work on the day of the fire. The trial court properly granted summary judgment as to count I of plaintiff's complaint. . . .

[The court also dismissed the negligence count.]

Affirmed.

NOTES AND QUESTIONS

1. The term *extrinsic evidence* is broader than *parol evidence.* Typically, the latter term is limited to describing evidence of oral or written negotiations or agreements that predate or are contemporaneous with a final agreement. Extrinsic evidence includes such parol evidence but also encompasses statements by a contracting party, whenever made, concerning the party's intended meaning for a contractual term. The term is also broad enough to include evidence of the "circumstances" surrounding the making of a contract — "the entire situation, as it appeared to the parties." See Restatement (Second) of Contracts §202. Further, the term *extrinsic evidence* includes evidence of usage of trade, course of dealing, or a course of performance. See UCC §§1-205 and 2-208. Which types of evidence would the appellate court in *Eichengreen.* exclude if there is no "ambiguity"? The trial court? How is the ambiguity to be determined according to the appellate court?

2. Williston felt that, if an agreement was integrated and not ambiguous on its face, interpretation should be accomplished by determining the meaning that would be attached "by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean." 4 Williston §607 (3d ed. 1961). Thus, when the contract was integrated and unambiguous on its face (within its "four corners"), Williston would exclude any parol evidence and any other statements of intended meaning — any evidence of any "private understanding." See Murray §109 at p. 242.

However, Williston would have permitted extrinisic evidence of surrounding circumstances although not all proponents of the plain meaning rule would. See, for example, Carey Canada, Inc. v. Columbia Casualty Co., 940 F.2d 1548 (D.C. Cir. 1991).

3. Williston and Corbin could not have been further apart on the desirability of the effect of parol evidence on the issue of interpretation. Williston thought the rule of obvious benefit because it promoted certainty. It did not bother him that occasionally a strict application of the rule would mean that the contract would be interpreted in a manner neither party intended. Williston §95 (1st ed.). Corbin was outraged at the suggestion. Corbin §574. To his mind fulfilling the intention of the parties was the only goal of this or any other interpretive rule. When questions of ambiguity arise, Corbin would urge the judge to send the jury from the room, hear the evidence, and ask this question: If the proffered evidence were true, is it inconsistent with the contract as written? If the contract might reasonably be read to mean what the parol evidence demonstrated,

the jury was then permitted to hear the evidence and decide its veracity. Williston would never have permitted parol evidence to *create* an ambiguity in an otherwise apparently unambiguous writing. Justice Traynor speaking in the next case was certainly a proponent of the Corbin approach.

PACIFIC GAS & ELECTRIC CO. v. G. W. THOMAS DRAYAGE & RIGGING CO.

Supreme Court of California, 1968
69 Cal. 2d 33, 69 Cal. Rptr. 561, 442 P.2d 641

TRAYNOR, C.J. Defendant appeals from a judgment for plaintiff in an action for damages for injury to property under an indemnity clause of a contract.

In 1960 defendant entered into a contract with plaintiff to furnish the labor and equipment necessary to remove and replace the upper metal cover of plaintiff's steam turbine. Defendant agreed to perform the work "at [its] own risk and expense" and to "indemnify" plaintiff "against all loss, damage, expense and liability resulting from . . . injury to property, arising out of or in any way connected with the performance of this contract." Defendant also agreed to procure not less than $50,000 insurance to cover liability for injury to property. Plaintiff was to be an additional named insured, but the policy was to contain a cross-liability clause extending the coverage to plaintiff's property.

During the work the cover fell and injured the exposed rotor of the turbine. Plaintiff brought this action to recover $25,144.51, the amount it subsequently spent on repairs. During the trial it dismissed a count based on negligence and thereafter secured judgment on the theory that the indemnity provision covered injury to all property regardless of ownership.

Defendant offered to prove by admissions of plaintiff's agents, by defendant's conduct under similar contracts entered into with plaintiff, and by other proof that in the indemnity clause the parties meant to cover injury to property of third parties only and not to plaintiff's property. Although the trial court observed that the language used was "the classic language for a third party indemnity provision" and that "one could very easily conclude that . . . its whole intendment is to indemnify third parties," it nevertheless held that the "plain language" of the agreement also required defendant to indemnify plaintiff for injuries to plaintiff's property. Having determined that the contract had a plain meaning, the court refused to admit any extrinsic evidence that would contradict its interpretation.

When a court interprets a contract on this basis, it determines the meaning of the instrument in accordance with the ". . . extrinsic evidence of the judge's own linguistic education and experience." (3 Corbin on Contracts (1960 ed.) [1964 Supp. §579, p. 225, fn. 56].) The exclusion of testimony that might contradict the linguistic background of the judge reflects a judicial belief in the possibility of perfect verbal expression. (9

Wigmore on Evidence (3d ed. 1940) §2461, p. 187.) This belief is a remnant of a primitive faith in the inherent potency[2] and inherent meaning of words.[3]

The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. . . .

A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.

Some courts have expressed the opinion that contractual obligations are created by the mere use of certain words, whether or not there was any intention to incur such obligations.[4] Under this view, contractual obligations flow, not from the intention of the parties but from the fact that they used certain magic words. Evidence of the parties' intention therefore becomes irrelevant.

In this state, however, the intention of the parties as expressed in the contract is the source of contractual rights and duties.[5] A court must ascertain and give effect to this intention by determining what the parties meant by the words they used. Accordingly, 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.

If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner

2. E.g., "The elaborate system of taboo and verbal prohibitions in primitive groups; the ancient Egyptian myth of Khern, the apotheosis of the word, and of Thoth, the Scribe of Truth, the Giver of Words and Script, the Master of Incantations; the avoidance of the name of God in Brahmanism, Judaism and Islam; totemistic and protective names in mediaeval Turkish and Finno-Ugrian languages; the misplaced verbal scruples of the 'Précieuses'; the Swedish peasant custom of curing sick cattle smitten by witchcraft, by making them swallow a page torn out of the psalter and put in dough." [F]rom Ullman, The Principles of Semantics (1963 ed.) 43. (See also Ogden and Richards, The Meaning of Meaning (rev. ed. 1956) pp. 24-47.)

3. " 'Rerum enim vocabula immutabilia sunt, homines mutabilia,' " (Words are unchangeable, men changeable) from Dig. XXXIII, 10, 7, §2, de sup. leg. as quoted in 9 Wigmore on Evidence, op. cit. supra, §2461, p.187.

4. "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent." (Hotchkiss v. National City Bank of New York (S.D.N.Y. 1911) 200 F. 287, 293. See also C. H. Pope & Co. v. Bibb Mfg. Co. (2d Cir. 1923) 290 F. 586, 587; see 4 Williston on Contracts (3d ed. 1961) §612, pp. 577-578, §613, p.583.)

5. "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, §1636; see also Code Civ. Proc. §1859; Universal Sales Corp. v. Cal. Press Mfg. Co. (1942) 20 Cal. 2d 751, 760, 128 P.2d 665; Lemm v. Stillwater Land & Cattle Co. (1933) 217 Cal. 474, 480, 19 P.2d 785.)

in which they were arranged. Words, however, do not have absolute and constant referents. "A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry." (Pearson v. State Social Welfare Board (1960) 54 Cal. 2d 184, 195, 5 Cal. Rptr. 553, 559, 353 P.2d 33, 39.) The meaning of particular words or groups of words varies with the ". . . verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). . . . A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning." (Corbin, The Interpretation of Words and the Parol Evidence Rule (1965) 50 Cornell L.Q. 161, 187.) Accordingly, the meaning of a writing ". . . can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended." . . .

Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose. The fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms. That possibility is not limited to contracts whose terms have acquired a particular meaning by trade usage,[6] but exists whenever the parties' understanding of the words used may have differed from the judge's understanding.

Accordingly, rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties.[7] (Civ. Code, §1647; Code Civ. Proc. §1860; see also 9 Wigmore on Evidence, op. cit. supra, §2470, fn. 11, p.227.) Such evidence includes

6. Extrinsic evidence of trade usage or custom has been admitted to show that the term "United Kingdom" in a motion picture distribution contract included Ireland (Ermolieff v. R.K.O. Radio Pictures (1942) 19 Cal. 2d 543, 549-552, 122 P.2d 3); that the word "ton" in a lease meant a long ton or 2,240 pounds and not the statutory ton of 2,000 pounds (Higgins v. Cal. Petroleum, etc., Co. (1898) 120 Cal. 629, 630-632, 52 P. 1080); that the word "stubble" in a lease included not only stumps left in the ground but everything "left on the ground after the harvest time" (Callahan v. Stanley (1881) 57 Cal. 476, 477-479); that the term "north" in a contract dividing mining claims indicated a boundary line running along the "magnetic and not the true meridian" (Jenny Lind Co. v. Bower & Co. (1858) 11 Cal. 194, 197-199) and that a form contract for purchase and sale was actually an agency contract (Body-Steffner Co. v. Flotill Products (1944) 63 Cal. App. 2d 555, 558-562, 147 P.2d 84). See also Code Civ. Proc. §1861; Annot., 89 A.L.R. 1228; Note (1942) 30 Cal. L. Rev. 679.

7. When objection is made to any particular item of evidence offered to prove the intention of the parties, the trial court may not yet be in a position to determine whether in the light of all the offered evidence, the item objected to will turn out to be admissible as tending to prove a meaning of which the language of the instrument is reasonably susceptible or inadmissible as tending to prove a meaning of which the language is not reasonably susceptible. In such case the court may admit the evidence conditionally by either reserving its ruling on the objection or by admitting the evidence subject to a motion to strike. (See Evid. Code, §403.)

testimony as to the "circumstances surrounding the making of the agreement . . . including the object, nature and subject matter of the writing . . ." so that the court can "place itself in the same situation in which the parties found themselves at the time of contracting." (Universal Sales Corp. v. Cal. Press Mfg. Co., supra, 20 Cal. 2d 751, 761, 128 P.2d 665, 671; Lemm v. Stillwater Land & Cattle Co., supra, 217 Cal. 474, 480-481, 19 P.2d 785.) If the court decides, after considering this evidence, that the language of a contract, in the light of all the circumstances, is "fairly susceptible of either one of the two interpretations contended for, . . ." extrinsic evidence relevant to prove either of such meanings is admissible.[8]

In the present case the court erroneously refused to consider extrinsic evidence offered to show that the indemnity clause in the contract was not intended to cover injuries to plaintiff's property. Although that evidence was not necessary to show that the indemnity clause was reasonably susceptible of the meaning contended for by defendant, it was nevertheless relevant and admissible on that issue. Moreover, since that clause was reasonably susceptible of that meaning, the offered evidence was also admissible to prove that the clause had that meaning and did not cover injuries to plaintiff's property.[9] Accordingly, the judgment must be reversed.

NOTES AND QUESTIONS

1. In a jurisdiction like California that will hear evidence to create the ambiguity, what procedure should the court follow when such evidence is first proffered? See footnote 7 of the opinion. Note the limitation: If the extrinsic evidence advances an intepretation to which the language of the contract is not "reasonably susceptible," the evidence is not admissible. See, e.g., A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc., Bumble Bee Seafoods Div., 852 F.2d 493 (9th Cir. 1988) (extrinsic evidence as to warranty of seaworthiness not admissible where clause in charter agreement for vessel clearly and unequivocally communicated that risk of unseaworthiness would fall on charterer once it accepted vessel because contract not reasonably susceptible of meaning advanced by company chartering vessel).

8. Extrinsic evidence has often been admitted in such cases on the stated ground that the contract was ambiguous (e.g., Universal Sales Corp. v. Cal. Press Mfg. Co., supra, 20 Cal. 2d 751, 761, 128 P.2d 665). This statement of the rule is harmless if it is kept in mind that the ambiguity may be exposed by extrinsic evidence that reveals more than one possible meaning.

9. The court's exclusion of extrinsic evidence in this case would be error even under a rule that excluded such evidence when the instrument appeared to the court to be clear and unambiguous on its face. The controversy centers on the meaning of the word "indemnify" and the phrase "all loss, damage, expense and liability." The trial court's recognition of the language as typical of a third party indemnity clause and the double sense in which the word "indemnify" is used in statutes and defined in dictionaries demonstrate the existence of an ambiguity. . . .

2. Would the court that decided *Eichengreen* have necessarily reached a different decision than Justice Traynor in the above case? Reread footnote 9 of *Pacific Gas & Electric.*

3. Corbin, The Parol Evidence Rule, 53 Yale L.J. 603, 623 (1944):

> The more bizarre and unusual an asserted interpretation is, the more convincing must be the testimony that supports it. At what point the court should cease listening to testimony that white is black and that a dollar is fifty cents is a matter for sound judicial discretion and common sense.

What language in *Pacific Gas* indicates the court's recognition of Corbin's limitation on extrinsic evidence?

4. There are strong proponents of the approach taken by Justice Traynor. Berg v. Hudesman, 115 Wash. 2d 657, 801 P.2d 222 (1990). While others feel Justice Traynor was way off the mark. Consider the dissent of Justice Mosk in Delta Dynamics, Inc. v. Arioto, 69 Cal. 2d 525, 72 Cal. Rptr. 785, 446 P.2d 785 (1968):

> It can be contended that there may be no evil per se in considering testimony about every discussion and conversation prior to and contemporaneous with the signing of a written instrument and that social utility may result in some circumstances. The problem, however, is that which devolves upon members of the bar who are commissioned by clients to prepare a written instrument able to withstand future assaults. Given two experienced businessmen dealing at arm's length, both represented by competent counsel, it has become virtually impossible under recently evolving rules of evidence to draft a written contract that will produce predictable results in court. The written word, heretofore deemed immutable, is now at all times subject to alteration by self-serving recitals based upon fading memories of antecedent events. This, I submit, is a serious impediment to the certainty required in commercial transactions.

Further criticism is found in Trident Center v. Connecticut General Life Ins., 847 F.2d 564 (9th Cir. 1988), and Bank v. Truck Ins. Exchange, 51 F.2d 736 (7th Cir. 1995).

RESTATEMENT (SECOND) OF CONTRACTS

§212. Interpretation of Integrated Agreement

(1) The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter.

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

B. *Admissibility of Evidence of Usage of Trade, Course of Dealing, and Course of Performance*

NANAKULI PAVING & ROCK CO. v. SHELL OIL CO.
United States Court of Appeals, Ninth Circuit, 1981
664 F.2d 772

HOFFMAN, District Judge. Appellant Nanakuli Paving and Rock Company (Nanakuli) initially filed this breach of contract action against appellee Shell Oil Company (Shell) in Hawaiian State Court in February, 1976. Nanakuli, the second largest asphaltic paving contractor in Hawaii, had bought all its asphalt requirements from 1963 to 1974 from Shell under two long-term supply contracts; its suit charged Shell with breach of the later 1969 contract. The jury returned a verdict of $220,800 for Nanakuli on its first claim, which is that Shell breached the 1969 contract in January, 1974, by failing to price protect Nanakuli on 7200 tons of asphalt at the time Shell raised the price for asphalt from $44 to $76. Nanakuli's theory is that price-protection, as a usage of the asphaltic paving trade in Hawaii, was incorporated into the 1969 agreement between the parties, as demonstrated by the routine use of price protection by suppliers to that trade, and reinforced by the way in which Shell actually performed the 1969 contract up until 1974. Price protection, appellant claims, required that Shell hold the price on the tonnage Nanakuli had already committed because Nanakuli had incorporated that price into bids put out to or contracts awarded by general contractors and government agencies. The District Judge set aside the verdict and granted Shell's motion for judgment n.o.v., which decision we vacate. We reinstate the jury verdict because we find that, viewing the evidence as a whole, there was substantial evidence to support a finding by reasonable jurors that Shell breached its contract by failing to provide protection for Nanakuli in 1974. . . .

Nanakuli offers two theories for why Shell's failure to offer price protection in 1974 was a breach of the 1969 contract. First, it argues, all material suppliers to the asphaltic paving trade in Hawaii followed the trade usage of price protection and thus it should be assumed, under the UCC, that the parties intended to incorporate price protection into their 1969 agreement. This is so, Nanakuli continues, even though the written contract provided for price to be "Shell's Posted Price at time of delivery." F.O.B. Honolulu. . . . The UCC looks to the actual performance of a contract as the best indication of what the parties intended those terms to mean. Nanakuli points out that Shell had price protected it on the two occasions of price increases under the 1969 contract other than the 1974 increase. In 1970 and 1971 Shell extended the old price for four and three months, respectively, after an announced increase. . . .

Nanakuli's second theory for price protection is that Shell was obliged to price protect Nanakuli, even if price protection was not incorporated

into their contract, because price protection was the commercially reasonable standard for fair dealing in the asphaltic paving trade in Hawaii in 1974. . . .

Shell presents three arguments for upholding the judgment n.o.v. or, on cross appeal, urging that the District Judge erred in admitting certain evidence. First, it says, the District Court should not have denied Shell's motion in limine to define trade, for purposes of trade usage evidence, as the sale and purchase of asphalt in Hawaii, rather than expanding the definition of trade to include other suppliers of materials to the asphaltic paving trade. Asphalt, its argument runs, was the subject matter of the disputed contract and the only product Shell supplied to the asphaltic paving trade. Shell protests that the judge, by expanding the definition of trade to include the other major suppliers to the asphaltic paving trade, allowed the admission of highly prejudicial evidence of routine price protection by all suppliers of aggregate. Asphaltic concrete paving is formed by mixing paving asphalt with crushed rock, or aggregate, in a "hot-mix" plant and then pouring the mixture onto the surface to be paved. Shell's second complaint is that the two prior occasions on which it price protected Nanakuli, although representing the only other instances of price increases under the 1969 contract, constituted mere waivers of the contract's price term, not a course of performance of the contract. A course of performance of the contract, in contrast to a waiver, demonstrates how the parties understand the terms of their agreement. . . . Shell's final argument is that, even assuming its prior price protection constituted a course of performance and that the broad trade definition was correct and evidence of trade usages by aggregate suppliers was admissible, price protection could not be construed as reasonably consistent with the express price term in the contract, in which case the Code provides that the express term controls. . . .

V. Scope of Trade Usage

The validity of the jury verdict in this case depends on four legal questions. First, how broad was the trade to whose usages Shell was bound under its 1969 agreement with Nanakuli: did it extend to the Hawaiian asphaltic paving trade or was it limited merely to the purchase and sale of asphalt, which would only include evidence of practices by Shell and Chevron? Second, were the two instances of price protection of Nanakuli by Shell in 1970 and 1971 waivers of the 1969 contract as a matter of law or was the jury entitled to find that they constituted a course of performance of the contract? Third, could the jury have construed an express contract term of Shell's posted price at delivery as reasonably consistent with a trade usage and Shell's course of performance of the 1969 contract of price protection, which consisted of charging the old price at times of price increases, either for a period of time or for specific tonnage committed at a fixed price in non-escalating contracts? Fourth, could the jury have found that good faith obliged Shell

to at least give advance notice of a $32 increase in 1974, that is, could they have found that the commercially reasonable standards of fair dealing in the trade in Hawaii in 1974 were to give some form of price protection?

We approach the first issue in this case mindful that an underlying purpose of the UCC as enacted in Hawaii is to allow for liberal interpretation of commercial usages. The Code provides, "This chapter shall be liberally construed and applied to promote its underlying purposes and policies." Haw. Rev. Stat. §490:1-102(1). Only three purposes are listed, one of which is "[t]o permit the continued expansion of commercial practices through custom, usage and agreement of the parties; . . ." Id. §490:1-102(2)(b). . . .

The Code defines usage of trade as "any practice or method of dealing having such regularity of observance in a *place, vocation or trade* as to justify an expectation that it will be observed with respect to the transaction in question." Id. §490:1-205(2) (emphasis supplied). . . . [A] usage need not necessarily be one practiced by members of the party's own trade or vocation to be binding *if* it is so commonly practiced in a locality that a party should be aware of it. . . . A party is always held to conduct generally observed by members of his chosen trade because the other party is justified in so assuming unless he indicates otherwise. He is held to more general business practices to the extent of his actual knowledge of those practices or to the degree his ignorance of those practices is not excusable: they were so generally practiced he should have been aware of them.

No UCC cases have been found on this point, but the court's reading of the Code language is similar to that of two of the best-known commentators on the UCC:

> Under pre-Code law, a trade usage was not operative against a party who *was not a member of the trade unless* he actually knew of it or *the other party could reasonably believe he knew of it.*

J. White & R. Summers, Uniform Commercial Code §12-6 at 371 (1972) (emphasis supplied) (citing 3 A. Corbin, Corbin on Contracts §557 at 248 (1960)). See also Restatement of Contracts §247, Comment b (1932); 5 S. Williston, Williston on Contracts §661 at 113-118 (3d ed. 1961). White and Summers add (emphasis supplied):

> This view has been carried forward by 1-205(3), . . . [U]sage of the trade is only binding on *members of the trade* involved or *persons* who know or *should know about it.* Persons who should be aware of the trade usage doubtless *include those who regularly deal with members of the relevant trade,* and also members of a second trade that commonly deals with members of a relevant trade (for example, farmers should know something of seed selling).

White & Summers, supra, §12-6 at 371. Using that analogy, even if Shell did not "regularly deal" with aggregate supplies, it did deal constantly and almost exclusively on Oahu with one asphalt paver. It therefore should have been aware of the usage of Nanakuli and other asphaltic pavers to bid at fixed prices and therefore receive price protection from their materials

suppliers due to the refusal by government agencies to accept escalation clauses. Therefore, we do not find the lower court abused its discretion or misread the Code as applied to the peculiar facts of this case in ruling that the applicable trade was the asphaltic paving trade in Hawaii. An asphalt seller should be held to the usages of trade in general as well as those of asphalt sellers and common usages of those to whom they sell. Certainly, under the unusual facts of this case it was not unreasonable for the judge to extend trade usages to include practices of other material suppliers toward Shell's primary and perhaps only customer on Oahu. He did exclude, on Shell's motion in limine, evidence of cement suppliers. He only held Shell to routine practices in Hawaii by the suppliers of the two major ingredients of asphaltic paving, that is, asphalt and aggregate. Those usages were only practiced towards two major pavers. It was not unreasonable to expect Shell to be knowledgeable about so small a market. In so ruling, the judge undoubtedly took into account Shell's half-million dollar investment in Oahu strictly because of a long-term commitment by Nanakuli, its actions as partner in promoting Nanakuli's expansion on Oahu, and the fact that its sales on Oahu were almost exclusively to Nanakuli for use in asphaltic paving. The wisdom of the pre-trial ruling was demonstrated by evidence at trial that Shell's agent in Hawaii stayed in close contact with Nanakuli and was knowledgeable about both the asphaltic paving market in general and Nanakuli's bidding procedures and economics in particular.

Shell argued not only that the definition of trade was too broad, but also that the practice itself was not sufficiently regular to reach the level of a usage and that Nanakuli failed to show with enough precision how the usage was carried out in order for a jury to calculate damages. The extent of a usage is ultimately a jury question. The Code provides, "The existence and scope of such a usage are to be proved as facts." Haw. Rev. Stat. §490:1-205(2). The practice must have "such regularity of observance . . . as to justify an expectation that it will be observed. . . ." Id. The Comment explains:

> The ancient English tests for "custom" are abandoned in this connection. Therefore, it is not required that a usage of trade be "ancient or immemorial," "universal" or the like. . . . [F]ull recognition is thus available for new usages and for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree.

Id., Comment 5. The Comment's demand that "not universality but only the described 'regularity of observance' " is required reinforces the provision only giving "effect to usages of which the parties 'are or should be aware.' " Id., Comment 7. A "regularly observed" practice of protection, of which Shell "should have been aware," was enough to constitute a usage that Nanakuli had reason to believe was incorporated into the agreement.[28]

28. White and Summers write that Code requirements for proving a usage are "far less stringent" than the old ones for custom. "A usage of trade need not be *well known*, let alone 'universal.' " It only needs to be regular enough that the parties expect it to be observed. White & Summers, supra §3-3 at 87 (emphasis supplied). "Note particularly [in 1-205(1) & (2)] that it is not necessary for both parties to be consciously aware of the trade usage. It is enough if the trade usage is such as to 'justify an expectation' of its observance." Id. at 84.

Nanakuli went beyond proof of a regular observance. It proved and offered to prove that price protection was probably a universal practice by suppliers to the asphaltic paving trade in 1969. It had been practiced by H.C.&D. since at least 1962, by P.C.&A. since well before 1960, and by Chevron routinely for years, with the last specific instance before the contract being March, 1969, as shown by documentary evidence. The only usage evidence missing was the behavior by Shell, the only other asphalt supplier in Hawaii, prior to 1969. That was because its only major customer was Nanakuli and the judge ruled prior course of dealings between Shell and Nanakuli inadmissible. Shell did not point in rebuttal to one instance of failure to price protect by any supplier to an asphalt paver in Hawaii before its own 1974 refusal to price protect Nanakuli. Thus, there clearly was enough proof for a jury to find that the practice of price protection in the asphaltic paving trade existed in Hawaii in 1969 and was regular enough in its observance to rise to the level of a usage that would be binding on Nanakuli and Shell. . . . [T]he scope of protection offered by a particular usage is left to the jury:

> In cases of a well established line of usage varying from the general rules of this Act where the precise amount of the variation has not been worked out into a single standard, the party relying on the usage is entitled, in any event, to the minimum variation demonstrated. The whole is not to be disregarded because no particular line of detail has been established. In case a dominant pattern [of usage] has been fairly evidenced, the party relying on the usage is entitled . . . to go to the trier of fact on the question of whether such dominant pattern has been incorporated into the agreement.

Id. §490:1-205, Comment 9. Summers and White write that a usage, under the language of 1-205(2), need not be "certain and precise" to fit within the definition of "any practice or method of dealing." White & Summers, supra, §3-3 at 87. The manner in which the usage of price protection was carried out was presented with sufficient precision to allow the jury to calculate damages at $220,800.

VI. Waiver or Course of Performance

Course of performance under the Code is the action of the parties in carrying out the contract at issue, whereas course of dealing consists of relations between the parties *prior* to signing that contract. Evidence of the latter was excluded by the District Judge; evidence of the former consisted of Shell's price protection of Nanakuli in 1970 and 1971. Shell protested that the jury could not have found that those two instances of price protection amounted to a course of performance of its 1969 contract, relying on two Code comments. First, one instance does not constitute a course of performance. "A single occasion of conduct does not fall within the language of this section. . . ." Haw. Rev. Stat. §490:2-208, Comment 4. Although the Comment rules out one instance, it does not further delineate how many acts are needed to form a course of performance. The prior occasions here were only two, but they constituted the

only occasions before 1974 that would call for such conduct. In addition, the language used by a top asphalt official of Shell in connection with the first price protection of Nanakuli indicated that Shell felt that Nanakuli was entitled to some form of price protection. On that occasion in 1970 Blee, who had negotiated the contract with Nanakuli and was familiar with exactly what terms Shell was bound to by that agreement, wrote of the need to "bargain" with Nanakuli over the extent of price protection to be given, indicating that some price protection was a legal right of Nanakuli's under the 1969 agreement.

Shell's second defense is that the Comment expresses a preference for an interpretation of waiver.

> 3. Where it is difficult to determine whether a particular act merely sheds light on the meaning of the agreement or represents a waiver of a term of the agreement, the preference is in favor of "waiver" whenever such construction, plus the application of the provisions on the reinstatement of rights waived . . ., is needed to preserve the flexible character of commercial contracts and to prevent surprise or other hardship.

Id., Comment 3. The preference for waiver only applies, however, where acts are ambiguous. It was within the province of the jury to determine whether those acts were ambiguous, and if not, whether they constituted waivers or a course of performance of the contract. The jury's interpretation of those acts as a course of performance was bolstered by evidence offered by Shell that it again price protected Nanakuli on the only two occasions of post-1974 price increases, in 1977 and 1978.

VII. Express Terms as Reasonably Consistent with Usage In Course of Performance

Perhaps one of the most fundamental departures of the Code from prior contract law is found in the parol evidence rule and the definition of an agreement between two parties. Under the UCC, an agreement goes beyond the written words on a piece of paper. " 'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this chapter (sections 490:1-205 and 490:2-208)." Id. §490:1-201(3). Express terms, then, do not constitute the entire agreement, which must be sought also in evidence of usages, dealings, and performance of the contract itself. The purpose of evidence of usages, which are defined in the previous section, is to help to understand the entire agreement.

> [Usages are] a factor in reaching the commercial meaning of the agreement which the parties have made. The language used is to be interpreted as meaning what it may fairly be expected to mean to parties involved in the particular commercial transaction in a given locality or in a given vocation or trade. . . . Part of the agreement of the parties . . . is to be sought for in the usages of trade which furnish the background and give particular meaning

> to the language used, and are the framework of common understanding controlling any general rules of law which hold only when there is no such understanding.

Id. §490:1-205, Comment 4. Course of dealings is more important than usages of the trade, being specific usages between the two parties to the contract. "[C]ourse of dealing controls usage of trade." Id. §490:1-205(4). It "is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Id. §490:1-205(1). Much of the evidence of prior dealings between Shell and Nanakuli in negotiating the 1963 contract and in carrying out similar earlier contracts was excluded by the court.

A commercial agreement, then, is broader than the written paper and its meaning is to be determined not just by the language used by them in the written contract but "by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing." Id., Comment 1. Performance, usages, and prior dealings are important enough to be admitted always, even for a final and complete agreement; only if they cannot be reasonably reconciled with the express terms of the contract are they not binding on the parties. "The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade." Id. §490:1-205(4).

Of these three, then, the most important evidence of the agreement of the parties is their actual performance of the contract. . . . The importance of evidence of course of performance is explained: "The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was. This section thus rounds out the set of factors which determines the meaning of the 'agreement.' . . ." Id. §490:2-208, Comment 1. "Under this section a course of performance is always relevant to determine the meaning of the agreement." Id., Comment 2.[33]

Our study of the Code provisions and Comments, then, form the first basis of our holding that a trade usage to price protect pavers at times of price increases for work committed on nonescalating contracts could reasonably be construed as consistent with an express term of seller's

33. Section 2-208, much like 1-205, provides

> [t]he express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (section 490:1-205).

Id. §490:2-208(2).

posted price at delivery. Since the agreement of the parties is broader than the express terms and includes usages, which may even add terms to the agreement, and since the commercial background provided by those usages is vital to an understanding of the agreement, we follow the Code's mandate to proceed on the assumption that the parties have included those usages unless they cannot reasonably be construed as consistent with the express terms.

Federal courts usually have been lenient in not ruling out consistent additional terms or trade usage for apparent inconsistency with express terms. The leading case on the subject is Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971). Columbia, the buyer, had in the past primarily produced and sold nitrogen to Royster. When Royster opened a new plant that produced more phosphate than it needed, the parties reversed roles and signed a sales contract for Royster to sell excess phosphate to Columbia. The contract terms set out the price that would be charged by Royster and the amount to be sold. It provided for the price to go up if certain events occurred but did not provide for price declines. When the price of nitrogen fell precipitously, Columbia refused to accept the full amount of nitrogen specified in the contract after Royster refused to renegotiate the contract price. The District Judge's exclusion of usage of the trade and course of dealing to explain the express quantity term in the contract was reversed. Columbia had offered to prove that the quantity set out in the contract was a mere projection to be adjusted according to market forces. Ambiguity was not necessary for the admission of evidence of usage and prior dealings. Even though the lengthy contract was the result of long and careful negotiations and apparently covered every contingency, the appellate court ruled that "the test of admissibility is not whether the contract appears on its face to be complete in every detail, but whether the proffered evidence of course of dealing and trade usage reasonably can be construed as consistent with the express terms of the agreement." Id. at 9. The express quantity term could be reasonably construed as consistent with a usage that such terms would be mere projections for several reasons:[36] (1) the contract did not expressly state that usage and dealings evidence would be excluded; (2) the contract was silent on the adjustment of price or quantities in a declining market; (3) the minimum

36. State court cases have interpreted express quantity as mere projections in similar circumstances. E.g., Campbell v. Hofstetter Farms, Inc., 251 Pa. Super. 232, 380 A.2d 463, 466-467 (1977) (express agreement to sell a specified number of bushels of corn, wheat, and soy beans was not, as a matter of law, inconsistent with a usage of the trade that amounts specified in contracts are only estimates of a seller-farmer's farms); Loeb & Co. v. Martin, 295 Ala. 262, 327 So. 2d 711, 714-715 (Ala. 1976) (it was a jury question whether, in light of trade usage, "all cotton produced on 400 acres" called for all cotton seller produced on 40 acres or for 400 acres of cotton); Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc., 59 Cal. App. 3d 948, 131 Cal. Rptr. 183, 188-189 (1976) (usage in the potato-processing trade that the amount specified in the contract was merely an estimate of buyer's requirements was admissible); Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652, 657-658 (Miss. 1975) (additional term that the seller was not obliged to deliver the full 4,000 bushels of soy beans called for in the contract was admissible).

tonnage was expressed in the contract as Products Supplied, not Products Purchased; (4) the default clause of the contract did not state a penalty for failure to take delivery; and (5) apparently most important in the court's view, the parties had deviated from similar express terms in earlier contracts in times of declining market. Id. at 9-10. As here, the contract's merger clause said that there were no oral agreements. . . .

Usage and an oral understanding led to much the same interpretation of a quantity term specifying delivery of 500 tons of stainless-steel solids in Michael Schiavone & Sons, Inc. v. Securalloy Co., 312 F. Supp. 801 (Conn. 1970). In denying summary judgment for plaintiff-buyer, the court ruled that defendant-seller could attempt to prove that the quantity term was modified by an oral understanding, in line with a trade usage, that seller would only supply as many tons as he could, with 500 tons the upper limit. . . .

Some guidelines can be offered as to how usage evidence can be allowed to modify a contract. First, the court must allow a check on usage evidence by demanding that it be sufficiently definite and widespread to prevent unilateral post-hoc revision of contract terms by one party. The Code's intent is to put usage evidence on an objective basis. J. H. Levie, Trade Usage and Custom Under the Common Law and the Uniform Commercial Code, 40 N.Y.U. L. Rev. 1101 (1965), states:

> When trade usage adds new terms to cover matters on which the agreement is silent the court is really making a contract for the parties, even though it says it only consulted trade usage to find the parties' probable intent. There is nothing wrong or even unusual about this practice, which really is no different from reading constructive conditions into a contract. Nevertheless the court does create new obligations, and perhaps that is why the courts often say that usage . . . must be proved by clear and convincing evidence.

Id. at 1102. Although the Code abandoned the traditional common law test of nonconsensual custom and views usage as a way of determining the parties' probable intent, id. at 1106-1107, thus abolishing the requirement that common law custom be universally practiced, trade usages still must be well settled, id. at 1113. . . .

"[U]sage may be used to 'qualify' the agreement, which presumably means to 'cut down' express terms although not to negate them entirely." [Levie, Trade Usage and Custom under the Common Law and the Uniform Commercial Code, 40 N.Y.U. L. Rev. 1101, 1112 (1965).] Here, the express price term was "Shell's Posted Price at time of delivery." A total negation of that term would be that the buyer was to set the price. It is a less than complete negation of the term that an unstated exception exists at times of price increases, at which times the old price is to be charged, for a certain period or for a specified tonnage, on work already committed at the lower price on nonescalating contracts. Such a usage forms a broad and important exception to the express term, but does not swallow it entirely. Therefore, we hold that, under these particular facts, a reasonable jury could have found that price protection was incorporated into the 1969 agreement between Nanakuli and Shell and that price

protection was reasonably consistent with the express term of seller's posted price at delivery. . . .

[The court's discussion on good faith is omitted.]

Reversed and remanded with directions to enter final judgment.

NOTES AND QUESTIONS

1. If you represented Shell during the negotiations, could you have disclaimed the prior price protection it had given? How would you do it?

2. For a much more restrictive view of the importance of usage of trade, see H&W Industries v. Occidental, Titone, Hancock & Bellacosa, 911 F.2d 1118, 12 U.C.C. Rep. Serv. 2d 921 (5th Cir. 1990) (court refused such evidence where the term of other contracts and the market for products was different).

3. The issue of inconsistency arises also with respect to course of dealing. It too is limited by the restriction against such evidence that contradicts the terms of the agreement. UCC §1-205(4). Such a contradiction was found when a buyer of an aircraft attempted to introduce evidence that the seller had promised to reduce the price of the aircraft by the amount of the commission normally due a salesperson. The court held that such evidence would contradict a contractual term that required the buyer to pay the entire sales price at the time of delivery. Aero Consulting Corp. v. Cessna Aircraft Co., 867 F. Supp. 1480 (D. Kan. 1994). What impact does this restrictive view of the concept of contradiction have on the utility of course of dealing evidence?

4. Was *Nanakuli* a case involving the attempt to introduce trade usage in order to "explain" or "supplement" the agreement? Does it make a difference under UCC §2-202(a)?

5. Official Comment 1(c) of the UCC states that usage of trade, course of dealing, and course of performance are admissible without requiring an initial finding of ambiguity. However, the common law rule has been different in many jurisdictions. See, e.g., J. O. Hooker & Sons, Inc. v. Roberts Cabinet Co., Inc., 683 So. 2d 396 (Miss. 1996). Nevertheless, the UCC approach in this regard will likely have a continuing effect on the development of the use of such evidence.

6. The Restatement (Second) provisions on usage of trade, course of dealing, and course of performance are set out immediately below in the next section.

C. *Rules of Interpretation*

The court may utilize any one of a series of black-letter rules used in interpreting a contract. None of these matters are absolutes; they are mere guidelines for the courts when reading contractual language. They are based on a series of assumptions that may or may not be valid in any particular case. For the most part they should strike you as restatements of the obvious.

RESTATEMENT (SECOND) OF CONTRACTS

§202. Rules in Aid of Interpretation

(1) Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.

(2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.

(3) Unless a different intention is manifested,

(a) here language has a generally prevailing meaning, it is interpreted in accordance with that meaning;

(b) technical terms and words of art are given their technical meaning when used in a transaction within their technical field.

(4) Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.

(5) Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.

§203. Standards of Preference in Interpretation

In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable:

(a) an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect;

(b) express terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade;

(c) specific terms and exact terms are given greater weight than general language;

(d) separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated.

§206. Interpretation Against the Draftsman

In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.

§207. Interpretation Favoring the Public

In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred.

IV. CONCLUSION

The parol evidence rule is all too often a trap for the unwary or the careless. It presumes a greater validity to a writing than most people give writings. Should the rule be abolished? Watered down?[1]

ZELL v. AMERICAN SEATING CO.
United States Court of Appeals, Second Circuit, 1943
138 F.2d 641

FRANK, Circuit Judge. On defendant's motion for summary judgment, the trial court, after considering the pleadings and affidavits, entered judgment dismissing the action. From that judgment, plaintiff appeals. . . .

Plaintiff, by a letter addressed to defendant company dated October 17, 1941, offered to make efforts to procure for defendant contracts for manufacturing products for national defense or war purposes, in consideration of defendant's agreement to pay him $1,000 per month for a three months' period if he were unsuccessful in his efforts, but, if he were successful, to pay him a further sum in an amount not to be less than 3 percent nor more than 8 percent of the "purchase price of said contracts." On October 31, 1941, at a meeting in Grand Rapids, Michigan, between plaintiff and defendant's President, the latter, on behalf of his company, orally made an agreement with plaintiff substantially on the terms set forth in plaintiff's letter, one of the terms being that mentioned in plaintiff's letter as to commissions; it was orally agreed that the exact amount within the two percentages was to be later determined by the parties.

1. The United Nations Convention on Contracts for the International Sale of Goods (CISG) has no parol evidence rule. Article 8(3) provides:

> (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

The courts have disallowed the use of the parol evidence rule in CISG cases; see MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A., 144 F.3d 1384 (11th Cir. 1998).

After this agreement was made, the parties executed, in Grand Rapids, a written instrument dated October 31, 1941, appearing on its face to embody a complete agreement between them; but that writing omitted the provision of their agreement that plaintiff, if successful, was to receive a bonus varying from three to eight percent; instead, there was inserted in the writing a clause that the $1,000 per month "will be full compensation, but the company may, if it desires, pay you something in the nature of a bonus." However, at the time when they executed this writing, the parties orally agreed that the previous oral agreement was still their actual contract, that the writing was deliberately erroneous with respect to plaintiff's commissions, and that the misstatement in that writing was made solely in order to "avoid any possible stigma which might result" from putting such a provision "in writing," the defendant's President stating that "his fears were based upon the criticism of contingent fee contracts." Nothing in the record discloses whose criticism the defendant feared; but plaintiff, in his brief, says that defendant was apprehensive because adverse comments had been made in Congress of such contingent-fee arrangements in connection with war contracts. The parties subsequently executed further writings extending, for two three-month periods, their "agreement under date of October 31, 1941." Through plaintiff's efforts and expenditures of large sums for traveling expenses, defendant, within this extended period, procured contracts between it and companies supplying aircraft to the government for war purposes, the aggregate purchase price named in said contracts being $5,950,000. The defendant has refused to pay the plaintiff commissions thereon in the agreed amount (i.e., not less than three percent) but has paid him merely $8,950 (at the rate of $1,000 a month) and has offered him, by way of settlement, an additional sum of $9,000 which he has refused to accept as full payment.

Defendant argues that the summary judgment was proper on the ground that, under the parol evidence rule, the court could not properly consider as relevant anything except the writing of October 31, 1941, which appears on its face to set forth a complete and unambiguous agreement between the parties. If defendant on this point is in error, then, if the plaintiff at a trial proves the facts as alleged by him, and no other defenses are successfully interposed, he will be entitled to a sum equal to 3 percent of $5,950,000. . . .

It is not surprising that confusion results from a rule called "the parol evidence rule" which is not a rule of evidence, which relates to extrinsic proof whether written or parol,[7] and which has been said to be virtually no rule at all.[8] As Thayer said of it, "Few things are darker than this, or fuller of subtle difficulties."[9] The rule is often loosely and confusingly

7. Restatement of Contracts, §237, comment a. Indeed the agreement, protected by the rule from competition with extrinsic proof, may itself be wholly oral. See Wigmore, Evidence, 3d ed., §2425.

8. Cf. Corbin, Delivery of Written Contracts, 36 Yale L.J. (1927) 443.

9. Thayer, A Preliminary Treatise on Evidence (1898) 390.

stated as if, once the evidence establishes that the parties executed a writing containing what appears to be a complete and unambiguous agreement, then no evidence may be received of previous or contemporaneous oral understandings which contradict or vary its terms. But, under the parol evidence rule correctly stated, such a writing does not acquire that dominating position if it has been proved by extrinsic evidence that the parties did not intend it to be an exclusive authoritative memorial of their agreement. If they did intend it to occupy that position, their secret mutual intentions as to the terms of the contract or its meaning are usually irrelevant, so that parties who exchange promises may be bound, at least "at law" as distinguished from "equity," in a way which neither intended, since their so-called "objective" intent governs. When, however, they have previously agreed that their written promises are not to bind them, that agreement controls and no legal obligations flow from the writing. It has been held virtually everywhere, when the question has arisen that (certainly in the absence of any fraudulent or illegal purpose) a purported written agreement, which the parties designed as a mere sham, lacks legal efficacy, and that extrinsic parol or other extrinsic evidence will always be received on that issue. . . .

We need not here consider cases where third persons have relied on the delusive agreement to their detriment[13] or cases in other jurisdictions (we find none in Michigan) where the mutual purpose of the deception was fraudulent or illegal.[14] For the instant case involves no such elements. As noted above, the pleadings and affidavits are silent as to the matter of whom the parties here intended to mislead, and we cannot infer a fraudulent or illegal purpose. Even the explanation contained in plaintiff's brief discloses no fraud or illegality: No law existed rendering illegal the commission provision of the oral agreement which the parties here omitted from the sham writing; while it may be undesirable that citizens should prepare documents so contrived as to spoil the scent of legislators bent on proposing new legislation, yet such conduct is surely not unlawful and does not deserve judicial castigation as immoral or fraudulent; the courts should not erect standards of morality so far above the customary. . . .

Candor compels the admission that, were we enthusiastic devotees of that rule, we might so construe the record as to bring this case within the rule's scope; we could dwell on the fact that plaintiff, in his complaint, states that the acceptance of his offer "was partly oral and partly contained" in the October 31 writing, and could then hold that, as that

13. See cases collected in 64 A.L.R. 601.

14. See, e.g., Graham v. Savage, 110 Minn. 510, 126 N.W. 394, 136 Am. St. Rep. 527, 19 Ann. Cas. 1022; Town of Grand Isle v. McKinney, 70 Vt. 381, 41 A. 130; Alexander v. Royson [1936] 1 K.B. 169, 114 A.L.R. 358; in these cases the courts refused to recognize the oral agreement and enforced the sham written agreement. Contra: In re Hicks & Son, 2 Cir., 82 F.2d 277; New York Trust Co. v. Island Oil & Transport Corp., 2 Cir., 34 F.2d 655; in those cases the party suing on the sham agreement was denied relief, but the courts, in Nightingale v. J. H. & C. K. Eagle, 141 App. Div. 386, 126 N.Y.S. 339, and in Beaman-Marvell Co. v. Gunn, supra, went further and enforced the earlier oral agreement in suits at law. Cf. L.R.A. 1917B, 263, 264, 265.

writing unambiguously covers the item of commissions, the plaintiff is trying to use extrinsic evidence to "contradict" the writing. But the plaintiff's affidavit, if accepted as true and liberally construed, makes it plain that the parties deliberately intended the October 31 writing to be a misleading, untrue, statement of their real agreement.

We thus construe the record because we do not share defendant's belief that the rule is so beneficent, so promotive of the administration of justice, and so necessary to business stability, that it should be given the widest possible application. The truth is that the rule does but little to achieve the ends it supposedly serves. Although seldom mentioned in modern decisions, the most important motive for perpetuation of the rule is distrust of juries, fear that they cannot adequately cope with, or will be unfairly prejudiced by, conflicting "parol" testimony.[16] If the rule were frankly recognized as primarily a device to control juries, its shortcomings would become obvious, since it is not true that the execution by the parties of an unambiguous writing, "facially complete," bars extrinsic proof. The courts admit such "parol" testimony (other than the parties' statements of what they meant by the writing) for a variety of purposes: to show "all the operative usages" and "all the surrounding circumstances prior to and contemporaneous with the making" of a writing; to show an agreed oral condition, nowhere referred to in the writing, that the writing was not to be binding until some third person approved; to show that a deed, absolute on its face, is but a mortgage. These and numerous other exceptions have removed most of that insulation of the jury from "oral" testimony which the rule is said to provide.

The rule, then, does relatively little to deserve its much advertised virtue of reducing the dangers of successful fraudulent recoveries and

16. That this fear was one of the causes of the creation of the rule, see Thayer, A Preliminary Treatise on Evidence (1898) 409, 410; Wigmore, Evidence, 3d ed., §2446.

Formalism was also a causal factor. See 9 Wigmore, ibid. However, for criticism of overemphasis on the formalism of the so-called "strict period of law," see United States v. Forness, 2 Cir., 125 F.2d 928, 935, 936.

Another factor was veneration for the written word. See Wigmore, ibid. Paul Radin, Primitive Man as Philosopher (1927) 59-60, says:

> Much if not all of the magical quality and potency possessed by the word is derived from its connection with the written script. That is quite intelligible. Granted a dynamic and ever-changing world, then the written word with its semi-permanence and its static character was a much desired oasis. . . . But culturally and psychologically it possessed even a greater significance, for it completed the victory of the visual-minded man over his competitors. From that time on, at least for the literate man, the main verities were the visual verities.

The perpetuation of the parol evidence rule doubtless owes much to inertia. Cf. Hoffman v. Palmer, 2 Cir., 129 F.2d 976, 997, 998. Any profession, the medical as well as the legal, possessed of a monopoly in its field, tends to develop what are today called "bureaucratic" habits of strong disinclination to alter its established ways. Cf. Seagle, The Quest for Law (1941) xv, 86, 96, 100, 101, 136; Stern, Social Factors in Medical Progress (1927). Unconscious sadism perhaps, too, influences some of the academic praise of the parol evidence rule: some cloistered scholars seem to take satisfaction in "hard cases" which, they feel, should not lead to deviations from "good law."

defenses brought about through perjury. The rule is too small a hook to catch such a leviathan. Moreover, if at times it does prevent a person from winning, by lying witnesses, a lawsuit which he should lose, it also, at times, by shutting out the true facts, unjustly aids other persons to win lawsuits they should and would lose, were the suppressed evidence known to the courts. Exclusionary rules, which frequently result in injustice, have always been defended — as was the rule, now fortunately extinct, excluding testimony of the parties to an action — with the danger-of-perjury argument.[19] Perjury, of course, is pernicious and doubtless much of it is used in our courts daily with unfortunate success. The problem of avoiding its efficacious use should be met head on. Were it consistently met in an indirect manner — in accordance with the viewpoint of the adulators of the parol evidence rule — by wiping out substantive rights provable only through oral testimony, we would have wholesale destruction of familiar causes of action such as, for instance, suits for personal injury and for enforcement of wholly oral agreements.

The parol evidence rule is lauded as an important aid in the judicial quest for "objectivity," a quest which aims to avoid that problem the solution of which was judicially said in the latter part of the fifteenth century to be beyond even the powers of Satan — the discovery of the inner thoughts of man. The policy of stern refusal to consider subjective intention, prevalent in the centralized common law courts of that period, later gave way; in the latter part of the eighteenth and the early part of the nineteenth century, the recession from that policy went far, and there was much talk of the "meeting of the minds" in the formation of contracts, of giving effect to the actual "will" of the contracting parties. The obstacles to learning that actual intention have, more recently, induced a partial reversion to the older view. Today a court generally restricts its attention to the outward behavior of the parties: the meaning of their acts is not what either party or both parties intended but the meaning which a "reasonable man" puts on those acts; the expression of mutual assent, not the assent itself, is usually the essential element. We now speak of "externality," insisting on judicial consideration of only those manifestations of intention which are public ("open to the scrutiny and knowledge of the community") and not private ("secreted in the heart" of a person). This objective approach is of great value, for a legal system can be more effectively administered if legal rights and obligations ordinarily attach only to overt conduct. Moreover, to call the standard "objective" and candidly to confess

19. "Perjury is one of the great bugaboos of the law. Every change in procedure by which the disclosure of the truth has been made easier has raised the spectre of perjury to frighten the profession. It was only in 1851 that Lord Brougham's Act for the first time made the parties to civil actions competent to testify in the higher courts of England. There was great dread of the Act, lest the interest of the parties should prove too powerful an incentive to false swearing. . . . But the fear that the temptation to perjury would ruin the value of the testimony of interested parties has so completely vanished that no one would seriously think of restoring the disqualification." Sunderland, Scope and Method of Discovery Before Trial, 42 Yale L.J. (1933) 863, 867.

that the actual intention is not the guiding factor serves desirably to highlight the fact that much of the "law of contracts" has nothing whatever to do with what the parties contemplated but consists of rules — founded on considerations of public policy — by which the courts impose on the contracting parties obligations of which the parties were often unaware; this "objective" perspective discloses that the voluntary act of entering into a contract creates a jural "relation" or "status" much in the same way as does being married or holding public office.

But we should not demand too much of this concept of "objectivity"; like all useful concepts it becomes a thought-muddler if its limitations are disregarded. We can largely rid ourselves of concern with the subjective reactions of the parties; when, however, we test their public behavior by inquiring how it appears to the "reasonable man," we must recognize, unless we wish to fool ourselves, that although one area of subjectivity has been conquered, another remains unsubdued. For instance, under the parol evidence rule, the standard of interpretation of a written contract is usually "the meaning that would be attached to" it "by a *reasonably intelligent person* acquainted with all operative usages and knowing all the circumstances prior to, and contemporaneous with, the making" of the contract, "other than oral statements by the parties of what they intended it to mean." We say that "the objective viewpoint of a third person is used." But where do we find that "objective" third person? We ask judges or juries to discover that "objective viewpoint" through their own subjective processes. Being but human, their beliefs cannot be objectified, in the sense of being standardized. . . . Early in the history of our legal institutions, litigants strongly objected to a determination of the facts by mere fallible human beings. A man, they felt, ought to be allowed to demonstrate the facts "by supernatural means, by some such process as the ordeal or the judicial combat; God may be for him, though his neighbors be against him."[25] We have accepted the "rational" method of trial based on evidence but the longing persists for some means of counter-acting the fallibility of the triers of the facts. Mechanical devices, like the parol evidence rule, are symptoms of that longing,[26] a longing particularly strong when juries participate in trials. But a mechanical device like the parol evidence rule cannot satisfy that longing, especially because the injustice of applying the rule rigidly has led to its being riddled with exceptions.

Those exceptions have, too, played havoc with the contention that business stability depends upon that rule, that, as one court put it "the tremendous but closely adjusted machinery of modern business cannot function at all without" the assurance afforded by the rule and that, "if such assurance were removed today from our law, general disaster would

25. Maitland, The Constitutional History of England (1908) 130.

26. Thayer delightfully described the fatuous notion of a "lawyer's Paradise, where all words have a fixed, precisely ascertained meaning; where men may express their purposes, not only with accuracy, but with fulness; and where, if the writer has been careful, a lawyer, having a document referred to him, may sit in his chair, inspect the text, and answer all questions without raising his eyes." Thayer, loc. cit., 428, 429.

result. . . ."[28] We are asked to believe that the rule enables businessmen, advised by their lawyers, to rely with indispensable confidence on written contracts unimpeachable by oral testimony. In fact, seldom can a conscientious lawyer advise his client, about to sign an agreement, that, should the client become involved in litigation relating to that agreement, one of the many exceptions to the rule will not permit the introduction of uncertainty-producing oral testimony. As Corbin says, "That rule has so many exceptions that only with difficulty can it be correctly stated in the form of a rule."[29] One need but thumb the pages of Wigmore, Williston, or the Restatement of Contracts to see how illusory is the certainty that the rule supplies. "Collateral parol agreements contradicting a writing are inadmissible," runs the rule as ordinarily stated; but in the application of that standard there exists, as Williston notes, "no final test which can be applied with unvarying regularity."[30] Wigmore more bluntly says that only vague generalizations are possible, since the application of the rule, "resting as it does on the parties' intent, can properly be made only after a comparison of the kind of transaction, the terms of the document, and the circumstances of the parties. . . . Such is the complexity of circumstances and the variety of documentary phraseology, and so minute the indicia of intent, that one ruling can seldom be controlling authority or even of utility for a subsequent one."[31] The recognized exceptions to the rule demonstrate strikingly that business can endure even when oral testimony competes with written instruments. If business stability has not been ruined by the deed-mortgage exception, or because juries may hear witnesses narrate oral understandings that written contracts were not to be operative except on the performance of extrinsic conditions, it is unlikely that commercial disaster would follow even if legislatures abolished the rule in its entirety.

In sum, a rule so leaky cannot fairly be described as a stout container of legal certainty. John Chipman Gray, a seasoned practical lawyer, expressed grave doubts concerning the reliance of businessmen on legal precedents generally.[33] If they rely on the parol evidence rule in particular, they will often be duped. It has been seriously questioned whether in fact they do so to any considerable extent.[34] We see no good reason why we should strain to interpret the record facts here to bring them within such a rule.

Reversed and remanded.

28. Cargill Commission Co. v. Swartwood, 159 Minn. 1, 198 N.W. 536, 538.

29. Corbin, Delivery of Written Contracts, 36 Yale L.J. (1927) 443.

30. 3 Williston, Contracts, rev. ed., §1837.

Proof of "collateral" agreements seems generally to be more freely permitted when the writing is a negotiable instrument, a lease or a deed — precisely the types of instrument on which one would suppose that business stability would peculiarly depend.

31. Wigmore, loc. cit., §2442.

33. See Gray, The Nature and Sources of Law (1921) §225; cf. Austin, Jurisprudence, 4th ed., 674; concurring opinion in Aero Spark Plug Co. v. B.G. Corp., 2 Cir., 130 F.2d 290, 292, 297, 298; Wigmore, The Judicial Function, in the Science of Legal Method (1917) Editorial Introduction, xxxvi-xxxix.

34. "The court assumes as self-evident that without some special assurance of the enforcement of contracts as written, as against claims of inconsistent oral agreements, businessmen generally will be seriously handicapped in the prosecution of commercial

NOTE

Judge Frank's triumph over the parol evidence rule was short lived. The United States Supreme Court reversed, 322 U.S. 709 (1944):

> PER CURIAM. In this case two members of the Court think that the judgment of the Circuit Court of Appeals should be affirmed. Seven are of the opinion that the judgment should be reversed and the judgment of the District Court affirmed—four because proof of the contract alleged in respondent's affidavits on the motion for summary judgment is precluded by the applicable state parol evidence rule, and three because the contract is contrary to public policy and void.

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enterprise. Like most of the law's basic assumptions, this one has never been tested by any survey of the actual effects in business of the presence or absence of such assurance. . . . It would, perhaps, be worthwhile to canvass the managers and counsel of business enterprises of countrywide scope, to ascertain whether they are aware of the lack of strictness of the courts of a few of the states (e.g., North Carolina) in protecting writings against claimed oral agreements, and, if so, whether this influences the amount and methods of business done by them in those states. . . . The telephone, and the urgent call for high speed in certain types of important transactions, such as security trading, have accustomed businessmen to rely upon word-of-mouth, and to dispense with the safeguard of writing. This is suggested in a letter from Professor Nathan Isaacs, from which I take the liberty of quoting: 'In the first place, the businessman of today relies and must rely less and less on writing than he did even fifty years ago. The telephone has something to do with this change, but a more important factor is the speed required in modern business. It is true that our facilities for rapid writing have increased, but our need for rapidity in transactions has increased much more rapidly. The result is that the businessman is accustomed to seeing millions of dollars worth of securities change hands on the stock exchange without the scratch of a pen. But this is not the whole or even the most important part of the story. Even where writing is resorted to, two forces have conspired to prevent the writing from containing or even purporting to contain the "whole" contract. One of these is the growing complexity of transactions, and the other is a phase of the speed already mentioned which shows itself in the brevity of business letters and other memoranda. To fill the gaps which necessarily result in the modern business contract, we resort more and more to the standardizing elements (customs, statutes, rules of trade associations, chambers of commerce, exchanges), but a great many blanks still remain to be filled in by oral understanding. The real danger therefore to the businessman that comes from a strict enforcement of the parol evidence rule, is that as contracts are made today essential parts are in danger of being excluded. In other words, I mean to suggest that however fitting the parol evidence rule may have been when it grew up, it is not in strict accord with the needs of business today. It is a gratuitous assumption that, where people take the trouble to reduce their contract to writing, their motive is to prevent explanations—even contradictory explanations—from entering into the situation. On the contrary, the motive for writing may be the very simple motive of satisfying the need of quick communication or of making a memorandum in such a form as to fit into the plan of a business for having the memorandum acted on, or it may be some quite different motive.'" McCormick, 41 Yale L.J. 364, 365, 366, 384.

CHAPTER

6

AVOIDANCE OF THE CONTRACT

Pacta Sunt Servanda (Agreements are to be observed)

I. INTRODUCTION

Even though the parties have engaged in a valid offer and acceptance process, exchanged sufficient consideration, and complied with formalities such as the requirement of a writing, events occurring prior or subsequent to the contract's formation may permit one or more of the parties to escape from the bargain. In some cases the contract is completely rescinded, and in others it is reformed by the court in a manner that solves the difficulty.

The avoidance doctrines that follow are important legal weapons in an attorney's arsenal. You must therefore become sensitive to the situations that call for their use.

II. MISTAKE

A. *Misunderstanding*

The issue presented in this Part A is sometimes taught as part of the doctrine of mistake and sometimes taught as part of law of offer and acceptance because it deals with confusion in the bargaining process. The leading case on misunderstanding as a doctrine of avoidance — the story of the good ship(s) *Peerless* — follows.

RAFFLES v. WICHELHAUS
Court of the Exchequer, 1864
2 Hurl. & C. 906, 159 Eng. Rep. 375

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 17¼ 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, etc. 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 for the sale of a number of bales of cotton of a particular 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 of 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.

PER CURIAM. There must be judgment for the defendants.

Judgment for the defendants.

QUESTIONS

1. What does "ex Peerless" mean? See UCC §2-322.

2. Would it matter which of the parties (the seller or the buyer) wanted to rescind the deal?

3. If the parties discovered the mistake, could they elect to live with it and take the late-arriving cotton? That is, does the mistake make the contract *void* or merely *voidable*?

4. Was there an "objective" meeting of the minds here? See Corbin §599; Hill-Shafer Partnership v. Chilson Family Trust, 165 Ariz. 469, 799 P.2d 810 (1990).

5. Professor Grant Gilmore, The Death of Contract 39 (1974):

> None of the judges thought of asking Mellish what would seem to be obvious questions. Would a reasonably well-informed cotton merchant in Liverpool have known that there were two ships called *Peerless*? Ought this buyer to have known? If in fact the October *Peerless* had arrived in Liverpool first, had the buyer protested the seller's failure to tender the cotton? The failure of the judges, who had given Milward such a hard time, to put any questions to Mellish suggests that they were entirely content to let the case go off on the purely subjective failure of the minds to meet at the time the contract was entered into.

For a complete description of the historical background of this famous case, see Simpson, Contracts for Cotton to Arrive: The Case of the Two Ships *Peerless,* 11 Cardozo L. Rev. 287 (1989).

RESTATEMENT (SECOND) OF CONTRACTS

§20. EFFECT OF MISUNDERSTANDING

(1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and

(a) neither party knows or has reason to know the meaning attached by the other; or
(b) each party knows or each party has reason to know the meaning attached by the other.

(2) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if

(a) that party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party; or
(b) that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.

The Reporter's Note to this section explains: "A contract should be held nonexistent under this Section only when the misunderstanding goes to conflicting and irreconcilable meanings of a material term that could have either but not both meanings."

Problem 107

(a) Seller offered to sell Buyer goods to be shipped from Bombay ex steamer *Peerless.* Buyer accepted. There are two steamers with the name *Peerless,* each sailing from Bombay but at materially different times. Is there a contract if both of the parties have reason to know there are two ships named *Peerless,* but they mean different ships? What if both parties intend the same ship?

(b) Is there a contract if Seller knows that Buyer means the later-sailing *Peerless* and Buyer does not know that there are two ships named *Peerless*?

Problem 108

For a week Andrew Carnes had been negotiating with Will Parker over the sale of a cow from Will to Andrew. Finally, in the presence of witnesses, Will said, "All right. I'll sell you my horse for $1,000." Andrew knew that Will loved his only horse and would never sell it, so that the word *horse* was a slip of the tongue. Nonetheless, he quickly accepted, planning to buy the horse. Both the cow and the horse are worth about $1,000. Is there a contract here? If so, is it for the sale of a cow or a horse?

B. Mutual Mistake

Since a contract is founded upon the agreement of the parties, if they are unaware of critical facts existing at the contract's inception, a mistake

has occurred and the courts may feel compelled to straighten out the resulting confusion.

If the mistake is *mutual,* both parties are mistaken as to facts that are a fundamental bases of the contract, the typical remedy is to permit either party to elect *rescission,* an equitable decree by which the contract is simply cancelled, at which point the court typically orders restitution of the considerations already exchanged. Other losses, such as reliance expenses and consequential damages, fall where they may. Restatement (Second) of Contracts §158 would permit "relief on such terms as justice requires including protection of the parties' reliance interests."

Where the mistake is *unilateral,* the courts are less sympathetic. With the major exceptions we shall explore in the materials that follow, courts typically deny relief to the erroneous party, leaving that person to be more careful in the future.

SHERWOOD v. WALKER
Supreme Court of Michigan, 1887
66 Mich. 568, 33 N.W. 919

MORSE, J. 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.

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 upon their 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 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:

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 the 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 has 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 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 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 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 was at his home, 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 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, and Rose 2d at $80. When he received the letter he called defendants up by telephone, 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 writing, it did not matter whether the cow was weighed before or after suit [was] 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 of 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, and not always easy of solution. An 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 location of title was an issue in this case because only a plaintiff having title could bring an action in replevin. The court concluded that the buyer had sufficient title to maintain his action — EDS.]

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 the possession of the animal, the defendants learned that she was with calf, and therefore of great value, and undertook to rescind the sale by refusing to deliver her. The question arises whether they had a right to do so. The circuit judge rules 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.) §§377, 148. See, also, Cutts v. Guild, 57 N.Y. 229; Harvey v. Harris, 112 Mass. 32; Gardner v. Lane, 9 Allen, 492, 12 Allen, 44; Huthmacher v. Harris' Admrs., 38 Pa. St. 491; Byers v. Chapin, 28 Ohio St. 300; Gibson v. Pelkie, 37 Mich. 380, and cases cited; Allen v. Hammond, 11 Pet. 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, 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, 587. 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 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 its 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. She was not a barren cow, and, if this fact had been known, there would have been no contract. The mistake 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.

The judgment of the court below must be reversed, and a new trial granted, with costs of this court to defendants.

CAMPBELL, C.J., and CHAMPLIN, J., concurred.

SHERWOOD, J., (dissenting.) 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 the 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 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.

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 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 of May, went out and looked at the defendants' cattle at Greenfield, and found one called "Rose, Second," which he wished to purchase, and the terms were finally agreed upon at five and a 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 (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.

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 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 any 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, 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 min. 16 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 these 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 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, — interpolate in it a condition by which, if the defendants should be mistaken in their belief that the cow was barren, she could be returned to them and their contract should be annulled. 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 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 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. [Judge Sherwood then discussed the cases relied upon by the majority.]

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. 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. 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" actually 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 Campbell in Williams v. Spurr completely cover this case, and should have been allowed to control in its decision. See 24 Mich. 335. See, also, Story, Sales, §§174, 175, 382, and Benj. Sales, §430. The judgment should be affirmed.

QUESTIONS AND NOTE

1. Do the majority and the dissenter disagree on the law of mistake?

2. If, unknown to Walker, Sherwood had conducted a fertility test on Rose and determined she was with calf and then decided to offer $80 for her, would the court still allow rescission?

3. For Professor Brainerd Currie's famous poem on point, see Currie, Rose of Aberlone, Harvard Law School Record (Thursday, March 4, 1954), or Student Lawyer Journal 4 (April 1965).

WOOD v. BOYNTON
Wisconsin Supreme Court, 1885
64 Wis. 265, 25 N.W. 42

TAYLOR, J. This action was brought in the circuit court for Milwaukee county to recover the possession of an uncut diamond of the alleged value of $1,000. The case was tried in the circuit court, and after hearing all the evidence in the case, the learned circuit judge directed the jury to find a verdict for the defendants. The plaintiff excepted to such instruction, and, after a verdict was rendered for the defendants, moved for a new trial upon the minutes of the judge. The motion was denied, and the plaintiff duly excepted, and after judgment was entered in favor of the defendants, appealed to this court. The defendants are partners in the jewelry business. On the trial it appeared that on and before the twenty-eighth of December, 1883, the plaintiff was the owner of and in the possession of a small stone of the nature and value of which she was ignorant; that on that day she sold it to one of the defendants for the sum of one dollar. Afterwards it was ascertained that the stone was a rough diamond, and of the value of about $700. After hearing this fact the plaintiff tendered the defendants the one dollar, and ten cents as interest, and demanded a return of the stone to her. The defendants refused to deliver it, and therefore she commenced this action.

The plaintiff testified to the circumstances attending the sale of the stone to Mr. Samuel B. Boynton, as follows:

> The first time Boynton saw that stone he was talking about buying the topaz, or whatever it is, in September or October. I went into the store to get a little pin mended, and I had it in a small box, — the pin, — a small earring; . . . this stone, and a broken sleeve-button were in the box. Mr. Boynton turned to give me a check for my pin. I thought I would ask him what the stone was, and I took it out of the box and asked him to please tell me what that was. He took it in his hand and seemed some time looking at it. I told him I had been told it was a topaz, and he said it might be. He says, "I would buy this; would you sell it?" I told him I did not know but what I would. What would it be worth? And he said he did not know; he would give me a dollar and keep it as a specimen, and I told him I would not sell it; and it was certainly pretty to look at. He asked me where I found it, and I told him in Eagle. He asked about how far out, and I said right in the village, and I went out. Afterwards, and about the twenty-eighth of December, I needed money pretty badly, and thought every dollar would help, and I took it back to Mr. Boynton and told him I had brought back the topaz, and he says, "Well, yes; what did I offer you for it?" and I says, "One dollar," and he stepped to the change drawer and gave me the dollar, and I went out.

In another part of her testimony she says: "Before I sold the stone I had no knowledge whatever that it was a diamond. I told him that I had been advised that it was probably a topaz, and he said probably it was. The stone was about the size of a canary bird's egg, nearly the shape of an egg, — worn pointed at one end; it was nearly straw color, — a little darker." She also testified that before this action was commenced she tendered the defendants $1.10, and demanded the return of the stone, which they refused. This is substantially all the evidence of what took place at and before the sale to the defendants, as testified to by the plaintiff herself. She produced no other witness on that point.

The evidence on the part of the defendant is not very different from the version given by the plaintiff, and certainly is not more favorable to the plaintiff. Mr. Samuel B. Boynton, the defendant to whom the stone was sold, testified that at the time he bought this stone, he had never seen an uncut diamond; had seen cut diamonds, but they are quite different from the uncut ones; "he had no idea this was a diamond, and it never entered his brain at the time." Considerable evidence was given as to what took place after the sale and purchase, but that evidence has very little if any bearing, upon the main point in the case.

This evidence clearly shows that the plaintiff sold the stone in question to the defendants, and delivered it to them in December, 1883, for a consideration of one dollar. By such sale the title to the stone passed by the sale and delivery to the defendants. How has that title been divested and again vested in the plaintiff? The contention of the learned counsel for the appellant is that the title became vested in the plaintiff by the tender to the Boyntons of the purchase money with interest, and a demand of a return of the stone to her. Unless such tender and demand revested the title in the appellant, she cannot maintain her action. The only question in the case is

whether there was anything in the sale which entitled the vendor (the appellant) to rescind the sale and so revest the title in her. The only reasons we know of for rescinding a sale and revesting the title in the vendor so that he may maintain an action at law for the recovery of the possession against his vendee are (1) that the vendee was guilty of some fraud in procuring a sale to be made to him; (2) that there was a mistake made by the vendor in delivering an article which was not the article sold, — a mistake in fact as to the identity of the thing sold with the thing delivered upon the sale. This last is not in reality a rescission of the sale made, as the thing delivered was not the thing sold, and no title ever passed to the vendee by such delivery.

In this case, upon the plaintiff's own evidence, there can be no just ground for alleging that she was induced to make the sale she did by any fraud or unfair dealings on the part of Mr. Boynton. Both were entirely ignorant at the time of the character of the stone and of its intrinsic value. Mr. Boynton was not an expert in uncut diamonds, and had made no examination of the stone, except to take it in his hand and look at it before he made the offer of one dollar, which was refused at the time, and afterwards accepted without any comment or further examination made by Mr. Boynton. The appellant had the stone in her possession for a long time, and it appears from her own statement that she had made some inquiry as to its nature and qualities. If she chose to sell it without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain. Kennedy v. Panama, etc., Mail Co., L.R. 2 Q.B. 580. There is no pretense of any mistake as to the identity of the thing sold. It was produced by the plaintiff and exhibited to the vendee before the sale was made, and the thing sold was delivered to the vendee when the purchase price was paid. Kennedy v. Panama, etc., Mail Co., supra, 587; Street v. Blay, 2 Barn. & Adol. 456; Gompertz v. Bartlett, 2 El. & Bl. 849; Gurney v. Womersley, 4 El. & Bl. 133; Ship's Case, 2 De G. J.&S. 544. Suppose the appellant had produced the stone, and said she had been told it was a diamond, and she believed it was, but had no knowledge herself as to its character or value, and Mr. Boynton had given her $500 for it, could he have rescinded the sale if it had turned out to be a topaz or any other stone of very small value? Could Mr. Boynton have rescinded the sale on the ground of mistake? Clearly not, nor could he rescind it on the ground that there had been a breach of warranty, because there was no warranty, nor could he rescind it on the ground of fraud, unless he could show that she falsely declared that she had been told it was a diamond, or, if she had been so told, still she knew it was not a diamond. See Street v. Blay, supra.

It is urged, with a good deal of earnestness, on the part of the counsel for the appellant that, because it has turned out that the stone was immensely more valuable than the parties at the time of the sale supposed it was, such fact alone is a ground for the rescission of the sale, and that fact was evidence of fraud on the part of the vendee. Whether inadequacy of price is to be received as evidence of fraud, even in a suit in equity to avoid a sale, depends upon the facts known to the parties at the time the sale is made. When this sale was made the value of the thing sold was open to the

investigation of both parties, neither knowing its intrinsic value, and, so far as the evidence in this case shows, both supposed that the price paid was adequate. How can fraud be predicated upon such a sale, even though after-investigation showed that the intrinsic value of the thing sold was hundreds of times greater than the price paid? It certainly shows no such fraud as would authorize the vendor to rescind the contract and bring an action at law to recover the possession of the thing sold. Whether that fact would have any influence in an action in equity to avoid the sale we need not consider. See Stettheimer v. Killip, 75 N.Y. 287; Etting v. Bank of U.S., 11 Wheat. 59.

We can find nothing in the evidence from which it could be justly inferred that Mr. Boynton, at the time he offered the plaintiff one dollar for the stone, had any knowledge of the real value of the stone, or that he entertained even a belief that the stone was a diamond. It cannot, therefore, be said that there was a suppression of knowledge on the part of the defendant as to the value of the stone which a court of equity might seize upon to avoid the sale. The following cases show that, in the absence of fraud or warranty, the value of the property sold, as compared with the price paid, is no ground for a rescission of a sale. Wheat v. Cross, 31 Md. 99; Lambert v. Heath, 15 Mees. & W. 487; Bryant v. Pember, 45 Vt. 487; Kuelkamp v. Hidding, 31 Wis. 503-511. However unfortunate the plaintiff may have been in selling this valuable stone for a mere nominal sum, she has failed entirely to make out a case either of fraud or mistake in the sale such as will entitle her to a rescission of such sale so as to recover the property sold in an action at law.

The judgment of the circuit court is affirmed.

QUESTION

Does this case conflict with Sherwood v. Walker (the barren cow case), or can some way be found to reconcile the two?

CORBIN ON CONTRACTS §605

In making this contract of exchange, either party may be mistaken as to the appetite of others for the commodity. He finds that he can not sell for as much as he paid. Practically never is this such a mistake as will justify rescission. The parties are conscious of the uncertainty of value. Value is one of the principal subjects of agreement. Each party is consciously assuming the risk of error of judgment. As to this, by business custom, by prevailing mores, by social policy, and by existing law, the rule is caveat emptor. It is also, and in equal degree, caveat vendor.

Problem 109

At an auction of an estate, one item to be auctioned off was a safe. When the auctioneer came to this item, he described the safe's features and casually mentioned that the safe contained an inner door that was

locked and would have to be opened by a professional locksmith. The safe was then sold to a buyer for $50. When the locksmith hired by the buyer opened the safe's inner door, $32,307 was found. The estate demanded its return, claiming the money to be an asset of the estate. The buyer naturally refused. Who gets the money? See UCC §§2-403(1) and 1-103; City of Everett v. Estate of Sumstad, 95 Wash. 2d 853, 631 P.2d 366 (1981).

Fogo v. Boehm

Problem 110

Mistakenly believing that he was the father of her illegitimate child, John promised Mary to pay for the child's support. Mary also believed that John was the father of the child. When blood tests showed that he could not possibly be the father, John quit paying and she sued. Does the law of mistake provide him with a defense?

WILLIAMS v. GLASH
Supreme Court of Texas, 1990
789 S.W.2d 261

DOGGETT, Justice. The question presented is whether execution of the release for personal injuries in this cause bars a subsequent suit for an injury unknown at the time of signing. The trial court granted summary judgment against Petitioners Margaret and David Williams based on execution of a release. The court of appeals affirmed. 769 S.W.2d 684. We reverse the judgment of the court of appeals and remand this case to the trial court for further proceedings.

Margaret Williams ("Williams") was a passenger in her family car when it was struck from behind by a car driven by the respondent Stephen Glash. While damage to the Petitioners' car was apparent at the time of the accident, there were no observable injuries. Williams immediately contacted State Farm Mutual Automobile Insurance Company, Glash's insurer, who advised Williams to bring the car to its local office for an appraisal of the property damage claims. State Farm estimated the cost of repairs at $889.46 and provided Williams a check payable for that precise amount.

At the State Farm office, Williams was asked to complete a claim form containing a question as to whether anyone had been injured by the accident. She checked "No" in response. There was no negotiating or bargaining for release of a personal injury claim; only property damage to the car was discussed. Nonetheless, the back of the check contained language purporting to release personal injury claims, providing that:

> The undersigned payee accepts the amount of this payment in full settlement of all claims for damages to property and for bodily injury whether known or unknown which payee claims against any insured under the policy shown on the face hereof, or their respective successors in interest, arising

out of an accident which occurred on or about the date shown. This release reserves all rights of the parties released to pursue their legal remedies, if any, against such payee.

This release language was never explained to nor discussed with Williams or her husband. The face of the check contained a State Farm code, "200-1," denoting the settlement of a property claim, rather than a separate code used by the insurer for personal injury claims. Petitioners subsequently endorsed the check over to the garage that repaired their car.

Williams was later diagnosed as having temporomandibular joint syndrome ("TMJ"), causing head and neck pain, as a result of the accident. Both the trial court and the court of appeals found that suit for this injury was barred by execution of the release.

Petitioners seek to avoid the effect of the release, imploring this court to follow the "modern trend" of setting aside releases when the injury later sued for was unknown at the time of signing. See generally, Annot., 13 A.L.R.4th 686 (1982 and Supp. 1989). It is true that a majority of our sister states would, under a variety of theories, permit invalidation of the release under the circumstances presented in this case. Id.[1] The most common basis for invalidation is the doctrine of mutual mistake, which mandates that a contract be avoided "[w]here a mistake of both parties at the time the contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances." Restatement (Second) of Contracts §152 (1981). Following the modern trend, the Restatement expressly recognizes avoidance of personal injury releases when, in view of the parties' knowledge and negotiations, the release language "flies in the face of what would otherwise be regarded as a basic assumption of the parties." Id. comment f.

Under Texas law, a release is a contract and is subject to avoidance, on grounds such as fraud or mistake, just like any other contract. Cf. Loy v. Kuykendall, 347 S.W.2d 726, 728 (Tex. Civ. App. — San Antonio 1961, writ

1. See, e.g., Witt v. Watkins, 579 P.2d 1065 (Alaska 1978); Dansby v. Buck, 92 Ariz. 1, 373 P.2d 1 (1962); Casey v. Proctor, 59 Cal. 2d 97, 28 Cal. Rptr. 307, 378 P.2d 579 (1963) (applying California statute); Gleason v. Guzman, 623 P.2d 378 (Colo. 1981); McGuirk v. Ross, 53 Del. 141, 166 A.2d 429 (1960); Wells v. Rau, 129 App. D.C. 253, 393 F.2d 362 (1968); Boole v. Florida Power & Light Co., 147 Fla. 589, 3 So. 2d 335 (1941); Ranta v. Rake, 91 Idaho 376, 421 P.2d 747 (1966); Ruggles v. Selby, 25 Ill. App. 2d 1, 165 N.E.2d 733 (Ill. App. Ct. 1960, cert. denied); Reed v. Harvey, 253 Iowa 10, 110 N.W.2d 442 (1961); Dorman v. Kansas City Terminal Ry. Co., 231 Kan. 128, 642 P.2d 976 (1982) (FELA case not distinguishable from state law); Hall v. Strom Constr. Co., 368 Mich. 253, 118 N.W.2d 281 (1962); Doud v. Minneapolis S.R. Co., 259 Minn. 341, 107 N.W.2d 521 (1961); Frahm v. Carlson, 214 Neb. 532, 334 N.W.2d 795 (1983); Poti v. New England Road Co., 83 N.H. 232, 140 A. 587 (1928); Mangini v. McClurg, 24 N.Y.2d 556, 301 N.Y.S.2d 508, 249 N.E.2d 386 (1969); Caudill v. Chatham Mfg. Co., 258 N.C. 99, 128 S.E.2d 128 (1962); Mitzel v. Schatz, 175 N.W.2d 659 (N.D. 1970); Sloan v. Standard Oil Co., 177 Ohio St. 149, 203 N.E.2d 237 (1964); K.C. Motor Co. v. Miller, 185 Okl. 84, 90 P.2d 433 (1939); Herndon v. Wright, 257 S.C. 98, 184 S.E.2d 444 (1971); Bowman v. Johnson, 83 S.D. 265, 158 N.W.2d 528 (1968) (applying state statute); Warren v. Crockett, 211 Tenn. 173, 364 S.W.2d 352 (1962); Reynolds v. Merrill, 23 Utah 2d 155, 460 P.2d 323 (1969); Seaboard Ice Co. v. Lee, 199 Va. 243, 99 S.E.2d 721 (1957); Finch v. Carlton, 84 Wash. 2d 140, 524 P.2d 898 (1974); Krezinski v. Hay, 77 Wis. 2d 569, 253 N.W.2d 522 (1977).

ref'd n.r.e.) (treating release as a contract subject to rules governing construction thereof). Pursuant to the doctrine of mutual mistake, when parties to an agreement have contracted under a misconception or ignorance of a material fact, the agreement will be avoided. See, e.g., ALG Enterprises v. Huffman, 660 S.W.2d 603, 606 (Tex. App. — Corpus Christi 1983), aff'd as reformed per curiam, 672 S.W.2d 230 (Tex. 1984). The parol evidence rule does not bar extrinsic proof of mutual mistake. Santos v. Mid-Continent Refrigerator Co., 471 S.W.2d 568, 569 (Tex. 1971) (per curiam). The law of mutual mistake does not, of course, preclude a person from intentionally assuming the risk of unknown injuries in a valid release.

However, whether the parties to a release intended to cover an unknown injury cannot always be determined exclusively by reference to the language of the release itself. It may require consideration of the conduct of the parties and the information available to them at the time of signing. In a subsequent suit for an unknown injury, once the affirmative defense of release has been pleaded and proved, the burden of proof is on the party seeking to avoid the release to establish mutual mistake. The question of mutual mistake is determined not by self-serving subjective statements of the parties' intent, which would necessitate trial to a jury in all such cases, but rather solely by objective circumstances surrounding execution of the release, such as the knowledge of the parties at the time of signing concerning the injury, the amount of consideration paid, the extent of negotiations and discussions as to personal injuries, and the haste or lack thereof in obtaining the release. See Restatement (Second) of Torts §152 comment f (1981).

We then turn to an application of the mutual mistake factors in this case. As this is a summary judgment case, the issue on appeal is whether State Farm met its burden of establishing that there exists no genuine issue of material fact, thereby entitling it to judgment as a matter of law. City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671, 678 (Tex. 1979). All doubts as to the existence of a genuine issue of material fact are resolved against the movant, and we must view the evidence in the light most favorable to the Petitioners. Great American Reserve Insurance Co. v. San Antonio Plumbing Supply Co., 391 S.W.2d 41, 47 (Tex. 1965). Summary judgment evidence manifesting Williams' objective intent shows that she had no knowledge of the TMJ injury at the time of signing the release. She neither discussed nor bargained for settlement of a personal injury claim, and the amount of consideration received was the exact amount of the property damage to her car. State Farm similarly had no knowledge of the TMJ injury and, in fact, used a code on the check indicating the settlement of property damage claims only. The only evidence that these parties intended to release a claim for unknown personal injuries is the language of the release itself. This summary judgment evidence is sufficient to establish the existence of a genuine issue of fact as to whether the parties intended the release to cover the injury for which suit was later brought.

The one case cited by State Farm as controlling precedent misapplies the Texas law of mutual mistake and is, therefore, unpersuasive. McClellan v. Boehmer, 700 S.W.2d 687 (Tex. App. — Corpus Christi 1985, no writ). In *McClellan* and in Houston & T.C.R. Co. v. McCarty, 94 Tex. 298, 60 S.W. 429 (1901), the courts were willing to look to the intent of the parties for

the purpose of interpreting and applying the release but not to alter the unambiguous language of the contract. *McClellan,* 700 S.W.2d at 692; *McCarty,* 94 Tex. at 303, 60 S.W. at 432. When mutual mistake is alleged, the task of the court is not to interpret the language contained in the release, but to determine whether or not the release itself is valid. We overrule *McCarty* and disapprove *McClellan* to the extent that they give controlling weight to the language of the release to defeat a claim of mutual mistake.[2]

We do not today, as the dissent claims, release an injuried tort victim from an unfair bargain. Rather, we hold only that the law of mutual mistake applies to personal injury releases the same as to other contracts. If it can be established that a release sets out a *bargain that was never made,* it will be invalidated. If the objective manifestation of the parties' intent — i.e., their conduct — indicates that no release of unknown personal injuries was contemplated, the courts cannot provide intent for them. The dissent is willing to hold the parties to a written agreement that is contrary to their intent and understanding and to ignore the law of mutual mistake, granting as a result a windfall to the insurer by releasing it from claims that it is contractually obligated to pay. A majority of our sister states have refused to follow such a harsh rule; and today we join them.[3]

The doctrine of mutual mistake must not routinely be available to avoid the results of an unhappy bargain. Parties should be able to rely on the finality of freely bargained agreements. However, in narrow circumstances a party may raise a fact issue for the trier of fact to set aside a release under the doctrine of mutual mistake. Because there is some evidence of such circumstances here, we reverse the judgment of the court of appeals and remand this cause to the trial court for further proceedings consistent with this opinion.

SPEARS, J., joined by COOK and HECHT, JJ., dissent.

SPEARS, Justice, dissenting. What the court has really decided today is that an injured tort victim should not be held to his bargain if the bargain later appears unfair. In order to reach this result, the court relies on the doctrine of mutual mistake and a long string citation. Yet, the reality is that the cases from other jurisdictions present a jumbled mish-mash of reasonings and results. The "mutual mistake" rationale does not adequately explain their holdings. See Casey v. Proctor, 59 Cal. 2d 97, 28 Cal. Rptr. 307, 378 P.2d 579,

2. Although Berry v. Guyer, 482 S.W.2d 719 (Tex. Civ. App. — Houston [14th Dist.] 1972, writ ref'd n.r.e.), Champlin v. Pruitt, 539 S.W.2d 356 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.), and Lawson v. Ulschmid, 578 S.W.2d 434 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e), are not cited by State Farm and are factually distinguishable, to the extent any language of those opinions conflicts with our decision today, they are disapproved.

3. While condemning the use in this opinion of a string-cite of cases from other states, the dissent nonetheless relies on a string-cite of its own to support deviation from the majority rule avoiding releases for unknown injuries. While in each of these cases the release scrutinized was upheld, it is far from clear that those courts would uphold the release before the court today. See, e.g., Maltais v. National Grange Ins. Co., 118 N.H. 318, 386 A.2d 1264, 1269 (1978) (release upheld because no evidence that "accident caused an injury more severe than originally thought or aggravated a preexisting condition of which the parties were originally unaware").

587 (1963). Therefore, rather than trying to resolve this case by simple string citation, the court ought to engage in a straight-forward analysis of the issue. Cf. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 466-67 (1897) (encouraging the candid articulation of judicial reasoning).

Two competing interests are involved. On the one hand, the law favors the peaceful settlement of disputes and the orderly resolution of claims. On the other hand, the law favors the just compensation of accident victims. Our dilemma is to resolve these competing interests, and we ought to do so openly rather than hiding behind the facade of mutual mistake.

Because I believe the law, in general, is better served by encouraging settlements, I would uphold the release and affirm the summary judgment in favor of Glash. In its effort to afford equitable relief, the court renders useless most releases. How is one to buy peace and settle a claim? If the release here can be avoided, then no release buys peace until the statute of limitations has run. "Consideration of the conduct of the parties and the information available to them at the time" will present a fact question so as to require a trial in every instance. Bad facts make bad law and that is what has happened here.

Insurers are now faced with a Hobson's choice. If they settle claims promptly, they are not protected from the later assertion of unknown claims. If they refuse to settle until all injuries are known, then they face potential liability under a bad faith claim. See Aranda v. Insurance Co. of North America, 748 S.W.2d 210 (Tex. 1988). Their only alternative is to settle known damages only and this defeats their reason for settling. What the insurer wants is to buy peace and put an end to any further claims; this is the very essence of its position. Any mistake as to the nature of injuries is strictly unilateral, not mutual.

Courts cannot legitimately cast themselves in the role of saving people from bad bargains. This sort of benevolent paternalism oversteps the boundaries of our proper role in society. In the short run, it may make life easier for one injured party, but in the long run it distorts the law and creates more problems than it solves. The Maryland court expressed a similar view when it stated:

> We are convinced that our society will be best served by adherence to the traditional methodology for interpreting contracts. . . . In our view, the bastardization of the well-founded principles concerning mutual mistake of fact is entirely too high a price to pay for the obtention of an unprincipled, if temporarily desirable, result.

Bernstein v. Kapneck, 290 Md. 452, 430 A.2d 602, 606-608 (1981). And numerous other sister states have also refused to go along with the so-called "modern trend."[1] Boles v. Blackstock, 484 So. 2d 1077 (Ala. 1986); Kennedy v. Bateman, 217 Ga. 458, 123 S.E.2d 656 (1961); Castro v. Chicago, R.I. & P.R. Co., 83 Ill. 2d 358, 47 Ill. Dec. 360, 415 N.E.2d 365 (Ill. 1980),

1. I dislike the use of string-cites, but it was the majority's choice to rely on this mode of analysis. I would be happy to delete *all* citation to other states and rely solely on Texas authority for this decision.

cert. denied, 452 U.S. 941 (1981); Hybarger v. American States Ins. Co., 498 N.E.2d 1015 (Ind. Ct. App. — 1st Dist. 1986); Reynard v. Bradshaw, 196 Kan. 97, 409 P.2d 1011 (1966); Johns v. Kubaugh, 450 S.W.2d 259 (Ky. 1970); Tewksbury v. Fellsway Laundry, Inc., 319 Mass. 386, 65 N.E.2d 918 (1946); Pearson v. Weaver, 252 Miss. 724, 173 So. 2d 666, 669 (1965); Sanger v. Yellow Cab Co., 486 S.W.2d 477 (Mo. 1972); Sibson v. Farmers Ins. Group, 88 Nev. 417, 498 P.2d 1331 (1972); Maltais v. National Grange Mut. Ins. Co., 118 N.H. 318, 386 A.2d 1264 (1978);[2] Raroha v. Earle Finance Corp., 47 N.J. 229, 220 A.2d 107 (1966); Wheeler v. White Rock Bottling Co., 229 Or. 360, 366 P.2d 527 (1961); Emery v. Mackiewicz, 429 Pa. 322, 240 A.2d 68 (1968); Boccarossa v. Watkins, 112 R.I. 551, 313 A.2d 135 (1973).

Moreover, in some of the case that have allowed releases to be avoided, the courts have at least moderated their decisions by imposing a higher burden of proof on the plaintiff. They have required clear and convincing proof that a mutual mistake was made or that the release was not fairly and knowingly made. E.g., Witt v. Watkins, 579 P.2d 1065 (Alaska 1978); Ranta v. Rake, 91 Idaho 376, 421 P.2d 747 (1966); Birch v. Keen, 449 P.2d 700 (Okla. 1969); Seaboard Ice Co. v. Lee, 199 Va. 243, 99 S.E.2d 721 (1957). By refusing to impose any higher burden, this court steps beyond even these more moderate decisions in other jurisdictions.

Finally, almost as an afterthought, the court looks to Texas precedent. In order to allow for the invalidation of this release, the court must overrule Houston & T.C.R. Co. v. McCarty, 94 Tex. 298, 60 S.W. 429 (1901) and must disapprove Lawson v. Ulschmid, 578 S.W.2d 434 (Tex. Civ. App. — Waco 1979, writ ref'd n.r.e.); Champlin Petroleum Co. v. Pruitt, 539 S.W.2d 356 (Tex. Civ. App. — Fort Worth 1976, writ ref'd n.r.e.); Berry v. Guyer, 482 S.W.2d 719 (Tex. Civ. App. — Houston [14th Dist.] 1972, writ ref'd n.r.e.); and McClellan v. Boehmer, 700 S.W.2d 687 (Tex. App. — Corpus Christi 1985, no writ). In all of these cases, Texas courts upheld the validity of personal injury releases, and the *Ulschmid* case even involved the same "200-1" notation as exists in this case. This is a lot of Texas precedent for the court to address it in such a summary fashion.

I can understand the desire to do equity,[3] but the court's decision today is too one-sided to fall under the rubric of equity. If the court is determined to reach this result, it ought to at least be candid about its reasons. I respectfully dissent. I would affirm the judgment of the court of appeals.

COOK and HECHT, JJ., join in this dissent.

2. The majority attacks *Maltais* as an example of how, for each case that upheld a release, "it is far from clear that those courts would uphold the release before the court today." However, the same can be said of the cases cited by the majority. In cases that have invalidated releases, it is far from clear that those courts would invalidate the release before this court today. See, e.g., Dorman v. Kansas City Terminal Ry. Co., 231 Kan. 128, 642 P.2d 976, 978 (1982) (In an FELA suit for back injuries, the court recognized a fact question on mistake since the release specifically described the plaintiff's injuries as being "to my left thigh and a laceration to my forehead.").

3. I would prefer that Texas address this problem by legislation rather than by judicial fiat. For example, in Idaho, a personal injury release executed within fifteen days after the occurrence may be disavowed at anytime within one year after the occurrence. Idaho Code §29-113 (1961). For other similar statutes, see also Md. Ann. Code art. 79, §11 (1957); Utah Code Ann. §78-27-3 (1953); N.D. Cent. Code §9-08-08 (1987); Cal. Civ. Code §1542 (West 1982); Me. Rev. Stat. Ann. tit. 17, §3964 (1964); Conn. Gen. Stat. §52-572a (1958).

QUESTION

If you were a member of the Texas Supreme Court when this case was argued, how would you have voted?

NOTE ON THE LAW OF WARRANTY

Warranties are of two basic types: warranties of title and warranties of quality.

The warranty of title is basically what it sounds like, a guarantee that the seller will convey good title to the buyer at the time of sale. See UCC §2-312.

Quality warranties are also divisible into two categories: express and implied warranties. An express warranty, according to UCC §2-313, which you should read, is created when the seller makes an affirmation of fact ("This is a new car"), describes the item ("When it arrives, it will be painted yellow"), makes a promise relating to the goods ("If it doesn't work, I'll fix it"), or displays a sample or model ("This is what it will look like"). The statement need not be in writing or even intended by the seller to be a warranty, but it must go to the "basis of the bargain." This means that it must have enough substance to it that it *might* have played some part in the buyer's decision to purchase. If so, the statement is *presumed* to be part of the basis of the bargain unless the seller can prove that the buyer did not rely on the statement.

Problem 111

Honest John told Mr. and Mrs. Consumer that the used car he was selling them was in "great condition and was never mistreated by its prior owner, a nun." In fact, unknown to Honest John, the nun had been a bad driver and repeatedly wrecked and repaired the vehicle. The Consumers signed a contract of sale which conspicuously stated there were "no express or implied warranties, particularly not the implied warranty of MERCHANTABILITY" (see below), involved in the sale. Two days later the car fell to pieces because of its many prior accidents, and the Consumers were injured. May they sue for breach of express warranty? See UCC §§2-316(1), 2-202, 2-302, and 1-103. Does it help Honest John that he did not know nor have reason to know of the car's defects?

Implied warranties are created by the legislature (and thus are often said to be "children of the law") in order to fulfill the buyer's typical expectations concerning the item purchased. The implied warranty of merchantability is basically a warranty that the goods will fulfill their usual functions. Read UCC §2-314, noting particularly §2-314(2)(c). The implied warranty of fitness for a particular purpose, UCC §2-315, arises when the

seller has reason to know of some *special* use the buyer has for the goods ("I need some boots for climbing Mt. Everest") and warrants that the goods will fulfill that particular purpose. Did the language of disclaimer in the last Problem effectively get rid of the implied warranties? See UCC §2-316(2).

Problem 112

The restaurant menu had beautiful photographs of the food. When Portia Moot and her friend Ralph Res were ready to order, Portia pointed at the picture of the plate of spaghetti and told the waitress, "I'll take that." Ralph ordered fish chowder.

(a) When the food arrived, Portia was annoyed to note that there were only two meatballs (the picture showed three). May she refuse the food for this reason? See UCC §2-313. Is the service of food a sufficient sale to trigger the UCC? See UCC §2-314(1).

(b) If Ralph chokes on a bone in the fish chowder, what commercial theory will offer possible relief to him or his heirs? See UCC §2-314(2)(c); Webster v. Blue Ship Tea Room, Inc., 347 Mass. 421, 198 N.E.2d 309, 2 U.C.C. Rep. Serv. 161 (1964). Is the question easier if the offending object in the fish chowder is a piece of gravel?

(c) If the water glass that Portia is holding proves to be defective and suddenly shatters, lacerating her hand, does any part of UCC §2-314 apply? See Shaffer v. Victoria Station, Inc., 91 Wash. 2d 295, 588 P.2d 233, 25 U.C.C. Rep. Serv. 427 (1978).

(d) Assume that Portia told the waitress that she was allergic to milk and asked her to make sure that the dishes she was served contained none. The waitress made no express promise (indeed, she said nothing when Portia gave her this information), but the food Portia was served made her very sick because it was laced with milk. May she sue in warranty? See UCC §2-315.

The warranties created by the UCC are supplemented by special statutes, both federal and state, that change the usual rules in certain situations, typically involving consumer buyers. On the federal level, the chief statute is the Magnuson-Moss Warranty Act, 15 U.S.C. §§2301-2312 (passed in 1975), which regulates written warranties given in the sale of consumer goods. Among other things, the act forbids the disclaimer of implied warranties when a written warranty is furnished and provides for an award of attorney's fees to the consumer who prevails in litigation.

BAILEY v. EWING
Court of Appeals of Idaho, 1983
105 Idaho 636, 671 P.2d 1099

SWANSTROM, J. This case involves a boundary dispute between the purchasers of adjoining lots which had been sold by a decedent's personal

representative. The dispute is over a strip of land lying between the conflicting boundary lines claimed by the purchasers. One purchaser, Fred Bailey, brought this suit to eject the other purchaser, Guy Ewing, from the disputed strip and to quiet title to the land in himself. Ewing filed a counterclaim against Bailey and a third party complaint against the personal representative, Gary Erhardt, to reform the deeds so that Ewing would own the disputed strip. The trial court found for Bailey and Erhardt. Ewing appealed.

Appellant Ewing raises several issues in this appeal. However, because we decide that one issue requires a reversal of the judgment entered in the trial court, we discuss only that issue: Did the trial court err in ruling that any mistake concerning the location of the boundary line was a unilateral mistake by Ewing?

The pertinent facts as shown by the record are as follows. On October 1, 1977, Erhardt, as the personal representative of decedent Mary Ellen Erhardt, conducted an auction sale of decedent's real and personal property. The real property consisted of two city lots, numbered "five" and "six," plus an additional twenty-foot strip of land adjoining the east side of lot six. This real property had been owned by decedent for many years, as a single parcel, improved by a house, a shop and other outbuildings. Sometime shortly before the sale the personal representative and the auctioneer decided that the real estate would likely sell for more money if it were divided into two parcels, to be sold separately. It was decided that lot five would be sold as one parcel; lot six, to the east, and the twenty-foot strip would be sold as the second parcel. When the bidding was conducted Ewing purchased lot five, but because no satisfactory bid was received for the second parcel, it was not sold on the day of the auction.

On the day of the sale, Erhardt conducted a tour of lot five and the house situated on that lot. During that tour, he indicated to Ewing and other prospective purchasers that he thought the east boundary line of lot five was at or near some lilac bushes about thirteen feet east of the house. He stated several times that he was not sure of the actual location of the boundary line. In addition, the auctioneer mentioned, before bidding began, that nobody knew exactly where the property lines were. Two later surveys showed, in fact, that the boundary line between lots five and six was less than one foot east of the base of the house on lot five. The vertical plane of the true line passed through the eaves of the house. Domestic water and sewer lines serving the house were located alongside the house beneath the surface of lot six.

A week after the auction, the personal representative sold the remaining parcel to Bailey, who had attended the auction. The personal representative later deeded lot five to Ewing, and lot six and the adjoining strip to Bailey. During his occupancy of the house on lot five, Ewing mowed the grass, trimmed the lilac bushes and otherwise acted as owner of the property between the house and the lilacs. In June of 1978, Ewing erected a fence just to the east of the lilac bushes. Bailey then caused a survey to be conducted and learned where the "true" line was. He asserted his claim to the strip of property between the bushes and the line, demanding that the fence be removed. After Ewing failed to remove the fence and relinquish