cured by an award of damages at the end of the trial, see Roland Machinery Co. v. Dresser Industries, Inc., supra, 749 F.2d at 386; Signode Corp. v. Weld-Loc Systems, Inc., 700 F.2d 1108, 1111 (7th Cir. 1983), we must ask whether the cases that accept it give enough weight to the policies of bankruptcy law. To use the defendant's insolvency as a reason for granting the plaintiff an injunction now rather than making him wait for [**16] damages till the end of the trial may seem to give the plaintiff a preference in the distribution of the defendant's assets and thus impose harms on third parties, the defendant's other creditors. The responsibility for assessing those harms, however, has been placed in the bankruptcy court (which in this case happens to be in Connecticut) rather than the court asked to grant a preliminary injunction. Ordinarily the bankruptcy court can, just by not granting a motion to lift the automatic stay of litigation against the bankrupt, prevent a creditor from seeking the "preference" represented by the grant of a preliminary injunction in the creditor's favor. That course was ruled out here by the fact that the injunction was granted before bankruptcy was declared; it was the bankrupt that moved to lift the automatic stay, so that it could appeal. The bankruptcy court can still protect the creditors, however, by disaffirming the renewed contract. We assume that disaffirmance (at least if upheld on appeal) would cause the district judge to dissolve the preliminary injunction, as it would show that American Hospital Supply had no legal basis for complaining about the termination of the contract [**17] after it was renewed but before it was even partially executed.

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We conclude that there was a threat of irreparable harm to the plaintiff; and although the dollar amount of that harm is not known with any precision and we hesitate to call it great, it seems substantial. We must next consider the irreparable harm to the defendant from the injunction. The district judge found there would be none, because American Hospital Supply -- which has billions of dollars in sales and earns substantial profits -- will be good for any money judgment that Hospital Products may obtain on its counterclaim. This ground is not entirely satisfactory. There is a difference between the damages caused Hospital Products by the breach of contract or other (alleged) misconduct committed by American Hospital Supply before this suit began, damages which we may [*597] assume American Hospital Supply is good for, and damages caused Hospital Products by the preliminary injunction -- that is, by an order fastening Hospital Products to American Hospital Supply for another year. Those are not the damages that Hospital Products seeks to recover on its counterclaim, and while there may be considerable overlap between [**18] the injunction damages and the counterclaim damages, we cannot say that the overlap is complete.

But we may not overlook the bond that a plaintiff who obtains a preliminary injunction is required to post (see Fed. R. Civ. P. 65(c)) and that this plaintiff did post, in an amount, $5 million, whose adequacy Hospital Products does not challenge. Again it can be argued that damages may be hard to prove. The injunction bond merely puts a ceiling on damages -- they must still be proved. See Coyne-Delany Co. v. Capital Development Bd., 717 F.2d 385, 391-94 (7th Cir. 1983). But the irreparability that comes from the difficulty of proving damages is not of the same order as that which comes from the uncollectibility of a damage judgment. The award of damages in a case where injury is difficult to measure is as likely to overcompensate as to undercompensate the injured party. When a court speaks of damages as being "irreparable" because they are difficult to measure it can mean only that confining the

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injured party to a remedy of damages creates a risk he may not like (because he is risk adverse -- the disposition that leads people to buy insurance), even though the upside [**19] risk is as large as the downside risk. That is, the plaintiff is as likely to do better than he expects as he is to do worse, but he would lose more utility by losing big than he would gain utility by winning equally big. So there is a harm, but probably not a big one. The specific harms to which the Second Circuit referred in Jack Kahn Music Co. v. Baldwin Piano & Organ Co., 604 F.2d 755, 764 (2d Cir. 1979), in explaining why a supplier should not be forced by a preliminary injunction to continue a dealership, are not alleged here.

But what of the fact that an award of damages on the injunction bond, even if it made Hospital Products' creditors whole (and it might not), might not come in time to save the company itself? Many reorganizations in bankruptcy end in liquidation, and Hospital Products' reorganization may end there too, before the case is tried on the merits and therefore before the injunction bond can be enforced; and even if the company is successfully reorganized, the shareholders may be wiped out, and all the stock come into the hands of creditors. But the full financial losses to Hospital Products' shareholders from the bankruptcy are not the [**20] correct measure of the harm from granting the injunction. Bankruptcy is not, not intentionally anyway, a device for reducing wealth, but a device for distributing the impact of a business failure over various claimants to the bankrupt's assets. The costs that bankruptcy imposes, as distinct from the costs that the underlying failure imposes, are therefore merely the costs of administering the bankruptcy proceeding. Nevertheless these costs are not negligible. See, e.g., Ang, Chua & McConnell, The Administrative Costs of Corporate Bankruptcy: A Note, 37 J. Fin. 219 (1982); Altman, A Further Empirical Investigation of the Bankruptcy Cost Question, 39 J. Fin. 1067 (1984). Although the expenses of administration are paid to someone -- to lawyers, accountants, etc. -- they are paid for time that would have

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value elsewhere; and that value is a deadweight loss from bankruptcy, as it cannot be recovered by a payment of damages to the bankrupt estate. A preliminary injunction that will or may precipitate a firm into bankruptcy is therefore a source of costs which ought to be considered in deciding whether to grant such an injunction.

A related and often more significant type of cost, [**21] but one whose implications for legal policy are more ambiguous, is the cost of the business failure itself. If the firm's assets would be worth less on the auction block than as part of a going concern, this might seem a powerful argument against granting a preliminary injunction [*598] that increased the risk of failure. It is not a complete answer to point out that the creditors will get the benefit of any injunction damages awarded the bankrupt; those damages may not offset the loss of going-concern value. But since business failure provides social as well as private benefits -- provides, indeed, the essential discipline of the capitalist system -- it seems questionable to give firms that conduct their affairs in an unduly risky or careless manner an advantage in litigation. A more mundane point is that Hospital Products should have asked for a bigger injunction bond if it thought the injunction might play the role of the proverbial nail for want of which the kingdom was lost.

We need penetrate no further into this maze; it is enough that the effect of a preliminary injunction in precipitating insolvency is a factor arguing against the grant of the injunction (how strongly [**22] we shall not have to decide). Reflection on this overlooked point might conceivably persuade the district judge to grant a motion to dissolve the preliminary injunction, should such a motion be made, as it can be at any time. See, e.g., Winterland Concessions Co. v. Trela, 735 F.2d 257, 259-60 (7th Cir. 1984). But it does not persuade us that the preliminary injunction was in error. It does not even persuade us that the district judge erred in concluding that the balance of harms inclined in favor of granting the preliminary injunction. Keep in mind that when the district judge acted, Hospital Products had not yet declared bankruptcy. The

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judge thought the injunction bond might tide the company over the crisis; he also pointed out (and this has great relevance to the issue of American Hospital Supply's chances of winning the case on the merits, of which more presently) that American Hospital Supply had loaned millions of dollars to Hospital Products to prevent the latter from going broke.

We attach no legal significance to the difference in the size of the parties. Although American Hospital Supply is a giant and Hospital Products a pygmy, we cannot think what [**23] legal difference that makes. We have taken an oath to do justice to rich and poor alike -- and anyway one can't tell merely from the relative size of two corporations what the relative wealth of their shareholders is. Relative size is relevant where, as in Machlett Laboratories, Inc. v. Techny Industries, Inc., 665 F.2d 795, 798 (7th Cir. 1981); Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970) (Friendly, J.), and Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co. of New York, Inc., 749 F.2d 124 (2d Cir. 1984) (per curiam), one party, being small and weak, faces bankruptcy if the preliminary injunction is granted or denied; for bankruptcy imposes social costs, as we have seen. See Sperry Int'l Trade, Inc. v. Government of Israel, 670 F.2d 8, 12 (2d Cir. 1982). But we have already considered the issue of bankruptcy risk.

As a matter of fact it could be argued that the relative size of the companies, viewed separately from the issue of bankruptcy costs, strengthens the case for the preliminary injunction. American Hospital Supply might suffer an irrecoverable loss of many millions [**24] of dollars if the injunction is denied it; Hospital Products' small size puts a cap on its loss of $5 million if the injunction bond was computed correctly. But we shall not pursue this interesting issue. Even if there were no clear basis for differentiating between the irreparable harms to American Hospital Supply from denying and to Hospital Products from granting a preliminary injunction, in which event those harms would have to be treated as equal, Hospital Products' appeal would fail. If the harms to the plaintiff and the

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defendant of denying and granting the injunction, respectively, are equal, the injunction must be granted if the plaintiff has a better than 50 percent chance of winning the case, for then P in our preliminary-injunction formula must exceed 1 - P, and therefore P x Hp must exceed (1 - P) x Hd from the assumption that Hp = Hd.

The district judge was persuaded that Hospital Products, not American Hospital Supply, had broken the contract, implying a [*599] very high P. He undoubtedly was correct if the contract was renewed on June 3 and in force the next day when Hospital Products announced that the contract was terminated. But we must consider as did he [**25] whether American Hospital Supply repudiated the contract before this announcement. That would make this a case of anticipatory breach of contract -- American Hospital Supply indicates that it will not perform its obligations under the renewed contract, Hospital Products therefore treats the contract as terminated. Hospital Products points to a letter from American Hospital Supply which threatens to end financial assistance to Hospital Products and call its loans unless Hospital Products agrees to modify the contract in American Hospital Supply's favor. American Hospital Supply responds with much show of reason that it had advanced millions of dollars to Hospital Products beyond anything that it was contractually obligated to do, and therefore had every right to condition the making of new loans or the extension of existing ones on contract concessions. Hospital Products says that no loans were due and what the letter referred to as financial assistance was a euphemism for money due on goods sold and delivered -- to which another round of replies asserts that if no loans were due, Hospital Products had nothing to worry about and that American Hospital Supply actually had bought far [**26] more surgical stapling products from Hospital Products than it needed or was contractually obligated to be, so that what looked like payment on the contract really was financial assistance.

This legal badminton is inconclusive; but as nearly as we can determine, the able and experienced district judge

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who resolved the uncertainty in American Hospital Supply's favor was on solid ground in doing so. Although his discussion of the merits of the parties' contract dispute was not extensive, we remind the reader of our earlier point that a district judge forced to act in haste on an application for a preliminary injunction will not be reversed merely because the reasons he gives are not so full as could properly be demanded of an order granting a permanent injunction or otherwise resolving a full trial on the merits.

Hospital Products was a deeply troubled company to which American Hospital Supply provided financial aid essential in keeping it afloat -- not out of altruism, of course, but because it liked Hospital Products' product. Hospital Products acknowledges that American Hospital Supply is its largest creditor. Naturally American Hospital Supply wanted to recoup its investment [**27] and it had every right to condition further assistance on whatever concessions it could extract. There is nothing unlawful about offering a benefit to a promisee in exchange for a modification of the contract; the problematic modifications are those not supported by consideration. Thus a buyer who owes money to a financially distressed seller for goods sold and delivered and withholds it in order to force a modification of the contract without fresh consideration is guilty of duress, and the modification will not be enforced. See, e.g., Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924 (7th Cir. 1983). But there was no modification here. Whatever concessions American Hospital Supply may have wanted to extract from Hospital Products, on June 3 on Hospital Products' invitation it renewed the contract on its original terms.

If when doing so American Hospital Supply had indicated that it would not honor the terms of the contract but would force Hospital Products into a deeper and deeper hole by refusing to pay for goods bought and received, Hospital Products would be entitled to terminate the contract as a measure of self-help. If you commit a material breach of contract, [**28] the other party can walk away from the contract without liability, and can do so as soon as

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you announce your intentions even if the time for the performance that you have repudiated hasn't arrived. See, e.g., B & C Electric, Inc. v. Pullman Bank & Trust Co., 96 Ill. App. 3d 321, 328, 421 N.E.2d 206, 211, 51 Ill. Dec. 698 (1981); Farnsworth, Contracts § 8.22, at p. 637 (1982); cf. Casio, [*600] Inc. v. S.M. & R. Co., 755 F.2d 528, 532 (7th Cir. 1985). On this issue the key evidence for Hospital Products is the two letters that American Hospital Supply sent it on June 3. One is the letter in which American Hospital Supply in response to Hospital Products' demand to indicate whether the contract would be renewed made clear that it was not exercising its right of cancellation and therefore the contract was renewed. But the letter also states an "understanding" of the contract by American Hospital Supply that Hospital Products asserts is a clear indication of an intention not to abide by its terms, specifically, not to buy as much as American Hospital Supply was obligated to do during the period of renewal. American Hospital Supply responds that [**29] it had bought all it was contractually obligated to buy during the renewal term already, in advance as it were, to help Hospital Products with its cash-flow problems. Whether this is true is a difficult question that depends not only on collating a mass of documents but on resolving a clash of testimony, which only the judge who heard the testimony can do.

The same is true with regard to American Hospital Supply's other letter of June 3, the one referring to financial assistance, wherein Hospital Products finds a veiled threat not to pay for goods already bought unless it agreed to modify the contract in American Hospital Supply's favor. The letter does not say this, however, and the district judge, who listened to several witnesses as well as reading the various documents submitted by the parties, concluded that the renewal was unconditional and that while the parties may have differed with regard to their understanding of the extent of American Hospital Supply's obligations under the contract, American Hospital Supply's refusal to accede to Hospital Products' unilateral understanding was not a

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repudiation of the contract. This finding is not clearly erroneous and the legal principle [**30] that underlies it -- the principle that it is not a breach of contract to refuse to accept the other party's interpretation of the contract -- is unexceptionable, see, e.g., Farwell Construction Co. v. Ticktin, 84 Ill. App. 3d 791, 800-01, 405 N.E.2d 1051, 1058-59, 39 Ill. Dec. 916 (1980). Since, moreover, the finding was based on all the evidence we can think of that the parties might present at the actual trial on the merits, the chances that the judge was wrong and that his preliminary findings will be reversed at trial are small, and the probability of the plaintiff's prevailing at trial correspondingly great. In thus commenting on the merits, however, as we must do to review the district court's action in granting the injunction, we do not mean to prejudge the outcome of the full trial, which may cast the facts in a different light from how they appeared in the preliminary injunction proceeding. This caveat applies to all the discussion of the merits of the case in this opinion.

Before concluding that the grant of the preliminary injunction should be affirmed, we must consider Hospital Products' argument that the injunction should have been denied because of [**31] American Hospital Supply's "unclean hands" in advertising Hospital Products' line of surgical stapling products as its own; and a related argument that the grant of the injunction disserved the public interest.

Although the contract forbade American Hospital Supply to sell products competitive with Hospital Products' line during the term of the contract, American Hospital Supply developed, but did not (before the mailgram of June 7) sell, its own line. Hospital Products argues that in order to pave the way for dealers to switch to American Hospital Supply's line as soon as it reached the market, American Hospital Supply passed off Hospital Products' line as its own in its advertising.

If merely developing a competing line of products were a violation of the contract, then American Hospital Supply's conduct in developing and by devious means promoting a

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competing line (if indeed American Hospital Supply engaged in false advertising, a hotly contested and unresolved issue) would be relevant to the question who broke the contract first, and [*601] hence to the likelihood of American Hospital Supply's prevailing at trial on its breach of contract claim. But the contract does not [**32] forbid development of competing products. Or if Hospital Products were accusing American Hospital Supply of misbranding Hospital Products' line and thereby impairing Hospital Products' trademarks, this would be highly relevant to the question who broke the contract first, since it is a most serious violation of the implied contractual duty of good faith for a distributor to misbrand his supplier's product, whether by selling someone else's product under the supplier's name or the supplier's product under someone else's name (including the distributor's). See discussion in Lippo v. Mobil Oil Corp., 776 F.2d 706, 722-25 (7th Cir. 1985) (dissenting opinion). But we do not understand Hospital Products to be arguing that. Its argument is that even if American Hospital Supply made out an ironclad case that Hospital Products alone violated the distribution contract, the doctrine of unclean hands forbade the grant of a preliminary injunction.

The doctrine applies to preliminary injunctions as to other equitable remedies, of course, but as we have been at pains to emphasize in two recent cases, the doctrine is not to be used as a loose cannon, depriving a plaintiff of an [**33] equitable remedy to which he is otherwise entitled merely because he is guilty of unrelated misconduct. See Shondel v. McDermott, supra, 775 F.2d at 867-69; Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185, 193 (7th Cir. 1985). To deny the preliminary injunction because American Hospital Supply was using false advertising to supplant Hospital Products as a maker of surgical stapling systems, as Hospital Products urges, would be to deny it for a reason unrelated to Hospital Products' alleged breach of contract in terminating American Hospital Supply as a distributor after the contract was renewed. By renewing the contract American Hospital

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Supply disabled itself for another year from selling in competition with Hospital Products. Denying the injunction would merely have accelerated the entry of American Hospital Supply into making a line of products previously dominated by Hospital Products and one other producer. It must not be forgotten that the contract which American Hospital Supply wants to enforce and Hospital Products wants to walk away from is an exclusive-dealing contract, with American Hospital Supply the dealer and Hospital [**34] Products the supplier. So long as the contract is in effect, American Hospital Supply is barred from competing with Hospital Products. Thus we do not see how an injunction that keeps the contract in effect for another year, or perhaps longer (more on this shortly), can be resisted on the basis that American Hospital Supply is trying to compete unfairly with Hospital Products.

Last, Hospital Products argues that the injunction is against the public interest. All such an argument means, as we said earlier, is that the injunction has effects on nonparties, in this case the members of the consuming public, which is to say the hospitals that are the ultimate purchasers of surgical stapling systems. Of course these effects must be taken into account in deciding whether to issue the injunction; when as here they are urged as reasons against the grant of the injunction, they are part of Hd in our formula, that is, they are part of the harm (to the defendant -- but also to anyone else adversely affected) if the injunction is granted. If the injunction had been denied, Hospital Products would have sold its products directly to dealers in the United States, and American Hospital Supply presumably [**35] would have sold its newly developed line to dealers, too, thus increasing the number of competing producers from two to three. From this it can be argued that renewal of the contract was anti-competitive because it has postponed American Hospital Supply's entry into the market as a competitor of Hospital Products. If "reusable surgical stapling systems for internal surgical procedures" constitute an economically meaningful market -- meaning that if the producers colluded expressly or

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tacitly, they could raise the price of the product significantly without [*602] experiencing such a drastic loss of sales (as customers switched to substitutes, or producers of other products switched to making this product) as to make the price increase unprofitable -- Hospital Products might have a winning argument; it is easier for two firms to collude without being detected than for three to do so. But Hospital Products has not tried to show that its product constitutes a genuine market and hence that there is a real danger of collusion; perhaps it has not tried to do so because it would be pointing to itself as one of the two colluders.

Another way to take Hospital Products' argument, however, [**36] is that the injunction weakens competition by keeping Hospital Products, not American Hospital Supply, out of the market. But if only because of American Hospital Supply's interest in liquidating its large unsold inventory of Hospital Products' goods, it is hardly likely that the injunction will in fact keep Hospital Products out of the market in any sense relevant to the concerns of antitrust policy. With all the discord between the parties, it is still the case that American Hospital Supply wants to sell off its inventory of Hospital Products' goods, necessarily in competition with those of the other producer. Even when that inventory is completely sold off, American Hospital Supply will be contractually obligated to buy from Hospital Products until the contract lapses; and what it buys, economic logic compels it to sell -- especially since, so long as the contract continues to be renewed, American Hospital Supply, being forbidden to sell competing products, will have no choice but to promote Hospital Products' line as vigorously as it can. All this will keep Hospital Products in the market.

We comment briefly on the term of the preliminary injunction. Since federal litigation [**37] is sometimes protracted and since the contract entitles American Hospital Supply to renew the contract annually for six more years after this year, there is a theoretical possibility that the injunction will remain in effect for many years. Over such a

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period the balance of harms and impact on the public interest may of course change. We trust that the district judge will bear this in mind in considering any requests to modify the injunction.

Finally, we note that the parties and the district court may wish to consider the possibility that this lawsuit might be transferred to the district court in Connecticut in which the bankruptcy proceeding is pending, assuming the requirements of 28 U.S.C. § 1404(a) can be met. Cf. Lank v. Federal Ins. Co., 309 F. Supp. 349, 353 (D. Del. 1970). Still another possibility might be the transfer of the bankruptcy proceeding to Chicago. See 28 U.S.C. § 1412. Either form of transfer might make it easier to ensure that this lawsuit is not handled in a way that would unfairly prejudice the interests of Hospital Products' other creditors. We mean to imply no view on whether transfer (in [**38] either direction) might be possible or desirable, but it is something for the parties and the district judge to consider in their quest to do equity in this matter.

Affirmed.

WALGREEN COMPANY, Plaintiff-Appellee, v. SARA CREEK PROPERTY COMPANY, B.V., a/k/a SARA CREEK BETA, and PHAR-MOR CORPORATION, Defendants-Appellants. UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 966 F.2d 273 April 17, 1992, Argued June 29, 1992, Decided

OPINIÓN POR: POSNER

[*274] [**2] This appeal from the grant of a permanent Injunction raises fundamental issues concerning the propriety of injunctive relief The essential facts are simple. Walgreen has operated a pharmacy in the Southgate Mall in Milwaukee since its opening in 1951. Its current lease, signed In 1971 and carrying a 30-year, 6-month term, contains, as had the only previous lease, a clause in which the landlord, Sara Creek, promises not to lease space in the mall to anyone else who wants to operate a pharmacy or a store containing a pharmacy. Such an exclusivity clause, common in shopping-center leases, is occasionally

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challenged on antitrust grounds, Milton Handler & Daniel E. Lazaroff, "Restraint of Trade and the Restatement (Second) of Contracts," 57 N.Y.U.L. Rev. 669, 683-708 (1982); Note, "The Antitrust Implications of Restrictive Covenants in Shopping Center Leases," 86 Harv. L. Rev. 1201 (1973)--implausibly enough, given the competition among malls; but that is an issue for another day, since in this appeal Sara Creek does not press the objection it made below to the clause on antitrust grounds.

In 1990, fearful that its largest tenant--what in real estate [**3] parlance is called the "anchor tenant"--having gone broke was about to close its store, Sara Creek informed Walgreen that it intended to buy out the anchor tenant and install in its place a discount store operated by Phar-Mor Corporation, a "deep discount" chain, rather than, like Walgreen, just a "discount" chain. Phar-Mor's store would occupy 100,000 square feet, of which 12,000 would be occupied by a pharmacy the same size as Walgreen's. The entrances to the two stores would be within a couple of hundred feet of each other.

Walgreen filed this diversity suit for breach of contract against Sara Creek and Phar-Mor and asked for an injunction against Sara Creek's letting the anchor premises to Phar-Mor. After an evidentiary hearing, the judge found a breach of Walgreen's lease and entered a permanent injunction against Sara Creek's letting the anchor tenant premises to Phar-Mor until the expiration of Walgreen's lease. He did this over the defendants' objection that Walgreen had failed to show that its remedy at law--damages--for the breach of the exclusivity clause was inadequate. Sara Creek had put on an expert witness who testified that Walgreen's damages could be readily estimated, [**4] and Walgreen had countered with evidence from its employees that its damages would be very difficult to compute, among other reasons because they included intangibles such as loss of goodwill.

Sara Creek reminds us that damages are the norm in breach of contract as in other cases. Many breaches, it points out, are "efficient," in the sense that they allow

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resources to be moved into a more valuable use. Patton v. Mid-Continent Systems, Inc., 841 F.2d 742, 750-51 (7th Cir. 1988). Perhaps this is one--the value of Phar-Mor's occupancy of the anchor premises may exceed the cost to Walgreen of facing increased competition. If so, society will be better off if Walgreen is paid its damages, equal to that cost, and Phar-Mor is allowed to move in rather than being kept out by an injunction. That is why injunctions are not granted as a matter of course, but only when the plaintiff's damages remedy is inadequate. Northern Indiana Public Service Co. v. Carbon County Coal Co., 799 F.2d 265, 279 (7th Cir. 1986). Walgreen's is not, Sara Creek argues; the projection of business losses due to increased competition is a routine exercise in calculation. Damages [**5] representing either the present value of lost future profits or (what should be the equivalent, Carusos v. Briarcliff, Inc., 76 Ga. App. 346, 351-52, 45 S.E.2d 802, 806-07 [*275] (1947)) the diminution in the value of the leasehold have either been awarded or deemed the proper remedy in a number of reported cases for breach of an exclusivity clause in a shopping-center lease. Coach House of Ward Parkway, Inc. v. Ward Parkway Shops, Inc., 471 S.W.2d 464, 473 (Mo. 1971); Krikorian v. Dailey, 171 Va. 16, 197 S.E. 442 (1938); PNY Realty Corp. v. Chong Leung Restaurant, 116 Misc. 2d 1035, 457 N.Y.S.2d 358 (1982); Saucier v. John-Clai Co., 408 So.2d 27 (La. App. 1981); Barr & Sons, Inc. v. Cherry Hill Center, Inc., 90 N.J. Super. 358, 376, 217 A.2d 631, 641 (1966); Renee Cleaners, Inc. v. Good Deal Super Markets of N.J., Inc., 89 N.J. Super. 186, 214 A.2d 437 (App. Div. 1965); Carusos v. Briarcliff, Inc., supra; Annot., "Validity, Construction, and Effect of Lessor's [**6] Covenant Against Use of His Other Property in Competition with the Lessee-Covenantee," 97 A.L.R.2d 4, 111-117 (§ 28) (1964 and Supp. 1983). Why, Sara Creek asks, should they not be adequate here?

Sara Creek makes a beguiling argument that contains much truth, but we do not think it should carry the day. For if, as just noted, damages have been awarded in some cases

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of breach of an exclusivity clause in a shopping-center lease, injunctions have been issued in others. Handy Andy Home Improvement Centers, Inc. v. American National Bank & Trust Co., 177 Ill. App. 3d 647, 532 N.E.2d 537 (1988); De Koven Drug Co. v. First National Bank, 27 Ill. App. 3d 798, 800, 327 N.E.2d 378, 379 (1975); Regis Corp. v. Fusco Corp., 496 So. 2d 833, 835 (Fla. App. 1986); Belvin v. Sikes, 2 So. 2d 65 (La. App. 1941); Child World, Inc. v. South Towne Centre, Ltd., 634 F. Supp. 1121, 1134-35 (S.D. Ohio 1986). The choice between remedies requires a balancing of the costs and benefits of the alternatives. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944); [**7] Yakus v. United States, 321 U.S. 414, 440 (1944). The task of striking the balance is for the trial judge, subject to deferential appellate review in recognition of its particularistic, judgmental, fact-bound character. K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 915 (1st Cir. 1989). As we said in an appeal from a grant of a preliminary injunction--but the point is applicable to review of a permanent injunction as well--"The question for us [appellate judges] is whether the [district] judge exceeded the bounds of permissible choice in the circumstances, not what we would have done if we had been in his shoes." Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 390 (7th Cir. 1984).

The plaintiff who seeks an injunction has the burden of persuasion--damages are the norm, so the plaintiff must show why his case is abnormal. But when, as in this case, the issue is whether to grant a permanent injunction, not whether to grant a temporary one, the burden is to show that damages are inadequate, not that the denial of the injunction will work irreparable harm. "Irreparable" in the injunction context means not [**8] rectifiable by the entry of a final judgment. Diginet, Inc. v. Western Union ATS, Inc., 958 F.2d 1388, 1393 (7th Cir. 1992); Vogel v. American Society of Appraisers, 744 F.2d 598, 599 (7th Cir. 1984). It has nothing to do with whether to grant a permanent injunction, which, in the usual case anyway, is the final judgment. The use of "irreparable harm" or

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"irreparable injury" as synonyms for inadequate remedy at law is a confusing usage. It should be avoided. Owen M. Fiss & Doug Rendleman, Injunctions 59 (2d ed. 1984).

The benefits of substituting an injunction for damages are twofold. First, it shifts the burden of determining the cost of the defendant's conduct from the court to the parties. If it is true that Walgreen's damages are smaller than the gain to Sara Creek from allowing a second pharmacy into the shopping mall, then there must be a price for dissolving the injunction that will make both parties better off. Thus, the effect of upholding the injunction would be to substitute for the costly processes of forensic fact determination the less costly processes of private negotiation. Second, a premise of our free-market system, and [**9] the lesson of experience here and [*276] abroad as well, is that prices and costs are more accurately determined by the market than by government. A battle of experts is a less reliable method of determining the actual cost to Walgreen of facing new competition than negotiations between Walgreen and Sara Creek over the price at which Walgreen would feel adequately compensated for having to face that competition.

That is the benefit side of injunctive relief but there is a cost side as well. Many injunctions require continuing supervision by the court, and that is costly. Roland Machinery Co. v. Dresser Industries, Inc., supra, 749 F.2d at 391-92; Rodriguez v. VIA Metropolitan Transit System, 802 F.2d 126, 132 (5th Cir. 1986); Bethlehem Engineering Export Co. v. Christie, 105 F.2d 933, 935 (2d Cir. 1939) (L. Hand, J.). A request for specific performance (a form of mandatory injunction) of a franchise was refused on this ground in North American Financial Group, Ltd. v. S.M.R. Enterprises, Inc., 583 F. Supp. 691, 699 (N.D. Ill. 1984); see Edward Yorio, Contract Enforcement: Specific Performance and Injunctions [**10] § 3.3.2 (1989). This ground was also stressed in Rental Development Corp. v. Lavery, 304 F.2d 839, 841-42 (9th Cir. 1962), a case involving a lease. Some injunctions are problematic because they impose costs on third parties. Shondel v.

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McDermott, 775 F.2d 859, 868 (7th Cir. 1985). A more subtle cost of injunctive relief arises from the situation that economists call "bilateral monopoly," in which two parties can deal only with each other: the situation that an injunction creates. Goldstick v. I.C.M. Realty, 788 F.2d 456, 463 (7th Cir. 1986); Milbrew, Inc. v. Commissioner, 710 F.2d 1302, 1306-07 (7th Cir. 1983); Chicago & North Western Transporation Co. v. United States, 678 F.2d 665, 667 (7th Cir. 1982). The sole seller of widgets selling to the sole buyer of that product would be an example. But so will be the situation confronting Walgreen and Sara Creek if the injunction is upheld. Walgreen can "sell" its injunctive right only to Sara Creek, and Sara Creek can "buy" Walgreen's surrender of its right to enjoin the leasing of the anchor tenant's space to Phar-Mor only from Walgreen. [**11] The lack of alternatives in bilateral monopoly creates a bargaining range, and the costs of negotiating to a point within that range may be high. Suppose the cost to Walgreen of facing the competition of Phar-Mor at the Southgate Mall would be $ 1 million, and the benefit to Sara Creek of leasing to Phar-Mor would be $ 2 million. Then at any price between those figures for a waiver of Walgreen's injunctive right both parties would be better off, and we expect parties to bargain around a judicial assignment of legal rights if the assignment is inefficient. R.H. Coase, "The Problem of Social Cost," 3 J. Law & Econ. 1 (1960). But each of the parties would like to engross as much of the bargaining range as possible--Walgreen to press the price toward $ 2 million, Phar-Mor to depress it toward $ 1 million. With so much at stake, both parties will have an incentive to devote substantial resources of time and money to the negotiation process. The process may even break down, if one or both parties wants to create for future use a reputation as a hard bargainer; and if it does break down, the injunction will have brought about an inefficient result. All these are in one [**12] form or another costs of the injunctive process that can be avoided by substituting damages.

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The costs and benefits of the damages remedy are the mirror of those of the injunctive remedy. The damages remedy avoids the cost of continuing supervision and third-party effects, and the cost of bilateral monopoly as well. It imposes costs of its own, however, in the form of diminished accuracy in the determination of value, on the one hand, and of the parties' expenditures on preparing and presenting evidence of damages, and the time of the court in evaluating the evidence, on the other.

The weighing up of all these costs and benefits is the analytical procedure that is or at least should be employed by a judge asked to enter a permanent injunction, with the understanding that if the balance is even the injunction should be withheld. The judge is not required to explicate every [*277] detail of the analysis and he did not do so here, but as long we are satisfied that his approach is broadly consistent with a proper analysis we shall affirm; and we are satisfied here. The determination of Walgreen's damages would have been costly in forensic resources and inescapably inaccurate. Roland Machinery Co. v. Dresser Industries, Inc., supra, 749 F.2d at 386; [**13] Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 382 (7th Cir. 1986); K-Mart Corp. v. Oriental Plaza, Inc., supra, 875 F.2d at 914-16. The lease had ten years to run. So Walgreen would have had to project its sales revenues and costs over the next ten years, and then project the impact on those figures of Phar-Mor's competition, and then discount that impact to present value. All but the last step would have been fraught with uncertainty.

We may have given too little weight to such uncertainties in American Dairy Queen Corp. v. Brown-Port Co., 621 F.2d 255, 257 n. 2 (7th Cir. 1980), but in that case the strict judge had found that the remedy at law was adequate in the circumstances and the movant had failed to make its best argument for inadequacy in the district court. Id. at 259. It is difficult to forecast the profitability of a retail store over a decade, let alone to assess the impact of a particular competitor on that profitability over that period.

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Of course one can hire an expert to make such predictions, Glen A. Stankee, "Econometric Forecasting of Lost Profits: Using [**14] High Technology to Compute Commercial Damages," 61 Fla. B.J. 83 (1987), and if injunctive relief is infeasible the expert's testimony may provide a tolerable basis for an award of damages. We cited cases in which damages have been awarded for the breach of an exclusivity clause in a shopping-center lease. But they are awarded in such circumstances not because anyone thinks them a clairvoyant forecast but because it is better to give a wronged person a crude remedy than none at all. It is the same theory on which damages are awarded for a disfiguring injury. No one thinks such injuries readily monetizable, City of Panama", 101 U.S. 453, 464 (1880); McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1557 (7th Cir. 1987); Marcus L. Plant, "Damages for Pain and Suffering," 19 Ohio St. L.J. 200, 205-06 (1958), but a crude estimate is better than letting the wrongdoer get off scot-free (which, not incidentally, would encourage more such injuries). Randall R. Bovbjerg et al., "Valuing Life and Limb in Tort: Scheduling 'Pain and Suffering,'" 83 Nw. U. L. Rev. 908 (1989). Sara Creek presented [**15] evidence of what happened (very little) to Walgreen when Phar-Mor moved into other shopping malls in which Walgreen has a pharmacy, and it was on the right track in putting in comparative evidence. But there was a serious question whether the other malls were actually comparable to the Southgate Mall, so we cannot conclude, in the face of the district judge's contrary conclusion, that the existence of comparative evidence dissolved the difficulties of computing damages in this case. Sara Creek complains that the judge refused to compel Walgreen to produce all the data that Sara Creek needed to demonstrate the feasibility of forecasting Walgreen's damages. Walgreen resisted, on grounds of the confidentiality of the data and the cost of producing the massive data that Sara Creek sought. Those are legitimate grounds; and the cost (broadly conceived) they expose of pretrial discovery, in turn presaging

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complexity at trial, is itself a cost of the damages remedy that injunctive relief saves.

Damages are not always costly to compute, or difficult to compute accurately. In the standard case of a seller's breach of a contract for the sale of goods where the buyer covers by purchasing the [**16] same product in the market, damages are readily calculable by subtracting the market price from the contract price and multiplying by the quantity specified in the contract. But this is not such a case and here damages would be a costly and inaccurate remedy; and on the other side of the balance some of the costs of an injunction are absent and the cost that is present seems low. The injunction here, like one enforcing a covenant not to compete (standardly enforced by injunction, Yorio, supra, 401-08), is a [*278] simple negative injunction--Sara Creek is not to lease space in the Southgate Mall to Phar-Mor during the term of Walgreen's lease and the costs of judicial supervision and enforcement should be negligible. There is no contention that the injunction will harm an unrepresented third party. It may harm Phar-Mor but that harm will be reflected in Sara Creek's offer to Walgreen to dissolve the injunction. (Anyway Phar-Mor is a party.) The injunction may also, it is true, harm potential customers of Phar-Mor--people who would prefer to shop at a deep-discount store than an ordinary discount store--but their preferences, too, are registered indirectly. The more business Phar-Mor [**17] would have, the more rent it will be willing to pay Sara Creek, and therefore the more Sara Creek will be willing to pay Walgreen to dissolve the injunction.

The only substantial cost of the injunction in this case is that it may set off a round of negotiations between the parties. In some cases, illustrated by Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870 (1970), this consideration alone would be enough to warrant the denial of injunctive relief. The defendant's factory was emitting cement dust that caused the plaintiffs harm monetized at less than $ 200,000, and the only way to abate the harm would have been to close down the factory, which had cost

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$ 45 million to build. An injunction against the nuisance could therefore have created a huge bargaining range (could, not would, because it is unclear what the current value of the factory was), and the costs of negotiating to a point within it might have been immense. If the market value of the factory was actually $ 45 million, the plaintiffs would be tempted to hold out for a price to dissolve the injunction in the tens of millions and the factory would be tempted to refuse to pay anything [**18] more than a few hundred thousand dollars. Negotiations would be unlikely to break down completely, given such a bargaining range, but they might well be protracted and costly. There is nothing so dramatic here. Sara Creek does not argue that it will have to close the mall if enjoined from leasing to Phar-Mor. Phar-Mor is not the only potential anchor tenant. Liza Danielle, Inc. v. Jamko, Inc., 408 So. 2d 735, 740 (Fla. App. 1982), on which Sara Creek relies, presented the converse case where the grant of the injunction would have forced an existing tenant to close its store. The size of the bargaining range was also a factor in the denial of injunctive relief in Gitlitz v. Plankinton Building Properties, Inc., 228 Wis. 334, 339-40, 280 N.W. 415, 418 (1938).

To summarize, the judge did not exceed the bounds of reasonable judgment in concluding that the costs (including forgone benefits) of the damages remedy would exceed the costs (including forgone benefits) of an injunction. We need not consider whether, as intimated by Walgreen, exclusivity clauses in shopping-center leases should be considered presumptively enforceable by injunctions. [**19] Although we have described the choice between legal and equitable remedies as one for case-by-case determination, the courts have sometimes picked out categories of case in which injunctive relief is made the norm. The best-known example is specific performance of contracts for the sale of real property. Anderson v. Onsager, 155 Wis. 2d 504, 455 N.W.2d 885 (1990); Okaw Drainage District v. National Distillers & Chemical Corp., 882 F.2d 1241, 1248 (7th Cir. 1989); Anthony T. Kronman,

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"Specific Performance," 45 U. Chi. L. Rev. 351, 355 and n. 20 (1978). The rule that specific performance will be ordered in such cases as a matter of course is a generalization of the considerations discussed above. Because of the absence of a fully liquid market in real property and the frequent presence of subjective values (many a homeowner, for example, would not sell his house for its market value), the calculation of damages is difficult; and since an order of specific performance to convey a piece of property does not create a continuing relation between the parties, the costs of supervision and enforcement if specific performance [**20] is ordered are slight. The exclusivity clause in Walgreen's lease relates to real estate, but we hesitate to suggest that every contract Involving real estate should [*279] be enforceable as a matter of course by injunctions. Suppose Sara Creek had covenanted to keep the entrance to Walgreen's store free of ice and snow, and breached the covenant. An injunction would require continuing supervision, and it would be easy enough if the injunction were denied for Walgreen to hire its own ice and snow remover and charge the cost to Sara Creek. Cf. City of Michigan City v. Lake Air Corp., 459 N.E.2d 760 (Ind. App. 1984). On the other hand, injunctions to enforce exclusivity clauses are quite likely to be justifiable by just the considerations present here--damages are difficult to estimate with any accuracy and the injunction is a one-shot remedy requiring no continuing judicial involvement. So there is an argument for making injunctive relief presumptively appropriate in such cases, but we need not decide in this case how strong an argument.

Affirmed.

VI. EL DESCARGO DE LA OBLIGACIÓN

A. EL CORRECTO CUMPLIMIENTO DEL CONTRATO

SUBSTANTIAL PERFORMANCE

JACOB & YOUNGS, INCORPORATED, Respondent, v. GEORGE E. KENT, Appellant. COURT

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OF APPEALS OF NEW YORK 230 N.Y. 239; 129 N.E. 889; 23 A.L.R. 1429 December 1, 1920, Argued January 25, 1921, Decided

OPINIÓN POR: CARDOZO

[*240] [**890] The plaintiff built a country residence for the defendant at a cost of upwards of $ 77,000, and now sues to recover a balance of $ 3,483.46, remaining unpaid. The work of construction ceased in June, 1914, and the defendant then began to occupy the dwelling. There was no complaint of defective performance until March, 1915. One of the specifications for the plumbing work provides that "all wrought iron pipe must be well galvanized, lap welded pipe of the grade known as 'standard pipe' of Reading manufacture." The defendant learned in March, 1915, that some of the pipe, instead of being made in Reading, was the product of other factories. The plaintiff was accordingly directed by the architect to do the work anew. The plumbing was then encased within the walls except in a few places where it had to be exposed. Obedience to the order meant more than the substitution of other pipe. It meant the demolition at great expense of substantial parts of [*241] the completed structure. The plaintiff left the work untouched, and asked for a certificate that the final payment was due. Refusal of the certificate was followed by this suit.

The evidence sustains a finding that the omission of the prescribed brand of pipe was neither fraudulent nor willful. It was the result of the oversight and inattention of the plaintiff's subcontractor. Reading pipe is distinguished from Cohoes pipe and other brands only by the name of the manufacturer stamped upon it at intervals of between six and seven feet. Even the defendant's architect, though he inspected the pipe upon arrival, failed to notice the discrepancy. The plaintiff tried to show that the brands installed, though made by other manufacturers, were the same in quality, in appearance, in market value and in cost as the brand stated in the contract -- that they were, indeed, the same thing, though manufactured in another place. The evidence was excluded, and a verdict directed for the

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defendant. The Appellate Division reversed, and granted a new trial.

We think the evidence, if admitted, would have supplied some basis for the inference that the defect was insignificant in its relation to the project. The courts never say that one who makes a contract fills the measure of his duty by less than full performance. They do say, however, that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture (Spence v. Ham, 163 N. Y. 220; Woodward v. Fuller, 80 N. Y. 312; Glacius v. Black, 67 N. Y. 563, 566; Bowen v. Kimbell , 203 Mass. 364, 370). The distinction is akin to that between dependent and independent promises, or between promises and conditions (Anson on Contracts [Corbin's ed.], sec. 367; 2 Williston on Contracts, sec. 842). Some promises are so plainly independent that they can never [*242] by fair construction be conditions of one another. (Rosenthal Paper Co. v. Nat. Folding Box & Paper Co., 226 N. Y. 313; Bogardus v. N. Y. Life Ins. Co., 101 N. Y. 328). Others are so plainly dependent that they must always be conditions. Others, though dependent and thus conditions when there is departure in point of substance, will be viewed as independent and collateral when the departure is insignificant (2 Williston on Contracts, secs. 841, 842; Eastern Forge Co. v. Corbin, 182 Mass. 590, 592; Robinson v. Mollett, L. R., 7 Eng. & Ir. App. 802, 814; Miller v. Benjamin, 142 N. Y. 613). Considerations partly of justice and partly of presumable intention are to tell us whether this or that promise shall be placed in one class or in another. The simple and the uniform will call for different remedies from the multifarious and the intricate. The margin of departure within the range of normal expectation upon a sale of common chattels will vary from the margin to be expected upon a contract for the construction of a mansion or a "skyscraper." There will be harshness sometimes and oppression in the implication of a condition when the thing upon which labor has been expended is

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incapable of surrender because united to the land, and equity and reason in [**891] the implication of a like condition when the subject-matter, if defective, is in shape to be returned. From the conclusion that promises may not be treated as dependent to the extent of their uttermost minutiae without a sacrifice of justice, the progress is a short one to the conclusion that they may not be so treated without a perversion of intention. Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication. There will be no assumption of a purpose to visit venial faults with oppressive retribution.

Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification [*243] where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier. The decisions in this state commit us to the liberal view, which is making its way, nowadays, in jurisdictions slow to welcome it (Dakin & Co. v. Lee, 1916, 1 K. B. 566, 579). Where the line is to be drawn between the important and the trivial cannot be settled by a formula. "In the nature of the case precise boundaries are impossible" (2 Williston on Contracts, sec. 841). The same omission may take on one aspect or another according to its setting. Substitution of equivalents may not have the same significance in fields of art on the one side and in those of mere utility on the other. Nowhere will change be tolerated, however, if it is so dominant or pervasive as in any real or substantial measure to frustrate the purpose of the contract (Crouch v. Gutmann, 134 N. Y. 45, 51). There is no general license to install whatever, in the builder's judgment, may be regarded as "just as good" (Easthampton L. & C. Co., Ltd., v. Worthington, 186 N. Y. 407, 412). The question is one of degree, to be answered, if

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there is doubt, by the triers of the facts (Crouch v. Gutmann; Woodward v. Fuller, supra), and, if the inferences are certain, by the judges of the law (Easthampton L. & C. Co., Ltd., v. Worthington, supra). We must weigh the purpose to be served, the desire to be gratified, the excuse for deviation from the letter, the cruelty of enforced adherence. Then only can we tell whether literal fulfilment is to be implied by law as a condition. This is not to say that the parties are not free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery. That question is not here. This is merely to say that the law will be slow to impute the purpose, in the silence of the parties, where the significance [*244] of the default is grievously out of proportion to the oppression of the forfeiture. The willful transgressor must accept the penalty of his transgression (Schultze v. Goodstein, 180 N. Y. 248, 251; Desmond-Dunne Co. v. Friedman-Doscher Co., 162 N. Y. 486, 490). For him there is no occasion to mitigate the rigor of implied conditions. The transgressor whose default is unintentional and trivial may hope for mercy if he will offer atonement for his wrong (Spence v. Ham, supra).

In the circumstances of this case, we think the measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing. Some of the exposed sections might perhaps have been replaced at moderate expense. The defendant did not limit his demand to them, but treated the plumbing as a unit to be corrected from cellar to roof. In point of fact, the plaintiff never reached the stage at which evidence of the extent of the allowance became necessary. The trial court had excluded evidence that the defect was unsubstantial, and in view of that ruling there was no occasion for the plaintiff to go farther with an offer of proof. We think, however, that the offer, if it had been made, would not of necessity have been defective because directed to difference in value. It is true that in most cases the cost of replacement is the measure (Spence v. Ham, supra). The owner is entitled to the money which will

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permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value. Specifications call, let us say, for a foundation built of granite quarried in Vermont. On the completion of the building, the owner learns that through the blunder of a subcontractor part of the foundation has been built of granite of the same quality quarried in New Hampshire. The measure of allowance is not the cost of reconstruction. "There may be [*245] omissions of that which could not afterwards be supplied exactly as called for by the contract without taking down the building to its foundations, and at the same time the omission may not affect the value of the building for use or otherwise, except so slightly as to be hardly appreciable" (Handy v. Bliss, 204 Mass. 513, 519. Cf. Foeller v. Heintz, 137 Wis. 169, 178; Oberlies v. [**892] Bullinger, 132 N. Y. 598, 601; 2 Williston on Contracts, sec. 805, p. 1541). The rule that gives a remedy in cases of substantial performance with compensation for defects of trivial or inappreciable importance, has been developed by the courts as an instrument of justice. The measure of the allowance must be shaped to the same end.

The order should be affirmed, and judgment absolute directed in favor of the plaintiff upon the stipulation, with costs in all courts.

DISCREPA DEL FUNDAMENTO: McLAUGHLIN

I dissent. The plaintiff did not perform its contract. Its failure to do so was either intentional or due to gross neglect which, under the uncontradicted facts, amounted to the same thing, nor did it make any proof of the cost of compliance, where compliance was possible.

Under its contract it obligated itself to use in the plumbing only pipe (between 2,000 and 2,500 feet) made by the Reading Manufacturing Company. The first pipe delivered was about 1,000 feet and the plaintiff's superintendent then called the attention of the foreman of the subcontractor, who was doing the plumbing, to the fact that the specifications annexed to the contract required all pipe used in the plumbing to be of the Reading

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Manufacturing Company. They then examined it for the purpose of ascertaining whether this delivery was of that manufacture and found it was. Thereafter, as pipe was required in the progress of the work, the foreman of the subcontractor would leave word at its [*246] shop that he wanted a specified number of feet of pipe, without in any way indicating of what manufacture. Pipe would thereafter be delivered and installed in the building, without any examination whatever. Indeed, no examination, so far as appears, was made by the plaintiff, the subcontractor, defendant's architect, or any one else, of any of the pipe except the first delivery, until after the building had been completed. Plaintiff's architect then refused to give the certificate of completion, upon which the final payment depended, because all of the pipe used in the plumbing was not of the kind called for by the contract. After such refusal, the subcontractor removed the covering or insulation from about 900 feet of pipe which was exposed in the basement, cellar and attic, and all but 70 feet was found to have been manufactured, not by the Reading Company, but by other manufacturers, some by the Cohoes Rolling Mill Company, some by the National Steel Works, some by the South Chester Tubing Company, and some which bore no manufacturer's mark at all. The balance of the pipe had been so installed in the building that an inspection of it could not be had without demolishing, in part at least, the building itself.

I am of the opinion the trial court was right in directing a verdict for the defendant. The plaintiff agreed that all the pipe used should be of the Reading Manufacturing Company. Only about two-fifths of it, so far as appears, was of that kind. If more were used, then the burden of proving that fact was upon the plaintiff, which it could easily have done, since it knew where the pipe was obtained. The question of substantial performance of a contract of the character of the one under consideration depends in no small degree upon the good faith of the contractor. If the plaintiff had intended to, and had complied with the terms of the contract except as to minor

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omissions, due to inadvertence, then he might be allowed to recover the contract price, less the amount [*247] necessary to fully compensate the defendant for damages caused by such omissions. (Woodward v. Fuller, 80 N. Y. 312; Nolan v. Whitney, 88 N. Y. 648.) But that is not this case. It installed between 2,000 and 2,500 feet of pipe, of which only 1,000 feet at most complied with the contract. No explanation was given why pipe called for by the contract was not used, nor was any effort made to show what it would cost to remove the pipe of other manufacturers and install that of the Reading Manufacturing Company. The defendant had a right to contract for what he wanted. He had a right before making payment to get what the contract called for. It is no answer to this suggestion to say that the pipe put in was just as good as that made by the Reading Manufacturing Company, or that the difference in value between such pipe and the pipe made by the Reading Manufacturing Company would be either "nominal or nothing." Defendant contracted for pipe made by the Reading Manufacturing Company. What his reason was for requiring this kind of pipe is of no importance. He wanted that and was entitled to it. It may have been a mere whim on his part, but even so, he had a right to this kind of pipe, regardless of whether some other kind, according to the opinion of the contractor or experts, would have been "just as good, better, or done just as well." He agreed to pay only upon condition that the pipe installed were made by that company and he ought not to be compelled to pay unless that condition be performed. (Schultze v. Goodstein, 180 N. Y. 248; Spence v. Ham, supra; Steel S. & E. C. Co. v. Stock, 225 N. Y. 173; Van Clief v. Van Vechten, 130 N. Y. 571; Glacius v. Black, 50 N. Y. 145; Smith v. Brady, 17 N. Y. 173, and authorities cited on [**893] p. 185.) The rule, therefore, of substantial performance, with damages for unsubstantial omissions, has no application. (Crouch v. Gutmann, 134 N. Y. 45; Spence v. Ham, 163 N. Y. 220.)

[*248] What was said by this court in Smith v. Brady (supra) is quite applicable here: "I suppose it will be conceded that everyone has a right to build his house, his

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cottage or his store after such a model and in such style as shall best accord with his notions of utility or be most agreeable to his fancy. The specifications of the contract become the law between the parties until voluntarily changed. If the owner prefers a plain and simple Doric column, and has so provided in the agreement, the contractor has no right to put in its place the more costly and elegant Corinthian. If the owner, having regard to strength and durability, has contracted for walls of specified materials to be laid in a particular manner, or for a given number of joists and beams, the builder has no right to substitute his own judgment or that of others. Having departed from the agreement, if performance has not been waived by the other party, the law will not allow him to allege that he has made as good a building as the one he engaged to erect. He can demand payment only upon and according to the terms of his contract, and if the conditions on which payment is due have not been performed, then the right to demand it does not exist. To hold a different doctrine would be simply to make another contract, and would be giving to parties an encouragement to violate their engagements, which the just policy of the law does not permit." (p. 186.)

I am of the opinion the trial court did not err in ruling on the admission of evidence or in directing a verdict for the defendant.

For the foregoing reasons I think the judgment of the Appellate Division should be reversed and the judgment of the Trial Term affirmed.

B. LA REVISIÓN DEL CONTRATO

IMPOSIBILIDAD MATERIAL DE CUMPLIMIENTO SOBREVENIDA

PARADINE v. JANE. IN THE HIGH COURT OF JUSTICE, KING'S BENCH DIVISION 82 Eng. Rep. 897 26th March 1647

OPINIÓN POR: ROLLE

In debt the plaintiff declares upon a lease for years rendring rent at the four usual -feasts; and for rent behind for three years, ending at the Feast of the Annunciation, 21

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Car. brings his action; the defendant pleads, that a certain German prince, by name Prince Rupert, an alien born, enemy to the King and kingdom, had invaded the realm with an hostile army of men; and with the same force did enter upon the defendant's possession, and him expelled, and held out of possession from the 19 of July 18 Car. till the Feast of the Annunciation, 21 Car. whereby he could not take the profits; whereupon the plaintiff demurred, and the plea was resolved insufficient.

1. Because the defendant hath not answered to one quarters rent.

2. He hath not averred that the army were all aliens, which shall not be intended, and then he hath his remedy against them; and Bacon cited 33 H. 6. 1. e. where the gaoler in bar of an escape pleaded, that alien enemies broke the prison, etc. and exception taken to it, for that he ought to shew of what countrey they were, viz. Scots, &c.

3. It was resolved, that the matter of the plea was insufficient; for though the whole army had been alien enemies, yet he ought to pay his rent. And this difference was taken, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. As in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. Dyer, 33. a. Inst. 53. d. 283. a. 12 H. 4. 6. so of an escape. Co. 4. 84. b. 33 H. 6. 1. So in 9 E. 3. 16. a supersedeas was awarded to the justices, that they should not proceed in a cessavit upon a cesser during the war, but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it. Dyer 33. a. 40 E. 3. 6. h. Now the rent is a duty created by the parties upon the reservation, and had there been a covenant to pay it, there had been no question but the lessee must have made it good, notwithstanding the interruption by

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enemies, for the law would not protect him beyond his own agreement, no more then in the case of reparations; this reservation then being a covenant in law, and whereupon an action of covenant hath been maintained (as Roll said) it is all one as if there had been an actual covenant. Another reason was added, that as the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses, and not lay the whole burthen of them upon his lessor; and Dyer 56. 6. was cited for this purpose, that though the land be surrounded, or gained by the sea, or made barren by wildfire, yet the lessor shall have his whole rent: and judgment was given for the plaintiff.

TAYLOR v. CALDWELL. IN THE HIGH COURT OF JUSTICE, KING'S BENCH DIVISION 122 Eng. Rep. 309 26th March 1647

OPINIÓN POR: BLACKBURN

In this case the plaintiffs and defendants had, on the 27th May, 1861, entered into a contract by which the defendants agreed to let the plaintiffs have the use of The Surrey Gardens and Music Hall on four days then to come, viz., the 17th June, 15th July, 5th August and 19th August, for the purpose of giving a series of four grand concerts, and day and night fetes at the Gardens and Hall on those days respectively; and the plaintiffs agreed to take the Gardens and Hall on those days, and pay 100l. for each day. The parties inaccurately call this a "letting," and the money to be paid a "rent;" but the whole agreement is such as to shew that the defendants were to retain the possession of the Hall and Gardens so that there was to be no demise of them, and that the contract was merely to give the plaintiffs the use of them on those days. Nothing however, in our opinion, depends on this. The agreement then proceeds to set out various stipulations between the parties as to what each was to supply for these concerts and entertainments, and as to the manner in which they should be carried on. The effect of the whole is to shew that the existence of the Music Hall in the Surrey Gardens in a state fit for a concert was essential for the fulfilment of the contract,-such entertainments as the parties contemplated in

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their agreement could not be given without it. After the making of the agreement, and before the first day on which a concert was to be given, the Hall was destroyed by fire. This destruction, we must take it on the evidence, was without the fault of either party, and was so complete that in consequence the concerts could not be given as intended. And the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants. The parties when framing their agreement evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend upon the general rules of law applicable to such a contract. There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible. The law is so laid down in 1 Roll. Abr. 450, Condition (G), and in the note (2) to Walton v. Waterhouse (2 Wms. Saund. 421 a. 6th ed.), and is recognised as the general rule by all the Judges in the much discussed case of Hall v. Wright (E. B. & E. 746). But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied: and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without

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default of the contractor. There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition. Accordingly, in the Civil law, such an exception is implied in every obligation of the class which they call obligatio de certo corpore. The rule is laid down in the Digest, lib. xLv., tit. l, de verborum obligationibus, 1. 33. "Si Stichus certo die dari promissus, ante diem moriatur: non tenetur promissor." The principle is more fully developed in l. 23. "Si ex legati causa, aut ex stipulatii hominem certum mihi debeas: non aliter post mortem ejus tenearis mihi, quam si per te steterit, quominus vivo eo eum mihi dares: quod ita fit, si aut interpellatus non dedisti, aut occidisti eum." The examples are of contracts respecting a slave, which was the common illustration of a certain subject used by the Roman lawyers, just as we are apt to take a horse; and no doubt the propriety, one might almost say necessity, of the implied condition is more obvious when the contract relates to a living animal, whether man or brute, than when it relates to some inanimate thing (such as in the present case a theatre) the existence of which is not so obviously precarious as that of the live animal, but the principle is adopted in the Civil law as applicable to every obligation of which the subject is a certain thing. The general subject is treated of by Pothier, who in his Traite des Obligations, partie 3, chap. 6, art. 3, § 668 states the result to be that the debtor corporis certi is freed from his obligation when the thing has perished, neither by his act, nor his neglect, and before he is in default, unless by some stipulation he has taken on himself the risk of the particular misfortune which has occurred.

Although the Civil law is not of itself authority in an English Court, it affords great assistance in investigating the principles on which the law is grounded. And it seems to us that the common law authorities establish that in such

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a contract the same condition of the continued existence of the thing is implied by English law.

There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person; and such promises, e.g. promises to marry, or promises to serve for a certain time, are never in practice qualified by an express exception of the death of the party; and therefore in such cases the contract is in terms broken if the promisor dies before fulfilment. Yet it was very early determined that, if the performance is personal, the executors are not liable; Hyde v. The Dean of Windsor (Cro. Eliz. 552, 553). See 2 Wms. Exors. 1560, 5th ed., where a very apt illustration is given. "Thus," says the learned author, "if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract: for the undertaking is merely personal in its nature, and, by the intervention of the contractor's death, has become impossible to be performed."For this he cites a dictum of Lord Lyndhurst in Marshall v. Broadhurst (1 Tyr. 348, 349), and a case mentioned by Patteson J. in Wentworth v. Cock (10 A. & E. 42, 45-46). In Hall v. Wright (E. B. & E. 746, 749), Crompton J., in his judgment, puts another case. "Where a contract depends upon personal skill, and the act of God renders it impossible, as, for instance, in the case of a painter employed to paint a picture who is struck blind, it may be that the performance might be excused."

It seems that in those cases the only ground on which the parties or their executors, can be excused from the consequences of the breach of the contract is, that from the nature of the contract there is an implied condition of the continued existence of the life of the contractor, and, perhaps in the case of the painter of his eyesight. In the instances just given, the person, the continued existence of whose life is necessary to the fulfilment of the contract, is himself the contractor, but that does not seem in itself to be necessary to the application of the principle; as is illustrated by the following example. In the ordinary form of an apprentice deed the apprentice binds himself in unqualified

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terms to "serve until the full end and term of seven years to be fully complete and ended," during which term it is covenanted that the apprentice his master "faithfully shall serve," and the father of the apprentice in equally unqualified terms binds himself for the performance by the apprentice of all and every covenant on his part. (See the form, 2 Chitty on Pleading, 370, 7th ed. by Greening.) It is undeniable that if the apprentice dies within the seven years, the covenant of the father that he shall perform his covenant to serve for seven years is not fulfilled, yet surely it cannot be that an action would lie against the father? Yet the only reason why it would not is that he is excused because of the apprentice's death.

These are instances where the implied condition is of the life of a human being, but there are others in which the same implication is made as to the continued existence of a thing. For example, where a contract of sale is made amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day; there, if the chattels, without the fault of the vendor, perish in the interval, the purchaser must pay the price and the vendor is excused from performing his contract to deliver, which has thus become impossible.

That this is the rule of the English law is established by the case of Rugg v. Minett (11 East, 210), where the article that perished before delivery was turpentine, and it was decided that the vendor was bound to refund the price of all those lots in which the property had not passed; but was entitled to retain without deduction the price of those lots in which the property had passed, though they were not delivered, and though in the conditions of sale, which are set out in the report, there was no express qualification of the promise to deliver on payment. It seems in that case rather to have been taken for granted than decided that the destruction of the thing sold before delivery excused the vendor from fulfilling his contract to deliver on payment.

This also is the rule in the Civil law, and it is worth noticing that Pothier, in his celebrated Traite du Contrat de

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Vente (see Part. 4, § 307, etc.; and Part. 2, ch. 1, sect. 1, art. 4, § 1), treats this as merely an example of the more general rule that every obligation de certo corpore is extinguished when the thing ceases to exist. See Blackburn on the Contract of Sale, p. 173.

The same principle seems to be involved in the decision of Sparrow v. Sowyate (W. Jones, 29), where, to an action of debt on an obligation by bail, conditioned for the payment of the debt or the render of the debtor, it was held a good plea that before any default in rendering him the principal debtor died. It is true that was the case of a bond with a condition, and a distinction is sometimes made in this respect between a condition and a contract. But this observation does not apply to Williams v. Lloyd (W. Jones, 179). In that case the count, which was in assumpsit, alleged that the plaintiff had delivered a horse to the defendant, who promised to redeliver it on request. Breach, that though requested to redeliver the horse he refused. Plea, that the horse was sick and died, and the plaintiff made the request after its death; and on demurrer it was held a good plea, as the bailee was discharged from his promise by the death of the horse without default or negligence on the part of the defendant. "Let it be admitted," say the Court, "that he promised to deliver it on request, if the horse die before, that is become impossible by the act of God, so the party shall be discharged, as much as if an obligation were made conditioned to deliver the horse on request, and he died before it." And Jones, adds the report, cited 22 Ass. 41, in which it was held that a ferryman who had promised to carry a horse safe across the ferry was held chargeable for the drowning of the animal only because he had overloaded the boat, and it was agreed, that notwithstanding the promise no action would have lain had there been no neglect or default on his part. It may, we think, be safely asserted to be now English law, that in all contracts of loan of chattels or bailments if the performance of the promise of the borrower or bailee to return the things lent or bailed, becomes impossible because it has perished, this impossibility (if not arising from the fault of the

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borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel. The great case of Coggs v. Bernard (1 Smith's L. C. 171, 5th ed.; 2 L. Raym. 909) is now the leading case on the law of bailments, and Lord Holt, in that case, referred so much to the Civil law that it might perhaps be thought that this principle was there derived direct from the civilians, and was not generally applicable in English law except in the ease of bailments; but the case of Williams v. Lloyd (W. Jones, 179), above cited, shews that the same law had been already adopted by the English law as early as The Book of Assizes. The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given; that being essential to their performance.

We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and other things. Consequently the rule must be absolute to enter the verdict for the defendants. Rule absolute.

CNA INTERNATIONAL REINSURANCE COMPANY, LTD., As Subrogee Of SHAPRAY LIMITED, DARK BLOOD, INC., NEW LINE CINEMA, INC., BRITISH SCREEN FINANCE, LTD., BERLINER

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BANK, SCREEN PARTNERS and FILM FINANCES, INC., Appellants, v. ARLYN PHOENIX, as Personal Representative of The Estate of RIVER J. PHOENIX, Appellee. AMERICAN CASUALTY COMPANY OF READING, PA., As Subrogee of TIME WARNER, INC., Appellant, v. ARLYN PHOENIX, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RIVER J. PHOENIX, Appellee. COURT OF APPEAL OF FLORIDA, FIRST DISTRICT 678 So. 2d 378 July 2, 1996, Filed

OPINIÓN POR: JOANOS

[*378] In these consolidated appeals from final orders granting appellee's motions to dismiss, appellants raise two issues: (1) whether the defense of impossibility of performance due to death applies when the impossibility is, allegedly, the fault of the person obligated to perform the personal services contract, [*379] and (2) whether the trial court erred in ruling that the effective dates of the policies of insurance involved here were in November, 1993, after the widely publicized death in question. We affirm in part and reverse in part.

The case arises from [**2] the unfortunate death of the young actor, River Phoenix, originally of Gainesville, Florida, apparently due to an overdose of illegal drugs, before completion of two films, "Dark Blood" and "Interview With the Vampire," in which he had contracted to appear. As a result of the death, the "Dark Blood" project was totally abandoned. "Interview With the Vampire" was completed with another actor replacing Phoenix. CNA and American Casualty, which are both members of the CNA group of insurance companies, had written entertainment package insurance policies covering various aspects of the two productions. After paying the policy holders, CNA and American Casualty became subrogated to the claims the insureds had against the estate. 1

1 CNA paid out over $ 5.7 million under its policy. American Casualty had not yet paid all claims, and sought a declaratory judgment on the coverage issue. It had paid out $ 15,000 of approximately $ 400,000 in claims.

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CNA attempted to state a cause of action for breach of contract against [**3] Phoenix's estate, based on an "actor loanout agreement," between Jude Nile, a corporation owned and run by Phoenix and his mother, Arlyn Phoenix, and Scala Productions. 2 The agreement, signed by Phoenix, allegedly included a general obligation not to do anything which would deprive the parties to the agreement of its benefits. CNA further alleged that by deliberately taking illegal drugs in quantities in excess of those necessary to kill a human being, Phoenix deprived the parties of his services and breached his obligation. American Casualty also couched its complaint for declaratory judgment in terms of breach of contract based on an actor loanout agreement between Jude Nile and Geffen Pictures, which gave Geffen the right to loan Phoenix to Time Warner. In addition to the count for breach of contract, the CNA complaint contained a second count, for fraud and misrepresentation, based on an allegedly false representation in a medical certificate, allegedly signed by Phoenix, denying that Phoenix had ever used "LSD, heroin, cocaine, alcohol in excess, or any other narcotics, depressants, stimulants or psychedelics whether prescribed or not prescribed by a physician."

2 Scala Productions, Ltd., the production company for "Dark Blood," later assigned its rights to Shapray Ltd. The additional appellants in case no. 95-401 provided financing or other services for that production.

[**4] The estate moved to dismiss both complaints, contending there could be no cause of action for breach of contract because the personal services contracts were rendered impossible to perform due to the death. The estate further alleged that reliance on any representation in the medical certificate was unreasonable as a matter of law as of the effective dates of the policies, which it contended were in November, 1993, after the widely publicized death on October 31, 1993. After hearings, the trial court granted the motions to dismiss with prejudice.

On appeal, CNA and American Casualty contend that the defense of impossibility of performance does not apply

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in this case because that doctrine requires that the impossibility be fortuitous and unavoidable, and that it occur through no fault of either party. They contend that because the death occurred from an intentional, massive overdose of illegal drugs, that this is not a situation in which neither party was at fault. The trial court very clearly ruled that even if the death was a suicide (there is no indication in the record that it was) or the result of an intentional, self-inflicted act, the doctrine of impossibility of performance [**5] applied.

Appellants have candidly conceded that no case authorities exist in support of their position concerning fault in a case of impossibility due to death. Appellants ask this court to find support for their theory in the following language of the Restatement of Contracts 2d §§ 261 and 262:

§ 261 Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

[*380] § 262 If the existence of a particular person is necessary for the performance of a duty, his death or such incapacity as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.

Appellants contend the Restatement dictates that impossibility of performance due to the destruction of one's own health is not the sort of conduct that will excuse performance, citing Handicapped Children's Education Board v. Lukaszewski, 112 Wis. 2d 197, 332 N.W.2d 774 (Wis. 1983), and [**6] that the same reasoning should apply in a case of self-induced death. Appellants also suggest a policy basis for the ruling they advocate, arguing that in a society dealing with increasing problems created by illegal drug abuse, such conduct should not excuse the performance of the contract.

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At oral argument of this case, it became apparent that any attempt to discern fault in a death case such as this one, or in a similar case, perhaps involving the use of tobacco or alcohol would create another case by case and hard to interpret rule of law. Being mindful that there are already too many of these in existence, we are not persuaded by the facts or the arguments presented to depart from the clear and unambiguous rule that death renders a personal services contract impossible to perform. See 17A Am. Jur. 2d "Contracts" § 688 (1991). In such contracts, "there is an implied condition that death shall dissolve the contract." Id. With this implied condition in mind, we believe the parties to the agreements could have provided specifically for the contingency of loss due to the use of illegal drugs, as they provided for other hazardous or life threatening contingencies. 3 We affirm [**7] the trial court's ruling that the doctrine of impossibility of performance applies in this case.

3 For example, the actor loanout agreement pertaining to "Interview With the Vampire" provided:

From the date two (2) weeks before the scheduled start date of principal photography until the completion of all services required of Employee hereunder, Employee will not ride in any aircraft other than as a passenger on a scheduled flight of a United States or other major international air carrier maintaining regularly published schedules, or engage in any ultrahazardous activity without Producer's written consent in each case.

The entertainment package policies contained exclusions based on similar activities.

We reverse the trial court's ruling that, as a matter of law, the policies were not effective until the issuance date, November 12, 1993, after Phoenix's death on October 31, 1993. The policies, as well as pertinent endorsements, clearly reflect earlier effective dates of July 23, 1993, and August [**8] 15, 1993 on their faces. Generally, the parties to a contract are competent to fix the effective date. See John A. Appleman and Jean Appleman, Insurance Law and Practice § 105 (1981). 4 At the very least, further

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development of the record is in order on this issue. 5 affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

4 In addition to responding to the two issues specifically raised, appellee, in an effort to support the trial court's ruling, asserts several additional theories, which we address briefly. Appellee contends one of the policies was not valid until countersigned; however, the countersignature requirement can be waived under certain circumstances. See 17 John A. Appleman and Jean Appleman, Insurance Law and Practice § 9581 (1981). Thus it appears the absence of a countersignature does not mean, as a matter of law, that the policy was not valid until the issuance date. Similarly, the adequacy of Phoenix's signature on one side of the medical certificate cannot be decided at this point as a matter of law. We also reject the contention that § 627.408(1), Fla. Stat., required the medical certificate to be attached to the policy. The language of that section, which pertains to life and health insurance, does not appear to apply in this case. We reject any additional arguments not specifically addressed here. [**9]

5 Finally, we note that American Casualty sought a declaratory judgment on the coverage issue, and was entitled to a declaration regardless of whether it prevailed on the coverage issue. See State Farm v. Hinestrosa, 614 So. 2d 633 (Fla. 4th DCA 1993).

DIFICULTAD EXTRAORDINARIA SOBREVENIDA EN EL CUMPLIMIENTO

KRELL v. HENRY. IN THE COURT OF APPEAL
2 KB 740 11th August 1903

OPINIÓN POR: VAUGHAN

The real question in this case is the extent of the application in English law of the principle of the Roman law which has been adopted and acted on in many English decisions, and notably in the case of Taylor v. Caldwell. L. R. 2 C. P. 651. That case at least makes it clear that "where, from the nature of the contract, it appears that the parties

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must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." Thus far it is clear that the principle of the Roman law has been introduced into the English law. The doubt in the present case arises as to how far this principle extends. The Roman law dealt with obligationes de certo corpore. Whatever may have been the limits of the Roman law, the case of Nickoll v. Ashton, L. R. 4 Q. B. 180, makes it plain that the English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance. It is said, on the one side, that the specified thing, state of things, or condition the continued existence of which is necessary for the fulfilment of the contract, so that the parties entering into the contract must have contemplated the continued existence of that thing, condition, or state of things as the foundation of what was to be done under the contract, is limited to things which are either the subject-matter of the contract or a condition or state of things, present or anticipated, which is expresssly mentioned in the contract. But, on the other side, it is said that the condition or state of things need not be expressly specified, but that it is sufficient if that condition or state of things clearly appears by extrinsic evidence to have been assumed by the parties to be the foundation or basis of the contract, and the event

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which causes the impossibility is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made. In such a case the contracting parties will not be held bound by the general words which, though large enough to include, were not used with reference to a possibility of a particular event rendering performance of the contract impossible. I do not think that the principle of the civil law as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject-matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognised by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited. Now what are the facts of the present case? The contract is contained in two letters of June 20 which passed between the defendant and the plaintiff's agent, Mr. Cecil Bisgood. These letters do not mention the coronation, but speak merely of the taking of Mr. Krell's chambers, or, rather, of the use of them, in the daytime of June 26 and 27, for the sum of 75l., 25l. then paid, balance 50l. to be paid on the 24th. But the affidavits, which by agreement between the parties are to be taken as stating the facts of the case, shew that the plaintiff exhibited on his premises, third floor, 56A, Pall Mall, an announcement to the effect that windows to view the Royal coronation procession were to be let, and that the defendant was induced by that announcement to apply to the housekeeper

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on the premises, who said that the owner was willing to let the suite of rooms for the purpose of seeing the Royal procession for both days, but not nights, of June 26 and 27. In my judgment the use of the rooms was let and taken for the purpose of seeing the Royal procession. It was not a demise of the rooms, or even an agreement to let and take the rooms. It is a licence to use rooms for a particular purpose and none other. And in my judgment the taking place of those processions on the days proclaimed along the proclaimed route, which passed 56A, Pall Mall, was regarded by both contracting parties as the foundation of the contract; and I think that it cannot reasonably be supposed to have been in the contemplation of the contracting parties, when the contract was made, that the coronation would not be held on the proclaimed days, or the processions not take place on those days along the proclaimed route; and I think that the words imposing on the defendant the obligation to accept and pay for the use of the rooms for the named days, although general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards occurred. It was suggested in the course of the argument that if the occurrence, on the proclaimed days, of the coronation and the procession in this case were the foundation of the contract, and if the general words are thereby limited or qualified, so that in the event of the non-occurrence of the coronation and procession along the proclaimed route they would discharge both parties from further performance of the contract, it would follow that if a cabman was engaged to take someone to Epsom on Derby Day at a suitable enhanced price for such a journey, say 10l., both parties to the contract would be discharged in the contingency of the race at Epsom for some reason becoming impossible; but I do not think this follows, for I do not think that in the cab case the happening of the race would be the foundation of the contract. No doubt the purpose of the engager would be to go to see the Derby, and the price would be proportionately high; but the cab had no special qualifications for the purpose which led to

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the selection of the cab for this particular occasion. Any other cab would have done as well. Moreover, I think that, under the cab contract, the hirer, even if the race went off, could have said, "Drive me to Epsom; I will pay you the agreed sum; you have nothing to do with the purpose for which I hired the cab," and that if the cabman refused he would have been guilty of a breach of contract, there being nothing to qualify his promise to drive the hirer to Epsom on a particular day. Whereas in the case of the coronation, there is not merely the purpose of the hirer to see the coronation procession, but it is the coronation procession and the relative position of the rooms which is the basis of the contract as much for the lessor as the hirer; and I think that if the King, before the coronation day and after the contract, had died, the hirer could not have insisted on having the rooms on the days named. It could not in the cab case be reasonably said that seeing the Derby race was the foundation of the contract, as it was of the licence in this case. Whereas in the present case, where the rooms were offered and taken, by reason of their peculiar suitability from the position of the rooms for a view of the coronation procession, surely the view of the coronation procession was the foundation of the contract, which is a very different thing from the purpose of the man who engaged the cab - namely, to see the race - being held to be the foundation of the contract. Each case must be judged by its own circumstances. In each case one must ask oneself, first, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative (as I think they should be in this case), I think both parties are discharged from further performance of the contract. I think that the coronation procession was the foundation of this contract, and that the non-happening of it prevented the performance of the contract; and, secondly, I think that the

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non-happening of the procession, to use the words of Sir James Hannen in Baily v. De Crespigny, 3 B. & S. 826, was an event "of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, and that they are not to be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened." The test seems to be whether the event which causes the impossibility was or might have been anticipated and guarded against. It seems difficult to say, in a case where both parties anticipate the happening of an event, which anticipation is the foundation of the contract, that either party must be taken to have anticipated, and ought to have guarded against, the event which prevented the performance of the contract. In both Jackson v. Union Marine Insurance Co., 2 K. B. 126, and Nickoll v. Ashton, 1 Q. B. D. 258, the parties might have anticipated as a possibility that perils of the sea might delay the ship and frustrate the commercial venture: in the former case the carriage of the goods to effect which the charterparty was entered into; in the latter case the sale of the goods which were to be shipped on the steamship which was delayed. But the Court held in the former case that the basis of the contract was that the ship would arrive in time to carry out the contemplated commercial venture, and in the latter that the steamship would arrive in time for the loading of the goods the subject of the sale. I wish to observe that cases of this sort are very different from cases where a contract or warranty or representation is implied, such as was implied in The Moorcock, 14 P. D. 64, and refused to be implied in Hamlyn v. Wood. 2 Q. B. 488. But The Moorcock is of importance in the present case as shewing that whatever is the suggested implication - be it condition, as in this case, or warranty or representation - one must, in judging whether the implication ought to be made, look not only at the words of the contract, but also at the surrounding facts and the knowledge of the parties of those facts. There seems to me to be ample authority for this proposition.

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Thus in Jackson v. Union Marine Insurance Co., in the Common Pleas, the question whether the object of the voyage had been frustrated by the delay of the ship was left as a question of fact to the jury, although there was nothing in the charterparty defining the time within which the charterers were to supply the cargo of iron rails for San Francisco, and nothing on the face of the charterparty to indicate the importance of time in the venture; and that was a case in which, as Bramwell B. points out in his judgment at p. 148, Taylor v. Caldwell was a strong authority to support the conclusion arrived at in the judgment - that the ship not arriving in time for the voyage contemplated, but at such time as to frustrate the commercial venture, was not only a breach of the contract but discharged the charterer, though he had such an excuse that no action would lie. And, again, in Harris v. Dreesman the vessel had to be loaded, as no particular time was mentioned, within a reasonable time; and, in judging of a reasonable time, the Court approved of evidence being given that the defendants, the charterers, to the knowledge of the plaintiffs, had no control over the colliery from which both parties knew that the coal was to come; and that, although all that was said in the charterparty was that the vessel should proceed to Spital Tongue's Spout (the spout of the Spital Tongue's Colliery), and there take on board from the freighters. a full and complete cargo of coals, and five tons of coke, and although there was no evidence to prove any custom in the port as to loading vessels in turn. Again it was held in Mumford v. Gething that, in construing a written contract of service under which A. was to enter the employ of B., oral evidence is admissible to shew in what capacity A. was to serve B. See also Price v. Mouat. The rule seems to be that which is laid down in Taylor on Evidence, vol. ii. s. 1082: "It may be laid down as a broad and distinct rule of law that extrinsic evidence of every material fact which will enable the Court to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words, to identify the persons and things to which the instrument refers, must of necessity be received."

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And Lord Campbell in his judgment says: "I am of opinion that, when there is a contract for the sale of a specific subject-matter, oral evidence may be received, for the purpose of shewing what that subject-matter was, of every fact within the knowledge of the parties before and at the time of the contract." See per Campbell C.J., Macdonald v. Longbottom. It seems to me that the language of Willes J. in Lloyd v. Guibert points in the same direction. I myself am clearly of opinion that in this case, where we have to ask ourselves whether the object of the contract was frustrated by the nonhappening of the coronation and its procession on the days proclaimed, parol evidence is admissible to shew that the subject of the contract was rooms to view the coronation procession, and was so to the knowledge of both parties. When once this is established, I see no difficulty whatever in the case. It is not essential to the application of the principle of Taylor v. Caldwell that the direct subject of the contract should perish or fail to be in existence at the date of performance of the contract. It is sufficient if a state of things or condition expressed in the contract and essential to its performance perishes or fails to be in existence at that time. In the present case the condition which fails and prevents the achievement of that which was, in the contemplation of both parties, the foundation of the contract, is not expressly mentioned either as a condition of the contract or the purpose of it; but I think for the reasons which I have given that the principle of Taylor v. Caldwell ought to be applied. This disposes of the plaintiff's claim for 50l. unpaid balance of the price agreed to be paid for the use of the rooms. The defendant at one time set up a cross-claim for the return of the 25l. he paid at the date of the contract. As that claim is now withdrawn it is unnecessary to say anything about it. I have only to add that the facts of this case do not bring it within the principle laid down in Stubbs v. Holywell Ry. Co.; that in the case of contracts falling directly within the rule of Taylor v. Caldwell the subsequent impossibility does not affect rights already acquired, because the defendant had the whole of June 24 to pay the balance, and the public

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announcement that the coronation and processions would not take place on the proclaimed days was made early on the morning of the 24th, and no cause of action could accrue till the end of that day. I think this appeal ought to be dismissed.

OPINIÓN POR: ROMER

With some doubt I have also come to the conclusion that this case is governed by the principle on which Taylor v. Caldwell was decided, and accordingly that the appeal must be dismissed. The doubt I have felt was whether the parties to the contract now before us could be said, under the circumstances, not to have had at all in their contemplation the risk that for some reason or other the coronation processions might not take place on the days fixed, or, if the processions took place, might not pass so as to be capable of being viewed from the rooms mentioned in the contract; and whether, under this contract, that risk was not undertaken by the defendant. But on the question of fact as to what was in the contemplation of the parties at the time, I do not think it right to differ from the conclusion arrived at by Vaughan Williams L.J., and (as I gather) also arrived at by my brother Stirling. This being so, I concur in the conclusions arrived at by Vaughan Williams L.J. in his judgment, and I do not desire to add anything to what he has said so fully and completely.

CAROLINE A. LLOYD et al., Respondents, v. WILLIAM J. MURPHY, Appellant. SUPREME COURT OF CALIFORNIA 25 Cal. 2d 48; 153 P.2d 47 October 31, 1944

OPINIÓN POR: TRAYNOR

[*50] [**48] On August 4, 1941, plaintiffs leased to defendant for a five-year term beginning September 15, 1941, [*51] certain premises located at the corner of Almont Drive and Wilshire Boulevard in the city of Beverly Hills, Los Angeles County, "for the sole purpose of conducting thereon the business of displaying and selling new automobiles (including the servicing and repairing thereof and of selling the petroleum products of a major oil company) and for no other purpose whatsoever without the

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written consent of the lessor" except "to make [**49] an occasional sale of a used automobile." Defendant agreed not to sublease or assign without plaintiffs' written consent. On January 1, 1942, the federal government ordered that the sale of new automobiles be discontinued. It modified this order on January 8, 1942, to permit sales to those engaged in military activities, and on January 20, 1942, it established a system of priorities restricting sales to persons having preferential ratings of A-1-j or higher. On March 10, 1942, defendant explained the effect of these restrictions on his business to one of the plaintiffs authorized to act for the others, who orally waived the restrictions in the lease as to use and subleasing and offered to reduce the rent if defendant should be unable to operate profitably. Nevertheless defendant vacated the premises on March 15, 1942, giving oral notice of repudiation of the lease to plaintiffs, which was followed by a written notice on March 24, 1942. Plaintiffs affirmed in writing on March 26th their oral waiver and, failing to persuade defendant to perform his obligations, they rented the property to other tenants pursuant to their powers under the lease in order to mitigate damages. On May 11, 1942, plaintiffs brought this action praying for declaratory relief to determine their rights under the lease, and for judgment for unpaid rent. Following a trial on the merits, the court found that the leased premises were located on one of the main traffic arteries of Los Angeles County; that they were equipped with gasoline pumps and in general adapted for the maintenance of an automobile service station; that they contained a one-story storeroom adapted to many commercial purposes; that plaintiffs had waived the restrictions in the lease and granted defendant the right to use the premises for any legitimate purpose and to sublease to any responsible party; that defendant continues to carry on the business of selling and servicing automobiles at two other places. Defendant testified that at one of these locations he sold new automobiles exclusively and when asked if he were aware that many new automobile dealers were continuing in business replied: "Sure. It [*52] is just

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the location that I couldn't make a go, though, of automobiles." Although there was no finding to that effect, defendant estimated in response to inquiry by his counsel, that 90 per cent of his gross volume of business was new car sales and 10 per cent gasoline sales. The trial court held that war conditions had not terminated defendant's obligations under the lease and gave judgment for plaintiffs, declaring the lease as modified by plaintiffs' waiver to be in full force and effect, and ordered defendant to pay the unpaid rent with interest, less amounts received by plaintiffs from re-renting. Defendant brought this appeal, contending that the purpose for which the premises were leased was frustrated by the restrictions placed on the sale of new automobiles by the federal government, thereby terminating his duties under the lease.

Although commercial frustration was first recognized as an excuse for nonperformance of a contractual duty by the courts of England (Krell v. Henry [1903] 2 K.B. 740 [C.A.]; Blakely v. Muller, 19 T.L.R. 186 [K.B.]; see McElroy and Williams, The Coronation Cases, 4 Mod.L.Rev. 241) its soundness has been questioned by those courts (see Maritime National Fish, Ltd., v. Ocean Trawlers, Ltd. [1935] A.C. 524, 528-29, 56 L.Q.Rev. 324, arguing that Krell v. Henry, supra, was a misapplication of Taylor v. Caldwell, 3 B.&S 826 [1863], the leading case on impossibility as an excuse for nonperformance), and they have refused to apply the doctrine to leases on the ground that an estate is conveyed to the lessee, which carries with it all risks (Swift v. McBean, 166 L.T.Rep. 87 [1942] 1 K.B. 375; Whitehall Court v. Ettlinger, 122 L.T.Rep. 540, (1920) 1 K.B. 680, [1919] 89 L.J. [K.B.] N.S. 126; 137 A.L.R. 1199, 1224; see collection and discussion on English cases in Wood v. Bartolino, N.M. [146 P.2d 883, 886-87]). Many courts, therefore, in the United States have held that the tenant bears all risks as owner of the estate (Cusack Co. v. Pratt, 78 Colo. 28 [239 P. 22, 44 A.L.R. 55]; Yellow Cab Co. v. Stafford-Smith Co., 320 Ill. 294 [150 N.E. 670, 43 A.L.R. 1173]), but the modern cases have recognized that the defense may be available in a proper

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case, even in a lease. As the author declares in 6 Williston, Contracts (rev. ed. 1938), § 1955, pp. 5485-87, "The fact that lease is a conveyance and not simply a continuing contract and the numerous authorities enforcing liability to pay rent in spite of destruction of leased premises, however, have made it difficult to give relief. That the tenant has been relieved, nevertheless, [*53] in several cases indicates the gravitation of the law toward a recognition of the principle that fortuitous [**50] destruction of the value of performance wholly outside the contemplation of the parties may excuse a promisor even in a lease. . . .

"Even more clearly with respect to leases than in regard to ordinary contracts the applicability of the doctrine of frustration depends on the total or nearly total destruction of the purpose for which, in the contemplation of both parties, the transaction was entered into."

The principles of frustration have been repeatedly applied to leases by the courts of this state (Brown v. Oshiro, 58 Cal.App.2d 190 [136 P.2d 29]; Davidson v. Goldstein, 58 Cal.App.2d Supp. 909 [136 P.2d 665]; Grace v. Croninger, 12 Cal.App.2d 603 [55 P.2d 940]; Knoblaugh v. McKinney, 5 Cal.App.2d 339 [42 P.2d 332]; Industrial Development & Land Co. v. Goldschmidt, 56 Cal.App. 507 [206 P. 134]; Burke v. San Francisco Breweries, Ltd., 21 Cal.App. 198 [131 P. 83]) and the question is whether the excuse for nonperformance is applicable under the facts of the present case.

(1) Although the doctrine of frustration is akin to the doctrine of impossibility of performance (see Civ. Code, § 1511; 6 Cal.Jur. 435-450; 4 Cal.Jur Ten-year Supp. 187-192; Taylor v. Caldwell, supra) since both have developed from the commercial necessity of excusing performance in cases of extreme hardship, frustration is not a form of impossibility even under the modern definition of that term, which includes not only cases of physical impossibility but also cases of extreme impracticability of performance (see Mineral Park Land Co. v. Howard, 172 Cal. 289, 293 [156 P. 458, L.R.A. 1916F 1]; Christin v. Superior Court, 9

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Cal.2d 526, 533 [71 P.2d 205, 112 A.L.R. 1153]; 6 Williston, op. cit. supra, § 1935, p. 5419; Rest., Contracts, § 454, comment a., and Cal.Ann. p. 254). Performance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration (Krell v. Henry, supra; Blakely v. Muller, supra; Marks Realty Co. v. Hotel Hermitage Co., 170 App.Div. 484 [156 N.Y.S. 179]; 6 Williston, op. cit. supra, §§ 1935, 1954, pp. 5477, 5480; Restatement, Contracts, § 288).

(2) The question in cases involving frustration is whether [*54] the equities of the case, considered in the light of sound public policy, require placing the risk of a disruption or complete destruction of the contract equilibrium on defendant or plaintiff under the circumstances of a given case (Fibrosa Spolka Akcyjina v. Fairbairn Lawson Combe Barbour, Ltd. [1942], 167 L.T.R. [H.L.] 101, 112-113; see Smith, Some Practical Aspects of the Doctrine of Impossibility, 32 Ill.L.Rev. 672, 675; Patterson, Constructive Conditions in Contracts, 42 Columb.L.Rev. 903, 949; 27 Cal.L.Rev. 461), and the answer depends on whether an unanticipated circumstance, the risk of which should not be fairly thrown on the promisor, has made performance vitally different from what was reasonably to be expected (6 Williston, op. cit. supra, § 1963, p. 5511; Restatement, Contracts, § 454). The purpose of a contract is to place the risks of performance upon the promisor, and the relation of the parties, terms of the contract, and circumstances surrounding its formation must be examined to determine whether it can be fairly inferred that the risk of the event that has supervened to cause the alleged frustration was not reasonably foreseeable. If it was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed.

(3) The doctrine of frustration has been limited to cases of extreme hardship so that businessmen, who must make

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their arrangements in advance, can rely with certainty on their contracts (Anglo-Northern Trading Co. v. Emlyn Jones and Williams, 2 K.B. 78; 137 A.L.R. 1199, 1216-1221). (4) The courts have required a promisor seeking to excuse himself from performance of his obligations to prove that the risk of the frustrating event was not reasonably foreseeable and that the value of counterperformance is totally or nearly totally destroyed, for frustration is no defense if it was foreseeable or controllable by the promisor, or if counterperformance remains valuable. (La Cumbre Golf & Country Club v. Santa Barbara Hotel Co., 205 Cal. 422, 425 [271 P. 476]; Johnson v. Atkins, 53 Cal.App.2d 430, 434 [127 P.2d 1027]; Grace v. Croninger, 12 Cal.App.2d 603, 606-607 [55 P.2d 940]; Industrial Development & Land Co. v. Goldschmidt, 56 Cal.App. 507, 511 [206 P. 134]; Burke v. San Francisco Breweries, Ltd., 21 Cal.App. 198, 201 [131 P. 83]; Megan v. [**51] Updike Grain Corp., (C.C.A. 8), 94 F.2d 551, 553; Herne Bay Steamboat Co. [*55] v. Hutton [1903], 2 K.B. 683; Leiston Gas Co. v. Leiston Cum Sizewell Urban District Council [1916], 2 K.B. 428; Raner v. Goldberg, 244 N.Y. 438 [155 N.E. 733]; 6 Williston, op. cit. supra, §§ 1939, 1955, 1963; Restatement, Contracts, § 288.)

(5) Thus laws or other governmental acts that make performance unprofitable or more difficult or expensive do not excuse the duty to perform a contractual obligation (Sample v. Fresno Flume etc. Co., 129 Cal. 222, 228 [61 P. 1085]; Klauber v. San Diego St. Car Co., 95 Cal. 353, 358 [30 P. 555]; Texas Co. v. Hogarth Shipping Co., 256 U.S. 619, 630 [41 S.Ct. 612, 65 L.Ed. 1123]; Columbus Ry. Power & Light Co. v. Columbus, 249 U.S. 399, 414 [39 S.Ct. 349, 63 L.Ed. 669]; Thomson v. Thomson, 315 Ill. 521, 527 [146 N.E. 451]; Commonwealth v. Bader, 271 Pa. 308, 312 [114 A. 266]; Commonwealth v. Neff, 271 Pa. 312, 314 [114 A. 267]; London & Lancashire Ind. Co. v. Columbiana County, 107 Ohio St. 51, 64 [140 N.E. 672]; see 6 Williston, op. cit. supra, §§ 1955, 1963, pp. 5507-09). (6) It is settled that if parties have contracted with reference

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to a state of war or have contemplated the risks arising from it, they may not invoke the doctrine of frustration to escape their obligations (Northern Pac. Ry. Co. v. American Trading Co., 195 U.S. 439, 467-68 [25 S.Ct. 84, 49 L.Ed. 269]; Primos Chemical Co. v. Fulton Steel Corp. (D.C.N.Y.), 266 F. 945, 948; Krulewitch v. National Importing & Trading Co., 195 App.Div. 544 [186 N.Y.S. 838, 840]; Smith v. Morse, 20 La.Ann. 220, 222; Lithflux Mineral & Chem. Works v. Jordan, 217 Ill.App. 64, 68; Mederios v. Hill, 8 Bing. 231, 131 Eng.Rep. 390, 392; Bolckow V. & Co. v. Compania Minera de Sierra Minera, 115 L.T.R. [K.B.] 745, 747).

(7) At the time the lease in the present case was executed the National Defense Act (Public Act No. 671 of the 76th Congress [54 Stats. 601], § 2A), approved June 28, 1940, authorizing the President to allocate materials and mobilize industry for national defense, had been law for more than a year. The automotive industry was in the process of conversion to supply the needs of our growing mechanized army and to meet lend-lease commitments. Iceland and Greenland had been occupied by the army. Automobile sales were soaring because the public anticipated that production would soon be restricted. These facts were commonly known and it cannot be said that the risk of war and its consequences necessitating restriction of the production and sale of automobiles [*56] was so remote a contingency that its risk could not be foreseen by defendant, an experienced automobile dealer. Indeed, the conditions prevailing at the time the lease was executed, and the absence of any provision in the lease contracting against the effect of war, gives rise to the inference that the risk was assumed. Defendant has therefore failed to prove that the possibility of war and its consequences on the production and sale of new automobiles was an unanticipated circumstance wholly outside the contemplation of the parties.

(8) Nor has defendant sustained the burden of proving that the value of the lease has been destroyed. The sale of automobiles was not made impossible or illegal but merely

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restricted and if governmental regulation does not entirely prohibit the business to be carried on in the leased premises but only limits or restricts it, thereby making it less profitable and more difficult to continue, the lease is not terminated or the lessee excused from further performance (Brown v. Oshiro, supra, p. 194; Davidson v. Goldstein, supra, p. 918; Grace v. Croninger, supra, p. 607; Industrial Development & Land Co. v. Goldschmidt, supra; Burke v. San Francisco Brewing Co., supra, p. 202; First National Bank of New Rochelle v. Fairchester Oil Co., 267 App.Div. 281 [45 N.Y.S.2d 532, 533]; Robitzek Inv. Co., Inc. v. Colonial Beacon Oil Co., 265 App.Div. 749 [40 N.Y.S.2d 819, 824]; Colonial Operating Corp. v. Hannon Sales & Service, Inc., 265 App. Div. 411 [39 N.Y.S.2d 217, 220]; Byrnes v. Balcolm, 265 App.Div. 268 [38 N.Y.S.2d 801, 803]; Deibler v. Bernard Bros. Inc., 385 Ill. 610 [53 N.E.2d 450, 453]; Wood v. Bartolino, N.M. [146 P.2d 883, 886, 888, 890]). Defendant may use the premises for the purpose for which they were leased. New automobiles and gasoline continue to be sold. Indeed, defendant testified that he continued to sell new automobiles exclusively at another location in the same county.

[**52] Defendant contends that the lease is restrictive and that the government orders therefore destroyed its value and frustrated its purpose. (9) Provisions that prohibit subleasing or other uses than those specified affect the value of a lease and are to be considered in determining whether its purpose has been frustrated or its value destroyed (see Owens, The Effect of the War Upon the Rights and Liabilities of Parties to a Contract, 19 California State Bar Journal 132, 143). It must not be forgotten, however, that "The landlord has not covenanted that the tenant shall have the right to carry on the [*57] contemplated business or that the business to which the premises are by their nature or by the terms of the lease restricted shall be profitable enough to enable the tenant to pay the rent but has imposed a condition for his own benefit; and, certainly, unless and until he chooses to take advantage of it, the tenant is not deprived of the use of the

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premises." (6 Williston, Contracts, op. cit. supra, § 1955, p. 5485; see, also, People v. Klopstock, 24 Cal.2d 897, 901 [151 P.2d 641].) (10) In the present lease plaintiffs reserved the rights that defendant should not use the premises for other purposes than those specified in the lease or sublease without plaintiffs' written consent. Far from preventing other uses or subleasing they waived these rights, enabling defendant to use the premises for any legitimate purpose and to sublease them to any responsible tenant. This waiver is significant in view of the location of the premises on a main traffic artery in Los Angeles County and their adaptability for many commercial purposes. The value of these rights is attested by the fact that the premises were rented soon after defendants vacated them. It is therefore clear that the governmental restrictions on the sale of new cars have not destroyed the value of the lease. Furthermore, plaintiffs offered to lower the rent if defendant should be unable to operate profitably, and their conduct was at all times fair and cooperative.

(11) The consequences of applying the doctrine of frustration to a leasehold involving less than a total or nearly total destruction of the value of the leased premises would be undesirable. Confusion would result from different decisions purporting to define "substantial" frustration. Litigation would be encouraged by the repudiation of leases when lessees found their businesses less profitable because of the regulations attendant upon a national emergency. Many leases have been affected in varying degrees by the widespread governmental regulations necessitated by war conditions.

The cases that defendant relies upon are consistent with the conclusion reached herein. In Industrial Development & Land Co. v. Goldschmidt, supra, the lease provided that the premises should not be used other than as a saloon. When national prohibition made the sale of alcoholic beverages illegal, the court excused the tenant from further performance on the theory of illegality or impossibility by a change in domestic law. The doctrine of frustration might have been applied, since the purpose for which the property

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was leased [*58] was totally destroyed and there was nothing to show that the value of the lease was not thereby totally destroyed. In the present case the purpose was not destroyed but only restricted, and plaintiffs proved that the lease was valuable to defendant. In Grace v. Croninger, supra, the lease was for the purpose of conducting a "saloon and cigar store and for no other purpose" with provision for subleasing a portion of the premises for bootblack purposes. The monthly rental was $ 650. It was clear that prohibition destroyed the main purpose of the lease, but since the premises could be used for bootblack and cigar store purposes, the lessee was not excused from his duty to pay the rent. In the present case new automobiles and gasoline may be sold under the lease as executed and any legitimate business may be conducted or the premises may be subleased under the lease as modified by plaintiff's waiver. Colonial Operating Corp. v. Hannon Sales & Service, Inc., 34 N.Y.S.2d 116, was reversed in 265 App.Div. 411 [39 N.Y.S.2d 217], and Signal Land Corp. v. Loecher, 35 N.Y.S.2d 25; Schantz v. American Auto Supply Co., Inc., 178 Misc. 909 [36 N.Y.S.2d 747]; and Canrock Realty Corp. v. Vim Electric Co., Inc., 37 N.Y.S.2d 139, involved government orders that totally destroyed the possibility of selling the products for which the premises were leased. No case has been cited by defendant or disclosed by research in which an appellate court has excused a lessee from performance of his duty to pay rent when the purpose of the lease has not been totally [**53] destroyed or its accomplishment rendered extremely impracticable or where it has been shown that the lease remains valuable to the lessee.

The judgment is affirmed.

NORTHERN INDIANA PUBLIC SERVICE COMPANY, an Indiana corporation, Plaintiff-Appellant, v. CARBON COUNTY COAL COMPANY, a partnership, Defendant-Appellee. UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 799 F.2d 265; 1 U.C.C. Rep. Serv. 2d (Callaghan) 1505; 92 Oil & Gas

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Rep. 468 June 6, 1986, Argued August 13, 1986, Decided August 13, 1986, Filed

OPINIÓN POR: POSNER

[*267] These appeals bring before us various facets of a dispute between Northern Indiana Public Service Company (NIPSCO), an electric utility in Indiana, and Carbon County Coal Company, a partnership that until recently owned and operated a coal mine in Wyoming. In 1978 NIPSCO and Carbon County signed a contract whereby Carbon County agreed to sell and NIPSCO to buy approximately 1.5 million tons of coal every year for 20 years, at a price of $24 a ton subject to various provisions for escalation which by 1985 had driven the price up to $44 a ton.

NIPSCO's rates are regulated by the Indiana Public Service Commission. In 1983 NIPSCO requested permission to raise its rates to reflect increased fuel charges. Some customers of NIPSCO opposed the increase on the ground that NIPSCO could reduce its overall [**2] costs by buying more electrical power from neighboring utilities for resale to its customers and producing less of its own power. Although the Commission granted the requested increase, it directed NIPSCO, in orders issued in December 1983 and February 1984 (the "economy purchase orders"), to make a good faith effort to find, and wherever possible buy from, utilities that would sell electricity to it at prices lower than its costs of internal generation. The Commission added ominously that "the adverse effects of entering into long-term coal supply contracts which do not allow for renegotiation and are not requirement contracts, is a burden which must rest squarely on the shoulders of NIPSCO management." Actually the contract with Carbon County did provide for renegotiation of the contract price -- but one-way renegotiation in favor of Carbon County; the price fixed in the contract (as adjusted from time to time in accordance with the escalator provisions) was a floor. And the contract was indeed not a requirements contract: it specified the exact amount of coal that NIPSCO must take over the 20 years during which the

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contract was to remain in effect. NIPSCO was eager to have an assured [**3] supply of low-sulphur coal and was therefore willing to guarantee both price and quantity.

Unfortunately for NIPSCO, however, as things turned out it was indeed able to buy electricity at prices below the costs of generating electricity from coal bought under the contract with Carbon County; and because of the "economy purchase orders," of which it had not sought judicial review, NIPSCO could not expect to be allowed by the Public Service Commission to recover in its electrical rates the costs of buying coal from Carbon County. NIPSCO therefore decided to stop accepting coal deliveries from Carbon County, at least for the time being; and on April 24, 1985, it brought this diversity suit against Carbon County in [*268] a federal district court in Indiana, seeking a declaration that it was excused from its obligations under the contract either permanently or at least until the economy purchase orders ceased preventing it from passing on the costs of the contract to its ratepayers. In support of this position it argued that the contract violated section 2(c) of the Mineral Lands Leasing Act of 1920, 30 U.S.C. § 202, because of Carbon County's affiliation [**4] with a railroad (Union Pacific), and that in any event NIPSCO's performance was excused or suspended -- either under the contract's force majeure clause or under the doctrines of frustration or impossibility -- by reason of the economy purchase orders.

On May 17, 1985, Carbon County counterclaimed for breach of contract and moved for a preliminary injunction requiring NIPSCO to continue taking delivery under the contract. On June 19, 1985, the district judge granted the preliminary injunction, from which NIPSCO has appealed. Also on June 19, rejecting NIPSCO's argument that it needed more time for pretrial discovery and other trial preparations, the judge scheduled the trial to begin on August 26, 1985. Trial did begin then, lasted for six weeks, and resulted in a jury verdict for Carbon County of $181 million. The judge entered judgment in accordance with the verdict, rejecting Carbon County's argument that in lieu of

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damages it should get an order of specific performance requiring NIPSCO to comply with the contract. Upon entering the final judgment the district judge dissolved the preliminary injunction, and shortly afterward the mine -- whose only customer was NIPSCO -- shut [**5] down. NIPSCO has appealed from the damage judgment, and Carbon County from the denial of specific performance and from the district judge's order staying execution of the damage judgment without requiring NIPSCO to post a bond guaranteeing payment of the judgment should NIPSCO lose on appeal.

NIPSCO's appeal from the grant of the preliminary injunction is moot, the injunction having been dissolved last October when the final judgment was entered. Lifting a preliminary injunction does not always make an appeal from the grant of the injunction moot; if the injunction was improper, the defendant may be entitled to damages. See Fed. R. Civ. P. 65(c); Coyne-Delany Co. v. Capital Development Bd., 717 F.2d 385 (7th Cir. 1983). But all that NIPSCO is asking for in appealing from the grant of the preliminary injunction is that the injunction be dissolved, and that request is moot. Later we shall see that another issue in the case, relating to the judge's instructions to the jury on force majeure, is also moot.

We are left with the following issues to decide: (1) whether the district judge abused his discretion in refusing to give NIPSCO more time to prepare for [**6] trial, (2) whether the contract was unenforceable as a violation of the Mineral Lands Leasing Act, (3) whether NIPSCO's obligations under the contract were excused or suspended by virtue of either the force majeure clause or (4) the doctrines of frustration or impracticability, (5) whether Carbon County was entitled to specific performance of the contract, and (6) whether NIPSCO should be required to post a bond in order to be allowed to stave off the execution of the damage judgment until the appellate process is over.

1. When he issued the preliminary injunction, two months into the case, the district judge scheduled the trial to begin in two months. This was a tight deadline for the

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completion of pretrial discovery, though NIPSCO is wrong to argue that it violates a local rule of the Northern District of Indiana. Rule 12(d) provides that "in all civil cases except in patent, antitrust, and trade-mark cases, all discovery shall be completed within five months after the case is at issue." Five months is the maximum, not the minimum. With somewhat greater force NIPSCO argues that this case is extraordinary, even though it is not a patent, antitrust, or trademark case. Although [**7] the issues are no more complex than they would be if the contract had been for $1 million rather than $1 billion (the [*269] estimated amount that NIPSCO would have owed over the life of the contract if the contract had not been cancelled), the large stakes justified a more careful and thorough preparation than if the stakes had been smaller: the consequences of an erroneous judgment were greater, so the optimal expenditure on avoiding error was greater. NIPSCO particularly complains about its inability to conduct thorough discovery of Carbon County's relationship to the Union Pacific Railroad -- a relationship that as we shall see is the basis of NIPSCO's defense based on the Mineral Lands Leasing Act -- and of Carbon County's theory of damages. And the only reason the district judge gave for drastically compressing the pretrial period was that his criminal trial calendar was so crowded (with cases not deferrable, because of the requirements of the Speedy Trial Act) that if he did not try the case in August 1985 he would have to put it over to April 1986 -- which still would have been only a year after the complaint was filed.

Nevertheless we do not think the district judge [**8] abused his discretion in refusing to postpone the trial. Matters of trial management are for the district judge; we intervene only when it is apparent that the judge has acted unreasonably. The occasions for intervention are rare. At a time when a combination of very heavy caseloads with the pressure exerted by the Speedy Trial Act to take criminal cases out of order and try them first makes managing federal district courts' dockets trickier than ever before,

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district judges must be allowed considerable leeway in scheduling civil cases, and therefore in denying continuances that would disrupt their schedules. Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1366 (7th Cir. 1985); see also Fontenot v. Upjohn Co., 780 F.2d 1190, 1193 (5th Cir. 1986); cf. Kagan v. Caterpillar Tractor Co., 795 F.2d 601, slip op. at 13 (7th Cir. 1986).

Of course some cases are so immense that it would be unrealistic to insist on trial after only two months for pretrial discovery, or even to insist on rigid adherence to deadlines in local rules. [**9] But this is not such a case. To begin with, the two-month figure is misleading. NIPSCO had decided in 1984 to stop accepting coal deliveries from Carbon County and had retained late in that year -- nine months or more before the trial began -- the large Chicago law firm that would later conduct the trial with the help of the much smaller Indiana firm that is NIPSCO's regular counsel. The Chicago firm has between 40 and 50 lawyers in its trial department. The timing of the suit was in the control of NIPSCO and its lawyers, and they could do much of their trial preparation before filing suit. True, they could not have conducted discovery then. Discovery is sometimes allowed before suit is filed, see Fed. R. Civ. P. 27(a), but not in the circumstances of this case. The defendants could, however, have begun discovery when they filed their suit, four months before the beginning of the trial and almost six months before the end; the latter is the relevant interval, because the judge interrupted the trial to allow NIPSCO to complete its discovery on the damage issue.

No case holds that the denial of a continuance in such circumstances is reversible error. The common element in cases that [**10] reverse such denials is the existence of changed circumstances to which a party cannot reasonably be expected to adjust without an extension of time. In Sutherland Paper Co. v. Grant Paper Box Co., 183 F.2d 926, 931 (3d Cir. 1950), the denial of certain pretrial motions just two weeks before the trial of a complex patent case, combined with the illness of the inventor, made it

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impossible for the defendants to complete their pretrial preparation without a continuance that the judge denied. In Smith-Weik Machinery Corp. v. Murdock Machine & Engineering Co., 423 F.2d 842 (5th Cir. 1970), the defendant's principal counsel became ill on the eve of trial, and its local counsel was not sufficiently well informed about the facts and pertinent law to conduct the trial by himself on such short notice. In Fenner v. Dependable Trucking Co., 716 F.2d 598, 600-02 (9th Cir. 1983), the judge refused to grant a continuance [*270] to enable the defendants' expert to rebut evidence newly discovered by the plaintiff. Other "surprise" cases are Wells v. Rushing, 755 F.2d 376, 380-81 (5th Cir. 1985); Menendez v. Perishable Distributors, Inc., 763 F.2d 1374, 1379-80 (11th Cir. 1985), [**11] and Shelak v. White Motor Co., 581 F.2d 1155, 1159 (5th Cir. 1978) (and see Judge Rubin's powerful dissent, id. at 1161-64). The element of changed circumstances is missing here.

Lack of precedent need not defeat NIPSCO's argument for reversal; NIPSCO can appeal to first principles, and ask us to forge new ground. But this we shall not do, when NIPSCO is unable to show how it was prejudiced by the compressed period for discovery and pretrial preparation, given the amount of time it had to plan the case before it filed suit and the large staff of lawyers at its disposal to conduct discovery once the suit began. On the view that we take of its defense of illegality, nothing NIPSCO could reasonably have been expected to obtain from additional discovery on the linkage between Carbon County and the Union Pacific Railroad could change the result of the case. As for damages, it is noteworthy both that NIPSCO does not complain in this court about the size of the jury verdict and that in April 1984 it had estimated that cancelling the contract would cost it $300 million in damages if Carbon County could show that the cancellation was a breach of contract. At argument [**12] NIPSCO's counsel acknowledged that the compression of the time for pretrial preparation was as harmful to Carbon County as to itself. Even if as a matter of abstract justice the judge should have

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given NIPSCO more time for conducting discovery, his refusal to do so would not be reversible error unless there was a reasonable probability that it caused NIPSCO to lose the case, see Fed. R. Civ. P. 61; Fontenot v. Upjohn Co., supra, 780 F.2d at 1194; Menendez v. Perishable Distributors, Inc., supra, 763 F.2d at 1380, and there is no indication of that. Finally, in arguing against the grant of a preliminary injunction NIPSCO had said that having to continue taking coal under the contract would be very costly to it; and if so it should have welcomed an early trial. Business Ass'n of University City v. Landrieu, 660 F.2d 867, 877-78 (3d Cir. 1981), upheld the denial of a continuance in parallel circumstances.

Justified public concern with the expenses and delays of modern litigation requires reexamination of traditional attitudes about the big [**13] case -- one of which is that such a case cannot be tried without leisurely pretrial preparation. Despite the abbreviated period for pretrial discovery in the present case, both parties had an adequate opportunity, which they used, to obtain all the evidence they needed for the trial and to scrutinize the opponent's evidence closely. Rather than believing that the district judge abused the broad discretion that our system gives trial judges in the management of litigation, we find nothing to criticize in the dispatch with which this big case was brought to judgment.

2. Section 2(c) of the Mineral Lands Leasing Act of 1920 provides in pertinent part that "no company or corporation operating a common-carrier railroad shall be given or hold a permit or lease under the provisions of this chapter [relating to federal lands] for any coal deposits except for its own use for railroad purposes. . . ." Oddly in this litigious age, no reported decision has interpreted section 2(c) in the 66 years since its enactment. NIPSCO contends that if the statute is not to be made a dead letter, it must be [**14] read to forbid a railroad's affiliate to hold a mineral lease or permit on federal lands. Roughly 15 percent of Carbon County's projected output for the contract with NIPSCO was to come from federal lands that

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Carbon County had a permit to mine, and Carbon County is a partnership of two firms (each with a half interest in the partnership), Dravo Coal Company and Rocky Mountain Energy Company, the latter a wholly owned subsidiary of the Union Pacific Corporation, whose principal subsidiary is the Union Pacific Railroad Company.

[*271] When the contract was made back in 1978, the Department of Interior took the view that section 2(c) did not require the automatic piercing of corporate veils, and hence did not invalidate leases by subsidiaries or other affiliates of railroads unless the affiliate was an "alter ego" of the railroad, meaning that their corporate separateness was a paper formality with no business or economic significance. In 1980 the Department of Justice, while recommending to Congress that section 2(c) be repealed as an anachronism, advised it that the section does reach affiliates, and in 1982 the Department of the Interior adopted this interpretation, though [**15] only for prospective application. Railroad Affiliates and Coal Leasing, 89 I.D. 610 (1982).

No one doubts that section 2(c) reaches a lease by a railroad's alter ego. The statutory language, "company . . . operating a . . . railroad," can without contortion be interpreted to cover a situation where the railroad sets up a dummy corporation to hold a mineral lease on federal lands and places control of the mining operations in the railroad's management; if such facile evasions could not be prevented, the statute would have very little consequence. By way of comparison consider the effort of the Federal Communications Commission to make its requirement that communications common carriers conduct their terminal equipment business through separate subsidiaries a meaningful one by forbidding the subsidiary and the carrier to share staff or facilities. See Illinois Bell Tel. Co. v. FCC, 740 F.2d 465, 473-74 (7th Cir. 1984). But if section 2(c) merely covers the railroad plus its alter egos, NIPSCO must lose, for Carbon County is not the alter ego of the Union Pacific Railroad. In recent years the railroad has generated only about half of Union Pacific Corporation's [**16] total

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revenues; and the corporation's Rocky Mountain subsidiary is only a 50 percent partner in Carbon County and the other partner both is unrelated to the Union Pacific family and was an active partner in the venture. Even if we treated the holding company as the alter ego of the railroad, we could not treat Carbon County so, if only because an equal partner cannot call the tune when the other partner is active, knowledgeable, and independent.

But does section 2(c) go beyond alter egos to embrace affiliates of railroads? It was enacted out of a fear that if railroads were allowed to own coal mines they would discriminate in transportation against competing coal mines which depended on rail transportation; this was thought to have happened in the anthracite mine fields of the eastern United States. See 58 Cong. Rec. 4739 (1919) (remarks of Sen. LaFollette); United States v. Reading Co., 253 U.S. 26, 64 L. Ed. 760, 40 S. Ct. 425 (1920). Since the railroads owned their coal mines through subsidiaries rather than directly, it is indeed true that the purpose of section 2(c) could not be fully achieved unless "company . . . operating a . . . railroad" were interpreted [**17] to mean "company . . . affiliated with a . . . railroad." And strained as this interpretation might seem from a linguistic standpoint, other strained statutory interpretations have been adopted where necessary to prevent a statute's evident, but imperfectly expressed, purpose, whether of inclusion or exclusion, from being too easily defeated. Yet so patent is the oversight -- given the corporate form in which the eastern railroads had held their coal mines, the narrow interpretation the Supreme Court had given the parallel "commodities clause" of the Interstate Commerce Act in United States ex rel. Attorney Gen'l v. Delaware & Hudson Co., 213 U.S. 366, 413-14, 53 L. Ed. 836, 29 S. Ct. 527 (1909), and the fact that an earlier version of the bill that became section 2(c) referred explicitly to subsidiaries and affiliates -- that one suspects it was deliberate. The proponents of cracking down on railroads' ownership of coal mines must not have had the votes to get a fully effective statute. We note that United States v. Reading

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Co., supra, 253 U.S. at 60-62, as interpreted in United States v. Elgin, Joliet & Eastern Ry., 298 U.S. 492, 501-02, 80 L. Ed. 1300, 56 S. Ct. 841 (1936), [**18] became the source of an "alter ego" interpretation of the commodities [*272] clause which the Department of the Interior then borrowed for section 2(c) of the Mineral Lands Leasing Act. Perhaps no broader interpretation of the section can be squared with its language and history.

Support for this conclusion is found in the peculiar pattern of railroad land holdings in the West, described in Leo Sheep Co. v. United States, 440 U.S. 668, 672-77, 59 L. Ed. 2d 677, 99 S. Ct. 1403 (1979). Beginning in 1862, Congress, in an effort to induce the Union Pacific to build a transcontinental railroad, had granted the Union Pacific large tracts of land along the projected railroad right of way. To reduce the cost to the government, Congress configured the grant in a checkerboard pattern: the Union Pacific got alternate blocks of land, and as a result every block granted to the Union Pacific was surrounded by federal land and every block of federal land was surrounded by Union Pacific land. The idea was that the federal government would benefit equally with Union Pacific from any appreciation in land values that was brought about by the creation of the railroad. The checkerboard [**19] pattern created problems for coordinated development, and Congress in 1920 may not have wanted to inhibit the development of contiguous lands by preventing the Union Pacific from obtaining mineral leases for subsidiaries already engaged in mining on the railroad's own land. The complications caused by the checkerboard grant, as well as the obsolescence of the monopoly concerns (possibly exaggerated even in 1920) that had led to the passage of section 2(c), are what persuaded the Justice Department to recommend repealing the statute.

All this leaves in doubt whether section 2(c) reaches affiliate relationships short of alter egoism (on the distinction between a mere affiliate and an alter ego in other legal settings see, e.g., Crest Tankers, Inc. v. National

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Maritime Union, 796 F.2d 234 (8th Cir. 1986)); but even if it does, the relationship here is so attenuated that one may doubt whether Carbon County should even be called an affiliate of the Union Pacific Railroad. And even if Carbon County should not have been granted a permit to mine coal on federal land, this would not allow NIPSCO to avoid its obligations under the contract. To begin with, assuming there is [**20] a violation of section 2(c) lurking somewhere in the background, the contract itself is not illegal. The statute does not regulate sales of coal mined on federal land. It prohibits railroads from holding leases or permits to mine coal on those lands (other than for the railroad's own use -- an anachronistic exception in the age of the diesel), but says nothing about sales of the coal. And it is not the sale that conceivably offends the statute but the seller's affiliation -- a problem that could be solved, without termination of the contract, by Union Pacific Corporation's selling Rocky Mountain Energy Company. Moreover, Carbon County's mine is mainly on private land. Apparently there is not enough coal on that land to supply the entire contract; and the contract requires Carbon County to supply the coal for the contract from this mine. Nevertheless the contract could not be thought illegal in its entirety. At most NIPSCO could claim an abatement of some of the contract damages, representing profits that would have accrued from the sale of the coal mined on public land. NIPSCO claimed no such abatement.

Since this is not a case where the contract itself is illegal -- as it would [**21] be if it were a contract in restraint of trade and therefore a violation of section 1 of the Sherman Act, or a contract to commit a bank robbery and therefore a criminal conspiracy -- it is not governed by Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 77-83, 70 L. Ed. 2d 833, 102 S. Ct. 851 (1982). Kaiser agreed to make extra contributions to a union welfare fund if Kaiser failed to adhere to an allegedly illegal boycott; the Court sustained the defense of illegality to a suit to enforce the agreement. The extra contributions were in effect a penalty for abandoning the boycott; the underlying agreement that

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the penalty was designed to enforce was thus an agreement to participate in the boycott. See also Somerset [*273] Importers, Ltd. v. Continental Vintners, 790 F.2d 775 (9th Cir. 1986). In contrast, the contract in this case is not "intrinsically illegal," Trustees of the Operative Plasterers' and Cement Masons' Local Union Officers & Employees Pension Fund v. Journeyman Plasterers' Protective & Benevolent Soc'y, Local Union No. 5, 794 F.2d 1217, slip op. at 5 (7th Cir. 1986); and the [**22] defense of illegality does not come into play just because a party to a lawful contract (here a contract to supply coal to an electric utility) commits unlawful acts to carry out his part of the bargain. See, e.g., Michigan Millers Mutual Fire Ins. Co. v. Canadian Northern Ry., 152 F.2d 292, 297 (8th Cir. 1945); Drost v. Professional Building Service Corp., 153 Ind. App. 273, 279, 286 N.E.2d 846, 850 (1972).

Second, supposing that the contract does violate section 2(c) of the Mineral Lands Leasing Act, this does not necessarily make it unenforceable. This issue, too, is one of federal rather than state law, though we have no reason to think Indiana law would require a different resolution of it; federal and state law on the contract defense of illegality -- the latter well described in Farnsworth, Contracts §§ 5.5, 5.6 (1982) -- seem quite similar. When the statute is federal, federal law determines not only whether the statute was violated but also, if so, and assuming the statute itself is silent on the [**23] matter, the effect of the violation on the enforceability of the contract. Walsh v. Schlecht, 429 U.S. 401, 407-08, 50 L. Ed. 2d 641, 97 S. Ct. 679 (1977); Kelly v. Kosuga, 358 U.S. 516, 519, 3 L. Ed. 2d 475, 79 S. Ct. 429 (1959); Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 176, 63 S. Ct. 172, 87 L. Ed. 165 (1942); cf. Kaiser Steel Corp. v. Mullins, supra, 455 U.S. at 77.

But when we ask what is the federal rule on illegality as a contract defense, we find, alas, that the course of decision has not run completely true. Compare, for example, the hard line taken in government-contract cases such as United States v. Mississippi Valley Generating Co., 364 U.S. 520, 563-66, 5 L. Ed. 2d 268, 81 S. Ct. 294 (1961),

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where the defense seems almost automatic (see also Comdisco, Inc. v. United States, 756 F.2d 569, 576 (7th Cir. 1985); but cf. United States v. Medico Industries, Inc., 784 F.2d 840, 845 (7th Cir. 1986)), with the very soft line taken in antitrust cases such as Kelly v. Kosuga, supra, and Delta Marina, Inc. v. Plaquemine Oil Sales, Inc., 644 F.2d 455, 458-59 (5th Cir. 1981); [**24] but cf. Kaiser Steel Corp. v. Mullins, supra, 455 U.S. at 79-82. The best generalization possible is that the defense of illegality, being in character if not origins an equitable and remedial doctrine, is not automatic but requires (as NIPSCO's counsel acknowledged at argument) a comparison of the pros and cons of enforcement. See Jackson Purchase Rural Electric Coop. Ass'n v. Local Union 816, Int'l Brotherhood of Electrical Workers, 646 F.2d 264, 267 (6th Cir. 1981); cf. 15 Williston, A Treatise on the Law of Contracts § 1767, at pp. 264-65 (Jaeger 3d ed. 1972).

There are, after all, statutory remedies (e.g., cancellation of the lease or permit, see 30 U.S.C. § 188(b)) for violations of section 2(c); the question is whether there should be an additional, a judge-made, remedy. To decide whether there should be, we must consider the reciprocal dangers of overdeterrence and underdeterrence. Applied too strictly, the doctrine that makes the unenforceability of a contract an additional remedy for the violation of a statute can produce a disproportionately severe sanction; and the overdeterrence of illegality is as great a [**25] danger to freedom and prosperity as underdeterrence. The benefits of enforcing the tainted contract -- benefits that lie in creating stability in contract relations and preserving reasonable expectations -- must be compared with the costs in forgoing the additional deterrence of behavior forbidden by statute that is brought about by refusing to let the violator enforce the contract.

The balance in this case favors enforcement. This makes it irrelevant whether the district judge improperly instructed the [*274] jury that in order to uphold the defense of illegality, it must find both that Carbon County was an alter ego of the railroad and that NIPSCO had been

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injured by the violation of section 2(c), or even whether the contract itself could be viewed as illegal under any interpretation of the statute. The interpretation of section 2(c) by the Departments of Justice and the Interior as embracing mere affiliates reversed the Department of the Interior's previous interpretation and was sufficiently unexpected to lead the Department to make the new interpretation prospective only -- and the contract in this case had been signed years earlier. In any event the violation of section [**26] 2(c) (if any) was trivial given the attenuated linkage between the Union Pacific Railroad and Carbon County, and so far as appears completely harmless. No competitor of Union Pacific in the railroad business, and no competitor of Rocky Mountain Energy Company in the coal business who might be dependent on Union Pacific to transport his coal -- no competitor of any member of the Union Pacific "family," however broadly defined -- has complained that Carbon County is violating section 2(c). Nor has the Department of the Interior or the Department of Justice. Nor has any customer of any of the entities involved (however peripherally) in this lawsuit. Compare National Licorice Co. v. NLRB, 309 U.S. 350, 364-66, 84 L. Ed. 799, 60 S. Ct. 569 (1940); Republic Airlines, Inc. v. United Air Lines, Inc., 796 F.2d 526, slip op. at 5 (D.C. Cir. 1986). Only NIPSCO complains.

Section 2(c) is an anachronism -- a regulatory statute on which the sun set long ago. It could serve as Exhibit A to Dean Calabresi's proposal that courts be empowered to invalidate obsolete statutes without having to declare them unconstitutional. See Calabresi, A Common Law for the Age [**27] of Statutes (1982). We do not believe that we have the power to declare a constitutional statute invalid merely because we, or for that matter everybody, think the statute has become obsolete. But the question in this case is not whether section 2(c) is enforceable but whether an alleged violation of the statute makes a contract unenforceable, and the obsolescence of the statute may be relevant to that determination.

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NIPSCO does not argue that Carbon County's alleged violation of the statute hurt NIPSCO or that invalidating this contract under section 2(c) would help anyone, anywhere, at any time. The only consequence, other than to the parties to this suit, would be to throw a cloud of uncertainty over hundreds, perhaps thousands, of contracts for the supply of coal by firms affiliated with railroads, and to inject uncertainty into the contracting process generally. Persons negotiating contracts would have to worry about whether their contract might someday be found to have violated some old, little-known, and newly reinterpreted statute. Lawyers would benefit from the need to do more legal research before signing a contract, but no one else would. We conclude that the Mineral [**28] Lands Leasing Act is not a defense to the enforcement of this contract.

3. The contract permits NIPSCO to stop taking delivery of coal "for any cause beyond [its] reasonable control . . . including but not limited to . . . orders or acts of civil . . . authority . . . which wholly or partly prevent . . . the utilizing . . . of the coal." This is what is known as a force majeure clause. See, e.g., Northern Illinois Gas Co. v. Energy Coop., Inc., 122 Ill. App. 3d 940, 949-52, 461 N.E.2d 1049, 1057-58, 78 Ill. Dec. 215 (1984). NIPSCO argues that the Indiana Public Service Commission's "economy purchase orders" prevented it, in whole or part, from using the coal that it had agreed to buy, and it complains that the district judge instructed the jury incorrectly on the meaning and application of the clause. The complaint about the instructions is immaterial. The judge should not have put the issue of force majeure to the jury. It is evident that the clause was not triggered by the orders.

All that those orders do is tell NIPSCO it will not be allowed to pass on fuel costs to its ratepayers in the form of higher rates if [*275] it can buy electricity [**29] cheaper than it can generate electricity internally using Carbon County's coal. Such an order does not "prevent," whether wholly or in part, NIPSCO from using the coal; it just prevents NIPSCO from shifting the burden of its

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improvidence or bad luck in having incorrectly forecasted its fuel needs to the backs of the hapless ratepayers. The purpose of public utility regulation is to provide a substitute for competition in markets (such as the market for electricity) that are naturally monopolistic. Suppose the market for electricity were fully competitive, and unregulated. Then if NIPSCO signed a long-term fixed-price fixed-quantity contract to buy coal, and during the life of the contract competing electrical companies were able to produce and sell electricity at prices below the cost to NIPSCO of producing electricity from that coal, NIPSCO would have to swallow the excess cost of the coal. It could not raise its electricity prices in order to pass on the excess cost to its consumers, because if it did they would buy electricity at lower prices from NIPSCO's competitors. By signing the kind of contract it did, NIPSCO gambled that fuel costs would rise rather than fall over the life [**30] of the contract; for if they rose then the contract price would give it an advantage over its (hypothetical) competitors who would have to buy fuel at the current market price. If such a gamble fails, the result is not force majeure.

This is all the clearer when we consider that the contract price was actually fixed just on the downside; it put a floor under the price NIPSCO had to pay, but the escalator provisions allowed the actual contract prices to rise above the floor, and they did. This underscores the gamble NIPSCO took in signing the contract. It committed itself to paying a price at or above a fixed minimum and to taking a fixed quantity at that price. It was willing to make this commitment to secure an assured supply of low-sulphur coal, but the risk it took was that the market price of coal or substitute fuels would fall. A force majeure clause is not intended to buffer a party against the normal risks of a contract. The normal risk of a fixed-price contract is that the market price will change. If it rises, the buyer gains at the expense of the seller (except insofar as escalator provisions give the seller some protection); if it falls, as here, the seller gains [**31] at the expense of the buyer. The whole purpose of a fixed-price contract is to

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allocate risk in this way. A force majeure clause interpreted to excuse the buyer from the consequences of the risk he expressly assumed would nullify a central term of the contract.

The Indiana Public Service Commission is a surrogate for the forces of competition, and the economy fuel orders are a device for simulating the effects in a competitive market of a drop in input prices. The orders say to NIPSCO, in effect: "With fuel costs dropping, and thus reducing the costs of electricity to utilities not burdened by long-term fixed-price contracts, you had better substitute those utilities' electricity for your own when their prices are lower than your cost of internal generation. In a freely competitive market consumers would make that substitution; if you do not do so, don't expect to be allowed to pass on your inflated fuel costs to those consumers." Admittedly the comparison between competition and regulation is not exact. In an unregulated market, if fuel costs skyrocketed NIPSCO would have a capital gain from its contract (assuming the escalator provisions did not operate to raise the contract [**32] price by the full amount of the increase in fuel costs, a matter that would depend on the cause of the increase). This is because its competitors, facing higher fuel costs, would try to raise their prices for electricity, thus enabling NIPSCO to raise its price, or expand its output, or both, and thereby increase its profits. The chance of this "windfall" gain offsets, on an ex ante (before the fact) basis, the chance of a windfall loss if fuel costs drop, though NIPSCO it appears was seeking a secure source of low-sulphur coal rather than a chance for windfall gains. If as is likely the Public Service Commission would require NIPSCO to pass on any capital gain from an advantageous contract to the [*276] ratepayers (which is another reason for thinking NIPSCO wasn't after windfall gains--it would not, in all likelihood, have been allowed to keep them), then it ought to allow NIPSCO to pass on to them some of the capital loss from a disadvantageous contract -- provided that the contract, when made, was prudent. Maybe it was not; maybe the risk that NIPSCO

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took was excessive. But all this was a matter between NIPSCO and the Public Service Commission, and NIPSCO did not seek judicial [**33] review of the economy purchase orders.

If the Commission had ordered NIPSCO to close a plant because of a safety or pollution hazard, we would have a true case of force majeure. As a regulated firm NIPSCO is subject to more extensive controls than unregulated firms and it therefore wanted and got a broadly worded force majeure clause that would protect it fully (hence the reference to partial effects) against government actions that impeded its using the coal. But as the only thing the Commission did was prevent NIPSCO from using its monopoly position to make consumers bear the risk that NIPSCO assumed when it signed a long-term fixed-price fuel contract, NIPSCO cannot complain of force majeure; the risk that has come to pass was one that NIPSCO voluntarily assumed when it signed the contract.

4. The district judge refused to submit NIPSCO's defenses of impracticability and frustration to the jury, ruling that Indiana law does not allow a buyer to claim impracticability and does not recognize the defense of frustration. Some background (on which see Farnsworth, Contracts §§ 9.5-9.7 (1982)) may help make these rulings intelligible. In the early common law a contractual [**34] undertaking unconditional in terms was not excused merely because something had happened (such as an invasion, the passage of a law, or a natural disaster) that prevented the undertaking. See Paradine v. Jane, Aleyn 26, 82 Eng. Rep. 897 (K.B. 1647). Excuses had to be written into the contract; this is the origin of force majeure clauses. Later it came to be recognized that negotiating parties cannot anticipate all the contingencies that may arise in the performance of the contract; a legitimate judicial function in contract cases is to interpolate terms to govern remote contingencies -- terms the parties would have agreed on explicitly if they had had the time and foresight to make advance provision for every possible contingency in performance. Later still, it was recognized that physical

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impossibility was irrelevant, or at least inconclusive; a promisor might want his promise to be unconditional, not because he thought he had superhuman powers but because he could insure against the risk of nonperformance better than the promisee, or obtain a substitute performance more easily than the promisee. See Field Container Corp. v. ICC, 712 F.2d 250, 257 (7th Cir. 1983); [**35] Holmes, The Common Law 300 (1881). Thus the proper question in an "impossibility" case is not whether the promisor could not have performed his undertaking but whether his nonperformance should be excused because the parties, if they had thought about the matter, would have wanted to assign the risk of the contingency that made performance impossible or uneconomical to the promisor or to the promisee; if to the latter, the promisor is excused.

Section 2-615 of the Uniform Commercial Code takes this approach. It provides that "delay in delivery . . . by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made. . . ." Performance on schedule need not be impossible, only infeasible -- provided that the event which made it infeasible was not a risk that the promisor had assumed. Notice, however, that the only type of promisor referred to is a seller; there is no suggestion that a buyer's performance might be excused by reason of impracticability. The reason is largely semantic. Ordinarily all the buyer has [**36] to do in order to perform his side of the bargain is pay, and while one can think of all sorts of reasons why, when the time [*277] came to pay, the buyer might not have the money, rarely would the seller have intended to assume the risk that the buyer might, whether through improvidence or bad luck, be unable to pay for the seller's goods or services. To deal with the rare case where the buyer or (more broadly) the paying party might have a good excuse based on some unforeseen change in circumstances, a new rubric was thought necessary, different from "impossibility" (the common law term) or

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"impracticability" (the Code term, picked up in Restatement (Second) of Contracts § 261 (1979)), and it received the name "frustration." Rarely is it impracticable or impossible for the payor to pay; but if something has happened to make the performance for which he would be paying worthless to him, an excuse for not paying, analogous to impracticability or impossibility, may be proper. See Restatement, supra, § 265, comment a.

The leading case on frustration remains Krell v. Henry, [1903] 2 K.B. 740 (C.A.). Krell rented Henry a suite of rooms for watching the [**37] coronation of Edward VII, but Edward came down with appendicitis and the coronation had to be postponed. Henry refused to pay the balance of the rent and the court held that he was excused from doing so because his purpose in renting had been frustrated by the postponement, a contingency outside the knowledge, or power to influence, of either party. The question was, to which party did the contract (implicitly) allocate the risk? Surely Henry had not intended to insure Krell against the possibility of the coronation's being postponed, since Krell could always relet the room, at the premium rental, for the coronation's new date. So Henry was excused.

NIPSCO is the buyer in the present case, and its defense is more properly frustration than impracticability; but the judge held that frustration is not a contract defense under the law of Indiana. He relied on an Indiana Appellate Court decision which indeed so states, Ross Clinic, Inc. v. Tabion, 419 N.E.2d 219, 223 (Ind. App. 1981), but solely on the basis of an old decision of the Indiana Supreme Court, Krause v. Board of Trustees, 162 Ind. 278, 283-84, 70 N.E. 264, 265 (1904), that doesn't even [**38] discuss the defense of frustration and anyway precedes by years the recognition of the defense by American courts. At all events, the facts of the present case do not bring it within the scope of the frustration doctrine, so we need not decide whether the Indiana Supreme Court would embrace the doctrine in a suitable case.

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For the same reason we need not decide whether a force majeure clause should be deemed a relinquishment of a party's right to argue impracticability or frustration, on the theory that such a clause represents the integrated expression of the parties' desires with respect to excuses based on supervening events; or whether such a clause either in general or as specifically worded in this case covers any different ground from these defenses; or whether a buyer can urge impracticability under section 2-615 of the Uniform Commercial Code, which applies to this suit. Regarding the last of these questions, although the text says "seller," Official Comment 9 to the section says that in some circumstances "the reason of the present section may well apply and entitle the buyer to the exemption," and many courts have done just that. See, e.g., Nora Springs Coop. Co. v. Brandau, 247 N.W.2d 744 (Iowa 1976); [**39] Lawrance v. Elmore Bean Warehouse, Inc., 108 Idaho 892, 894, 702 P.2d 930, 932 (Idaho App. 1985); Northern Illinois Gas Co. v. Energy Coop., Inc., supra, 122 Ill. App. 3d at 954, 461 N.E.2d at 1060. The rub is that Indiana has not adopted the "Official Comments" to the UCC. It has its own official comments, and they seem critical of Official Comment 9: "Comment 9 discusses 'exemption' for the buyer, but the text of the section is applicable only to sellers." Burns Ind. Stat. Ann. § 26-1-2-615, Ind. Comment. It may be, therefore, that buyers cannot use section 2-615 in Indiana. But it is not clear that this has substantive significance. Section 1-103 of the Uniform Commercial Code authorizes the courts to [*278] apply common law doctrines to the extent consistent with the Code -- this is the basis on which NIPSCO is able to plead frustration as an alternative defense to section 2-615; and the essential elements of frustration and of impracticability are the same. With section 2-615 compare Restatement, supra, §§ 261 (impossibility/impracticability) and 265 (frustration); and see id., § 265, comment a. NIPSCO gains nothing by pleading [**40] section 2-615 of the Uniform Commercial Code as well as common law frustration, and

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thus loses nothing by a ruling that buyers in Indiana cannot use section 2-615.

Whether or not Indiana recognizes the doctrine of frustration, and whether or not a buyer can ever assert the defense of impracticability under section 2-615 of the Uniform Commercial Code, these doctrines, so closely related to each other and to force majeure as well, see International Minerals & Chemical Corp. v. Llano, Inc., 770 F.2d 879, 885-87 (10th Cir. 1985), cannot help NIPSCO. All are doctrines for shifting risk to the party better able to bear it, either because he is in a better position to prevent the risk from materializing or because he can better reduce the disutility of the risk (as by insuring) if the risk does occur. Suppose a grower agrees before the growing season to sell his crop to a grain elevator, and the crop is destroyed by blight and the grain elevator sues. Discharge is ordinarily allowed in such cases. See, e.g., Matousek v. Galligan, 104 Neb. 731, 178 N.W. 510 (1920); Pearce-Young-Angel Co. v. Charles R. Allen, Inc., 213 S.C. 578, 50 S.E.2d 698 (1948); [**41] cf. Olbum v. Old Home Manor, Inc., 313 Pa. Super. 99, 459 A.2d 757 (1983). The grower has every incentive to avoid the blight; so if it occurs, it probably could not have been prevented; and the grain elevator, which buys from a variety of growers not all of whom will be hit by blight in the same growing season, is in a better position to buffer the risk of blight than the grower is.

Since impossibility and related doctrines are devices for shifting risk in accordance with the parties' presumed intentions, which are to minimize the costs of contract performance, one of which is the disutility created by risk, they have no place when the contract explicitly assigns a particular risk to one party or the other. As we have already noted, a fixed-price contract is an explicit assignment of the risk of market price increases to the seller and the risk of market price decreases to the buyer, and the assignment of the latter risk to the buyer is even clearer where, as in this case, the contract places a floor under price but allows for escalation. If, as is also the case here, [**42] the buyer

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forecasts the market incorrectly and therefore finds himself locked into a disadvantageous contract, he has only himself to blame and so cannot shift the risk back to the seller by invoking impossibility or related doctrines. See Farnsworth, supra, at 680 and n. 18; White & Summers Handbook of the Law Under the Uniform Commercial Code 133 (2d ed. 1980). It does not matter that it is an act of government that may have made the contract less advantageous to one party. See, e.g., Connick v. Teachers Ins. & Annuity Ass'n, 784 F.2d 1018, 1022 (9th Cir. 1986); Waegemann v. Montgomery Ward & Co., 713 F.2d 452, 454 (9th Cir. 1983). Government these days is a pervasive factor in the economy and among the risks that a fixed-price contract allocates between the parties is that of a price change induced by one of government's manifold interventions in the economy. Since "the very purpose of a fixed price agreement is to place the risk of increased costs on the promisor (and the risk of decreased costs on the promisee)," the fact that costs decrease steeply (which is in effect what happened here -- the cost of generating electricity turned out to [**43] be lower than NIPSCO thought when it signed the fixed-price contract with Carbon County) cannot allow the buyer to walk away from the contract. In re Westinghouse Electric Corp. Uranium Contracts Litigation, 517 F. Supp. 440, 453 (E.D. Va. 1981); cf. Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co., 508 F.2d 283, 293 (7th Cir. 1974).

[*279] 5. This completes our consideration of NIPSCO's attack on the damages judgment and we turn to Carbon County's cross-appeal, which seeks specific performance in lieu of the damages it got. Carbon County's counsel virtually abandoned the cross-appeal at oral argument, noting that the mine was closed and could not be reopened immediately -- so that if specific performance (i.e., NIPSCO's resuming taking the coal) was ordered, Carbon County would not be able to resume its obligations under the contract without some grace period. In any event the request for specific performance has no merit. Like other equitable remedies, specific performance is available

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only if damages are not an adequate remedy, Farnsworth, supra [**44] , § 12.6, and there is no reason to suppose them inadequate here. The loss to Carbon County from the breach of contract is simply the difference between (1) the contract price (as escalated over the life of the contract in accordance with the contract's escalator provisions) times quantity, and (2) the cost of mining the coal over the life of the contract. Carbon County does not even argue that $181 million is not a reasonable estimate of the present value of the difference. Its complaint is that although the money will make the owners of Carbon County whole it will do nothing for the miners who have lost their jobs because the mine is closed and the satellite businesses that have closed for the same reason. Only specific performance will help them.

But since they are not parties to the contract their losses are irrelevant. Indeed, specific performance would be improper as well as unnecessary here, because it would force the continuation of production that has become uneconomical. Cf. Farnsworth, supra, at 817-18. No one wants coal from Carbon County's mine. With the collapse of oil prices, which has depressed the price of substitute fuels as well, this coal costs far more to [**45] get out of the ground than it is worth in the market. Continuing to produce it, under compulsion of an order for specific performance, would impose costs on society greater than the benefits. NIPSCO's breach, though it gave Carbon County a right to damages, was an efficient breach in the sense that it brought to a halt a production process that was no longer cost-justified. See Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1289 (7th Cir. 1985); Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 57, 63 (2d Cir. 1985) (Friendly, J.). The reason why NIPSCO must pay Carbon County's loss is not that it should have continued buying coal it didn't need but that the contract assigned to NIPSCO the risk of market changes that made continued deliveries uneconomical. The judgment for damages is the method by which that risk is being fixed on NIPSCO in accordance with its undertakings.

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With continued production uneconomical, it is unlikely that an order of specific performance, if made, would ever actually be implemented. If, as a finding that the breach was efficient implies, the cost of substitute supply (whether of coal, or of electricity) to NIPSCO is [**46] less than the cost of producing coal from Carbon County's mine, NIPSCO and Carbon County can both be made better off by negotiating a cancellation of the contract and with it a dissolution of the order of specific performance. Suppose, by way of example, that Carbon County's coal costs $20 a ton to produce, that the contract price is $40, and that NIPSCO can buy coal elsewhere for $10. Then Carbon County would be making a profit of only $20 on each ton it sold to NIPSCO ($40-$20), while NIPSCO would be losing $30 on each ton it bought from Carbon County ($40-$10). Hence by offering Carbon County more than contract damages (i.e., more than Carbon County's lost profits), NIPSCO could induce Carbon County to discharge the contract and release NIPSCO to buy cheaper coal. For example, at $25, both parties would be better off than under specific performance, where Carbon County gains only $20 but NIPSCO loses $30. Probably, therefore, Carbon County is seeking specific performance in order to have bargaining leverage with NIPSCO, and we can think of no reason why the law should give it such [*280] leverage. We add that if Carbon County obtained and enforced an order for specific performance [**47] this would mean that society was spending $20 (in our hypothetical example) to produce coal that could be gotten elsewhere for $10 -- a waste of scarce resources.

As for possible hardships to workers and merchants in Hanna, Wyoming, where Carbon County's coal mine is located, we point out that none of these people were parties to the contract with NIPSCO or third-party beneficiaries. They have no legal interest in the contract. Cf. Local 1330, United Steel Workers of America v. United States Steel Corp., 631 F.2d 1264, 1279-82 (6th Cir. 1980); Serrano v. Jones & Laughlin Steel Co., 790 F.2d 1279, 1289 (6th Cir. 1986). Of course the consequences to third parties of

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granting an injunctive remedy, such as specific performance, must be considered, and in some cases may require that the remedy be withheld. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 312-13, 72 L. Ed. 2d 91, 102 S. Ct. 1798 (1982); Shondel v. McDermott, 775 F.2d 859, 868 (7th Cir. 1985); Duran v. Elrod, 760 F.2d 756, 759 (7th Cir. 1985); [**48] Donovan v. Robbins, 752 F.2d 1170, 1176 (7th Cir. 1985). The frequent references to "public interest" as a factor in the grant or denial of preliminary injunction invariably are references to third-party effects. See, e.g., Punnett v. Carter, 621 F.2d 578, 587-88 (3d Cir. 1980). But even though the formal statement of the judicial obligation to consider such effects extends to orders denying as well as granting injunctive relief, see, e.g., Kershner v. Mazurkiewicz, 670 F.2d 440, 443 (3d Cir. 1982) (en banc), the actuality is somewhat different: when the question is whether third parties would be injured by an order denying an injunction, always they are persons having a legally recognized interest in the lawsuit, so that the issue really is the adequacy of relief if the injunction is denied. In Mississippi Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618 (5th Cir. 1985), for example, a public utility sought a preliminary injunction against alleged overcharges by a supplier. If the injunction was denied and later the utility got damages, its customers would be entitled to refunds; but for a variety [**49] of reasons explained in the opinion, refunds would not fully protect the customers' interests. The customers were the real parties in interest on the plaintiff side of the case, and their interests had therefore to be taken into account in deciding whether there would be irreparable harm (and how much) if the preliminary injunction was denied. See id. at 623-26. Carbon County does not stand in a representative relation to the workers and businesses of Hanna, Wyoming. Treating them as real parties in interest would evade the limitations on the concept of a third-party beneficiary and would place the promisor under obligations potentially far heavier than it had thought it was accepting when it signed the contract. Indeed, if we are right that an order of specific

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performance would probably not be carried out -- that instead NIPSCO would pay an additional sum of money to Carbon County for an agreement not to enforce the order -- it becomes transparent that granting specific performance would make NIPSCO liable in money damages for harms to nonparties to the contract, and it did not assume such liability by signing the contract. Cf. H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928). [**50]

Moreover, the workers and merchants in Hanna assumed the risk that the coal mine would have to close down if it turned out to be uneconomical. The contract with NIPSCO did not guarantee that the mine would operate throughout the life of the contract but only protected the owners of Carbon County against the financial consequences to them of a breach. As Carbon County itself emphasizes in its brief, the contract was a product of the international oil cartel, which by forcing up the price of substitute fuels such as coal made costly coal-mining operations economically attractive. The OPEC cartel is not a source of vested rights to produce substitute fuels at inflated prices.

6. The last issue is the judge's refusal to force NIPSCO to post a $181 million [*281] bond as a condition of obtaining a stay of execution of the damage judgment pending NIPSCO's appeal. The issue is not moot, because our decision upholding the judgment will not become final until NIPSCO has exhausted all its rights of further review, and meanwhile Carbon County will continue to incur whatever risk is created by the absence of a bond.

There are two grounds for rejecting Carbon County's appeal. The first [**51] is the cross-appeal, which seeks to substitute specific performance for the damage judgment. A party that is trying to obtain specific performance in lieu of damages cannot at the same time attempt to execute a damage judgment. Bronson v. La Crosse & Milwaukee R.R., 68 U.S. 405, 409-10, 17 L. Ed. 616 (1863); Price v. Franklin Investment Co., 187 U.S. App. D.C. 383, 574 F.2d 594, 597 (D.C. Cir. 1978). Yet the reason for an appeal

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bond is to give the plaintiff security while execution is postponed. If he does not want to execute the damage judgment, because he hopes for something better, he gives up nothing by waiting till the appeals are over with before executing the damage judgment -- there is no quid for the quo of a bond paid for by the defendant-appellant. Although supersedeas bonds have sometimes been granted in such cases, see New York v. Shore Realty Corp., 763 F.2d 49, 51 (2d Cir. 1985); Mid-Jersey Nat'l Bank v. Fidelity-Mortgage Investors, 518 F.2d 640, 642 (3d Cir. 1975); Knapp v. Kinsey, 249 F.2d 797, 800 (6th Cir. 1957), [**52] none of the cases discusses the propriety of doing so. Lacking omniscience, we hesitate to say that requiring a bond would never be proper in such a case, but there would have to be a good reason for it and Carbon County has provided none.

Second, as explained in Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 786 F.2d 794 (7th Cir. 1986), it is a misreading of Rule 62(d) of the Federal Rules of Civil Procedure to suggest that an appellant who wants to stay execution pending appeal must post a bond. The rule requires him to post a bond if he wants an automatic stay, but not if he is content to throw himself on the district judge's discretion. See also Lightfoot v. Walker, 797 F.2d 505, slip op. at 2 (7th Cir. 1986). An appeal bond usually costs one percent of the amount secured, which in the case of a $181 million judgment is almost $2 million. That is not small change; and if the district judge is satisfied that the expenditure is unnecessary to protect the appellee, he does not have to insist that it be spent. NIPSCO has assets of more [**53] than $4 billion, revenues of almost $2 billion a year, and a net worth of more than $1 billion. A public utility, it is in no financial jeopardy, it is not about to place its assets beyond the reach of this judgment creditor, and it is, in short, good for the $181 million. Should NIPSCO's ability to pay begin to deteriorate, Carbon County can always petition the district judge for supplementary relief; he has even required

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periodic reports from NIPSCO to make it easier to monitor the company's financial health.

To summarize, the appeal from the grant of the preliminary injunction is dismissed as moot; the other orders appealed from are affirmed. No costs will be awarded in this court, since we have turned down Carbon County's appeals as well as NIPSCO's.

So ordered.

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