

Mutual Assent

These materials provide examples of rules, doctrines, and techniques used by courts to determine whether the parties have manifested agreement such that legal consequences should follow. Contract obligation is voluntarily assumed, but how do we determine when each party has voluntarily assumed the same obligation? In particular, these cases consider whether the parties are contracting about the same thing, or whether they understand their respective representations differently.

Take, for example, the famous case, *Lucy v. Zehmer*. 196 Va. 493, 84 S.E.2d 516 (1954). In *Lucy*, the plaintiff alleged that the defendant agreed to sell defendant's farm for the price of \$50,000. The defendant drew up a short contract to that effect on the back of a counter check at the bar where the conversation took place. The next day, plaintiff persuaded his brother to front half of the purchase price, hired an attorney to conduct a title search, and informed defendant he was ready to close the deal. Defendant refused, arguing that he was drunk when he made the deal, and moreover that he and the plaintiff both knew the offer was a joke. A trial court concluded that the contract was not enforceable because the plaintiff knew the defendant was joking about the sale. The Supreme Court of Virginia reversed, holding that the language of the contract was clear and unmistakable, and that the plaintiff obviously relied on it in preparing to purchase the property.

The case raises two questions for our conversation about mutual assent. First, can courts determine whether the parties both mean the same thing when they ostensibly form a contract? Should that question turn on the subjective understanding of the parties, or their objective representations? Second, where does responsibility lie for mistaken impressions when parties *don't* mean the same thing? To state the second point another way, which party bears the fault when there is a misunderstanding about the deal? Generally, either party will likely suffer a loss if the contract is construed against it, and thus would prefer to avoid that construction.

Raffles v. Wichelhaus

[1864] 2 H. & C. 906; 159 Eng. Rep. 375 (Court of Exchequer)

To a declaration for not accepting Surat cotton which the defendant bought of the plaintiff "to arrive ex 'Peerless' from Bombay," the defendant pleaded that he meant a ship called the "Peerless" which sailed from Bombay, in October, and the plaintiff was not ready to deliver any cotton which arrived by that ship, but only cotton which arrived by another ship called the "Peerless," which sailed from Bombay in December. Held, on demurrer, that the plea was a good answer.

Declaration. For that it was agreed between the plaintiff and the defendants, to wit, at Liverpool, that the plaintiff should sell to the defendants, and the defendants buy of the plaintiff, certain goods, to wit, 125 bales of Surat cotton, guaranteed middling fair merchant's Dhollorah, to arrive ex "Peerless" from Bombay ; and that the cotton should be taken from the quay, and that the defendants would pay the plaintiff for the same at a certain rate, to wit, at the rate of 171d. per pound, within a certain time then agreed upon after the arrival of the said goods in England.

Averments: that the said goods did arrive by the said ship from Bombay in England, to wit, at Liverpool, and the plaintiff was then and there ready, and willing and offered to deliver the said goods to the defendants, &c. Breach: that the defendants refused to accept the said goods or pay the plaintiff for them.

Plea. That the said ship mentioned in the said agreement was meant and intended by the defendants to be the ship called the "Peerless," which sailed from Bombay, to wit, in October; and that the plaintiff was not ready and willing and did not offer to deliver to the defendants any bales of cotton which arrived by the last mentioned ship, but instead thereof was only ready and willing and offered to deliver to the defendants 125 bales of Surat cotton which arrived. by another and different ship, which was also called the "Peerless," and which sailed from Bombay, to wit, in December.

Demurrer, and joinder therein.

Milward, in support of the demurrer. The contract was 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.

Notes and Questions

1. Many English cases from the nineteenth and prior centuries were reported in a manner that can cause some confusion for the American law student. The first case in this module, *Raffles v. Wichelhaus*, is one such case. The case starts with a summary of the dispute from the reporter. We then read a declaration summarizing the plaintiff cotton seller's case, and a plea from the defendant buyer arguing that the buyer did not breach the contract. Plaintiff demurred or objected to defendant's plea, reducing the question to something equivalent to a judgment on the pleadings. Under English procedural rules at the time, if the plaintiff fails at this stage, he cannot proceed with the litigation. We then read a summary of the plaintiff's argument by counsel, Milward. Chief Barron Pollock and Baron Martin interrupt Milward's arguments with questions. The argument from defendants' counsel, Mellish and Cohen, follows. The court stops Mellish's argument and issues a judgment. The court holds in favor of the defendant buyer. We find no opinion like we might be accustomed to reading in most U.S. cases, but we can find something of the reasoning of the judges in their interjections.
2. For more on the historical context of *Raffles v. Wichelhaus*, see A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of Two Ships Peerless*, 11 CARDOZO L. REV. 287 (1989).
3. Consider the following possibilities:

- a. Is Chief Baron Pollock's two-warehouse example distinguishable from the example of the two wine estates? Which is more like the case at issue in *Raffles*?
- b. Would the result be different if both parties knew there were at least two ships named *Peerless* sailing regularly from Bombay? (There were seventeen that regularly docked at Liverpool!)
- c. What if both parties knew there were multiple ships regularly sailing from Bombay, but both understood the contract to refer to the ship sailing in October?

Flower City Painting Contractors, Inc. v. Gumina Const. Co.

591 F.2d 162 (2d Cir. 1979)

GURFEIN, Circuit Judge.

This is an action for breach of contract, entertained in the District Court for the Western District of New York (Hon. Harold P. Burke, Judge) by virtue of the diversity of citizenship of the parties. 28 U.S.C. § 1332. Plaintiff-appellant, Flower City Painting Contractors, Inc. ("Flower") is a newly formed painting contracting firm in Rochester, New York, owned and managed by black minority personnel. Defendant-appellee, Gumina Construction Company ("Gumina") is an Ohio company with its principal place of business in Lorain, Ohio.

Gumina entered into a prime contract with the FIGHT Village Housing Development Fund Company, Inc., for the construction of a garden type apartment project called "FIGHT Village," on March 12, 1973. The project was federally funded and developed under the auspices of the Federal Housing Authority of the Department of Housing and Urban Development ("HUD"). Pursuant to Executive Order No. 11246, which prohibits employment discrimination by Government contractors, HUD regulations and the terms of the prime contract required the prime contractor to undertake an affirmative action program that included efforts to recruit and hire minority subcontractors. HUD Contract Compliance Handbook 8000.6 at 27 (1972). Compliance was a condition of the contract.

Part of Gumina's affirmative action obligation was satisfied by its award of a subcontract for painting in the FIGHT Village to Flower on April 16, 1973. As indicated by the cost breakdown summary sheet attached to the prime contract, the total anticipated cost of painting and decorating the Entire FIGHT project was to be \$101,000. This estimation of cost was significant, since an excess of cost in one aspect could have caused a cost overrun that would

cut into the prime contractor's profits. The subcontract executed with Flower provided that Flower was to be paid \$98,499.84 for its work, a sum that was roughly only \$2500 less than the maximum allotted for painting and decorating the entire project.

The terms of the Gumina-Flower subcontract included the language of Flower's original bid on the subcontract which was incorporated In haec verba as Schedule A of the subcontract. That Schedule reads as follows:

"SCHEDULE A"

The painting of the above mentioned project in accordance with the painting specifications and plans for this project.

1.	One bedroom units	\$*335.00 per unit	\$*17,420.00
2.	Two bedroom units	\$*371.00 per unit	\$*28,196.00
3.	Three bedroom units	\$*428.00 per unit	\$*29,960.00
4.	Four bedroom units	\$*477.58 per unit	\$*22,923.84
A Total of:			\$*98,499.84

Please note: price given reflects no bonding requirement and a non-union job operation.

The subcontract also incorporated by reference the prime contract, drawings, addenda, and specifications, as well as modifications subsequently issued. Indeed, Schedule A made specific reference to the contract specifications and plans in defining the scope of the subcontractor's work. The subcontract further provided that the subcontractor would "faithfully observe all requirements and conditions set forth by plans and specifications on file at the F.H.A. Office

in Buffalo, N.Y. . . .,” and that these documents were to be “available for inspection by the Subcontractor upon his request.”

On March 18, 1974, nearly one year after Flower entered into the subcontract, it asserted in a letter to Gumina that the contract required Flower to paint interior walls of the individual apartment units only and that Flower was not obligated to paint exteriors or common buildings.² On March 25, 1974, Flower received from Gumina a copy of Article II of the subcontract with additional explanatory language typed in as a reminder of obligations which Gumina insisted that Flower had under its subcontract. This notation stated: “It is further understood that this contract includes all exterior work, (encompasses all work, within specs and drawings) except exterior siding. The community building is also a part of this contract.” On March 29, 1974, the president of Flower submitted to Gumina an itemization of additional costs for this “exterior work,” claiming that it was not required to do the painting of apartment laundry rooms, storage rooms, and hallways, as well as of exterior doors, trim and certain common buildings.³ On April 4, 1974 (the letter was erroneously dated March 4), Gumina responded to Flower’s demand for extra payments by reiterating that the exterior work specified by Flower as requiring additional payment, was work which had already been agreed upon. Gumina, in the same letter, though the work had not yet begun, cancelled the contract. Appellant sued Gumina for damages.

At trial, Gumina defended its removal of Flower on the ground that the latter had misinterpreted the contract, and that by insisting upon extra payment for the painting of exteriors Flower had refused to comply with the terms of and had thereby repudiated the existing subcontract. Flower maintained the converse position: that Gumina had unilaterally attempted to enlarge the scope of Flower’s obligation under the contract by requiring work outside the individual “unit” interiors. The trial court accepted the contract interpretation offered by Gumina. It found, despite Flower’s contentions that it had been hired to paint only the walls in the “units,” that, on the contrary, neither the subcontract nor the specifications incorporated by reference excluded common hallways, storage areas, laundry rooms, or exterior surfaces of FIGHT Village. The court determined that the specifications required the painting of “all surfaces except those specifically excluded.”

² There is some indication that this opening salvo was preceded by discussion. See *infra*.

³ The extra work was estimated to cost an additional \$14,545.17, about 15 percent of the subcontract price.

The court held that Flower committed a breach of contract “by asking for extra pay for work it was obligated to do under its contract.” It found that “Flower City unequivocally declared its refusal to perform according to the contract” and that “cancellation was the proper response by Gumina Construction.” It was on that basis that the complaint was dismissed after trial.

On this appeal, the defendant contends that an alternative ground upon which to uphold dismissal of Flower’s suit is that no subcontract was actually formed between Flower and Gumina because there was no “meeting of the minds.” This issue was not expressly considered by the District Court, although the assumption that a contract existed as interpreted by Gumina is implicit in its ruling.

If we hold Flower strictly to its obligation to recognize that the specifications were part of the subcontract, then its claim for additional payment as a condition of performance was unjustified, as Judge Burke found. This, in turn, would raise the question whether a refusal to perform part of an alleged contract, except in accordance with one’s own interpretation, is a repudiation. If so, we would then have to decide whether such a repudiation by Flower was sufficiently material to be treated as a justification for unilateral rescission by Gumina. Thus, if we adopted the approach of the court below that there was a contract, even aside from the issue of what were its obligations, we would have considerable difficulty in weighing the correctness of the conclusion of law that there had been a repudiation sufficient to justify an immediate unilateral rescission.

We think, however, that this thorny problem need not be reached. Rather, we have concluded using the objective criterion of judgment that there was no meeting of the minds in the first instance and that, hence, there never was a contract [enforceable] by either party.

Viewing the subcontract itself as written, both Flower’s and Gumina’s interpretations of the document are plausible. The description of the subject matter of the contract in Schedule A in terms of “units” and the fact that the total bid listed is the aggregate of the bids on the individual units suggest that nothing more was required to be painted than the actual units themselves. On the other hand, the incorporation of the specifications with their delineation of exterior painting chores and the use of the word “project” in Schedule A indicate that the scope of the work encompassed all painting in FIGHT City.

Resolution of this ambiguity might be effected by construing the contract on the assumption that it incorporated the habitual or customary practice of the construction industry in Rochester, New York, that painting subcontracts be awarded on an entire project basis.

Such usage, if operative, may be proved by parol, as was done here. *See, e.g., Division of Triple T Service, Inc. v. Mobil Oil Corp.*, 60 Misc.2d 720, 730-31, 304 N.Y.S.2d 191 (Sup. Ct. 1969). But proof of the usage is not enough by itself to establish the meaning of the contract, for “(a) party cannot be bound by usage unless he either knows or has reason to know of its existence and nature.” Restatement (First) of Contracts s 247, comment b. *See Walls v. Bailey*, 49 N.Y. 464 (1872).

In an ordinary situation involving the painting subcontract on a construction job in Rochester, the court could find as a fact that a painting contractor “knows or has reason to know of (this usage’s) existence and nature.” It seems clear enough that Flower actually did not know the usage, as its President testified, and the court made no finding to the contrary. The question whether Flower had “reason to know” is the issue.

Flower was brought into the picture by the imposition on the contractor of an affirmative action program. While competence to do the job must have been the assumption of the Regulation, experience in the trade was not. Flower was a neophyte minority painting contractor. This was its first substantial subcontract on a construction job. It would be unrealistic to hold it strictly to a “reason to know” standard of trade usage.

The consequence of ruling that Flower cannot be held to trade usage is recognition, however, that the contract document could represent two different understandings of what the subject matter embraced. This means that Gumina, as well, was not bound since it takes two to make a contract. Unfortunately, there was no contract to enforce in favor of Flower, as there would have been no contract to enforce against Flower if Gumina had been the plaintiff in an action for breach. And we cannot say that either party acted so unreasonably as to justify construing the ambiguity in the contract against it. Each party, in fact, held a different and reasonable view of the undertaking, Flower on the basis of its literal reading of the word “units” and Gumina because of its suppositions concerning trade practice and its awareness that Flower was to be paid virtually the entire sum allocated to painting the FIGHT City project.⁴

Though the setting is new, the problem is old. In two nineteenth century cases, *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (Ex. 1864) (the famous “Peerless” case) and *Kyle v. Kavanagh*, 103 Mass. 356 (1869), courts, when faced with an arguably material contract term that could mean or represent two different things, found that no contract existed. *See* O. Holmes, *The*

⁴ We do note, however, that Flower’s people expected to make a profit of about \$60,000 on this \$98,000 contract, which may be some indication that their view of the scope of the work was unrealistic.

Common Law 309-10 (1881)... The rule of Raffles and Kyle was adopted and more fully formulated in the Restatement (First) of Contracts § 71(a).

If the manifestations of intention of either party are uncertain or ambiguous, and he has no reason to know that they may bear a different meaning to the other party from that which he himself attaches to them, his manifestations are operative in the formation of a contract Only in the event that the other party attaches to them the same meaning. (Emphasis added.)

We affirm the judgment of dismissal on the ground that no enforceable contract ever came into existence.

The dissenting opinion, finding a contract as interpreted by Flower, relies upon some testimony by Ellison, president of Flower, that he was told by the superintendent for Gumina in March 1974 almost a year after the putative “contract” was signed that there had been some “changes” since the signing and that the Gumina superintendent, therefore, had to add a “piece of contract document.” The dissenting opinion finds that this bit of testimony indicated that Gumina was “redefining the scope of the work by a ‘further understanding’” and concludes that “(c)learly, Gumina made an initial mistake and then tried to get Flower to change the contract.” Dissent op. at 168 . But we are not the trial court, and this conclusion rests upon an opinion as to the credibility of a witness whom Judge Burke heard, and whom we have never seen. If Judge Burke had believed this parol evidence, it would have amounted to an admission regarding the construction of the contract by Gumina. Although this testimony was admitted, Judge Burke found, nevertheless, that the “piece” of document Flower received from Gumina later in March was “a copy of Article II of the subcontract, with additional explanatory language as a Reminder of obligations Flower City had under its subcontract.” Finding No. 14 (emphasis added). One may assume, therefore, that, in reaching Finding No. 14, Judge Burke rejected Ellison’s testimony to the contrary.

The judgment is affirmed.

OAKES, Circuit Judge, dissenting:

I respectfully dissent and would reverse the judgment.

It seems to me that we must construe the original contract against the general contractor who prepared it. To be sure, the parties based that contract on a proposal, which Flower submitted

and Gumina accepted, stated precisely in the terms of the schedule attached to the contract. But Gumina had indicated to Flower that the proposal was in the form necessary to win the bid; and it was important to Gumina for purposes of the affirmative action program required under HUD regulations, majority op. at 163, that Flower obtain the painting subcontract. As the majority notes, Schedule A does refer to the “painting of the above mentioned project in accordance with the painting specifications and plans for this project”; but it also specifically itemizes the work and the price in terms of the one, two, three, and four bedroom units, stating a price per unit, then the total price for each size apartment, and finally a grand total for all units of all sizes which equals the contract price of \$98,499.84. To my mind this schedule means exactly that the painting envisioned under the contract included only the “units” themselves and that the exterior, the community building, and the interior halls were not included. Indeed there was evidence that when Flower submitted its proposal the interior halls were going to be brick and not painted at all.¹

The majority relies on the introductory clause in Schedule A reading, “The painting of the above mentioned project in accordance with the painting specifications and plans for this project.” But the particular governs the general, and immediately below the quoted caption the schedule lists the per unit figures for the different size apartments and sets out a total price for size representing the price for the total number of units of each size. Moreover, the introductory clause in Schedule A does not say “All painting in the above mentioned project”; it says “the painting of the above mentioned project.”

The majority suggests that had Flower examined Defendant’s Exhibit 5, the prime contract with the cost breakdown for each type of labor and materials, which indicates a total painting cost of \$101,000, Flower would have known that Gumina would require the painting of the exterior work, interior hallways, and the community building in addition to the units themselves for less than \$101,000 and that given Flower’s contract for \$98,499.84, the contractor would go over his projection for painting costs unless Flower did all the painting. I do not think, however, that we can hold the subcontractor to this kind of knowledge simply because the prime contract was on file. A contractor can over- or underestimate a particular

¹ Michael Ellison, president and general superintendent of Flower, testified on cross-examination as follows:

The General Contractor informed us what had to be painted on the Fight Village project, because the preliminary specs were not complete. So he told me the public hallways there were going to be brick, so it was to my understanding from the General Contractor that was not going to be painted.

portion of the work, and here Flower followed Gumina's own suggestions as to price, proposal format, and scope of work.

If there were any doubt as to the meaning of the subcontract and it seems to me there cannot be because of the undisputed evidence that the general contractor, Gumina, drew the contract and that Flower submitted the proposal precisely in the terms of Schedule A at Gumina's specific request the subsequent conduct of the parties is quite compelling. Gumina's field superintendent, Brian Smith, asked Flower's president and general superintendent, Michael Ellison, to bring a copy of the contract "over to the job site." He then "informed (Ellison) that since we had signed the contract, there had been some changes and he needed to get (Ellison's) copy of (the) contract so that he could add a piece of contract document to (the contract)." That "piece of contract document" was a new AIA subcontract page covering Articles 1-4 inclusive and redefining the scope of the work by a "further understanding," namely that all exterior work and the community building were included (at the original price). Smith told Ellison "that he didn't think the exteriors or the common interior hallways were included" and that he thought that Ellison "ought to amend the contract." Clearly, Gumina made an initial mistake and then tried to get Flower to change the contract. There had been a meeting of the minds on the terms of the contract as stated in Schedule A; but one party, the one in the more favorable bargaining position and the one which had drawn the contract, had made a unilateral mistake. It does not need citation of authority to suggest that this kind of mistake does not permit repudiation, rescission, or modification of the contract.

... I believe that Gumina entered into and breached a valid, enforceable contract with Flower and that the case should be remanded for the ascertainment of damages.⁶

⁶ I agree with the majority on the argument pertaining to custom in the trade. If the contract were really ambiguous such evidence might be admissible generally, but it would not be admissible against Flower in this case.

The trial judge made a number of findings pertaining to damages; but these do not in my view support his conclusion, among others, that Flower "failed to establish a rational basis for its assertion of lost profit and failed to prove prospective lost profits with reasonable particularity and certainty." *Flower City Painting Contractors, Inc. v. Gumina Constr. Co.*, Civ.No.74-552, at 9 (W.D.N.Y. Feb. 16, 1978). The evidence was somewhat vague and conclusory but, with all respect, not so uncertain in my view as to require dismissal of the case.

Notes and Questions

1. If contractors are aware of the court's holding in *Flower City*, what might we expect to happen over the long term in the Rochester market?
2. In *Konic Int'l Corp. v. Spokane Computer Servs., Inc.*, 109 Idaho 527, 708 P.2d 932 (Ct. App. 1985), the seller had responded to the buyer's inquiry about the price of certain computer equipment by saying "fifty-six twenty." The seller meant \$5,620; the buyer thought the asking price was \$56.20; the misunderstanding was discovered not long after the equipment had been installed. What result?

Dickey v. Hurd

33 F.2d 415 (1st Cir. 1929)

BINGHAM, Circuit Judge.

These are cross-appeals from a decree of the District Court for Massachusetts in favor of the plaintiff, John W. Dickey, of Augusta, Ga., in a suit in equity brought by him against Lyman C. Hurd, of Winter Hill, Mass., since deceased (the executrices of whose will, Lizzie E. Hurd and Edith L. Hurd, have been substituted as defendants), to enforce specific performance of an alleged contract said to have been entered into between Mr. Hurd, in his lifetime, and Mr. Dickey for the sale and purchase of certain lands on the Savannah river in Richmond county, Ga.

By the decree it was ordered and adjudged:

'1. That Lyman C. Hurd and the plaintiff, John W. Dickey, entered into a contract as alleged in the bill of complaint whereby the plaintiff became entitled to a conveyance of all that tract of land described in paragraph 2 of the plaintiff's bill of complaint upon payment by the plaintiff to the said Lyman C. Hurd at the rate of \$15 per acre.

'2. That the said tract of land contained 1,300.14 acres; that the price as agreed upon in said contract is \$19,502.10.

'3. That the defendants, Edith L. Hurd and Lizzie E. Hurd, as executrices of the will of Lyman C. Hurd, shall execute and deliver to the plaintiff, John W. Dickey, a good and sufficient quitclaim deed for conveyance of premises described in paragraph 2 of plaintiff's bill of complaint, free from all encumbrances, and upon the delivery to him of such deed the plaintiff shall then and there pay to the defendant the sum of the purchase price stated in the agreement between them, to wit, \$19,502.10. * * * '

It appears that on June 30, 1926, the plaintiff from Augusta, Ga., wrote a letter to Mr. Hurd, saying: 'Under date of the 15th inst., I wrote you and asked you if you cared to put a price on your land on the Savannah River but am without a reply to this letter. If you care to put a price on it I would like to work on the proposition'; that on July 8, 1926, Mr. Hurd, from Winter Hill, Mass., by letter replied: 'Dear Mr. Dickey: Replying to your favor of the 30th ult., I wish to say that I should like very much to look over the property before making a price on it. As I cannot come just at present, I think it only fair to name a price to you. My deeds call for 1,266 acres and I will sell the same to you for \$15 per acre cash and give you till July 18, 1926, including that day to accept this offer. This offer I wish you to consider strictly confidential.'

July 17, 1926, the plaintiff, from Augusta, Ga., telegraphed Mr. Hurd at Winter Hill, Mass., as follows: 'Answering your letter of July eighth in which you offer to sell me your twelve hundred sixty six acres in Richmond County on Savannah River at fifteen dollars per acre and give me thru the eighteenth to accept your offer, I desire to say I will buy the property at your price and terms and will send you Monday five hundred dollars to be held by you subject to examination of titles by my attorneys and survey of property to show acreage you claim. Unable to mail confirmation tonight as just returned from trip to your property but will send letter Monday.'

This telegram was received by Mr. Hurd on the day of its date. On July 22, 1926, Mr. Hurd notified Mr. Dickey that the offer had expired, as he (Dickey) had 'not complied with requirements.' The letter of July 8th and the telegram of July 17th are the instruments which the plaintiff contends, and the court below found, constitute the contract, the specific performance of which it decreed.

It further appeared that July 16 was Saturday, and that Mr. Dickey did not on the following Monday mail to Mr. Hurd the letter of confirmation and the \$500 he stated he would in his telegram of July 17, but that on Tuesday, July 20, he did so, in which he said: 'Dear Mr. Hurd: I was unable to send you the contract yesterday, as I could not get it prepared. I had to get the boundaries of your property, which I only got last night. I am enclosing herewith contract in duplicate, and New York draft for \$500.00 payable to your order. Please be kind enough to execute this contract, you retaining one and return one to me. I will also thank you to send me whatever chain of title you have to this property and I will get the matter in shape as promptly as possible.'

* * *

The defendants have assigned numerous errors, but the questions raised by them are: (1) Was the contract sought to be established by the letter of July 8 and the telegram of July 17 unilateral, that is, one where the offer simply required the offeree to do something, not to promise to do something; or, as applied to the facts in this case, was the offer one that only required the offeree to pay the purchase price on or before the 18th of July, 1926, to create a contract?

(2) Was the contract sought to be established a bilateral one, involving mutual promises, that is, an offer and a notification of acceptance; and, if so, was the acceptance unequivocal, unconditional, and without variance?

(3) If a bilateral contract was consummated, was Mr. Hurd's telegram of July 22 notifying Mr. Dickey that the offer had expired a repudiation of the contract and a waiver of Mr. Hurd's right to have Mr. Dickey tender the purchase price before bringing his bill for specific performance?

(4) Did the court err in its decree by requiring the execution of a deed by the executrices before a tender or payment of the purchase money, the purchase price not having been tendered before suit was brought, or thereafter at any time paid into court?

The plaintiff, in his assignment of errors, complains that the court erred in denying his motion to add new parties and in holding that Edith L. Hurd and Lizzie E. Hurd, sole legatees and devisees under the will of Mr. Hurd, were not necessary parties.

As to the first question, we think that the language used by Mr. Hurd in his letter of July 8 makes it reasonably certain that he offered to sell his land on the Savannah river to the plaintiff for \$18,990; that, when he said in that letter: 'My deeds (of that land) call for 1,266 acres and I will sell the same to you for \$15 per acre,' he offered to sell the entire tract covered by his deed estimated to contain 1,266 acres, and that that estimate, not measurement, was the basis of reckoning which fixed the purchase price. This meaning of the offer was not only the one entertained by Mr. Hurd but also by Mr. Dickey, to whom the offer was made; for in his telegram of July 17 he recites that Mr. Hurd's offer is 'to sell me your 1,266 acres in Richmond County on Savannah River at \$15 per acre, etc.'; and in the memorandum of agreement inclosed in his letter of July 20, in confirmation of his telegram, he specifically states: 'The purchase price to be paid for said tract of land is eighteen thousand nine hundred and ninety dollars (\$18,990.00).'

A more difficult question is whether the offer calls for payment of the purchase price, an act of acceptance, on or before July 18; or whether it simply calls for a notice of acceptance. The language of the offer is: 'I will sell the same to you for (having named the price) cash and give you till July 18, 1926, including that day to accept this offer.' Standing alone and apart from the surrounding circumstances, the words 'to accept this offer' are equivocal. They may mean that he would give through July 18 to accept the offer by paying the price fixed; or would give him through that date to accept the offer by giving him notice to that effect. But two letters were put in evidence, written by Mr. Dickey to Mr. Hurd between the 8th and the 17th of July. The first is dated July 12th and the second July 15th. In both of these letters Mr. Dickey clearly discloses that he understood the offer did not require him to pay the purchase price on or before July 18, but to give an answer, notice of acceptance, on or before that day. In the letter of the 12th he says: 'Answering your favor of the 8th inst., I thank you for giving me through the 18th of July to give you an answer about your property. * * * I expect to give you a definite answer about your property before that time,' and later in the same letter he states: 'I will give you an answer within the time you were kind enough to allow me.' And in the letter of July 15th, after explaining difficulties he was having, he stated: 'If possible I am going to give you an answer within the time you have allowed me.' When Mr. Hurd received these communications, he was fully apprised of how Mr. Dickey understood the language of his offer, and, if that was not the meaning which he intended to give to it, it was his duty to have at once informed him that the offer called for payment of the price on or before the 18th of July, and not simply for a notice of acceptance. It was not open to him to lie quietly by until after the time of acceptance had expired and then say my offer called for payment of the price on or before July 18th, and you have not met the requirements. *Goulding v. Hammond* (C.C.), 49 F. 443; *Leete v. Pacific Mill & Mining Co.* (C.C.), 88 F. 957, 969; *Pacific Mill & Mining Co. v. Leete* (C.C.A.), 94 F. 968, 975. We are therefore of the opinion that the contract which the parties undertook to make was a bilateral one. This reduces the second question to the proposition whether the language of the telegram of July 17 shows the acceptance was unequivocal, unconditional, and without variance.

Notes and Questions

1. What if the plaintiff in *Raffles* knew of the existence of multiple ships Peerless but defendant knew only about the October Peerless? Does it matter if plaintiff knows about defendant's subjective understanding? How is that case similar to or different from the dispute in *Dickey v. Hurd*?

2. Read Restatement (Second) of Contracts § 20. What light does the Restatement shed (if any) on question 1 above?

Embry v. Hargadine–McKittrick Dry Goods Co.

105 S.W. 777 (St. Louis Court of Appeals 1907)

GOODE, Judge.

We dealt with this case on a former appeal (115 Mo. App. 130, 91 S. W. 170). It has been retried, and is again before us for the determination of questions not then reviewed. The appellant was an employé of the respondent company under a written contract to expire December 15, 1903, at a salary of \$2,000 per annum. His duties were to attend to the sample department of respondent, of which he was given complete charge. It was his business to select samples for the traveling salesmen of the company, which is a wholesale dry goods concern, to use in selling goods to retail merchants. Appellant contends that on December 23, 1903, he was re-engaged by respondent, through its president, Thos. H. McKittrick, for another year at the same compensation and for the same duties stipulated in his previous written contract. On March 1, 1904, he was discharged, having been notified in February that, on account of the necessity of retrenching expenses, his services and that of some other employés would no longer be required. The respondent company contends that its president never re-employed appellant after the termination of his written contract, and hence that it had a right to discharge him when it chose. The point with which we are concerned requires an epitome of the testimony of appellant and the counter testimony of McKittrick, the president of the company, in reference to the alleged re-employment. Appellant testified: That several times prior to the termination of his written contract on December 15, 1903, he had endeavored to get an understanding with McKittrick for another year, but had been put off from time to time. That on December 23d, eight days after the expiration of said contract, he called on McKittrick, in the latter's office, and said to him that as appellant's written employment had lapsed eight days before, and as there were only a few days between then and the 1st of January in which to seek employment with other firms, if respondent wished to retain his services longer he must have a contract for another year, or he would quit respondent's service then and there. That he had been put off twice before and wanted an understanding or contract at once so that he could go ahead without worry. That McKittrick asked him how he was getting along in his department, and appellant said he was very busy, as they were in the height of the season getting men out--had about 110 salesmen on the line and others in preparation. That McKittrick then said: "Go ahead, you're all right. Get your men out, and don't let that worry you." That appellant took McKittrick at his word and worked

until February 15th without any question in his mind. It was on February 15th that he was notified his services would be discontinued on March 1st. McKittrick denied this conversation as related by appellant, and said that, when accosted by the latter on December 23d, he (McKittrick) was working on his books in order to get out a report for a stockholders' meeting, and, when appellant said if he did not get a contract he would leave, that he (McKittrick) said: "Mr. Embry, I am just getting ready for the stockholders' meeting to-morrow. I have no time to take it up now. I have told you before I would not take it up until I had these matters out of the way. You will have to see me at a later time. I said: 'Go back upstairs and get your men out on the road.' I may have asked him one or two other questions relative to the department, I don't remember. The whole conversation did not take more than a minute."

Embry also swore that, when he was notified he would be discharged, he complained to McKittrick about it, as being a violation of their contract, and McKittrick said it was due to the action of the board of directors, and not to any personal action of his, and that others would suffer by what the board had done as well as Embry. Appellant requested an instruction to the jury setting out, in substance, the conversation between him and McKittrick according to his version, and declaring that those facts, if found to be true, constituted a contract between the parties that defendant would pay plaintiff the sum of \$2,000 for another year, provided the jury believed from the evidence that plaintiff commenced said work believing he was to have \$2,000 for the year's work. This instruction was refused, but the court gave another embodying in substance appellant's version of the conversation, and declaring it made a contract "if you (the jury) find both parties thereby intended and did contract with each other for plaintiff's employment for one year from and including December 23, 1903, at a salary of \$2,000 per annum." Embry swore that, on several occasions when he spoke to McKittrick about employment for the ensuing year, he asked for a renewal of his former contract, and that on December 23d, the date of the alleged renewal, he went into Mr. McKittrick's office and told him his contract had expired, and he wanted to renew it for a year, having always worked under year contracts. Neither the refused instruction nor the one given by the court embodied facts quite as strong as appellant's testimony, because neither referred to appellant's alleged statement to McKittrick that unless he was re-employed he would stop work for respondent then and there.

It is assigned for error that the court required the jury, in order to return a verdict for appellant, not only to find the conversation occurred as appellant swore, but that both parties intended by such conversation to contract with each other for plaintiff's employment for the year from December, 1903, at a salary of \$2,000. If it appeared from the record that there was a dispute between the parties as to the terms on which appellant wanted re-employment, there might

have been sound reason for inserting this clause in the instruction; but no issue was made that they split on terms; the testimony of McKittrick tending to prove only that he refused to enter into a contract with appellant regarding another year's employment until the annual meeting of stockholders was out of the way. Indeed, as to the proposed terms McKittrick agrees with Embry, for the former swore as follows: "Mr. Embry said he wanted to know about the renewal of his contract. Said if he did not have the contract made he would leave." As the two witnesses coincided as to the terms of the proposed re-employment, there was no reason for inserting the above-mentioned clause in the instruction in order that it might be settled by the jury whether or not plaintiff, if employed for one year from December 23, 1903, was to be paid \$2,000 a year. Therefore it remains to determine whether or not this part of the instruction was a correct statement of the law in regard to what was necessary to constitute a contract between the parties; that is to say, whether the formation of a contract by what, according to Embry, was said, depended on the intention of both Embry and McKittrick. Or, to put the question more precisely: Did what was said constitute a contract of re-employment on the previous terms irrespective of the intention or purpose of McKittrick?

Judicial opinion and elementary treatises abound in statements of the rule that to constitute a contract there must be a meeting of the minds of the parties, and both must agree to the same thing in the same sense. Generally speaking, this may be true; but it is not literally or universally true. That is to say, the inner intention of parties to a conversation subsequently alleged to create a contract cannot either make a contract of what transpired, or prevent one from arising, if the words used were sufficient to constitute a contract. In so far as their intention is an influential element, it is only such intention as the words or acts of the parties indicate; not one secretly cherished which is inconsistent with those words or acts. The rule is thus stated by a text-writer, and many decisions are cited in support of his text: "The primary object of construction in contract law is to discover the intention of the parties. This intention in express contracts is, in the first instance, embodied in the words which the parties have used and is to be deduced therefrom. This rule applies to oral contracts, as well as to contracts in writing, and is the rule recognized by courts of equity." 2 Paige, Contracts, § 1104. So it is said in another work: "Now this measure of the contents of the promise will be found to coincide in the usual dealings of men of good faith and ordinary competence, both with the actual intention of the promisor and with the actual expectation of the promisee. But this is not a constant or a necessary coincidence. In exceptional cases a promisor may be bound to perform something which he did not intend to promise, or a promisee may not be entitled to require that performance which he understood to be promised to him." WALDS-POLLOCK, CONTRACTS, 309 (3d Ed.). In *Brewington v. Mesker*, 51 Mo. App. 348, 356 (1892), it is said

that the meeting of minds, which is essential to the formation of a contract, is not determined by the secret intention of the parties, but by their expressed intention, which may be wholly at variance with the former. In *Esterly Harvesting Machine Co. v. Criswell*, 58 Mo. App. 471 (1894, an instruction was given on the issue of whether the sale of a machine occurred, which told the jury that an intention on the part of the seller to pass the title, and of the purchaser to receive and accept the machine for the purpose of making it his own, was essential to a sale, and if the jury believed such intention did not exist in the minds of both parties at the time, and was not made known to each other, then there was no sale, notwithstanding the delivery. In commenting on this instruction, the court said: "The latter clause of the instruction is erroneous and misleading. It is true that in every case of purchase the question of sale or no sale is a matter of intention; but such intention must always be determined by the conduct, acts, and express declarations of the parties, and not by the secret intention existing in the mind or minds of the contracting parties. If the validity of such a contract depended upon secret intentions of the parties, then no oral contract of sale could be relied on with safety." *Esterly Harvesting Machine Co. v. Criswell*, 58 Mo., loc. cit. 473. In *Smith v. Hughes*, L. R. 6 Q. B. 597, 607, it was said: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." And that doctrine was adopted in *Phillip v. Gallant*, 62 N. Y. 256 (1875). In 9 Cyc. 245, we find the following text: "The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real, but unexpressed, state of his mind on the subject." Even more pointed was the language of Baron Bramwell in *Brown v. Hare*, 3 Hurlst. & N. *484, *495: "Intention is immaterial till it manifests itself in an act. If a man intends to buy, and says so to the intended seller, and he intends to sell, and says so to the intended buyer, there is a contract of sale; and so there would be if neither had the intention." In view of those authorities, we hold that, though McKittrick may not have intended to employ Embry by what transpired between them according to the latter's testimony, yet if what McKittrick said would have been taken by a reasonable man to be an employment, and Embry so understood it, it constituted a valid contract of employment for the ensuing year.

The next question is whether or not the language used was of that character, namely, was such that Embry, as a reasonable man, might consider he was re-employed for the ensuing year on the previous terms, and act accordingly. We do not say that in every instance it would be for the court to pronounce on this question, because, peradventure, instances might arise in which there would be such an ambiguity in the language relied on to show an assent by the obligor to the proposal of the obligee that it would be for the jury to say whether a reasonable mind would take it to signify acceptance of the proposal. *Belt v. Goode*, 31 Mo. 128 (1860); *Davies v. Baldwin*, 66 Mo. App. 577 (1896). In *Lancaster v. Elliott*, 28 Mo. App. 86, 92 (1887), the opinion, as to the immediate point, reads: "The interpretation of a contract in writing is always a matter of law for determination by the court, and equally so, upon like principles, is the question what acts and words, in nearly every case, will suffice to constitute an acceptance by one party, of a proposal submitted by the other, so that a contract or agreement thereby becomes matured." The general rule is that it is for the court to construe the effect of writings relied on to make a contract, and also the effect of unambiguous oral words. *Belt v. Goode*, *supra*; *Brannock v. Elmore*, 114 Mo. 55, 21 S. W. 451 (1893); *Norton v. Higbee*, 38 Mo. App. 467, 471 (1889). However, if the words are in dispute, the question of whether they were used or not is for the jury. *Belt v. Goode*, *supra*. With these rules of law in mind, let us recur to the conversation of December 23d between Embry and McKittrick as related by the former. Embry was demanding a renewal of his contract, saying he had been put off from time to time, and that he had only a few days before the end of the year in which to seek employment from other houses, and that he would quit then and there unless he was reemployed. McKittrick inquired how he was getting along with the department, and Embry said they, i. e., the employés of the department, were very busy getting out salesmen. Whereupon McKittrick said: "Go ahead, you are all right. Get your men out, and do not let that worry you." We think no reasonable man would construe that answer to Embry's demand that he be employed for another year, otherwise than as an assent to the demand, and that Embry had the right to rely on it as an assent. The natural inference is, though we do not find it testified to, that Embry was at work getting samples ready for the salesmen to use during the ensuing season. Now, when he was complaining of the worry and mental distress he was under because of his uncertainty about the future, and his urgent need, either of an immediate contract with respondent, or a refusal by it to make one, leaving him free to seek employment elsewhere, McKittrick must have answered as he did for the purpose of assuring appellant that any apprehension was needless, as appellant's services would be retained by the respondent. The answer was unambiguous, and we rule that if the conversation was according to appellant's version, and he understood he was employed, it constituted in law a valid contract of re-employment, and the court erred in making the formation of a contract depend on a finding that both parties intended to make

one. It was only necessary that Embry, as a reasonable man, had a right to and did so understand.

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

The judgment is reversed, and the cause remanded. All concur.

Notes and Questions

1. *Raffles v. Wichelhaus* has been the subject of much analysis over the years. The language might lead the reader to presume courts are looking for a match in the subjective intents of the parties. But Justice Oliver Wendell Holmes rejected this view. For him, the case turned on an objective approach. What matters is not what the parties thought, but what they said, and what a reasonable person would conclude based on that representation. Which view (subjective or objective) informs the holding in *Embry v. Hargadine-McKittrick Dry Goods Co.*?
2. The default employment structure in the United States is at will employment, meaning the employee can leave whenever she wishes, and the employer can ask the employee to leave whenever he wishes. But parties can contract around that default. Contracts negotiated through collective bargaining agreements, like those negotiated by unions, change the at will default to a “just cause” structure that provides more protection to employees. See Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LAB. L. & POL’Y J. 313, 348 (2007).