Civil Law & Common Law

Historical Perspective

I. Common Law v Civil Law- Historical Perspective

II. Civil Law – Importance of Codification

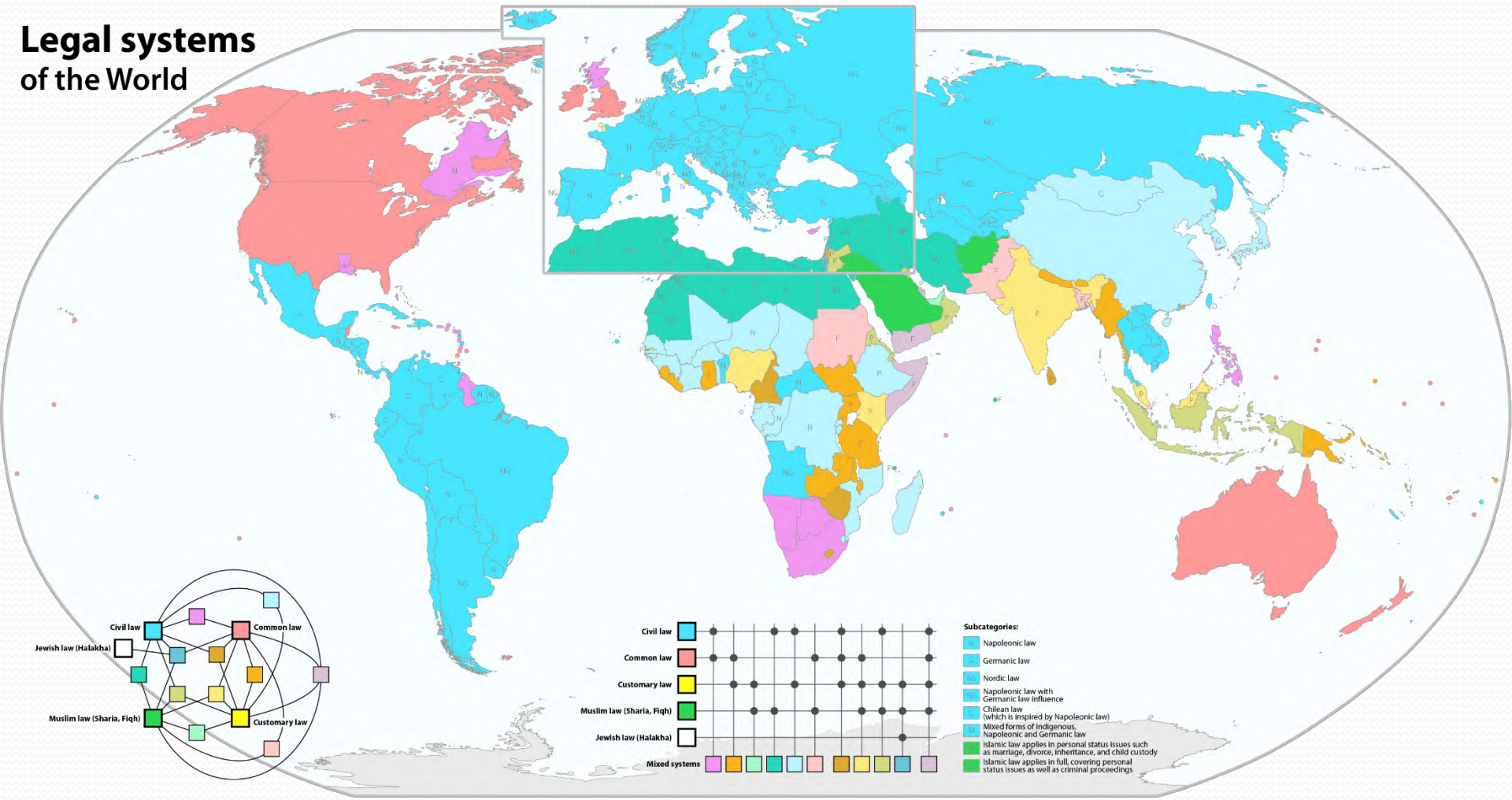
III. Common Law – Influence on resolving disputes

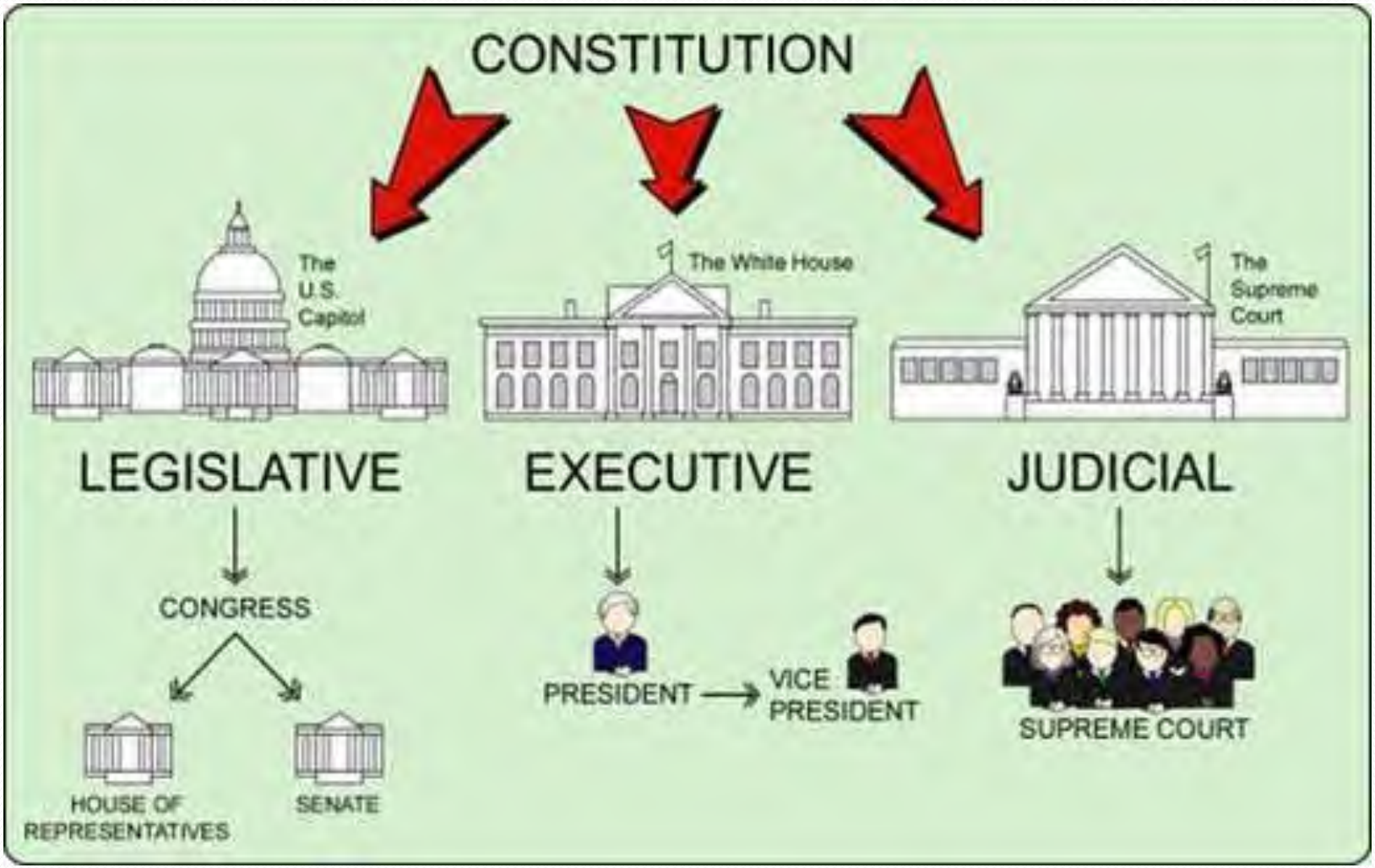
IV. More on Role of Courts/Precedent

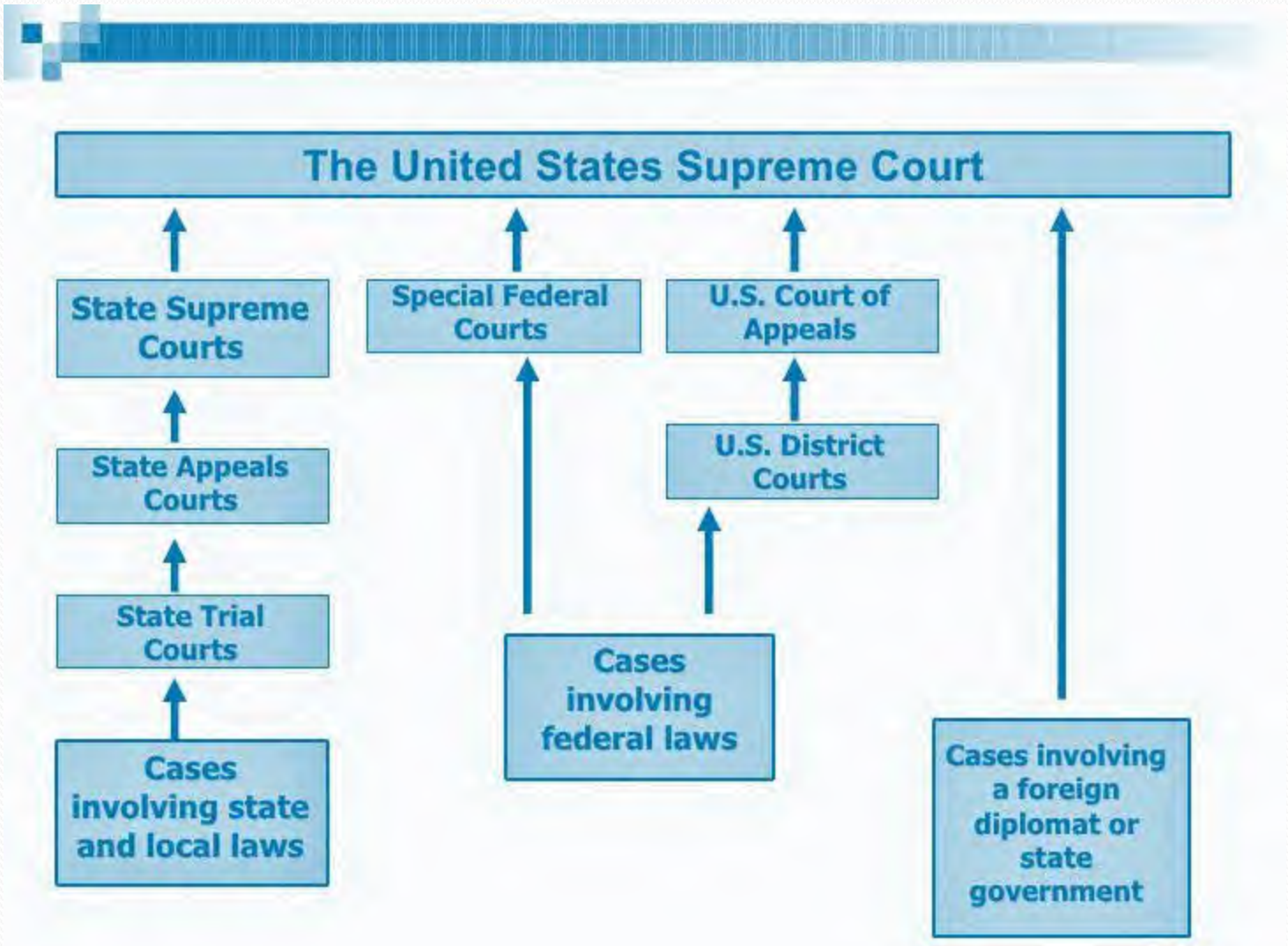
V. Scholarly Writing (2ndary Authority)

VI. Definitions and Distinctions

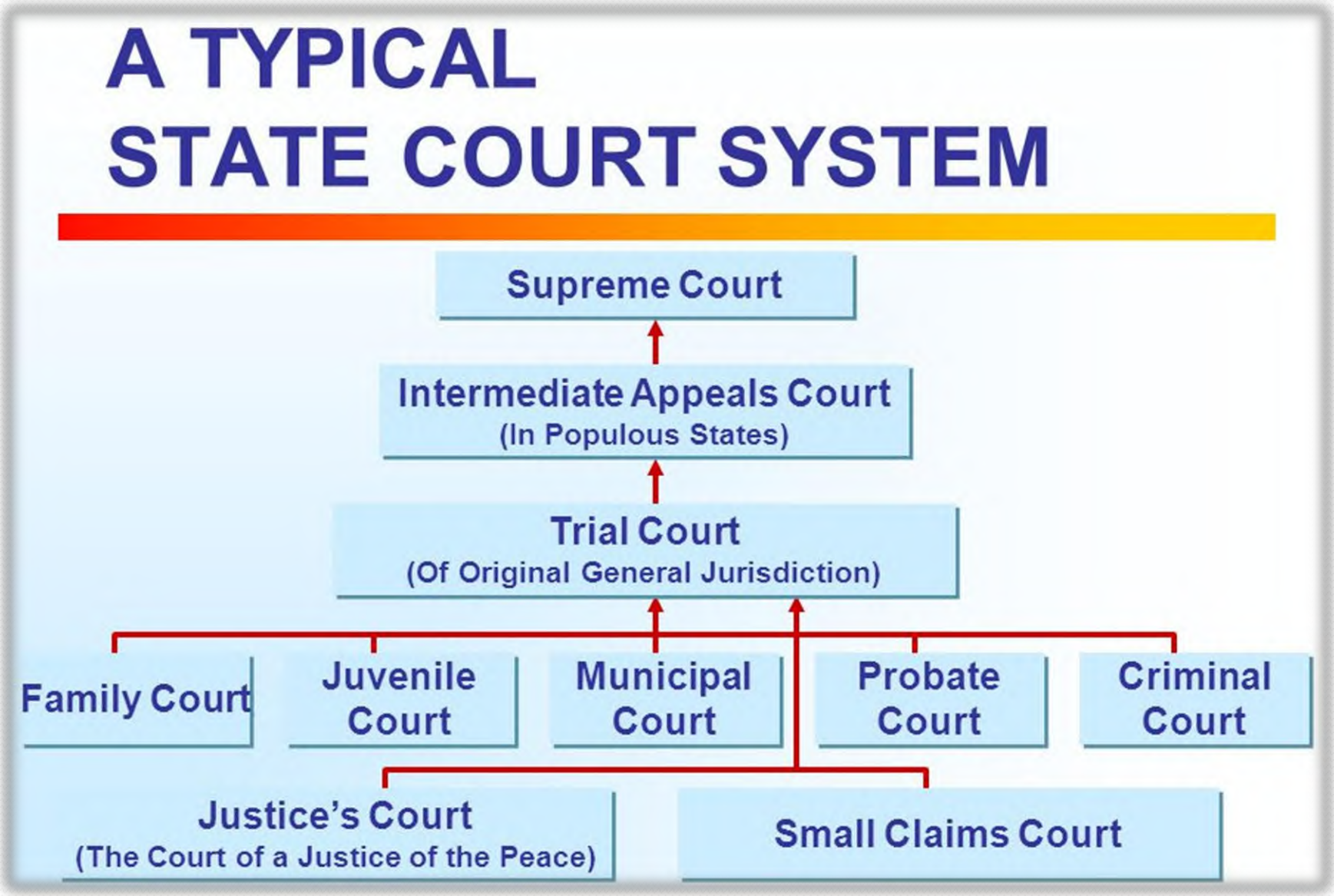
Legal systems
of the World



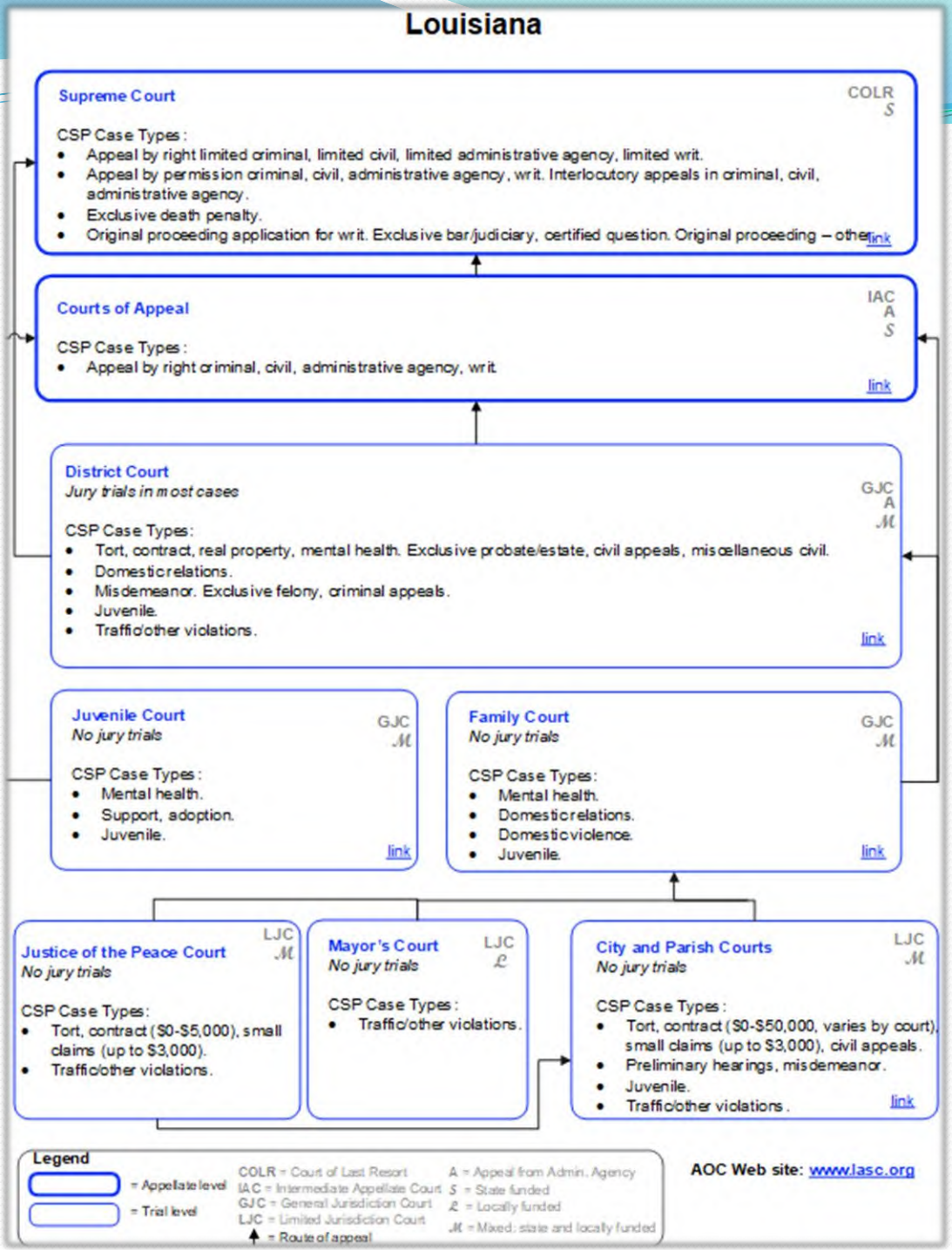

CONSTITUTION
The U.S. Capitol
The White House
The Supreme Court
LEGISLATIVE
EXECUTIVE
JUDICIAL
CONGRESS
PRESIDENT
VICE PRESIDENT
SUPREME COURT
HOUSE OF REPRESENTATIVES
SENATE


The United States Supreme Court
State Supreme Courts
State Appeals Courts
State Trial Courts
Cases involving state and local laws
Special Federal Courts
U.S. Court of Appeals
U.S. District Courts
Cases involving federal laws
Cases involving a foreign diplomat or state government

A TYPICAL STATE COURT SYSTEM



Louisiana


Supreme Court
COLR
S
CSP Case Types:
• Appeal by right limited criminal, limited civil, limited administrative agency, limited writ.
• Appeal by permission criminal, civil, administrative agency, writ. Interlocutory appeals in criminal, civil, administrative agency.
• Exclusive death penalty.
• Original proceeding application for writ. Exclusive bar/judiciary, certified question. Original proceeding – other
link
Courts of Appeal
IAC
A
S
CSP Case Types:
• Appeal by right criminal, civil, administrative agency, writ.
link
District Court
Jury trials in most cases
GJC
A
M
CSP Case Types:
• Tort, contract, real property, mental health. Exclusive probate/estate, civil appeals, miscellaneous civil.
• Domestic relations.
• Misdemeanor. Exclusive felony, criminal appeals.
• Juvenile.
• Traffic/other violations.
link
Juvenile Court
No jury trials
GJC
M
CSP Case Types:
• Mental health.
• Support, adoption.
• Juvenile.
link
Family Court
No jury trials
GJC
M
CSP Case Types:
• Mental health.
• Domestic relations.
• Domestic violence.
• Juvenile.
link
Justice of the Peace Court
No jury trials
LJC
M
CSP Case Types:
• Tort, contract ($0-$5,000), small claims (up to $3,000).
• Traffic/other violations.
Mayor's Court
No jury trials
LJC
L
CSP Case Types:
• Traffic/other violations.
City and Parish Courts
No jury trials
LJC
M
CSP Case Types:
• Tort, contract ($0-$50,000, varies by court), small claims (up to $3,000), civil appeals.
• Preliminary hearings, misdemeanor.
• Juvenile.
• Traffic/other violations.
link
Legend
= Appellate level
= Trial level
COLR = Court of Last Resort
IAC = Intermediate Appellate Court
GJC = General Jurisdiction Court
LJC = Limited Jurisdiction Court
= Route of appeal
A = Appeal from Admin. Agency
S = State funded
L = Locally funded
M = Mixed: state and locally funded
AOC Web site: www.lasc.org

Contracts

RESTATEMENT, SECOND

§1. CONTRACT DEFINED

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

§2. PROMISE; PROMISOR; PROMISEE; BENEFICIARY

(1) A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.

(2) The person manifesting the intention is the promisor.

(3) The person to whom the manifestation is addressed is the promisee.

(4) Where performance will benefit a person other than the promisee, that person is a beneficiary.

Contracts

Contract Elements

(Def. Reduced)

Offer

+

Acceptance

Mutual Assent

+

Consideration

Enforceable Contract

Contracts

RESTATEMENT (SECOND)

§22. MODE OF ASSENT: OFFER AND ACCEPTANCE

(1) The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.

(2) A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.

§24. OFFER DEFINED

An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

Contracts

ACCEPTANCE

RESTATEMENT (SECOND) §50.

ACCEPTANCE OF OFFER DEFINED; ACCEPTANCE BY PERFORMANCE; ACCEPTANCE BY PROMISE

(1) Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.

(2) Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise.

(3) Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.

Contracts

ACCEPTANCE

RESTATEMENT (SECOND) §30
FORM OF ACCEPTANCE INVITED

(1) An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act, or may empower the offeree to make a selection of terms in his acceptance.

(2) Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.

Contracts

Consideration

RESTATEMENT, 2nd § 17. Requirement of a Bargain

(1) Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration

(2) Whether or not there is a bargain a contract may be formed under special rules applicable to formal contracts or under the rules stated in §§ 82-94.

Contracts

Consideration

RESTATEMENT, 2nd §71.
Requirement of Exchange; Types of Exchange

(1) To constitute consideration, a performance or a return promise must be bargained for.

(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise….

(3) The performance may consist of

(a) an act other than a promise, or

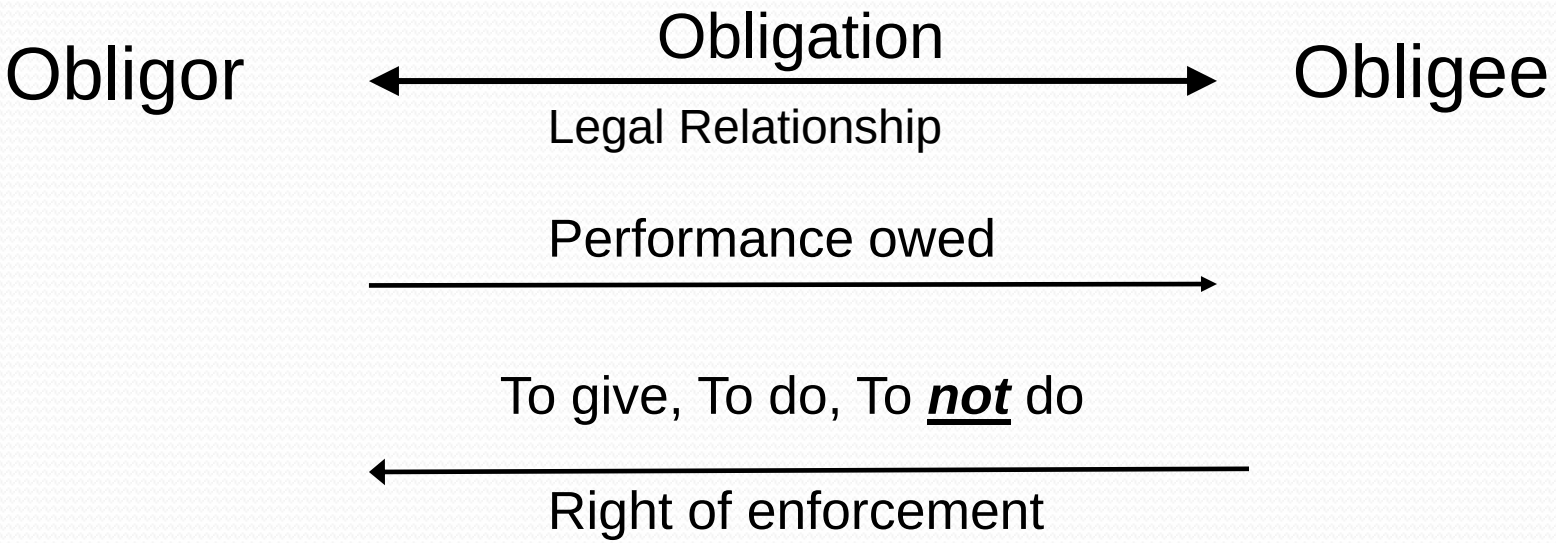
(b) a forbearance, or

(c) the creation, modification,

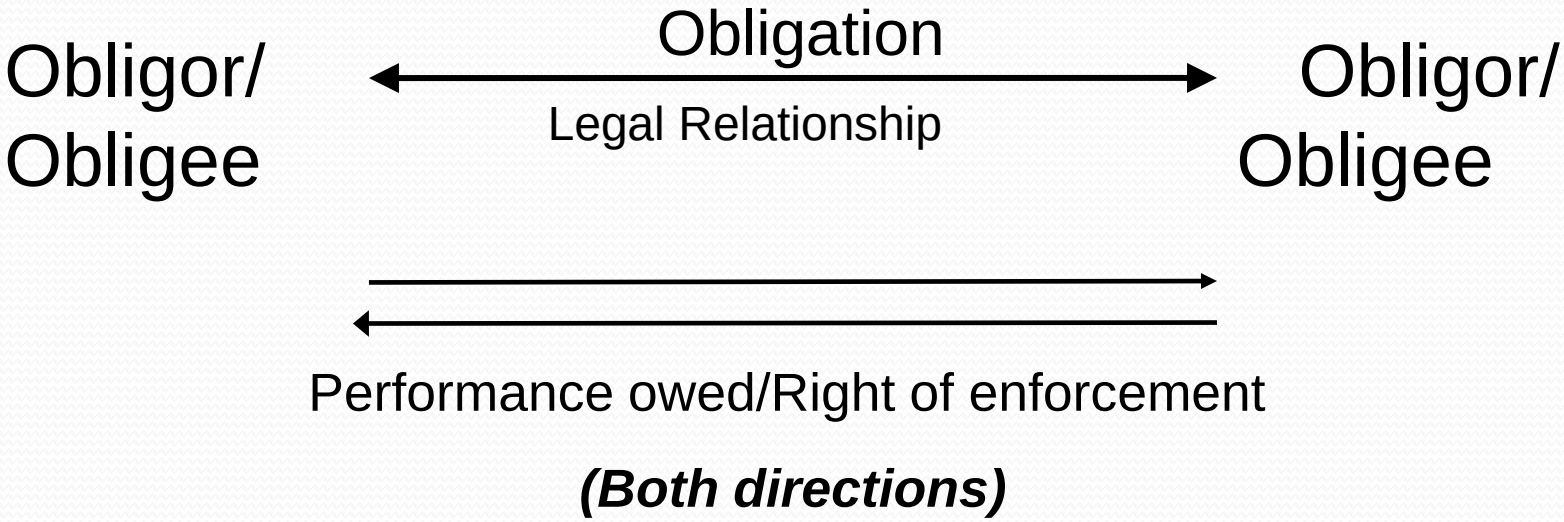
or destruction of a legal relation.

(4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

Obligations



Obligations



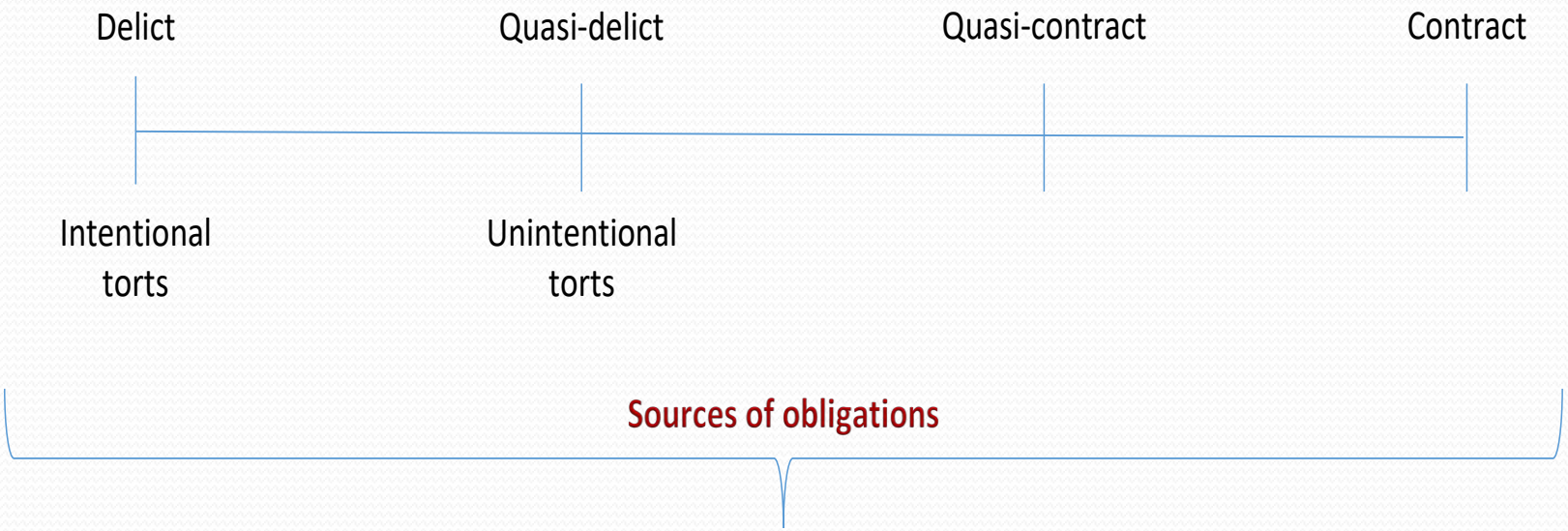
Obligations

Obligor/
Obligee

Obligation

Legal Relationship

Obligor/
Obligee



Conventional Obligation (Contract) Elements

CAPACITY

+

MUTUAL ~~ASSENT~~ CONSENT

(Offer + Acceptance)

+

CAUSE ~~CONSIDERATION~~

+

OBJECT

ENFORCEABLE CONVENTIONAL OBLIGATION (CONTRACT)

88 F.Supp.2d 116
United States District Court,
S.D. New York.

John D.R. LEONARD, Plaintiff,
v.
PEPSICO, INC., Defendant.

Nos. 96 Civ. 5320(KMW), 96 Civ. 9069(KMW).
|
Aug. 5, 1999.

***117** OPINION & ORDER

KIMBA M. WOOD, District Judge.

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

I. Background

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

A. *The Alleged Offer*

Because whether the television commercial constituted an offer is the central question in this case, the Court will describe the commercial in detail. The commercial opens upon an idyllic, suburban morning, where the chirping of birds in sun-dappled trees welcomes a paperboy on his morning route. As the newspaper hits the stoop of a conventional two-story house, the tattoo of a military drum introduces the subtitle, "MONDAY 7:58 AM." The stirring strains of a martial air mark the appearance of a well-coiffed teenager preparing to leave for school, dressed in a shirt emblazoned with the Pepsi logo, a red-white-and-blue ball. While the teenager confidently preens, the military drumroll again sounds as the subtitle "T–SHIRT 75 PEPSI POINTS" scrolls across the screen. Bursting from his room, the teenager strides down the hallway wearing a leather jacket. The drumroll sounds again, as the subtitle "LEATHER JACKET 1450 PEPSI POINTS" appears. The teenager opens the door of his house and, unfazed by the glare of the early morning sunshine, puts on a pair of sunglasses. The drumroll then accompanies the subtitle "SHADES 175 PEPSI POINTS." A voiceover then intones, "Introducing the new Pepsi Stuff catalog," as the camera focuses on the cover of the catalog. (*See* Defendant's Local Rule 56.1 Stat., Exh. A (the "Catalog").)[2]

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

The teenager opens the cockpit of the fighter and can be seen, helmetless, holding a Pepsi. "[L]ooking very pleased with himself," (Pl. Mem. at 3,) the teenager exclaims, "Sure beats the bus," and chortles. The military drumroll sounds a final time, as the following words appear: "HARRIER FIGHTER 7,000,000 PEPSI POINTS." A few seconds later, the following appears in

more stylized script: "Drink Pepsi—Get Stuff." With that message, the music and the commercial end with a triumphant flourish.

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

The rear foldout pages of the Catalog contain directions for redeeming Pepsi Points for merchandise. (*See* Catalog, at rear foldout pages.) These directions note that merchandise may be ordered "only" with the original Order Form. (*See id.*) The Catalog notes that in the event that a consumer lacks enough Pepsi Points to obtain a desired item, additional Pepsi Points may be purchased for ten cents each; however, at least fifteen original Pepsi Points must accompany each order. (*See id.*)

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

B. *Plaintiff's Efforts to Redeem the Alleged Offer*

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

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

> The item that you have requested is not part of the Pepsi Stuff collection. It is not included in the catalogue or on the order form, and only catalogue merchandise can be redeemed under this program.
>
> The Harrier jet in the Pepsi commercial is fanciful and is simply included to create a humorous and entertaining ad. We apologize for any misunderstanding or confusion that you may have experienced and are enclosing some free product coupons for your use.

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

> Your letter of May 7, 1996 is totally unacceptable. We have reviewed the video tape of the Pepsi Stuff commercial ... and it clearly offers the new Harrier jet for 7,000,000 Pepsi Points. Our client followed your rules explicitly....
>
> This is a formal demand that you honor your commitment and make immediate arrangements to transfer the new Harrier jet to our client. If we do not receive transfer instructions within ten (10) business days of the date of this letter you will leave us no choice but to file an appropriate action against Pepsi....

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

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

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

Litigation of this case initially involved two lawsuits, the first a declaratory judgment action brought by PepsiCo in this district (the "declaratory judgment action"), and the second an action brought by Leonard in Florida state court (the "Florida action").[3] . . . . With these [actions] having been [consolidated], PepsiCo moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. The present motion thus follows three years of jurisdictional and procedural wrangling.

II. Discussion

A. *The Legal Framework*

. . . .

B. *Defendant's Advertisement Was Not An Offer*

1. *Advertisements as Offers*

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

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

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

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

1 Arthur Linton Corbin & Joseph M. Perillo, *Corbin on Contracts* § 2.4, at 116–17 (rev. ed.1993) (emphasis added); *see also* 1 E. Allan Farnsworth, *Farnsworth on Contracts* § 3.10, at 239 (2d ed.1998); 1 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 4:7, at 286–87 (4th ed.1990). New York courts adhere to this general principle. *See* *Lovett v. Frederick Loeser & Co.*, 124 Misc. 81, 207 N.Y.S. 753, 755 (N.Y.Mun.Ct.1924) (noting that an "advertisement is nothing but an invitation to enter into negotiations, and is

not an offer which may be turned into a contract by a person who signifies his intention to purchase some of the articles mentioned in the advertisement"); *see also Geismar v. Abraham & Strauss*, 109 Misc.2d 495, 439 N.Y.S.2d 1005, 1006 (N.Y.Dist.Ct.1981) (reiterating *Lovett* rule); *People v. Gimbel Bros.*, 202 Misc. 229, 115 N.Y.S.2d 857, 858 (N.Y.Sp.Sess.1952) (because an "[a]dvertisement does not constitute an offer of sale but is solely an invitation to customers to make an offer to purchase," defendant not guilty of selling property on Sunday).

[4] [5] An advertisement is not transformed into an enforceable offer merely by a potential offeree's expression of willingness to accept the offer through, among other means, completion of an order form. In *Mesaros v. United States*, 845 F.2d 1576 (Fed.Cir.1988), for example, the plaintiffs sued the United States Mint for failure to deliver a number of Statue of Liberty commemorative coins that they had ordered. When demand for the coins proved unexpectedly robust, a number of individuals who had sent in their orders in a timely fashion were left empty-handed. *See id.* at 1578–80. The court began by noting the "well-established" rule that advertisements and order forms are "mere notices and solicitations for offers which create no power of acceptance in the recipient." *Id.* at 1580; *see also Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 538–39 (9th Cir.1983) ("The weight of authority is that purchase orders such as those at issue here are not enforceable contracts until they are accepted by the seller.");[5] *Restatement (Second) of Contracts* § 26 ("A manifestation of willingness to enter a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent."). The spurned coin collectors could not maintain a breach of contract action because no contract would be formed until the advertiser accepted the order form and processed payment. *See id.* at 1581; *see also Alligood v. Procter & Gamble*, 72 Ohio App.3d 309, 594 N.E.2d 668 (1991) (finding that no offer was made in promotional campaign for baby diapers, in which consumers were to redeem teddy bear proof-of-purchase symbols for catalog merchandise); ***124** *Chang v. First Colonial Savings Bank*, 242 Va. 388, 410 S.E.2d 928 (1991) (newspaper advertisement for bank settled the terms of the offer once bank accepted plaintiffs' deposit, notwithstanding bank's subsequent effort to amend the terms of the offer). Under these principles, plaintiff's letter of March 27, 1996, with the Order Form and the appropriate number of Pepsi Points, constituted the offer. There would be no enforceable contract until defendant accepted the Order Form and cashed the check.

The exception to the rule that advertisements do not create any power of acceptance in potential offerees is where the advertisement is "clear, definite, and explicit, and leaves nothing open for negotiation," in that circumstance, "it constitutes an offer, acceptance of which will complete the contract." *Lefkowitz v. Great Minneapolis Surplus Store*, 251 Minn. 188, 86 N.W.2d 689, 691 (1957). In *Lefkowitz*, defendant had published a newspaper announcement stating: "Saturday 9 AM Sharp, 3 Brand New Fur Coats, Worth to $100.00, First Come First Served $1 Each." *Id.* at 690. Mr. Morris Lefkowitz arrived at the store, dollar in hand, but was informed that under defendant's "house rules," the offer was open to ladies, but not gentlemen. *See id.* The court ruled that because plaintiff had fulfilled all of the terms of the advertisement and the advertisement was specific and left nothing open for negotiation, a contract had been formed. *See id.; see also Johnson v. Capital City Ford Co.*, 85 So.2d 75, 79 (La.Ct.App.1955) (finding that newspaper advertisement was sufficiently certain and definite to constitute an offer).

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

Mesaros, 845 F.2d at 1581. "A customer would not usually have reason to believe that the shopkeeper intended exposure to the risk of a multitude of acceptances resulting in a number of contracts exceeding the shopkeeper's inventory." Farnsworth, *supra*, at 242. There was no such danger in *Lefkowitz*, owing to the limitation "first come, first served."

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

***125** 2. *Rewards as Offers*

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

Long a staple of law school curricula, *Carbolic Smoke Ball* owes its fame not merely to "the comic and slightly mysterious object involved," A.W. Brian Simpson. *Quackery and Contract Law: Carlill v. Carbolic Smoke Ball Company (1893)*, in *Leading Cases in the Common Law* 259, 281 (1995), but also to its role in developing the law of unilateral offers. The case arose during the London influenza epidemic of the 1890s. Among other advertisements of the time, for Clarke's World Famous Blood Mixture, Towle's Pennyroyal and Steel Pills for Females, Sequah's Prairie Flower, and Epp's Glycerine Jube–Jubes, *see* Simpson, *supra*, at 267, appeared solicitations for the Carbolic Smoke Ball. The specific advertisement that Mrs. Carlill saw, and relied upon, read as follows:

> 100 £ reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any diseases caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. 1000 £ is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter.
>
> During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

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

Affirming the lower court's decision, Lord Justice Lindley began by noting that the advertisement was an express promise to pay £ 100 in the event that a consumer of the Carbolic Smoke Ball was stricken with influenza. *See id.* at 261. The advertisement was construed as offering a reward because it sought to induce performance, unlike an invitation to negotiate, which seeks a reciprocal promise. As Lord Justice Lindley explained, "advertisements offering rewards ... are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer." *Id.* at 262; *see also id.* at 268 (Bowen, L.J.).[9] Because Mrs. Carlill had complied with the terms of the offer, yet ***126** contracted influenza, she was entitled to £>> 100.

Like *Carbolic Smoke Ball*, the decisions relied upon by plaintiff involve offers of reward. In *Barnes v. Treece*, 15 Wash.App. 437, 549 P.2d 1152 (1976), for example, the vice-president of a punchboard distributor, in the course of hearings before the Washington State Gambling Commission, asserted that, " 'I'll put a hundred thousand dollars to anyone to find a crooked board. If they find it, I'll pay it.' " *Id.* at 1154. Plaintiff, a former bartender, heard of the offer and located two crooked punchboards. Defendant, after reiterating that the offer was serious, providing plaintiff with a receipt for the punchboard on company stationery, and assuring plaintiff that the reward was being held in escrow, nevertheless repudiated the offer. *See* *id.* at 1154. The court ruled that the offer was valid and that plaintiff was entitled to his reward. *See* *id.* at 1155. The plaintiff in this case also cites cases involving prizes for skill (or luck) in the game of golf. *See*

Las Vegas Hacienda v. Gibson, 77 Nev. 25, 359 P.2d 85 (1961) (awarding $5,000 to plaintiff, who successfully shot a hole-in-one); *see also* *Grove v. Charbonneau Buick–Pontiac, Inc.*, 240 N.W.2d 853 (N.D.1976) (awarding automobile to plaintiff, who successfully shot a hole-in-one).

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

In the present case, the Harrier Jet commercial did not direct that anyone who appeared at Pepsi headquarters with 7,000,000 Pepsi Points on the Fourth of July would receive a Harrier Jet. Instead, the commercial urged consumers to accumulate Pepsi Points and to refer to the Catalog to determine how they could redeem their Pepsi Points. The commercial sought a reciprocal promise, expressed through acceptance of, and compliance with, the terms of the Order Form. As noted previously, the Catalog contains no mention of the Harrier Jet. Plaintiff states that he "noted that the Harrier Jet was not among the items described in the catalog, but this did not affect [his] understanding of the offer." (Pl. Mem. at 4.) It should have.[10]

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

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

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

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

Plaintiff's understanding of the commercial as an offer must also be rejected because the Court finds that no objective person could reasonably have concluded that the commercial actually offered consumers a Harrier Jet.

1. *Objective Reasonable Person Standard*

[7] In evaluating the commercial, the Court must not consider defendant's subjective intent in making the commercial, or plaintiff's subjective view of what the commercial offered, but what an objective, reasonable person would have understood the commercial to convey.

See *Kay–R Elec. Corp. v. Stone & Webster Constr. Co.*, 23 F.3d 55, 57 (2d Cir.1994) ("[W]e are not concerned with what was going through the heads of the parties at the time [of the alleged contract]. Rather, we are talking about the objective principles of contract law."); *Mesaros*, 845 F.2d at 1581 ("A basic rule of contracts holds that whether an offer has been made depends on the objective reasonableness of the alleged offeree's belief that the advertisement or solicitation was intended as an offer."); Farnsworth, *supra*, § 3.10, at 237; Williston, *supra*, § 4:7 at 296–97.

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

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

Corbin on Contracts, § 1.11 at 30 (emphasis added). An obvious joke, of course, would not give rise to a contract. *See, e.g.*, *Graves v. Northern N.Y. Pub. Co.*, 260 A.D. 900, 22 N.Y.S.2d 537 (1940) (dismissing claim to offer of $1000, which appeared in the "joke column" of the newspaper, to any person who could provide a commonly available phone number). On the other hand, if there is no indication that the offer is "evidently in jest," and that an objective, reasonable person would find that the offer was serious, then there may be a valid offer. *See* *Barnes*, 549 P.2d at 1155 ("[I]f the jest is not apparent and a reasonable hearer would believe that an offer was being made, then the speaker risks the formation of a contract which was not intended."); *see also* *Lucy v. Zehmer*, 196 Va. 493, 84 S.E.2d 516, 518, 520 (1954) ***128** (ordering specific performance of a contract to purchase a farm despite defendant's protestation that the transaction was done in jest as " 'just a bunch of two doggoned drunks bluffing' ").

2. *Necessity of a Jury Determination*

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

Plaintiff's argument that his claim must be put to a jury is without merit. *Gallagher* involved a claim of sexual harassment in which the defendant allegedly invited plaintiff to sit on his lap, gave her inappropriate Valentine's Day gifts, told her that "she brought out feelings that he had not had since he was sixteen," and "invited her to help him feed the ducks in the pond, since he was 'a bachelor for the evening.' " *Gallagher*, 139 F.3d at 344. The court concluded that a jury determination was particularly appropriate because a federal judge lacked "the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications." *Id.* at 342. This case, in contrast, presents a question of whether there was an offer to enter into a contract, requiring the Court to determine how a reasonable, objective person would have understood defendant's commercial. Such an inquiry is commonly performed by courts on a motion for summary judgment. *See* *Krumme*, 143 F.3d at 83; *Bourque*, 42 F.3d at 708; *Wards Co.*, 761 F.2d at 120.

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

[9] Plaintiff's insistence that the commercial appears to be a serious offer requires the Court to explain why the commercial is funny. Explaining why a joke is funny is a daunting task; as the essayist E.B. White has remarked,

"Humor can be dissected, as a frog can, but the thing dies in the process...."[11] The commercial is the embodiment of what defendant appropriately characterizes as "zany humor." (Def. Mem. at 18.)

First, the commercial suggests, as commercials often do, that use of the advertised product will transform what, for most youth, can be a fairly routine and ordinary experience. The military tattoo and stirring martial music, as well as the use of subtitles in a Courier font that scroll terse messages across the screen, such as "MONDAY 7:58 AM," evoke military and espionage thrillers. The implication of the commercial is that Pepsi Stuff merchandise will inject drama and moment into hitherto unexceptional lives. The commercial in this case thus makes the exaggerated claims similar to those of many television advertisements: that by consuming the featured clothing, car, beer, or potato chips, one will become attractive, stylish, desirable, and admired by all. A reasonable viewer would understand such advertisements as mere puffery, not as statements of fact, *see, e.g.*, *Hubbard v. General Motors Corp.*, 95 Civ. 4362(AGS), 1996 WL 274018, at *6 (S.D.N.Y. May 22, 1996) (advertisement describing automobile as "Like a Rock," was mere puffery, not a warranty of quality); *Lovett*, 207 N.Y.S. at 756; and refrain from interpreting the promises of the commercial as being literally true.

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

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

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

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

***130** Plaintiff argues that a reasonable, objective person would have understood the commercial to make a serious offer of a Harrier Jet because there was "absolutely no distinction in the manner" (Pl. Mem. at 13,) in which the items in the commercial were presented. Plaintiff also relies upon a press release highlighting the promotional campaign, issued by defendant, in which "[n]o mention is made by [defendant] of humor, or anything of the sort."

(*Id.* at 5.) These arguments suggest merely that the humor of the promotional campaign was tongue in cheek. Humor is not limited to what Justice Cardozo called "[t]he rough and boisterous joke ... [that] evokes its own guffaws." *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 483, 166 N.E. 173, 174 (1929). In light of the obvious absurdity of the commercial, the Court rejects plaintiff's argument that the commercial was not clearly in jest.

4. *Plaintiff's Demands for Additional Discovery*

[10] In his Memorandum of Law, and in letters to the Court, plaintiff argues that additional discovery is necessary on the issues of whether and how defendant reacted to plaintiff's "acceptance" of their "offer"; how defendant and its employees understood the commercial would be viewed, based on test-marketing the commercial or on their own opinions; and how other individuals actually responded to the commercial when it was aired. (*See* Pl. Mem. at 1–2; Letter of David E. Nachman to the Hon. Kimba M. Wood, Apr. 5, 1999.)

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

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

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

. . . .

III. Conclusion

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

For the reasons stated above, the Court grants defendant's motion for summary judgment. The Clerk of Court is instructed to close these cases. Any pending motions are moot.

All Citations

88 F.Supp.2d 116, 39 UCC Rep.Serv.2d 1

Footnotes

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

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

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

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

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

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

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

[7] The reservation of the details of the offer in this case distinguishes it from *Payne v. Lautz Bros. & Co.,* 166 N.Y.S. 844 (N.Y.City Ct.1916). In *Payne,* a stamp and coupon broker purchased massive quantities of coupons produced by defendant, a soap company, and tried to redeem them for 4,000 round-trip tickets to a local beach. The court ruled for plaintiff, noting that the advertisements were "absolutely unrestricted. It contained no reference whatever to any of its previous advertising of any form." *Id.* at 848. In the present case, by contrast, the commercial explicitly reserved the details of the offer to the Catalog.

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

[9] *Carbolic Smoke Ball* includes a classic formulation of this principle: "If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write a note saying that they have

accepted my proposal?" *Carbolic Smoke Ball,* 1 Q.B. at 270 (Bowen, L.J.).

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

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

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

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

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

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

65 La. B.J. 378

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Feature

New Orleans Celebrates Tricentennial!
Ilijana Todorovic[a1]
On Behalf of the New Orleans Bar Association

THE UNIQUENESS OF LOUISIANA'S LEGAL HERITAGE: A HISTORICAL PERSPECTIVE

How many times have you heard Louisianians say, "Our law is different. It's the Napoleonic Code." While it is true that the "civil" law in our state differs from the common law in other sister states, it would be inaccurate to refer to it as "the Napoleonic Code" or as the law derived (solely) therefrom.[1] Even numerous attorneys today erroneously believe that civil law is simply the law embodied in civil codes, originating in Europe on the eve of the 19th century. In fact, civil law had already been highly developed throughout most of Europe before the enactment of the renowned Napoleonic Code, or any civil code for that matter. Indeed, civil law can be traced all the way back to the middle of the 5th century B.C. and "The Twelve Tables,"[2] the first-ever written expression of law in Roman tradition. As such, civil law has been shaped over a period of almost 1,000 years, beginning with the rediscovery of the Justinian's Digest in 1076. In order to fully understand the uniqueness of Louisiana's legal heritage, it is pivotal to offer an insight into the evolution of Louisiana law from the rise of the codification movement to most recent years. What better moment to do it than for New Orleans' Tricentennial!

*379 The International Trend of Codification

The intellectual freedom put in motion by humanists[3] coupled with the industrial and technological breakthroughs, such as printing, led to an exponential sophistication and self-consciousness. For the first time, people across the world had access to books, became educated, and began to apply their logical analysis and reasoning to everything that surrounded them. Of course, one of the first subjects of people's skepticism and mistrust was the legal system. People at the time viewed law as a complex and mystical phenomenon and did not understand it.[4] They believed that legal scholars had no incentive to simplify such law because their expertise was desirable and in high demand. Even the judges, in people's eyes, exploited the intricate nature of law because they could use it to justify any decision they wanted to reach. Thus, people demanded a *plain and laymen-friendly* compilation of the laws that they could understand because they wanted to shield themselves from the abuse of judicial discretion. This is why, led by the French in 1804, the codification movement was born.[5]

After illegally ceasing power through coup d'état in 1799, Napoleon proclaimed the French Republic and named himself an emperor. Immediately thereafter, Napoleon appointed a committee of four lawyers and tasked them with drafting a civil code.[6] In only four months, these four lawyers finalized the first draft of the French Civil Code from scratch.[7] However,

contrary to what the French population expected and hoped for, the codification replaced one extreme with another and did not resolve the issue of unfettered judicial discretion. That is, the superabundance of legal sources that initially led to complex laws gave way to oversimplification and generalization which, once again, required wide judicial discretion. Therefore, following the codification, both judges and jurists happily resumed the roles they enjoyed during the pre-codification period.[8]

The Codification Movement in Louisiana

The French Civil Code was drafted in the spirit of the French Revolution, following bloody military and political turmoil. Despite the fact that the break from the past in the eyes of the law was more of a line in the sand than a radical shift, the Code was presented to the world as a "new beginning."[9] However, while the French fought hard for, *inter alia*, a legal transformation, the recently colonial Louisiana was not looking for a change; rather, the goal was simply to maintain the status quo.[10]

The first point in understanding Louisiana's legal system is to recall how Louisiana, *alone* among the 50 states, came to even have a civil code modeled on a European civil code. A 2004 article published by Loyola University College of Law Professor David W. Gruning provides a perfect synopsis of this complicated and fascinating story:

> French explorers arrived on the American coast of the Gulf of Mexico in 1682. In 1712, the Crown decreed that the Custom of Parish would govern the colony, and placed the colony effectively in the hands both of private interests and of a Superior Council. After failure of the private interests, the Crown assumed full control in 1731. In 1762, France transferred Louisiana to Spain. The latter, however, did not achieve effective control until 1769. Thereafter Spain administered Louisiana, perhaps more effectively than had France. Spain established its own system of government, replacing the Superior Council with a Cabildo or city council, and applying Spanish colonial law. Later, in 1800, Napoleon engineered the return of Louisiana to France, but his intentions in the Caribbean having been frustrated, he sold Louisiana to the United States in April 1803. The French flag went up over Louisiana for a few weeks in the fall of that year, being replaced definitively by the American flag by the end of the year. Louisiana had become an American territory. Now a part of the United States, Louisiana (then the Territory of Orleans) faced the question of what law would be applicable.[11]

As evidenced by the discussion below, this question perplexed the Louisiana legal community in the years to come.

Louisiana's first code, "A Digest of the Laws in Force in the Territory of Orleans," was enacted in 1808.[12] The 1808 Digest stylistically resembled the French Civil Code, but it incorporated certain Roman law provisions that could not be found in the French Code but were considered relevant for Louisiana, such as the rules of public rights on the river banks (Articles 452 and 456), the sale of a hope (Article 2451), and the action for things thrown onto the street (Article 177).[13] The 1808 Digest remained in effect when Louisiana became a state in 1812.[14]

In 1817, the Louisiana Supreme Court restricted the Digest's applicability by holding that prior Spanish, Roman and French law which was not in conflict with the Digest was *still valid* and in force.[15] This caused great confusion in Louisiana and had to be changed. But, there was no ***380** one to effectuate the change because attorneys in 19th century Louisiana were dedicated to drafting legislation and could not devote their time to supervise the application of the law and keep it on track.[16] Hence, due to the lack of sufficient legal expertise, the confusion of legal sources created by the 1808 Digest was only partially remedied by the Civil Code of 1825.

The 1825 Civil Code "expressly repealed the Spanish, Roman, and French laws in force at the time of the Louisiana Purchase."[17] However, the Code only repealed those laws that were specifically enumerated therein, meaning that a substantial part of the old law still survived.[18] A novelty that came with the 1825 Code was that its articles included explanation and reasoning.[19] Notwithstanding this change, the Code was written in a technical fashion and was not meant to be used by ordinary citizens.[20]

Recodification of Louisiana's Civil Code

As cleverly illustrated by Professor Gruning in his 2004 article, because the rules of a society change, a civil code that attempts to represent these rules must follow and adapt so as to remain connected to the changes and properly reflect them.[21] Unlike France, Quebec or Haiti which re-codified their civil codes pragmatically and deliberately, with one piece of legislation, Louisiana decided to take a different approach.[22] And it did so for a reason. Namely, after researching the law and its history, Louisiana's legal experts realized that it may be in the state's best interest to add or avoid adding certain legal provisions. Hence, instead of a single-handed recodification, Louisiana opted to revise its civil law "not as a whole, but in distinct blocks."[23] This piecemeal recodification made Louisiana's Civil Code one of the *most eclectic* in the world.

A product of this daring endeavor was the Civil Code of 1870 which replaced the 1825 Code. However, the aftermath of World War I brought significant economic and cultural changes which tested the new 1870 Code. The most eminent pressure placed on the 1870 Code was *lingual* because the Code, unlike its predecessors, was published in English only--without any French text whatsoever.[24] As English became the primary language, French was slowly dying out and, with it, the French legal doctrines.[25] This change was also reflected in the educational system where lectures were now conducted solely in English.[26] Naturally, for the non-French-speaking lawyers and judges, English legal authorities were more appealing and, instead of looking to the Napoleonic Civil Code for guidance, they consulted their colleagues in sister states.[27] The problem, however, was that sister states used legal techniques that derived from the English common taw. This is how the common law principles of equity and estoppel and the doctrine of *stare decisis* became introduced to Louisiana lawyers.[28]

Louisiana: A Civil Law, Common Law or Mixed Jurisdiction?

The cumulative impact of the infiltration of the common law concepts into Louisiana's jurisdiction led one professor in 1937 to assert that "Louisiana had become a common law state."[29] This observation was not received well by Louisiana's legal community which has, ever since, engaged in a concerted effort to defend and preserve Louisiana's civil law roots. One way in which this was achieved was by, once again, revising the Civil Code to emphasize Louisiana's civil law legacy.[30] Again, by using the piecemeal approach to codification, the 1870 Code was revised and replaced by the 2003 Code which endured several more revisions to date.[31]

However, contrary to popular belief, this did not turn Louisiana into a purely civil law jurisdiction. While most of Louisiana's private law retained a civil law orientation that existed during the colonial rule of France and Spain, Louisiana's public law, criminal law and civil procedures are modeled after Anglo-American common law norms that were brought to the United States from England, its political sovereign at the time.[32] This kind of jurisdiction is regarded as a "mixed jurisdiction."[33] Louisiana is not the only one. Some of the others are Quebec, Puerto Rico, the Philippines, South Africa, Scotland and Israel.[34] With the exception of the latter two, all these countries followed the same developmental pattern and have readily apparent historical similarities with Louisiana reflected in their struggle for autonomy--their civil law nature was established during the initial period of colonial rule by a continental European power, while the common law nature was established during the subsequent Anglo-American conquest or cession.

Conclusion

While it is true that Louisiana differs from its sister states in many respects, it would be wrong to only praise the French for its legal contribution. The Roman, Spanish and English influences also played a major role in forming Louisiana's eclectic legal history, which still lives today. As the only state that can pride itself with having such unique legal heritage, we should continue to pridefully and stubbornly safeguard it.

Footnotes

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1 *See generally*, J.T. Hood, Jr., "The History and Development of the Louisiana Civil Code," 19 La. L. Rev. (December 1958).

2 The law of "The Twelve Tables" was adopted in 450 B.C. and is regarded as one of the most important documents in the history of law. As the bedrock of European taw and the western legal system, "The Twelve Tables" is not only the first memorialization of Roman law known to humankind, but also the first expression of the *preserved writing* in Roman civilization (besides, for instance, inscriptions on tombs).

3 The medieval era ended in the 1400s with the invention of the printing press and the emergence of a new intellectual current called humanism. The concept of humanism began as an esthetic movement among intellectuals in favor of purity of classic Latin. That is, humanists harshly criticized the work of prior legal scholars (glossators and commentators), claiming that their Latin was of poor quality and they did not understand and translate the legal scripts correctly.

4 *See, e.g., Bill of Right in Action* (1999). BRIA 15:2(a)-- The Code Napoleon. Constitutional Rights Foundation. ("By Napoleon's time, a contusion of customary, feudal, royal, revolutionary, church, and Roman laws existed in France. Different legal systems controlled different parts of the country. The French writer Voltaire once complained that a man traveling across France would have to change laws as often as he changed horses.")

5 *Id.* ("Napoleon wanted this code to be clear, logical, and easily understood by all citizens.")

6 *See*, W.J. Wagner (1953). "Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States." Articles by Maurer Faculty. Paper 2324, at p. 342.

7 *Id.*

8 P.G. Stein (1986), "Judge and Jurist in the Civil Law: A Historical Interpretation," 46 La. L. Rev. 241, 252.

9 J.A. Lovett, *et al.* (2014). *Louisiana Property Law: The Civil Code, Cases and Commentary*. Carolina Academic Press, at p. 12.

[10] *Id. See also*, Cottin v. Cottin, 5 Mart. (o.s.) 93, 94 (La. 1817) (The Louisiana Supreme Court squashed any radicals who might have thought that their code should be treated as a new beginning by holding that the old law was still in force, unless it was actually inconsistent with the code.).

[11] D. Gruning (2004), "Mapping Society through Law: Louisiana, Civil Law Recodified," 19 Tul. Eur. & Civ. L. Forum 1, 1-12, 14-20, 31-34, at p. 4.

[12] Lovett, note 9 *supra*, at p. 12.

[13] *Id.*

[14] Gruning, note 11 *supra*, at p. 5.

[15] *Id.*

[16] Lovett, note *9 supra*, at p. 12.

[17] *Id.*

[18] *Id.* This issue was finally rectified three years later with the enactment of the Great Repealing Act of 1828 which repealed "all the civil laws which were in force before the promulgation of the civil code lately promulgated."

[19] *Id.* at p. 13.

[20] *Id.*

[21] Gruning. note 11 *supra*, at p. 2.

[22] *Id.*

[23] *Id.*

[24] *Id.* at p. 7.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* (internal citations omitted).

[29] G. Ireland (1936-1937), "Louisiana's Legal System Reappraised," 11 Tul. L. Rev. 585.

[30] F. Zengel (1979-1980), "Civil Code Revision in Louisiana," 54 Tul. L. Rev. 943, 944.

[31] Gruning, note 11 *supra*, at p. 9.

[32] Lovett, note *9 supra*, at p. 24.

[33] *See*, V. Palmer (2001), *Mixed Jurisdictions Worldwide: The Third Legal Family*.

[34] Lovett, note 9 *supra*, at p. 24.

65 LABJ 378

46 La. B.J. 301

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Feature
Alain A. Levasseur[a1] Roger K. Ward[aa1]

300 YEARS AND COUNTING: THE FRENCH INFLUENCE ON THE LOUISIANA LEGAL SYSTEM

On Jan. 1, 1999, Louisiana begins a year-long commemoration of the French establishment of the first permanent colony in the Louisiana territory. This commemoration, billed as FrancoFête '99, celebrates the founding of the colony, Point Mardi Gras, as well as the 300 subsequent years of French influence in Louisiana. In honor of this tricentennial, it is only fitting that the Louisiana legal profession reflect upon the role that the French language and culture have played in the legal history of the state.

Because it was the French who initially explored, claimed, populated and governed Louisiana, their influence over the shaping of the eventual state of Louisiana's legal system has been considerable. French laws were in full force and effect in Louisiana during much of the 18th century. The thousands of French settlers who came to Louisiana found a Roman-based legal system that mirrored the one in place in *ancien régime* France.

The French so solidified their influence over the Louisiana legal system that, even when France ceded Louisiana to Spain in 1762, the newly official Spanish law could not supplant the deeply entrenched French laws in place in the territory. Preference for French law was not based just upon obstinate patriotism: rather, French law was preferred because it was both familiar and readily accessible to Louisiana's Francophone population. With the passage of time, however, Spanish law did make some headway but adherence to French law, especially in the realm of property and contractual obligations, remained stalwart.

Through a series of events on the European continent, France regained possession of Louisiana from Spain in 1803. However, on Dec. 20, 1803, only 20 days after officially regaining control of Louisiana, France sold the vast Louisiana territory to the United States. French-Louisianians felt that France and its diminutive emperor Napoleon had betrayed them but nevertheless clung to French institutions, especially the French civil law system.

Following the American purchase of the Louisiana territory, the complexity ***302** of Louisiana's legal system became obvious. First, it was unclear whether, at the time of the purchase, Louisiana law was, in fact, French or Spanish.[1] Second. the Americans recognized that Louisiana's colonial experience had been different from that of the other states of the union. The existing states all had been nurtured by and eventually weaned from a common mother. English-speaking, Protestant, parliamentary Great Britain. Louisiana, on the other hand, had been reared by non-English-speaking, papist nations led by absolute monarchs. The American government was afraid that this dissimilarity in experiences would cause friction and hinder national homogeneity. Therefore, anglicization of Louisiana was believed to be the best course of action.[2]

Consequently, English-speaking Americans were encouraged to settle in the territory of Orleans. Within a matter of a few years, the English-speaking Americans outnumbered the French-speaking population. However, the French population initially was able to safeguard its language and law, as well as secure ironclad control of the state government.[3] Francophone control over the state government and legal processes ***303** of the state, as well as the gradual decline of this control, can best be demonstrated through an examination of Louisiana's legal institutions.

The French Language in the Louisiana Civil Codes

There have been three civil codes in Louisiana: the Civil Code of 1808, the Civil Code of 1825 and the Revised Civil Code of 1870. Although the sources of these codes have been the subject of intense debate, the fact that the redactors of the first two civil codes drafted the original editions of the works in French strongly suggests that the architects of Louisiana's civilian legal system intended to bestow upon the French language a lasting position in Louisiana law.

Louisiana's decision to adopt a civil code was based on necessity. Because of its motley colonial past, Louisiana's legal system was actually a confusing amalgamation of Spanish and French law.[4] In an effort to remedy the confusion in the law, the Legislative Council appointed Louis Moreau Lislet and James Brown to compile and prepare a civil code for use in the territory. Moreau Lislet and Brown prepared a digest of the civil laws in force in the Territory of Orleans. This digest was prepared in French and was submitted to the Legislature for approval in 1808.[5]

Because there were to be two different versions of the same code, a French original and English translation, the Legislature directed that, in case of "any obscurity or ambiguity, fault or omission, both the English and the French texts shall be consulted, and shall mutually serve to the interpretation of one and the other."[6] As the anticipated disparities between the two different texts began to manifest themselves, the Louisiana Supreme Court attempted to comply with this legislative mandate by comparing and applying the more comprehensive of the two texts.[7] Eventually, however, the Supreme Court held that both the texts were authoritative and compliance with either was sufficient.[8]

The Louisiana Legislature saw the need to revamp the civil code in the wake of the 1817 Louisiana Supreme Court case of *Cottin v. Cottin*.[9] This case held that the act of the Legislature adopting the Civil Code of 1808 repealed only those ancient laws of the territory which were contrary to or irreconcilable with the Civil Code of 1808, thus thwarting the objectives of the code. The Legislature appointed Louis Moreau Lislet, Pierre Derbigny and Edward Livingston to undertake revision of the civil code. In 1823, the three redactors submitted a *projet* of their proposed revision. This *projet* was written in French and later ***304** translated into English. The Legislature subsequently approved the *projet* and ordered the adoption and promulgation of the new Civil Code of 1825. The Civil Code of 1825 was originally prepared in French and, by act of the Legislature, was to "be printed in the English and French language, opposite to one another."[10] The English translation proved to be spectacularly bad. Recognizing the deficiencies in translation, the Louisiana Supreme Court ruled that, in the event of a conflict between the two texts, the French would prevail.[11] This French-preference rule has been applied consistently by Louisiana courts.[12]

The Louisiana Civil Code was once again revised in 1870 in the aftermath of the Civil War. By this time, the influence of the French-speaking population had greatly diminished and the Civil Code of 1870 was enacted and promulgated in English only, in accordance with the new state Constitution.

Since there is no longer a French version of the Civil Code, one could argue that the English text alone is controlling. However, this is not the accepted view in Louisiana law and jurisprudence. Although French is no longer the language of the Civil Code, it still plays a fundamental role in the interpretation of the English language code. This is evident from the many modern Louisiana cases that make reference to the French versions of the Louisiana Civil Codes of 1808 and 1825 in order to have an accurate grasp of the law.

The French Language in the Louisiana Constitutions

Examination of Louisiana's 10 constitutions demonstrates a gradual, yet systematic decline of the French language in Louisiana. The first constitution was drafted in 1812. It was originally drafted in French but translated into English for transmission to Washington. Both the French original and the English translations were declared to be authoritative. The Constitution of 1812 required that all laws passed by the Legislature, the public record, and the judicial and legislative written proceedings of the Legislature be "promulgated, preserved, and conducted in the language in which the Constitution of the United States is written."[13] However, because Louisiana remained overwhelmingly Francophone, debates in the Legislature, promulgation of legislative acts, proceedings before the courts, and legal relationships between private parties continued to be conducted largely in the French language. The fact that French was not officially recognized as the language of the law was of no concern to the confident, politically powerful French-speaking population.

In contrast, the Constitution of 1845 reflected a changed and diminished status of the French language in Louisiana. Since the passage of the first constitution, the English-speaking population had grown to outnumber the French-speaking population. Although firmly in control of the state government, French-speaking Louisianians realized that they should no longer take their linguistic survival for granted and clamored for constitutional protection.

The Constitution of 1845, as well as its successor, the Constitution of 1852. retained the requirement that the legal proceedings of the state and the Legislature be rendered in English. However, these two constitutions gave official status to the French language by mandating the promulgation of laws in both French and English. This bilingual promulgation requirement provided much needed protection for the French language in Louisiana's constitutional scheme. However, it was probably too little, too late.

The Constitution of 1864 severely weakened the French language's constitutional status. This constitution eliminated the bilingual promulgation requirement. More damaging to future generations was inclusion of the requirement ***305** that instruction in the public schools be in the English language.[14]

The Reconstructionist Constitution of 1868 bore witness to the dismantling of the constitutional protections for the French language that began in earnest four years earlier. Delegates to the Constitutional Convention retained the "English-only" in the public schools provision instituted in the previous constitution. Moreover, the Constitution of 1868 provided that "no laws shall require judicial process to be issued in any other than the English language."[15] By including this provision, delegates effectively killed the French language in Louisiana's constitutional scheme. French-Louisianians were able to revive some of their language's lost constitutional protections in the subsequent Constitutions of 1879, 1898 and 1913. However, by the time Louisiana again revised its constitution in 1921, the French population had so declined in numbers and influence that the need to provide constitutional protection for them appeared moot.

In 1973, the Louisiana Legislature called a Constitutional Convention to revise the Constitution of 1921. By this time, pride in French heritage and a growing interest in reintroducing the French language to Louisiana had emerged and caused many to appeal for official recognition of the French language in the new constitution. Although the new Constitution of 1974 did not specifically provide recognition or protection of the French language as hoped, it did recognize "the right of the people to preserve, foster, and promote their respective historic, linguistic, and cultural origins."[16] This provision satisfied Francophiles and, since 1974, Louisiana has attempted to reintroduce the French language to its citizens, working primarily through the Council for the Development of French in Louisiana (CODOFIL).

The French Language in Louisiana Civil Procedure

Final consideration of the French language in Louisiana legal history should ***306** be given to its position in Louisiana civil procedure. In the early periods of Louisiana statehood, many procedural elements were French. However, these French elements and special legal treatment afforded French-speaking citizens were eliminated during the Reconstructionist period.

Like the initial Civil Code and state Constitution, the Code of Practice of 1825 was originally prepared in French. It was

translated into English and promulgated in both languages. In the event that a conflict existed between the two versions, the courts held that the French text prevailed.[17]

A close analysis of the Code of Practice of 1825 reveals some important procedural rights granted to Francophones. For example, article 172 provided, in part, that the petition must be drawn in both the French and English languages when either party spoke French as a mother tongue. However, even if one of the parties was Francophone, the defendant or his attorney could agree that the plaintiff's petition be drawn in English only. In the event that the plaintiff only filed and served an English version of the petition, the French-speaking defendant could demand that a French version be served. Failure to serve a French petition on a party whose native language was French interrupted prescription. The Code of Practice permitted a French-speaking defendant to answer the petition in French. However, an English copy of the answer also was required.[18]

Notwithstanding the bilingual petition requirement outlined in the Code of Practice, petitions addressed to the court needed to be written in English. In the early years of statehood, proceedings before the court were bewildering. Judges often spoke one language while attorneys argued in another. Consequently, early courts were extremely inefficient. To remedy this inefficiency, the language of the courts became English.[19] This English-preference rule was borne of necessity and was not intended to eradicate the French language from Louisiana law.

Unfortunately for the French-speaking population, the post-Civil War revision of the Code of Practice in 1870 eliminated all special rights and privileges afforded French-speaking Louisianians. Thenceforth, all pleadings, orders, writs and legal notices were to be exclusively in English.

Conclusion

The contributions that French law and language have made to Louisiana are considerable. While French is no longer the medium of Louisiana law, the fact that the structure of our legal system has retained its civilian character serves as legacy and link to Louisiana's former colonial master. As Louisiana fetes its French heritage, let us, the Louisiana legal community, not forget the important role that the French language has played in the development of our legal system.

Footnotes

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1 Whether the law of Louisiana at the time of the Louisiana Purchase was, in fact, French or Spanish has been vigorously debated ever since. *See* Alain A. Levasseur, *Louis Moreau-Lislet: Foster Father of Louisiana Civil Law* (1996); Joseph Dainow, "Moreau Lislet's Notes on Sources of Louisiana Civil Code of 1808," 19 La. L. Rev. 43 (1958); Rodolfo Batiza. "The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance," 46 Tul. L.

Rev. 4 (1971); Robert A. Pascal, "Sources of the Digest of 1808: A Reply to Professor Batiza," 46 Tul. L. Rev. 604 (1972).

[2] William Newton Lewis. "The Americanization of French Louisiana: A Study of the Process of Adjustment Between the French and the Anglo-American Populations of Louisiana, 1793-1860," (Ph.D. Dissertation, University of Chicago, 1929).

[3] Roger Ward, "The French Language in Louisiana Law and Legal Education: A Requiem," 57 La. L. Rev. 1283 (1997).

[4] John R. Hood, "The History and Development of the Louisiana Civil Code," 19 La. L. Rev. 18 (1958).

[5] John H. Tucker Jr., *Source Books of Louisiana Law* (1934).

[6] La. Acts of 1808, pp. 120-128.

[7] Chretien v. Theard, 1824, 2 Mart. (N.S.) 582: Shelp v. National Surety Corp., 333 F.2d 431 (5 Cir. 1964).

[8] Touro v. Cushing, 1823, 1 Mart. (N.S.) 425.

[9] 5 Mart. (O.S.) 93 (La. 1817).

[10] La. Acts of 1824, p. 172.

[11] Dunford v. Clark's Estate. 3 La. 199 (1831).

[12] Ward, *supra* note 3.

[13] La. Const. of 1812 (Art. VI, section 15); Warren M. Billings and Edward F. Haas, *In Search of Fundamental Law: Louisiana's Constitutions 1812-1974* (1993); Cecil Morgan, *The First Constitution of the State of Louisiana* (1975).

[14] Heinz Kloss, *Les Droits Linguistiques des Franco-Américains aux Etats-Unis* (1970), p. 114.

[15] La. Const. of 1868 (Art. 109).

[16] La. Const. of 1974 (Art. XII, section 3).

[17] Cowand v. Pulley, 9 La. Ann. 12 (1854); State ex rel Southern Bank v. Judge, 22 La. Ann. 581 (1870); New Orleans Terminal Co. v. Fuller, 113 La. 773, 37 So. 624 (1905).

[18] Ward, *supra* note 3.

[19] Alain Levasseur, *La Guerre de Troie a toujours lieu...en Louisiane* (1993).

46 LABJ 301

ASPEN CASEBOOK SERIES

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CHAPTER 1

Introduction to Contracts

A AN INTRODUCTION TO THE STUDY OF CONTRACT LAW

1. The Legal Definition of Contract

Even as they enter law school, most students have a pretty good idea of what contracts are and of the pervasive role they play in daily life. This book examines the rules, principles, and concepts of the law that govern the making of contracts, their performance, and enforcement. The word "contract" may be used in lay language to describe any form of agreement or consensual relationship. In law, however, the word is used more narrowly to signify a legal relationship that must have specific qualities and consequences. Section 1 of the Restatement, Second, of Contracts[1] defines "contract" as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Admittedly, this is rather a vague definition that seems to raise more questions than it answers. However, it does suggest a number of key factors that must be present for an arrangement to qualify as a contract. Specifically, a contract is an exchange relationship, created by agreement between two or more parties, containing at least one promise, and recognized as enforceable in law. In a few types of transactions (covered by a rule known as the statute of frauds), the agreement must be in

[1] The Restatement, Second, of Contracts is a highly influential text that sets out principles of contract law. It is described more fully in Section A.4.b.

writing to qualify as a legally enforceable contract, but in most cases an oral agreement is sufficient and no particular formalities are needed.

2. The Sources, Nature, and Traditions of Contract Law

a. The Roots of Contract Law

Contract law occupies such a predominant role in our modern legal system that it is hard to imagine that this has not always been so. However, the law of contracts as a coherent, systematic body of rules developed quite late in the history of our law and did not take the form recognizable today until the latter part of the nineteenth century. The classifications of legal categories that are familiar to us today, such as contracts, torts, and property, were not recognized in early English common law.[2] Early law was very formalistic. To sue, the plaintiff had to fit his claim into one of a number of established writs (often called "forms of action"), and if the facts of the case did not fit into a writ, no relief was available. Certain writs did exist for types of claims that we would classify as contracts today, but these were very narrow and did not cover the situation in which a plaintiff sought to enforce an executory contract—that is, one that he had not yet fully performed.

During the Middle Ages English courts began to recognize that the breach of an executory agreement should give rise to a legal action. Because no form of action existed for such suits, courts adapted one of the forms of action available for tort to serve the purpose of enforcing contractual promises. The form used was known as "trespass on the case," a form of action that lay for injury resulting from wrongful nonviolent action. (Trespass on the case was distinguished from trespass, which lay for torts involving violence.) The courts began the process of expansion by including in the writ of trespass on the case situations in which a person undertook to perform a duty and then performed it improperly, thereby causing harm. In its original form, the writ covered only wrongful performance (misfeasance), and did not extend to include failure to perform altogether (nonfeasance). Because liability for this variety of trespass on the case was based on a promise—an agreed assumption of a duty—the cause of action became known as "assumpsit" (Latin for "he has taken up" the duty). In time, liability for the breach of an executory contract expanded beyond improper performance to cover failure to perform at all. The action of assumpsit became the foundation of what eventually grew, by slow development over many centuries, into what we now recognize as the general cause of action for breach of contract. When the British colonists settled the American colonies, they brought this growing

[2] The term "common law" is explained below.

but still rudimentary collection of rules and principles with them, and it formed the basis of colonial law and ultimately state contract law.[3]

Because contract law was developed by courts in performing their ongoing function of deciding cases, its evolution was not systematic or neatly organized. By the nineteenth century, many of the rules and principles that form the basis of modern contract law had been formulated, but they had not yet been comprehensively organized into a coherent compendium. The work of constructing such a compilation of the law of contracts of the kind that we would expect to find today in an authoritative treatise was begun not much more than a century ago. We will return to the work of these nineteenth century jurists shortly in our overview of the theoretical themes of contract law in Section A.5. But first we will briefly introduce the sources and nature of contract law in our legal system.

b. Contract as State Law

As you proceed through this book you will find cases decided by the courts of many different states as well as by the federal courts. Except in some very narrow and specific circumstances (for example, where the federal government enters contracts subject to federal procurement statutes or has enacted a particular law in the exercise of its power to regulate interstate commerce), contracts are governed by state law. Therefore, there is no single and unified law of contracts in the United States. Rather, there are as many separate and distinct systems of contract law as there are states and territories. A practitioner must be concerned with the law of contracts applicable in the specific state that governs the transaction, but law schools, whose students may end up practicing anywhere in the country, must adopt a wider view. We therefore teach contracts as if it is a national law. For the most part, this works out well, because the law in every state (except Louisiana[4]) derives from the same source—the common law of England. As the law has developed in each state, it is influenced by what happens in other states and by nationwide trends in economic and social philosophy. Therefore, while the individual state systems of contract law may

[3] Much has been written on the history of the law of contracts. For students who are interested in reading more detailed, but brief and manageable accounts of this history, we recommend E. Allan Farnsworth, *Contracts* 9-19 (4th ed., Aspen Publishers 2004), and John E. Murray, Jr., *Murray on Contracts* 4-11 (5th ed., LexisNexis 2011). For those with a deeper interest in the historical development of contract law in this country, a classic work is Lawrence M. Friedman, *Contract Law in America* (U. Wis. Press 1965).

[4] Before it became a U.S. Territory, Louisiana was colonized successively by Spain and France. As a result, Civilian law was well-established in Louisiana by the time of statehood. In the early nineteenth century, Louisiana codified its law, drawing on its Spanish and French legal traditions and influenced heavily by the Code Napoleon. (The Code Napoleon and the meaning of the term "Civilian" are explained in the text.) Although Louisiana is the only state whose law is not derived from the law of England, many of its legal rules are very similar to those of other states. This is partly because the underlying legal systems of England and continental Europe often deal with issues in similar ways, and partly because states influence each other in the development of the law.

vary in matters of detail, they share a core of rules and principles that permit generalization. This is particularly true at the level of fundamental values, reasoning, and analysis.

c. *The Meaning of "Common Law"*

(i) "Common Law" Denotes Our Legal System as a Whole. In England, the term "common law" developed to distinguish the body of English national law common to all of England from local law and custom. (Note that we refer to English common law. It is incorrect to speak of "British" common law because Scotland's legal system is distinct from England's.) As mentioned earlier, the law of contracts, like all American law, is based on the common law of England, transplanted to America by the colonists and used by the colonies, and later by the states, as the basis of their legal systems. This also happened in most of the other colonies established by Britain around the world. This legacy has generally survived. As a result, England, the United States, Canada, Australia, India, and many other countries that used to be part of the British Empire share the common law legal tradition.

A second great legal tradition derives from continental Europe. It has its basis in ancient Roman law, and is called "Civilian" or "civil law" in recognition of its roots in the Roman Civil Code, called the *Corpus Juris Civilis*. Over the centuries, continental scholars expanded and built on the Roman law base to create the modern Civilian system. One of the most important features of the system is its comprehensive codification. During the nineteenth century, European countries created massive codes, reducing the entire body of national law into legislative form. The preeminent codifications were accomplished in France (the Code Napoleon) and Germany, and these were used as models in many other countries. All of continental Europe, as well as many countries that were colonies of European powers, adopted codes. However, the use of these codes was not confined to countries that followed the Roman law tradition. Because the codes were so comprehensive and coherent, they were attractive models for countries that wished to modernize their legal systems. As a result, most countries in the world other than those that were part of the British sphere imported one or another of the European codifications as their basic legal framework.

Although common law and civil law have many similarities in concepts and in substantive rules, they differ quite significantly in many ways. As you might imagine, the most important differences lie in the underlying style and concept of the systems. The common law places great reliance on the role of courts as participants in the creation of law, while the civil law focuses heavily on the code as the source of law and subordinates the judicial lawmaking role. This difference in approach permeates each system and emerges in many different ways.

(ii) "Common Law" Is Used Within Our Legal System to Distinguish Judge-Made Law from Legislation and to Describe an Approach to Legal Analysis. While "common law" describes our legal system as a whole, it is also used within our legal system in two related narrower senses. First, it distinguishes those areas of the law that derive principally from judicial decision rather than from statute. In this sense, contracts is a common law subject because most of its rules are not found in legislation, but have been developed by courts. This does not mean that there are no statutes governing contracts. Indeed, many do exist, of which Article 2 of the Uniform Commercial Code, discussed in Chapter 2, is a prime example. However, judge-made law predominates in the field. (By contrast, tax law, created by and based on the Internal Revenue Code, legislation passed by Congress, is classified as a statutory subject.) Second, "common law" describes an approach to the analysis and development of the law. Even in an area governed by statute, the courts play a vital role in interpreting and developing the law by applying general rules to specific cases. As a result, gaps in the law are filled and legal principles are expounded through the process of judicial decision making. Judicial interpretations of statutes are thus themselves a source of law.

The use of judicial opinions as a means of studying the law is partly explained by the importance of judge-made law in our system. However, cases do not simply serve the purpose of setting out legal doctrine. A treatise could do this more efficiently. Opinions also teach legal argument and analysis, and provide concrete illustrations of the application of law to resolve disputes, show the relationship between law and fact, and provide insight into the many considerations that must be taken into account in formulating and applying the law. Because the courts' lawmaking power is so fundamental a part of our legal system, the doctrine of precedent serves a pivotal role in our law.

3. The Doctrine of Precedent and Case Analysis

a. The Doctrine of Precedent

In a system in which judges have no lawmaking role (as is generally true of most courts in civilian systems), the court's sole function is to decide the case before it, thereby resolving the dispute between the parties. However, if in addition the court's opinion is treated as establishing or reaffirming legal rules, its reach goes beyond the immediate parties. The opinion creates generally applicable law that has a binding effect on everyone within the jurisdiction, and must be followed in future cases involving other parties but substantially similar facts—that is, the opinion creates a precedent. This is the doctrine of precedent (described in Latin as *stare decisis*—meaning "to stand with what has been decided"). For this reason, court opinions constitute a primary source of law and are published.

The operation of precedent has many complexities that we do not attempt to explore in this introductory note. We confine ourselves to a few broad general principles that you may find helpful as you begin to analyze cases:

1. Not every court is senior enough to establish precedent. For example, decisions of trial courts do not usually create precedents; only the decisions of appellate courts have binding force. (This explains why most of the opinions that you will read are delivered by appellate courts. In fact, in most states, trial court opinions are not published.)
2. Appellate courts do not officially publish (report) every opinion that they issue. In both the federal and state systems, courts are selective in deciding which opinions are worthy of being published in the official court reports, and rules of court may contain guidelines to be followed by courts in deciding which of their opinions should be reported. In the days before the creation of online databases such as Westlaw and Lexis, it was very difficult to find unreported decisions. However, with the advent of these databases, unreported decisions have become accessible. (You will find a number of such cases in this book, which have only the Westlaw citation and a note that the case is not officially reported.) The precedential weight of unreported decisions varies from one jurisdiction to another, and some court rules limit the use of unreported cases in briefs.
3. Precedents do not bind every court. The force of a precedent depends on the jurisdiction in which it is decided and the jurisdiction whose law it applies.

The effect of precedent is illustrated in the following example. Say that Sally Conn and Chip Micro live in the state of Cyberia. (We use a fictional state in this example to provide a generalized sketch of the judicial structure of a state.) Sally has formed a startup high-technology business, and Chip is a genius inventor. Sally and Chip agree orally that Sally will employ Chip for two years to work on a new product that Sally is developing. Sally reneges on this agreement and Chip sues her for damages in a Cyberia trial court. Because both parties live in Cyberia and the agreement was entered there, Cyberia law governs the transaction.[5]

Upon being served with Chip's complaint, Sally makes a motion before the trial court for dismissal of his suit. Sally denies that she entered into a legally binding contract with Chip and claims that even if the parties did intend a contractual commitment, their oral agreement lacks the formalities required

[5] The question of which jurisdiction's law governs a particular transaction (called choice of law) is complex and is beyond the scope of this book. Choice of law—the determination of the state law that must be applied to resolve a legal issue—is different from the question of which court has jurisdiction to hear the case. Therefore, although a state court often does apply the law of its own state in resolving the case, it sometimes happens that the law governing the transaction is the law of another state. For purposes of our introduction to the doctrine of precedent, we use the least complicated situation of a court applying its own state's law.

by law for enforcement as a contract.[6] After hearing argument on the legal issue involved in the motion to dismiss, the trial court agrees with Sally. The court finds that because the agreement could not be performed within a year of its making, it had to be in writing and signed by Sally to be legally enforceable as a contract. Therefore, even if the parties did make the agreement alleged by Chip, the agreement was oral and unenforceable. Accordingly, the trial court awards judgment to Sally, dismissing Chip's suit.

Chip feels the trial court was wrong and he decides to appeal its decision. Like most states, Cyberia has a judicial structure consisting of two levels of appellate court. Appeals from the decision of a trial court must first be made to the Cyberia Court of Appeals, the state's lower appellate court. Thereafter, there is the possibility of an appeal to the Cyberia Supreme Court, the state's highest court, provided that the Supreme Court agrees to hear the appeal. (The Supreme Court does not review every case appealed to it. It selects only those cases that it considers legally significant or otherwise worthy of its consideration. The party who wishes to appeal to the Supreme Court must file a process, commonly called a writ of certiorari or a writ of review, requesting the Supreme Court to hear the appeal. If the court decides to hear the case, it grants the writ.)

The Court of Appeals, applying Cyberia law, upholds the trial court. The precedent set by the Court of Appeals is absolutely binding only on courts in Cyberia that are inferior to the Court of Appeals. In any case that arises in the future in the state involving the point of law on which the Court of Appeals has pronounced in this case, the trial court must apply the rule of law established by the Court of Appeals. Although the Court of Appeals is, in a sense, also bound by its own decision and is expected to follow its own precedents, it has the power to overrule them if it concludes that they are wrong.

The Cyberia Supreme Court is not bound by the precedent set by the Court of Appeals. Of course, if Chip appealed the decision further to the Cyberia Supreme Court and the Supreme Court accepted the appeal, the court could reverse the decision of the lower court in this case. If Chip does not appeal to the Supreme Court, the rule, as settled by the Court of Appeals, remains the law until such time as the Court of Appeals considers a future case, raising the same legal rule and overrules its prior decision, or a future case makes its way to the Supreme Court. If the Supreme Court does hear a future case involving the rule established by the Court of Appeals, the Supreme Court may agree with the Court of Appeals' view of the law and give its stamp of authority to the precedent, or it may disagree and establish a different rule. That rule then binds all courts in the state. As is true of the Court of Appeals, the Supreme Court will normally follow its own precedents, but it has the power to overrule them if persuaded that they are wrong. In all cases (except those involving

[6] Although oral contracts are generally enforceable, certain kinds of contracts, such as a contract that cannot be performed within a year of its making, must be in writing and signed by the party against whom enforcement is sought. This formal requirement, known as the Statute of Frauds, is discussed in Chapter 8.

Constitutional interpretation) the legislature has the final say on what the legal rule should be. If the legislature disagrees with a legal rule established by judicial precedent, including Supreme Court precedent, it has the power to pass a statute that changes the rule.

As noted above, precedents are binding only in the state over which the court has jurisdiction. Although the decision of the Cyberia Supreme Court binds the courts in that state, it has no binding effect in another state. Therefore, if a similar issue later arose in a court in another state, the courts of that other state have no duty to follow the Cyberia precedent. However, if the issue has not been settled by binding precedent in the other state, its courts may consult the Cyberia decision (as well as any from additional states) as persuasive authority.

Many opinions are long and involve complex facts and several legal issues. It can therefore be difficult to pinpoint exactly what part of the opinion is binding precedent. It is only the rule or holding of the case (in Latin, *ratio decidendi*, roughly translated as "the reason for the decision") that constitutes the binding part of the precedent. This is the narrowest and most crucial part of the opinion, the articulation of the rule that is directly applicable to the facts of the case and is needed to resolve it. In addition to expressing the rule that disposes of the case, a court commonly expounds more widely on the law—for example, by indicating how the case might have been decided had the facts been different. This part of the opinion, called *obiter dictum* (roughly translated as "said in passing" and usually stated in abbreviated form as "dictum") has persuasive force, but is not the law.

Appellate courts sit in panels or en banc (that is, the case is decided by a group of judges). Quite often, the panel is not unanimous. One or more judges may dissent from the majority opinion or may concur in it. (Although in lay usage "concurrence" means agreement, it has a different meaning in the judicial context. The concurring judge agrees with the conclusion reached by the majority but disagrees with or wishes to express a qualification on the rationale for that conclusion.) Where dissenting or concurring opinions are published, they are merely of persuasive weight. The majority opinion establishes the rule of the case.

b. Reading and Briefing Cases

It is not enough just to extract the legal doctrine expounded in a case. To study a case properly, you must pay careful attention to the facts on which the court's decision is based, the procedural context in which it is decided, and any broader policy considerations that might motivate the decision. To properly understand a judicial opinion, you must be conscious of the court's rationale, its disposition of the parties' arguments, and the scope of its decision. You also need to go beyond the confines of the opinion itself, to evaluate it critically, explore its possible permutations, and seek its relationship to broader themes of the

law. A common method of studying a case is to brief it—that is, to write notes on it in an organized way to take account of all the case's salient aspects. The exact form that a brief takes is influenced by the case itself and by the student's individual learning style. However we offer some general guidelines that will help you to think about what you should be extracting from your study of a case:

1. *Get the parties straight.* Make sure you know who is suing whom and what their relationship is. Although you need to know which party is the plaintiff and which is the defendant, it helps to avoid confusion if you make sure that you know, apart from the parties' relationship in the litigation, what their relationship was in the transaction that is being litigated. (For example, if the case involves a sale, is the plaintiff the buyer or the seller?)
2. *Identify what is being claimed in the case.* Take note of the cause (or causes) of action on which the plaintiff bases the suit as well as the remedy sought. Determine who wins the case and why.
3. *Take note of the procedural posture of the case, including the history of the lawsuit.* The procedural context of the opinion is an important ingredient in interpreting it. For example, an opinion delivered on some preliminary motion before trial must be read differently from one rendered after trial. In an appellate case, identify the disposition in the lower court (or courts). Take note of the stage the case had reached at the time of the appeal and the decision that is being appealed.
4. *Take careful note of the facts of the case.* Facts are crucial to the decision, and the scope and effect of an opinion cannot be properly understood without careful examination of the facts on which it is based. In its opinion, the court sets out the facts that it accepts for the purpose of the opinion, and also indicates if those facts are agreed to by the parties, disputed but established at trial, or based on preliminary (and as yet unproved) allegations. Of course, not every fact mentioned by the court is central or even relevant to the case, so you also need to interpret the opinion to evaluate the relative importance of each fact.
5. *Identify the legal issues involved.* Identify each legal issue that is presented by the case. Some cases hinge on a single question of law, but others involve more than one issue. If more than one legal issue is discussed, you should try to decide which are central, forming the rule of the case, and which are dicta.
6. *Analyze all the argumentation in the opinion.* Study and evaluate not only the court's argument, but also any other arguments (such as those of the lower courts, the parties, or a dissenting or concurring judge) that may be set out in the opinion, and that offer supporting, alternative, or contrasting views. Take note of the use of authoritative and persuasive precedent, reasoning, and any expressed or underlying policy rationales.
7. *Evaluate the opinion critically.* Having studied the court's disposition as well as any other arguments advanced, form a view of the case. Do you agree with the reasoning or the result or both? Articulate why you agree or disagree. (Yes, you are allowed to disagree with the court, even though the judge is wise and vastly experienced and you are just a first-year law student.)

8. *Consider whether the case ties into other concepts that you have studied.* Of course, this will be difficult to do at the beginning, but as you proceed with your study of law, you will find that there are many analogies and themes that interweave and interconnect, not only in the law of contracts, but in the law as a whole. We will often raise these connections in the text and questions, but you should be thinking about this on your own as well.

c. The Drawback of Teaching the Law Through Cases and a Warning About Misperception

We have already alluded to the merits of using court opinions to teach the law. This method, which has been employed, albeit with a shifting emphasis, for about a century, has been criticized as too oriented toward litigation and insufficiently attentive to other important lawyering skills such as client-counseling, negotiation, and drafting. The point is that many lawyers spend their time trying to solve problems, facilitate transactions, and avoid litigation. Much legal work relating to contracts is concerned with forming and performing them, not with fighting over them. The vast majority of contracts do not end up in court. Most are made and consummated without friction. Where one party does not perform as promised or a dispute arises, the problem is commonly resolved without recourse to litigation—by negotiation, a consensual termination of the relationship, or extrajudicial dispute resolution. Even if matters get to the stage of bringing suit, cases are frequently settled before or during trial. Of those cases that are tried, even a smaller number are appealed. Therefore, a course that is based largely on the study of appellate court opinions—in some ways, the very worst examples of the breakdown of the relationship—could provide a skewed perspective of what really happens in most transactions.

It should also be noted that most cases that reach the level of appeal concern legal issues that are uncertain. Competent and ethical attorneys do not waste their clients' money by recommending extended litigation and appeals unless there is at least a tenable argument to be made in support of a client's position. Because casebooks concentrate on appellate cases, particularly on cases that present interesting issues, students could quite easily form the impression that the whole of contract law is an ambiguous mess in which every question has at least two contending answers. It is therefore worth cautioning that there are many situations that do not result in litigation simply because the rights and duties of the parties are clear.

Although these are legitimate concerns, the study of law through cases is still the best means of exploring the rules, principles, and policies of the law. Cases provide a concrete, fact-based context that exposes the methodology of legal argument and analysis. Such instruction forms the basis of what is needed not only by the litigator but also by the lawyer who helps in planning and facilitating contract relationships. By anticipating what might go wrong, a savvy lawyer can help to avoid future disputes. We therefore follow the tradition of

relying primarily on cases. You will find that the cases present many opportunities to go beyond a narrow focus on litigation to consider these other skills.

4. The Role of Scholarly Commentary

a. The Influence of Scholarly Writing

While court opinions contain authoritative discussions of the law, they are, of course, not the only source of legal commentary. In studying and seeking to understand the law, lawyers (including professors and judges) and law students rely heavily on the work of scholars who write books and articles to explain, analyze, debate, and theorize on the law. Unlike court opinions, these scholarly texts do not make law—they cannot bind a court. However, good, thoughtful commentary is persuasive and is often cited and discussed in court opinions. (It is sometimes referred to as "secondary" authority.) We keep the citation of secondary authority to a minimum but periodically refer to significant books and articles. There are, however, four comprehensive treatments of contract law that have had dominant influence over the last century, and these are singled out for mention in this introduction.

The first, originally written in the 1920s, is Professor Samuel Williston's multivolume *Treatise on the Law of Contracts*. Williston was surely the most influential contracts scholar of his day, and his treatise, as well as his work on the Restatement of Contracts, mentioned below, did more than any other secondary commentary to formulate and set the tone for contract law in the twentieth century. In the 1950s another legendary scholar of contract law, Professor Arthur Corbin, published his own multivolume treatise, *Corbin on Contracts*. Corbin built on Williston's foundations but significantly departed from his basic philosophy of law.[7] Corbin's work has had a profound and continuing influence on the development of contract law. Currently, the preeminent comprehensive treatise on contract law is *Contracts* by Professor E. Allan Farnsworth, who was also centrally involved in the drafting of the Restatement, Second, of Contracts.[8] The Restatement, Second, of Contracts (referred to from now on as the Restatement, Second) is the fourth commentary on this list. It is not a typical treatise and therefore merits further explanation.

b. The Restatement, Second

The original Restatement of Contracts was published in 1932 by the American Law Institute (ALI), a prestigious national organization formed for the purpose

[7] The differing philosophies of Williston and Corbin are briefly described in Section A.5.

[8] Two other well-respected modern treatises on contract law are Joseph M. Perillo, *Calamari and Perillo on Contracts* (6th ed., West 2009), and John E. Murray, Jr., *Murray on Contracts* (5th ed., LexisNexis 2011).

of creating compilations of legal rules in various common law fields. The model chosen by the ALI for the Restatement of Contracts (and other Restatements) was to structure the book in a way that makes it look more like a statute than a treatise. It sets out rules of contract law in statutory form—that is, in numbered sections, with each section being followed by commentary and illustrations. Williston was the Reporter (the principal drafter) for the Restatement of Contracts, and Corbin was a primary adviser. The Restatement of Contracts was immensely influential and was constantly cited by cases. By the 1950s the ALI decided that the Restatement needed to be updated, and work was begun on the Restatement, Second. Its initial Reporter was Professor Robert Braucher, who was succeeded by Farnsworth during the course of drafting. Corbin continued as an advisor until his death. The Restatement, Second, was published in 1981.

Like the original Restatement, the Restatement, Second, continues to be very influential, as you will notice from the number of times that you see it cited in the cases. It follows the format and organization of the original Restatement but seeks to update the rules and commentary to reflect developments since the 1930s. The rules in the Restatement, Second, are generally based on decided cases, but they do not necessarily represent the law as it exists in any particular jurisdiction. As we have already noted, contracts are governed by state law, and some variations occur between states. In some areas, the authors of the Restatement, Second, based their rule on what the majority of courts have decided, but in others they adopted a less well-established rule because they felt it was the best rule; that is, the Restatement, Second, does not necessarily "restate" clearly established law. Sometimes it articulates the law as it exists in most states, but sometimes it expresses what the drafters considered to be the best rule, even though it may not be widely recognized by courts.

One of the significant influences in the drafting of the Restatement, Second, was the enactment of the Uniform Commercial Code (UCC)[9] in the period following the publication of the original Restatement. The drafters believed that, in many situations, the reforms relating to sales of goods in UCC Article 2 should be adopted by the courts in relation to other contracts. They therefore drafted many sections of the Restatement, Second, so as to conform to the equivalent provisions in Article 2. This has influenced courts in their development of common law principles so that the common law has drawn closer to Article 2. You will notice this trend as this course proceeds.

It is worth stressing again (because students often forget this) that although the Restatement, Second, reads like a statute, with numbered sections and language in statutory form, it is not a statute; it is a treatise. Therefore, although courts give it great deference and often rely on it as persuasive authority, it is not the same as the UCC, which forms the basis of statutes enacted into law by

[9] The UCC is introduced in Chapter 2. It was drafted for the purpose of unifying state law relating to various commercial transactions and has been enacted as a statute by state legislatures. Article 2 of the UCC governs sales of goods.

state legislatures. While courts are bound to follow statutes such as the UCC where the transaction is governed by the statute, they are not constrained to adopt the position taken by the Restatement, Second.

5. Theoretical Perspectives on Contract Law

The law is composed of many rules, but it is much more than a collection of rules. Because the law is a means through which society seeks to achieve desired ends, legal rules must be understood in light of the law's underlying purposes. Therefore, as important as it is to know the rules of law, an examination confined to those rules is superficial and cannot produce true insight into what the law is really about. We must go further and look at the more fundamental questions: Why are the rules as they are? What societal goals do they and should they seek to achieve? Are they the most effective rules for achieving those aims? Are the rules just and morally justifiable? Do the rules, as a whole, form a coherent and rational system for dealing with the interactions that they govern? In short, every time we study a topic in this course, we must be conscious not only of being able to describe what the rules are, but also to consider the policies that generate the rules, and to think about the normative questions that justify the rules or that may form the basis for challenging them. As you may expect, many judges and scholarly commentators have written on the policy and jurisprudence of the law of contracts. These writings show that there is sometimes wide agreement, but also often strong disagreement on the nature and underlying purposes of contract law and on the means that it should employ to achieve optimal societal benefits. This introduction attempts, in very broad terms, to give you a brief initial overview of some of the thinking on these issues over the last century. This survey is quite generalized and abstract, but it will at least alert you to the fact that contract law embodies values as well as rules, and that there are different ways of seeing its role and ultimate goals.

Jurisprudential thinkers have been pondering the moral underpinnings and social value of contract law for many centuries; however, we will begin our survey in late nineteenth century America. This was the era known as the "classical period" of American contract law, when the great work of systematizing the law was first undertaken. By that time, many fundamental ideas about contract had been established: the ability to enter into contracts and the right to be bound only by voluntarily and consensual undertakings—that is, freedom of contract—was firmly grounded, not only in the common law, but in the U.S. Constitution.[10] Contract was seen as an exercise of free will by autonomous

[10] The two provisions of the U.S. Constitution that bear most directly on freedom of contract are the due process clause, U.S. Const. amend. V and XIV, and the contracts clause, U.S. Const. art. 1, §10. The due process clause, which prohibits federal and state government from depriving persons of "life, liberty, or property, without due process of law" protects the ability to enter into relationships and the right not to be held to

parties acting pursuant to their right to order their private relationships by agreement. It was also well understood that the right to make and demand enforcement of contracts carried with it the correlative legal and moral duty to keep contractual promises. Although contracts were recognized as private arrangements between the parties involved, it had long been settled that the state played a vital role in setting the rules that governed these relationships and by providing a mechanism for enforcing them.

The classical conception of contract was built on these foundations, but it was molded by two philosophical strains that had become dominant by the late nineteenth century. One was based on then current economic theory and the other derived from a conception of the role and nature of law and government. Belief in capitalism and the virtues of a free market were the economic underpinnings of classicism. Laissez-faire[11] economic theories had taken root by this time, extolling the free market and frowning upon government regulation. Classicists felt that too much regulation of contracts, either by legislatures or by courts, would not only undermine freedom of contract but would interfere with the wealth-maximizing power of a free market. Therefore, the law should give parties wide leeway to order their relationships as they saw fit. This meant that legislatures should not enact laws that burdened or restricted contracting, and that courts should give effect to the expressed will of the parties in the absence of a clear showing that a party had been forced or tricked into manifesting assent to a contract by outrageously dishonest or coercive behavior.

In combination with this attitude toward the market, the classicists viewed law in formalistic terms (and are therefore sometimes described as "formalists"). They saw the law as a logical, self-contained system of interlocking rules. These rules are firm, ascertainable, and rationally related, so that a judge can find them by recourse to or reasoning from prior cases, and can then apply them with minimal judicial invention or policy making. The adjudication of contract disputes therefore involves little more than the rather mechanical process of finding and applying the correct rule. Classicists placed great value on the certainty and predictability of legal rules. They felt that if rules were clear, the resolution of disputes would be more predictable, thus allowing contracting parties to feel more secure in their transactions. In this way, contract law would facilitate market activity. The great systematizing of contract law, mentioned in Section A.2, was a reflection of this belief that the law could be arranged and stated in the form of clear principles. In fact, one of the great early classicists, Christopher Columbus Langdell (dean of the Harvard Law School and the first law professor to write a casebook) went so far as to describe the law as a science.[12] Williston,

relationships that are not formed voluntarily. The contracts clause, which prohibits states from passing any law "impairing the Obligation of Contracts," protects the right to judicial enforcement of contracts. Quite apart from federal protection, freedom of contract is also guaranteed in many state constitutions.

[11] "Laissez-faire," translated as "allow to do," means that the government should abstain from regulating the actions of citizens, especially in the marketplace.

[12] Langdell's principal works were his contracts casebook and a treatise titled *A Summary of the Law of Contracts*, which was appended to the casebook. A passage from the preface of his casebook, in which he

whose work was introduced in Section A.4, is the preeminent scholar of the late classical period. His focus on identifying and expounding on an integral system of contract rules to be applied by courts underlies his treatise and is a basic foundation of the original Restatement of Contracts.

As a practical matter, the classical approach tended to have a quite strict rule orientation, with particular emphasis on the interpretation of written documents and other objective (observable) indications of contractual intent. Its ultimate effect was to strongly favor the enforcement of transactions at their face value. Philosophically, classicists saw this as a positive value, because a focus on formalism ensured that parties would be held to manifested intent, thus promoting security of transactions and stability in the marketplace. To critics of classicism, its disadvantage was glaringly obvious: It tended towards rigidity, paid insufficient attention to underlying questions of fairness, limited the discretion of the judge to take account of other policy concerns, and was likely to favor the interests of the economically powerful over those who might need judicial protection from overreaching.

The classical conception of law began to erode during the early decades of the twentieth century, as the economy became increasingly more complex, and powerful enterprises proliferated. People became more concerned about the social and economic dimensions of commercial interactions between parties of disparate power and sophistication. Legal commentators and judges increasingly questioned the premise that the law could be encompassed in a system of clear rules to be applied by courts in mechanistic fashion. The critics considered such formalism to be based on an unrealistic theoretical model, divorced from what was really happening in the marketplace and the courts. They were skeptical of the classicist view that law consisted of neutral principles and criticized the classical orientation toward "black letter" rules as rigid and often leading to skewed and unfair results. These commentators advocated a much broader and more fluid approach that examined rules in the entire societal context and took into account the realities of the marketplace, the relationship of the parties, and the decision-making process of the courts. They understood, through the growing influence of the social sciences, that law is very much an instrument of public policy applied by judges who are not immune from the influence of their own political predilections. This broader view of the law allows for greater flexibility in rules, which inevitably undermines the certainty and predictability so cherished by the classicists.

Because it emphasizes the realistic study of law in action, this philosophy is known as legal realism. Legal realism offered a vital new insight into the law that has formed the basis of enduring premises of legal analysis and judicial process. Although it was a bold departure from classical thought, it was not revolutionary. Realists continued to accept and work within the framework of rules and principles established by the classicists while softening the rules' hard

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describes law as a science, is quoted in Grant Gilmore, *The Death of Contract* 13 (Ronald K.L. Collins ed., 2d ed., Ohio St. U. Press 1995). (Professor Gilmore was himself a giant of contract and commercial law. *The Death of Contract*, based on a series of lectures, is one of the most influential and enduring essays on contract law.)

edges and treating them as much more fluid and subject to greater judicial discretion. Corbin was one of the preeminent advocates of this new approach, as was Professor Karl Llewellyn, whose contribution is discussed in Chapter 2. The Restatement of Contracts, with Williston as its Reporter but with Corbin's deep involvement, reflects this transition. The work on the Restatement proceeded through the 1920s and culminated in publication in 1932, by which time realism had already begun to eclipse classicism as the prevailing philosophy. As a collaboration between leading figures in these two opposing schools, the Restatement exhibits values derived from both.[13]

In addition to this focus on a realistic view of law, the 1920s and 1930s saw a change in the general attitude to the role of government in commercial transactions. The excesses of laissez-faire economics during the nineteenth century showed that too much faith in the free market tended to favor the predations of the powerful. Legislatures realized that freedom of contract needed to be tempered with social responsibility. In response, they began to enact laws that regulated specific kinds of contracts that had become most susceptible to overreaching and advantage-taking by parties with overbearing power.

The concept of law advanced by the legal realists (as well as by associated schools of thought that emphasized the social role of law) has become firmly established as the mainstream of contract jurisprudence and underlies most modern court opinions as well as much commentary, including the Restatement, Second. Current mainstream thinking is sometimes called neoclassicism to reflect the fact that it is based on but has moved away from the classical model. However, the strong formalism of the classicists is no longer commonplace. While it is occasionally found in recent opinions, you are more likely to encounter it in older cases.

This does not mean that everyone is a neoclassicist today. There are a number of modern philosophical schools that have challenged neoclassical thinking, arguing that a realistic view of law may provide understanding of the world as it exists, but furnishes few if any tools with which to challenge or improve it. Instead, these schools have adopted alternative analyses that describe the law from varied perspectives and emphasize different normative values. Some writers adopt a consent theory of contract. They see the consensual aspect of contract as central, so that rules of law should be built around the core value of assent. Some writers favor a promissory theory of contract that places great stress on the morality of keeping promises and promotes the sanctity of promise as the true moral and legal justification of rules of contract law. Some writers argue for a relational theory of contracts in which rules take into account that most contracts are not discrete, one-time transactions but are part of an ongoing series of dealings between parties who have a long-term relationship. They fault traditional theory for paying insufficient attention to the overall relationship of the parties, resulting in rules that

[13] Professor Gilmore observes that the antithetical points of view held by Williston and Corbin give the Restatement a ". . . schizophrenic quality which makes . . . [it], viewed historically, the fascinating document which it is." Gilmore, *The Death of Contract, supra* note 12, at 66.

disregard the dynamics of the relationship on matters such as contract formation and dispute resolution. The Critical Legal Studies movement, a philosophical school that has generated much writing and controversy in recent decades, adopts a radical approach to contract law. This school examines the effect of contract law on the economic or political underdog and criticizes traditional thinking as an instrument of dominant economic interests. It calls for the "deconstruction" of current rules and their replacement by principles that are more altruistic. Other writers, some of whom have views that are related to those of the Critical Legal Studies movement, focus on the effect of traditional contract law on specific classes of people, such as women and ethnic minorities, whose interests traditionally have not been served by the law.

The alternative legal theory that has achieved the greatest dominance in the last few decades is the Law and Economics movement. Its adherents focus on economic efficiency as the yardstick for measuring the efficacy and propriety of contract rules. In some respects, they have taken up the mantle of the earlier laissez-faire proponents and place faith in free market mechanisms to motivate the behavior of contracting parties in a way that maximizes value for them and for society. The basic idea is that if the law facilitates, rather than interferes with, the operation of the market, the parties will place their own value on transactions, and allocate resources optimally. This will result in efficient transactions and the greatest good for society as a whole. The Law and Economics approach has been controversial. Its opponents argue that the economic analysis of law often relies too heavily on theoretical market models and assumptions about human behavior that may not represent reality. In addition, its opponents contend that the approach tends to focus too strongly on economic efficiency at the expense of other values, such as fairness or protection of the weak.

One of the reactions to the Law and Economics movement has been the development of a school of thought known as Behavioral Law and Economics. Scholars who write from this perspective recognize that the model of a rational decision maker, so central to the economic analysis of law, is an artificial construct. Real people are seldom capable of rational decision making because their decisions are too heavily influenced by emotion, fallible memory, and inadequate understanding of information. To correct for this problem, these scholars attempt to take more account of actual decision-making behavior, as revealed by empirical study.

As you pursue your study of contract law, you may develop your own theories of what the law's underlying purpose is or should be. Law is dynamic and changes in response to debate over its goals and effects. Attention to theory not only enriches academic study; it also allows lawyers to be more effective counselors and advocates.

6. International Perspectives on Contract Law

Although our focus is on the domestic law of contracts in the United States, we will periodically refer briefly to the equivalent (and sometimes different) rules of

contract law that you might find in transactions that cross international borders. It is beyond the scope of the first-year contracts course to discuss in any detail contracts between parties who are located in different countries. However, because international commerce is such an important aspect of modern business, it is helpful to be aware from the outset that the approach to and the rules governing contracts in the international setting may not be the same as those established for the purely domestic setting. (We should emphasize the words "may not" because the law of an American state could apply to an international transaction, either because the parties selected the law of that state as the governing law or because it is otherwise applicable under international principles of choice of law.) Where we refer to international principles, we do so in short text notes that are intended to provide only basic and general comparisons between the legal rules and principles that you study in this course and those that you might find in transnational contracts.

In these periodic notes, we will refer to two documents. The first is a treaty, the United Nations Convention on Contracts for the International Sale of Goods (the CISG). This treaty applies only to contracts involving the sale of goods, and it is introduced in Chapter 2. The United States has ratified the CISG, and, as a treaty of the United States, it has binding force in every state in relation to transactions that fall within its scope.

The second is the UNIDROIT Principles of International Commercial Contracts. This publication is similar in its effect to the Restatement, Second. It is not a treaty, but rather an influential scholarly publication, intended to reflect general rules applicable to international commercial transactions. It was drafted under the auspices of the International Institute for the Unification of Private Law (abbreviated in French as UNIDROIT) and first promulgated in final form in 1994. UNIDROIT adopted updated editions of the Principles in 2004 and again in 2010. In creating the Principles, the drafters examined the rules of contract law from several countries (including the United States) and attempted to cull common principles and best solutions for the purpose of articulating a rational and broadly accepted set of legal rules that could be applied to international transactions. The UNIDROIT Principles are not binding law, but they may be applied by agreement of the parties or might be useful as persuasive authority where a court or arbitrator seeks guidance on how to resolve an international dispute.

B WHAT MAKES AN AGREEMENT INTO A CONTRACT

In Section A.1 we quote the definition of "contract" from the Restatement, Second: "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." We then identify the hallmarks of a legally recognized contract—an

exchange relationship created by agreement between two or more parties, containing at least one promise, and recognized as enforceable in law. We begin this section by briefly surveying these elements.

An exchange relationship. A contract is more than the spoken words of agreement or the piece of paper recording what was agreed. Once a contract is formed, a relationship exists in which the parties commit themselves to each other for a common enterprise. The relationship may be intended to be short (for example, a purchase of goods to be delivered and paid for later that same day), or it may be intended to last for a long time (for example, a ten-year lease of office space). It may be a discrete, one-time transaction entered into by parties who have not contracted with each other before and do not expect to have future dealings, or it may be one of many transactions entered into by parties who deal with each other regularly.

The purpose of the relationship is exchange—a reciprocal arrangement in which each party gives up something to get something else from the other. The function of contract law is to facilitate these exchanges. As we will see later (when we deal with consideration doctrine in Chapter 9), an agreement that lacks any element of exchange (for example, an agreement that one person will make a gift to another) does not qualify as a contract.

Created by agreement. A contract is created by agreement. There must, of course, be at least two parties to this agreement, but there could be many parties to it—multiparty contracts are common. The voluntary nature of contract is fundamental. We can call a relationship a contract only if both parties, in the exercise of free will, consent to enter it. Freedom of contract—which includes both the power to choose whether or not to make a contract and the power to assent to its terms—is a central policy of our law. As we will see later, the question of what constitutes volition and consent can be quite intricate, but consent remains a vital premise of contract.

Containing at least one promise. Although exchange is an indispensable component of a contract, it is not enough on its own to give rise to a contract. For a transaction to be a contract, at least one of the parties must have made a promise—that is, must have committed to do something or refrain from doing something in the future. If no future commitment is made, the law of contracts, which is concerned with the enforcement of promises, has no role to play in the relationship. In most cases, of course, it is not just one but both of the parties who make commitments, but only one promise is needed to qualify the relationship as a contract.

Recognized as enforceable in law. A basic purpose of contract law is to enforce contract obligations—that is, contractual promises become the law between the parties, binding the party who made them and giving the party to whom they are made the right to employ the power of the state, through its courts, to enforce them. Only a small number of contracts ever end up in litigation, but the right of recourse to legal process gives contractual obligations great weight. Parties who enter contracts know that they undertake a serious commitment and realize that its breach could result in a lawsuit and a judicially

imposed remedy. The legal recognition and enforcement of contract obligations are crucial attributes of contract law. Without these attributes, there would be no ultimate recourse to law where social or economic pressure is not enough to motivate a party to honor his commitment. This would diminish reliability and predictability in commercial dealings; Legal recognition of contractual promises distinguishes them from other promises, such as a promise to a spouse to clean up the garage this weekend or to a friend to show up for his boring party.

Later in this book we deal comprehensively with the remedies available for the enforcement of contracts. However, as you will see, we raise remedial issues frequently throughout the book (beginning in this chapter), so that by the time you come to study them in detail, you will be quite familiar with the basic concepts.

In our first two cases, the courts must decide whether an agreement qualifies as a contract. In studying the cases, do not just look for the rule that the courts articulate, but use the cases as your first exercise in analyzing opinions. The questions following the cases will help you to do that.

Contracts

RESTATEMENT, 2nd

§1. CONTRACT DEFINED

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

§2. PROMISE; PROMISOR; PROMISEE; BENEFICIARY

(1) A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.

(2) The person manifesting the intention is the promisor.

(3) The person to whom the manifestation is addressed is the promisee.

(4) Where performance will benefit a person other than the promisee, that person is a beneficiary

Contracts

RESTATEMENT, 2nd

§3. AGREEMENT DEFINED; BARGAIN DEFINED

An agreement is a manifestation of mutual assent on the part of two or more persons. A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.

§4. HOW A PROMISE MAY BE MADE

A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.

Contracts

RESTATEMENT, 2nd §23
Inadvertent Manifestation of Assent

"It is essential to a bargain that **each** party manifest **assent** with reference **to** the manifestation of **the other**."

Contracts

RESTATEMENT, 2nd

§22. MODE OF ASSENT: OFFER AND ACCEPTANCE

(1) The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.

(2) A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined

§24. OFFER DEFINED

An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

Contracts

RESTATEMENT, 2nd §50.

ACCEPTANCE OF OFFER DEFINED; ACCEPTANCE BY PERFORMANCE; ACCEPTANCE BY PROMISE

(1) Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.

(2) Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise.

(3) Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.

Contracts

RESTATEMENT, 2nd §30
FORM OF ACCEPTANCE INVITED

(1) An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act, or may empower the offeree to make a selection of terms in his acceptance.

(2) Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.

Contracts

RESTATEMENT, 2nd § 17
Requirement of a Bargain

(1) Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration
(2) Whether or not there is a bargain a contract may be formed under special rules applicable to formal contracts or under the rules stated in §§ 82-94.

Contracts

RESTATEMENT, 2nd §71.
Requirement of Exchange; Types of Exchange

(1) To constitute consideration, a performance or a return promise must be bargained for.
(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise….
(3) The performance may consist of
(a) an act other than a promise, or
(b) a forbearance, or
(c) the creation, modification, or destruction of a legal relation.
(4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

TITLE IV - CONVENTIONAL OBLIGATIONS OR CONTRACTS

CHAPTER 1 - GENERAL PRINCIPLES

Art. 1906. A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1907. A contract is unilateral when the party who accepts the obligation of the other does not assume a reciprocal obligation. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1908. A contract is bilateral, or synallagmatic, when the parties obligate themselves reciprocally, so that the obligation of each party is correlative to the obligation of the other. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1909. A contract is onerous when each of the parties obtains an advantage in exchange for his obligation. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1910. A contract is gratuitous when one party obligates himself towards another for the benefit of the latter, without obtaining any advantage in return. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1911. A contract is commutative when the performance of the obligation of each party is correlative to the performance of the other. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1912. A contract is aleatory when, because of its nature or according to the parties' intent, the performance of either party's obligation, or the extent of the performance, depends on an uncertain event. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1913. A contract is accessory when it is made to provide security for the performance of an obligation. Suretyship, mortgage, pledge, and other types of security agreements are examples of such a contract.

When the secured obligation arises from a contract, either between the same or other parties, that contract is the principal contract. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985; Acts 1989, No. 137, §16, eff. Sept. 1, 1989]

Art. 1914. Nominate contracts are those given a special designation such as sale, lease, loan, or insurance.

Innominate contracts are those with no special designation. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1915. All contracts, nominate and innominate, are subject to the rules of this title. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1916. Nominate contracts are subject to the special rules of the respective titles when those rules modify, complement, or depart from the rules of this title. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1917. The rules of this title are applicable also to obligations that arise from sources other than contract to the extent that those rules are compatible with the nature of those obligations. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

CHAPTER 2 - CONTRACTUAL CAPACITY AND EXCEPTIONS

Art. 1918. All persons have capacity to contract, except unemancipated minors, interdicts, and persons deprived of reason at the time of contracting. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1919. A contract made by a person without legal capacity is relatively null and may be rescinded only at the request of that person or his legal representative. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1920. Immediately after discovering the incapacity, a party, who at the time of contracting was ignorant of the incapacity of the other party, may require from that party, if the incapacity has ceased, or from the legal representative if it has not, that the contract be confirmed or rescinded. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1921. Upon rescission of a contract on the ground of incapacity, each party or his legal representative shall restore to the other what he has received thereunder. When restoration is impossible or impracticable, the court may award compensation to the party to whom restoration cannot be made. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1922. A fully emancipated minor has full contractual capacity. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1923. A contract by an unemancipated minor may be rescinded on grounds of incapacity except when made for the purpose of providing the minor with something necessary for his support or education, or for a purpose related to his business. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1924. The mere representation of majority by an unemancipated minor does not preclude an action for rescission of the contract. When the other party reasonably relies on the minor's representation of majority, the contract may not be rescinded. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1925. A noninterdicted person, who was deprived of reason at the time of contracting, may obtain rescission of an onerous contract upon the ground of incapacity only upon showing that the other party knew or should have known that person's incapacity. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1926. A contract made by a noninterdicted person deprived of reason at the time of contracting may be attacked after his death, on the ground of incapacity, only when the contract is gratuitous, or it evidences lack of understanding, or was made within thirty days of his death, or when application for interdiction was filed before his death. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

CHAPTER 3 - CONSENT

Art. 1927. A contract is formed by the consent of the parties established through offer and acceptance.

Unless the law prescribes a certain formality for the intended contract, offer and acceptance may be made orally, in writing, or by action or inaction that under the circumstances is clearly indicative of consent.

Unless otherwise specified in the offer, there need not be conformity between the manner in which the offer is made and the manner in which the acceptance is made. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1928. An offer that specifies a period of time for acceptance is irrevocable during that time.

When the offeror manifests an intent to give the offeree a delay within which to accept, without specifying a time, the offer is irrevocable for a reasonable time. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1929. An irrevocable offer expires if not accepted within the time prescribed in the preceding Article. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1930. An offer not irrevocable under Civil Code Article 1928 may be revoked before it is accepted. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1931. A revocable offer expires if not accepted within a reasonable time. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1932. An offer expires by the death or incapacity of the offeror or the offeree before it has been accepted. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1933. An option is a contract whereby the parties agree that the offeror is bound by his offer for a specified period of time and that the offeree may accept within that time. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1934. An acceptance of an irrevocable offer is effective when received by the offeror. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1935. Unless otherwise specified by the offer or the law, an acceptance of a revocable offer, made in a manner and by a medium suggested by the offer or in a reasonable manner and by a reasonable medium, is effective when transmitted by the offeree. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1936. A medium or a manner of acceptance is reasonable if it is the one used in making the offer or one customary in similar transactions at the time and place the offer is received, unless circumstances known to the offeree indicate otherwise. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1937. A revocation of a revocable offer is effective when received by the offeree prior to acceptance. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1938. A written revocation, rejection, or acceptance is received when it comes into the possession of the addressee or of a person authorized by him to receive it, or when it is deposited in a place the addressee has indicated as the place for this or similar communications to be deposited for him. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1939. When an offeror invites an offeree to accept by performance and, according to usage or the nature or the terms of the contract, it is contemplated that the performance will be completed if commenced, a contract is formed when the offeree begins the requested performance. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1940. When, according to usage or the nature of the contract, or its own terms, an offer made to a particular offeree can be accepted only by rendering a completed performance, the offeror cannot revoke the offer, once the offeree has begun to perform, for the reasonable time necessary to complete the performance. The offeree, however, is not bound to complete the performance he has begun.

The offeror's duty of performance is conditional on completion or tender of the requested performance. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1941. When commencement of the performance either constitutes acceptance or makes the offer irrevocable, the offeree must give prompt notice of that commencement unless the offeror knows or should know that the offeree has begun to perform. An offeree who fails to give the notice is liable for damages. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1942. When, because of special circumstances, the offeree's silence leads the offeror reasonably to believe that a contract has been formed, the offer is deemed accepted. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1943. An acceptance not in accordance with the terms of the offer is deemed to be a counteroffer. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1944. An offer of a reward made to the public is binding upon the offeror even if the one who performs the requested act does not know of the offer. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1945. An offer of reward made to the public may be revoked before completion of the requested act, provided the revocation is made by the same or an equally effective means as the offer. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1946. Unless otherwise stipulated in the offer made to the public, or otherwise implied from the nature of the act, when several persons have performed the requested act, the reward belongs to the first one giving notice of his completion of performance to the offeror. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1947. When, in the absence of a legal requirement, the parties have contemplated a certain form, it is presumed that they do not intend to be bound until the contract is executed in that form. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

196 Va. 493
Supreme Court of Appeals of Virginia

W. O. LUCY AND J. C. LUCY
v.
A. H. ZEHMER AND IDA S. ZEHMER.

Record No. 4272.
|
November 22, 1954.

***493** Present, ****517** Eggleston, Buchanan, Miller, Smith and Whittle, JJ.

Opinion

JUDGE: BUCHANAN

BUCHANAN, J., delivered the opinion of the court.

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

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

The answer of A. H. Zehmer admitted that at the time mentioned W. O. Lucy offered him $50,000 cash for the farm, but that he, Zehmer, considered that the offer ****518** was made in jest; that so thinking, and both he and Lucy having had several drinks, he wrote out 'the memorandum' quoted above and induced his wife to sign it; that he did not deliver ***495** the memorandum to Lucy, but that Lucy picked it up, read it, put it in his pocket, attempted to offer Zehmer $5 to bind the bargain, which Zehmer refused to accept, and realizing for the first time that Lucy was serious, Zehmer assured him that he had no intention of selling the farm and that the whole matter was a joke. Lucy left the premises insisting that he had purchased the farm.

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

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

The discussion leading to the signing of the agreement, said Lucy, lasted thirty or forty minutes, during which Zehmer seemed to doubt that Lucy could raise $50,000.

Lucy suggested the provision for having the title examined and Zehmer made the suggestion that he would sell it 'complete, everything there,' and stated that all he had on the farm was three heifers.

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

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

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

He bought this farm more than ten years ago for $11,000. He had had twenty-five offers, more or less, to buy it, including several from Lucy, who had never offered any specific sum of money. He had given them all the same answer, that he was not interested in selling it. On this Saturday night before Christmas it looked like everybody ****519** and his brother came by there to have a drink. He took a good many drinks during the afternoon and had a pint of his own. When he entered the restaurant around eight-thirty ***497** Lucy was there and he could see that he was 'pretty high.' He said to Lucy, 'Boy, you got some good liquor, drinking, ain't you?' Lucy then offered him a drink. 'I was already high as a Georgia pine, and didn't have any more better sense than to pour another great big slug out and gulp it down, and he took one too.'

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

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

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

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

She said that only one paper was written and it said: 'I

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

On examination by her own counsel she said that her husband laid this piece of paper down after it was signed; that Lucy said to let him see it, took it, folded it and put it ***499** in his wallet, then said to Zehmer, ‘Let me give you $5.00,‘ but Zehmer said, ‘No, this is liquor talking. I don’t want to sell the farm, I have told you that I want my son to have it. This is all a joke. ‘ Lucy then said at least twice, ‘Zehmer, you have sold your farm,‘ wheeled around and started for the door. He paused at the door and said, ‘I will bring you $50,000.00 tomorrow. * * * No, tomorrow is Sunday. I will bring it to you Monday.‘ She said you could tell definitely that he was drinking and she said to her husband, ‘You should have taken him home,‘ but he said, ‘Well, I am just about as bad off as he is.‘

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

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

The defendants insist that the evidence was ample to support their contention that the writing sought to be enforced was prepared as a bluff or dare to force Lucy to admit that he did not have $50,000; that the whole matter was a joke; that the writing was not delivered to Lucy and no binding contract was ever made between the parties.

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

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

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

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

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

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

If it be assumed, contrary to what we think the evidence ***502** shows, that Zehmer was jesting about selling his farm to Lucy and that the transaction was intended by him to be a joke, nevertheless the evidence shows that Lucy did not so understand it but considered it to be a serious business transaction and the contract to be binding on the Zehmers as well as on himself. The very next day he arranged with his brother to put up half the money and take a half interest in the land. The day after that he employed an attorney to examine the title. The next night, Tuesday, he was back at Zehmer's place and there Zehmer told him for the first time, Lucy said, that he wasn't going to sell and he told Zehmer, 'You know you sold that place fair and square.' After receiving the report from his attorney that the title was good he wrote to Zehmer that he was ready to close the deal.

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

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

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

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

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

[5] An agreement or mutual assent is of course essential to a valid contract but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of

his mind. 17 C.J.S., Contracts, § 32, p. 361; 12 Am. Jur., Contracts, § 19, p. 515.

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

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

***504** [7] Defendants contend further, however, that even though a contract was made, equity should decline to enforce it under the circumstances. These circumstances have been set forth in detail above. They disclose some drinking by the two parties but not to an extent that they were unable to understand fully what they were doing. There was no fraud, no misrepresentation, no sharp practice and no dealing between unequal parties. The farm had been bought for $11,000 and was assessed for taxation at $6,300. The purchase price was $50,000. Zehmer admitted that it was a good price. There is in fact present in this case none of the grounds usually urged against specific performance.

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

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

Reversed and remanded.

All Citations

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88 F.Supp.2d 116
United States District Court,
S.D. New York.

John D.R. LEONARD, Plaintiff,
v.
PEPSICO, INC., Defendant.

Nos. 96 Civ. 5320(KMW), 96 Civ. 9069(KMW).
|
Aug. 5, 1999.

***117** OPINION & ORDER

KIMBA M. WOOD, District Judge.

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

I. Background

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

A. *The Alleged Offer*

Because whether the television commercial constituted an offer is the central question in this case, the Court will describe the commercial in detail. The commercial opens upon an idyllic, suburban morning, where the chirping of birds in sun-dappled trees welcomes a paperboy on his morning route. As the newspaper hits the stoop of a conventional two-story house, the tattoo of a military drum introduces the subtitle, "MONDAY 7:58 AM." The stirring strains of a martial air mark the appearance of a well-coiffed teenager preparing to leave for school, dressed in a shirt emblazoned with the Pepsi logo, a red-white-and-blue ball. While the teenager confidently preens, the military drumroll again sounds as the subtitle "T–SHIRT 75 PEPSI POINTS" scrolls across the screen. Bursting from his room, the teenager strides down the hallway wearing a leather jacket. The drumroll sounds again, as the subtitle "LEATHER JACKET 1450 PEPSI POINTS" appears. The teenager opens the door of his house and, unfazed by the glare of the early morning sunshine, puts on a pair of sunglasses. The drumroll then accompanies the subtitle "SHADES 175 PEPSI POINTS." A voiceover then intones, "Introducing the new Pepsi Stuff catalog," as the camera focuses on the cover of the catalog. (*See* Defendant's Local Rule 56.1 Stat., Exh. A (the "Catalog").)[2]

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

The teenager opens the cockpit of the fighter and can be seen, helmetless, holding a Pepsi. "[L]ooking very pleased with himself," (Pl. Mem. at 3,) the teenager exclaims, "Sure beats the bus," and chortles. The military drumroll sounds a final time, as the following words appear: "HARRIER FIGHTER 7,000,000 PEPSI POINTS." A few seconds later, the following appears in

more stylized script: "Drink Pepsi—Get Stuff." With that message, the music and the commercial end with a triumphant flourish.

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

The rear foldout pages of the Catalog contain directions for redeeming Pepsi Points for merchandise. (*See* Catalog, at rear foldout pages.) These directions note that merchandise may be ordered "only" with the original Order Form. (*See id.*) The Catalog notes that in the event that a consumer lacks enough Pepsi Points to obtain a desired item, additional Pepsi Points may be purchased for ten cents each; however, at least fifteen original Pepsi Points must accompany each order. (*See id.*)

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

B. *Plaintiff's Efforts to Redeem the Alleged Offer*

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

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

> The item that you have requested is not part of the Pepsi Stuff collection. It is not included in the catalogue or on the order form, and only catalogue merchandise can be redeemed under this program.
>
> The Harrier jet in the Pepsi commercial is fanciful and is simply included to create a humorous and entertaining ad. We apologize for any misunderstanding or confusion that you may have experienced and are enclosing some free product coupons for your use.

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

> Your letter of May 7, 1996 is totally unacceptable. We have reviewed the video tape of the Pepsi Stuff commercial ... and it clearly offers the new Harrier jet for 7,000,000 Pepsi Points. Our client followed your rules explicitly....
>
> This is a formal demand that you honor your commitment and make immediate arrangements to transfer the new Harrier jet to our client. If we do not receive transfer instructions within ten (10) business days of the date of this letter you will leave us no choice but to file an appropriate action against Pepsi....

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

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

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

Litigation of this case initially involved two lawsuits, the first a declaratory judgment action brought by PepsiCo in this district (the "declaratory judgment action"), and the second an action brought by Leonard in Florida state court (the "Florida action").[3] . . . . With these [actions] having been [consolidated], PepsiCo moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. The present motion thus follows three years of jurisdictional and procedural wrangling.

II. Discussion

A. *The Legal Framework*

. . . .

B. *Defendant's Advertisement Was Not An Offer*

1. *Advertisements as Offers*

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

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

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

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

1 Arthur Linton Corbin & Joseph M. Perillo, *Corbin on Contracts* § 2.4, at 116–17 (rev. ed.1993) (emphasis added); *see also* 1 E. Allan Farnsworth, *Farnsworth on Contracts* § 3.10, at 239 (2d ed.1998); 1 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 4:7, at 286–87 (4th ed.1990). New York courts adhere to this general principle. *See* *Lovett v. Frederick Loeser & Co.*, 124 Misc. 81, 207 N.Y.S. 753, 755 (N.Y.Mun.Ct.1924) (noting that an "advertisement is nothing but an invitation to enter into negotiations, and is

not an offer which may be turned into a contract by a person who signifies his intention to purchase some of the articles mentioned in the advertisement"); *see also Geismar v. Abraham & Strauss,* 109 Misc.2d 495, 439 N.Y.S.2d 1005, 1006 (N.Y.Dist.Ct.1981) (reiterating *Lovett* rule); *People v. Gimbel Bros.,* 202 Misc. 229, 115 N.Y.S.2d 857, 858 (N.Y.Sp.Sess.1952) (because an "[a]dvertisement does not constitute an offer of sale but is solely an invitation to customers to make an offer to purchase," defendant not guilty of selling property on Sunday).

[4] [5] An advertisement is not transformed into an enforceable offer merely by a potential offeree's expression of willingness to accept the offer through, among other means, completion of an order form. In *Mesaros v. United States,* 845 F.2d 1576 (Fed.Cir.1988), for example, the plaintiffs sued the United States Mint for failure to deliver a number of Statue of Liberty commemorative coins that they had ordered. When demand for the coins proved unexpectedly robust, a number of individuals who had sent in their orders in a timely fashion were left empty-handed. *See id.* at 1578–80. The court began by noting the "well-established" rule that advertisements and order forms are "mere notices and solicitations for offers which create no power of acceptance in the recipient." *Id.* at 1580; *see also Foremost Pro Color, Inc. v. Eastman Kodak Co.,* 703 F.2d 534, 538–39 (9th Cir.1983) ("The weight of authority is that purchase orders such as those at issue here are not enforceable contracts until they are accepted by the seller.");[5] *Restatement (Second) of Contracts* § 26 ("A manifestation of willingness to enter a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent."). The spurned coin collectors could not maintain a breach of contract action because no contract would be formed until the advertiser accepted the order form and processed payment. *See id.* at 1581; *see also Alligood v. Procter & Gamble,* 72 Ohio App.3d 309, 594 N.E.2d 668 (1991) (finding that no offer was made in promotional campaign for baby diapers, in which consumers were to redeem teddy bear proof-of-purchase symbols for catalog merchandise); ***124** *Chang v. First Colonial Savings Bank,* 242 Va. 388, 410 S.E.2d 928 (1991) (newspaper advertisement for bank settled the terms of the offer once bank accepted plaintiffs' deposit, notwithstanding bank's subsequent effort to amend the terms of the offer). Under these principles, plaintiff's letter of March 27, 1996, with the Order Form and the appropriate number of Pepsi Points, constituted the offer. There would be no enforceable contract until defendant accepted the Order Form and cashed the check.

The exception to the rule that advertisements do not create any power of acceptance in potential offerees is where the advertisement is "clear, definite, and explicit, and leaves nothing open for negotiation," in that circumstance, "it constitutes an offer, acceptance of which will complete the contract." *Lefkowitz v. Great Minneapolis Surplus Store,* 251 Minn. 188, 86 N.W.2d 689, 691 (1957). In *Lefkowitz,* defendant had published a newspaper announcement stating: "Saturday 9 AM Sharp, 3 Brand New Fur Coats, Worth to $100.00, First Come First Served $1 Each." *Id.* at 690. Mr. Morris Lefkowitz arrived at the store, dollar in hand, but was informed that under defendant's "house rules," the offer was open to ladies, but not gentlemen. *See id.* The court ruled that because plaintiff had fulfilled all of the terms of the advertisement and the advertisement was specific and left nothing open for negotiation, a contract had been formed. *See id.; see also Johnson v. Capital City Ford Co.,* 85 So.2d 75, 79 (La.Ct.App.1955) (finding that newspaper advertisement was sufficiently certain and definite to constitute an offer).

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

Mesaros, 845 F.2d at 1581. "A customer would not usually have reason to believe that the shopkeeper intended exposure to the risk of a multitude of acceptances resulting in a number of contracts exceeding the shopkeeper's inventory." Farnsworth, *supra,* at 242. There was no such danger in *Lefkowitz,* owing to the limitation "first come, first served."

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

***125** 2. *Rewards as Offers*

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

Long a staple of law school curricula, *Carbolic Smoke Ball* owes its fame not merely to "the comic and slightly mysterious object involved," A.W. Brian Simpson. *Quackery and Contract Law: Carlill v. Carbolic Smoke Ball Company (1893),* in *Leading Cases in the Common Law* 259, 281 (1995), but also to its role in developing the law of unilateral offers. The case arose during the London influenza epidemic of the 1890s. Among other advertisements of the time, for Clarke's World Famous Blood Mixture, Towle's Pennyroyal and Steel Pills for Females, Sequah's Prairie Flower, and Epp's Glycerine Jube–Jubes, *see* Simpson, *supra,* at 267, appeared solicitations for the Carbolic Smoke Ball. The specific advertisement that Mrs. Carlill saw, and relied upon, read as follows:

> 100 £ reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any diseases caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. 1000 £ is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter.
>
> During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

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

Affirming the lower court's decision, Lord Justice Lindley began by noting that the advertisement was an express promise to pay £ 100 in the event that a consumer of the Carbolic Smoke Ball was stricken with influenza. *See id.* at 261. The advertisement was construed as offering a reward because it sought to induce performance, unlike an invitation to negotiate, which seeks a reciprocal promise. As Lord Justice Lindley explained, "advertisements offering rewards ... are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer." *Id.* at 262; *see also id.* at 268 (Bowen, L.J.).[9] Because Mrs. Carlill had complied with the terms of the offer, yet ***126** contracted influenza, she was entitled to £>> 100.

Like *Carbolic Smoke Ball,* the decisions relied upon by plaintiff involve offers of reward. In *Barnes v. Treece,* 15 Wash.App. 437, 549 P.2d 1152 (1976), for example, the vice-president of a punchboard distributor, in the course of hearings before the Washington State Gambling Commission, asserted that, " 'I'll put a hundred thousand dollars to anyone to find a crooked board. If they find it, I'll pay it.' " *Id.* at 1154. Plaintiff, a former bartender, heard of the offer and located two crooked punchboards. Defendant, after reiterating that the offer was serious, providing plaintiff with a receipt for the punchboard on company stationery, and assuring plaintiff that the reward was being held in escrow, nevertheless repudiated the offer. *See id.* at 1154. The court ruled that the offer was valid and that plaintiff was entitled to his reward. *See id.* at 1155. The plaintiff in this case also cites cases involving prizes for skill (or luck) in the game of golf. *See*

Las Vegas Hacienda v. Gibson, 77 Nev. 25, 359 P.2d 85 (1961) (awarding $5,000 to plaintiff, who successfully shot a hole-in-one); *see also* *Grove v. Charbonneau Buick–Pontiac, Inc.*, 240 N.W.2d 853 (N.D.1976) (awarding automobile to plaintiff, who successfully shot a hole-in-one).

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

In the present case, the Harrier Jet commercial did not direct that anyone who appeared at Pepsi headquarters with 7,000,000 Pepsi Points on the Fourth of July would receive a Harrier Jet. Instead, the commercial urged consumers to accumulate Pepsi Points and to refer to the Catalog to determine how they could redeem their Pepsi Points. The commercial sought a reciprocal promise, expressed through acceptance of, and compliance with, the terms of the Order Form. As noted previously, the Catalog contains no mention of the Harrier Jet. Plaintiff states that he "noted that the Harrier Jet was not among the items described in the catalog, but this did not affect [his] understanding of the offer." (Pl. Mem. at 4.) It should have.[10]

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

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

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

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

Plaintiff's understanding of the commercial as an offer must also be rejected because the Court finds that no objective person could reasonably have concluded that the commercial actually offered consumers a Harrier Jet.

1. *Objective Reasonable Person Standard*

[7] In evaluating the commercial, the Court must not consider defendant's subjective intent in making the commercial, or plaintiff's subjective view of what the commercial offered, but what an objective, reasonable person would have understood the commercial to convey.

See *Kay–R Elec. Corp. v. Stone & Webster Constr. Co.*, 23 F.3d 55, 57 (2d Cir.1994) ("[W]e are not concerned with what was going through the heads of the parties at the time [of the alleged contract]. Rather, we are talking about the objective principles of contract law."); *Mesaros*, 845 F.2d at 1581 ("A basic rule of contracts holds that whether an offer has been made depends on the objective reasonableness of the alleged offeree's belief that the advertisement or solicitation was intended as an offer."); Farnsworth, *supra*, § 3.10, at 237; Williston, *supra*, § 4:7 at 296–97.

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

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

Corbin on Contracts, § 1.11 at 30 (emphasis added). An obvious joke, of course, would not give rise to a contract. *See, e.g.*, *Graves v. Northern N.Y. Pub. Co.*, 260 A.D. 900, 22 N.Y.S.2d 537 (1940) (dismissing claim to offer of $1000, which appeared in the "joke column" of the newspaper, to any person who could provide a commonly available phone number). On the other hand, if there is no indication that the offer is "evidently in jest," and that an objective, reasonable person would find that the offer was serious, then there may be a valid offer. *See* *Barnes*, 549 P.2d at 1155 ("[I]f the jest is not apparent and a reasonable hearer would believe that an offer was being made, then the speaker risks the formation of a contract which was not intended."); *see also* *Lucy v. Zehmer*, 196 Va. 493, 84 S.E.2d 516, 518, 520 (1954) ***128** (ordering specific performance of a contract to purchase a farm despite defendant's protestation that the transaction was done in jest as " 'just a bunch of two doggoned drunks bluffing' ").

2. *Necessity of a Jury Determination*

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

Plaintiff's argument that his claim must be put to a jury is without merit. *Gallagher* involved a claim of sexual harassment in which the defendant allegedly invited plaintiff to sit on his lap, gave her inappropriate Valentine's Day gifts, told her that "she brought out feelings that he had not had since he was sixteen," and "invited her to help him feed the ducks in the pond, since he was 'a bachelor for the evening.' " *Gallagher*, 139 F.3d at 344. The court concluded that a jury determination was particularly appropriate because a federal judge lacked "the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications." *Id.* at 342. This case, in contrast, presents a question of whether there was an offer to enter into a contract, requiring the Court to determine how a reasonable, objective person would have understood defendant's commercial. Such an inquiry is commonly performed by courts on a motion for summary judgment. *See* *Krumme*, 143 F.3d at 83; *Bourque*, 42 F.3d at 708; *Wards Co.*, 761 F.2d at 120.

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

[9] Plaintiff's insistence that the commercial appears to be a serious offer requires the Court to explain why the commercial is funny. Explaining why a joke is funny is a daunting task; as the essayist E.B. White has remarked,

"Humor can be dissected, as a frog can, but the thing dies in the process...."[11] The commercial is the embodiment of what defendant appropriately characterizes as "zany humor." (Def. Mem. at 18.)

First, the commercial suggests, as commercials often do, that use of the advertised product will transform what, for most youth, can be a fairly routine and ordinary experience. The military tattoo and stirring martial music, as well as the use of subtitles in a Courier font that scroll terse messages across the screen, such as "MONDAY 7:58 AM," evoke military and espionage thrillers. The implication of the commercial is that Pepsi Stuff merchandise will inject drama and moment into hitherto unexceptional lives. The commercial in this case thus makes the exaggerated claims similar to those of many television advertisements: that by consuming the featured clothing, car, beer, or potato chips, one will become attractive, stylish, desirable, and admired by all. A reasonable viewer would understand such advertisements as mere puffery, not as statements of fact, *see, e.g.*, *Hubbard v. General Motors Corp.*, 95 Civ. 4362(AGS), 1996 WL 274018, at *6 (S.D.N.Y. May 22, 1996) (advertisement describing automobile as "Like a Rock," was mere puffery, not a warranty of quality); *Lovett*, 207 N.Y.S. at 756; and refrain from interpreting the promises of the commercial as being literally true.

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

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

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

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

***130** Plaintiff argues that a reasonable, objective person would have understood the commercial to make a serious offer of a Harrier Jet because there was "absolutely no distinction in the manner" (Pl. Mem. at 13,) in which the items in the commercial were presented. Plaintiff also relies upon a press release highlighting the promotional campaign, issued by defendant, in which "[n]o mention is made by [defendant] of humor, or anything of the sort."

(*Id.* at 5.) These arguments suggest merely that the humor of the promotional campaign was tongue in cheek. Humor is not limited to what Justice Cardozo called "[t]he rough and boisterous joke ... [that] evokes its own guffaws." *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 483, 166 N.E. 173, 174 (1929). In light of the obvious absurdity of the commercial, the Court rejects plaintiff's argument that the commercial was not clearly in jest.

4. *Plaintiff's Demands for Additional Discovery*

[10] In his Memorandum of Law, and in letters to the Court, plaintiff argues that additional discovery is necessary on the issues of whether and how defendant reacted to plaintiff's "acceptance" of their "offer"; how defendant and its employees understood the commercial would be viewed, based on test-marketing the commercial or on their own opinions; and how other individuals actually responded to the commercial when it was aired. (*See* Pl. Mem. at 1–2; Letter of David E. Nachman to the Hon. Kimba M. Wood, Apr. 5, 1999.)

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

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

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

. . . .

III. Conclusion

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

For the reasons stated above, the Court grants defendant's motion for summary judgment. The Clerk of Court is instructed to close these cases. Any pending motions are moot.

All Citations

88 F.Supp.2d 116, 39 UCC Rep.Serv.2d 1

Footnotes

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

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

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

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

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

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

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

[7] The reservation of the details of the offer in this case distinguishes it from *Payne v. Lautz Bros. & Co.,* 166 N.Y.S. 844 (N.Y.City Ct.1916). In *Payne,* a stamp and coupon broker purchased massive quantities of coupons produced by defendant, a soap company, and tried to redeem them for 4,000 round-trip tickets to a local beach. The court ruled for plaintiff, noting that the advertisements were "absolutely unrestricted. It contained no reference whatever to any of its previous advertising of any form." *Id.* at 848. In the present case, by contrast, the commercial explicitly reserved the details of the offer to the Catalog.

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

[9] *Carbolic Smoke Ball* includes a classic formulation of this principle: "If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write a note saying that they have

accepted my proposal?" *Carbolic Smoke Ball,* 1 Q.B. at 270 (Bowen, L.J.).

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

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

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

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

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

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

TITLE III - OBLIGATIONS IN GENERAL

CHAPTER 1 - GENERAL PRINCIPLES

Art. 1756. An obligation is a legal relationship whereby a person, called the obligor, is bound to render a performance in favor of another, called the obligee. Performance may consist of giving, doing, or not doing something. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1757. Obligations arise from contracts and other declarations of will. They also arise directly from the law, regardless of a declaration of will, in instances such as wrongful acts, the management of the affairs of another, unjust enrichment and other acts or facts. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1758. A. An obligation may give the obligee the right to:

(1) Enforce the performance that the obligor is bound to render;

(2) Enforce performance by causing it to be rendered by another at the obligor's expense;

(3) Recover damages for the obligor's failure to perform, or his defective or delayed performance.

B. An obligation may give the obligor the right to:

(1) Obtain the proper discharge when he has performed in full;

(2) Contest the obligee's actions when the obligation has been extinguished or modified by a legal cause. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1759. Good faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

TITLE IV - CONVENTIONAL

OBLIGATIONS OR CONTRACTS

CHAPTER 1 - GENERAL PRINCIPLES

Art. 1906. A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1907. A contract is unilateral when the party who accepts the obligation of the other does not assume a reciprocal obligation. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1908. A contract is bilateral, or synallagmatic, when the parties obligate themselves reciprocally, so that the obligation of each party is correlative to the obligation of the other. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1909. A contract is onerous when each of the parties obtains an advantage in exchange for his obligation. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1910. A contract is gratuitous when one party obligates himself towards another for the benefit of the latter, without obtaining any advantage in return. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1911. A contract is commutative when the performance of the obligation of each party is correlative to the performance of the other. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1912. A contract is aleatory when, because of its nature or according to the parties' intent, the performance of either party's obligation, or the extent of the performance, depends on an uncertain event. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1913. A contract is accessory when it is made to provide security for the performance of an obligation. Suretyship, mortgage, pledge, and other types of security agreements are examples of such a contract.

When the secured obligation arises from a contract, either between the same or other parties, that contract is the principal contract. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985; Acts 1989, No. 137, §16, eff. Sept. 1, 1989]

Art. 1914. Nominate contracts are those given a special designation such as sale, lease, loan, or insurance.

Innominate contracts are those with no special designation. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1915. All contracts, nominate and innominate, are subject to the rules of this title. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1916. Nominate contracts are subject to the special rules of the respective titles when those rules modify, complement, or depart from the rules of this title. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1917. The rules of this title are applicable also to obligations that arise from sources other than contract to the extent that those rules are compatible with the nature of those obligations. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

CHAPTER 2 - CONTRACTUAL CAPACITY AND EXCEPTIONS

Art. 1918. All persons have capacity to contract, except unemancipated minors, interdicts, and persons deprived of reason at the time of contracting. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1919. A contract made by a person without legal capacity is relatively null and may be rescinded only at the request of that person or his legal representative. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1920. Immediately after discovering the incapacity, a party, who at the time of contracting was ignorant of the incapacity of the other party, may require from that party, if the incapacity has ceased, or from the legal representative if it has not, that the contract be confirmed or rescinded. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1921. Upon rescission of a contract on the ground of incapacity, each party or his legal representative shall restore to the other what he has received thereunder. When restoration is impossible or impracticable, the court may award compensation to the party to whom restoration cannot be made. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1922. A fully emancipated minor has full contractual capacity. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1923. A contract by an unemancipated minor may be rescinded on grounds of incapacity except when made for the purpose of providing the minor with something necessary for his support or education, or for a purpose related to his business. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

Art. 1924. The mere representation of majority by an unemancipated minor does not preclude an action for rescission of the contract. When the other party reasonably relies on the minor's representation of majority, the contract may not be rescinded. [Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

196 Va. 493
Supreme Court of Appeals of Virginia

W. O. LUCY AND J. C. LUCY
v.
A. H. ZEHMER AND IDA S. ZEHMER.

Record No. 4272.
|
November 22, 1954.

***493** Present, ****517** Eggleston, Buchanan, Miller, Smith and Whittle, JJ.

Opinion

JUDGE: BUCHANAN

BUCHANAN, J., delivered the opinion of the court.

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

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

The answer of A. H. Zehmer admitted that at the time mentioned W. O. Lucy offered him $50,000 cash for the farm, but that he, Zehmer, considered that the offer ****518** was made in jest; that so thinking, and both he and Lucy having had several drinks, he wrote out 'the memorandum' quoted above and induced his wife to sign it; that he did not deliver ***495** the memorandum to Lucy, but that Lucy picked it up, read it, put it in his pocket, attempted to offer Zehmer $5 to bind the bargain, which Zehmer refused to accept, and realizing for the first time that Lucy was serious, Zehmer assured him that he had no intention of selling the farm and that the whole matter was a joke. Lucy left the premises insisting that he had purchased the farm.

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

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

The discussion leading to the signing of the agreement, said Lucy, lasted thirty or forty minutes, during which Zehmer seemed to doubt that Lucy could raise $50,000.

Lucy suggested the provision for having the title examined and Zehmer made the suggestion that he would sell it 'complete, everything there,' and stated that all he had on the farm was three heifers.

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

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

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

He bought this farm more than ten years ago for $11,000. He had had twenty-five offers, more or less, to buy it, including several from Lucy, who had never offered any specific sum of money. He had given them all the same answer, that he was not interested in selling it. On this Saturday night before Christmas it looked like everybody ****519** and his brother came by there to have a drink. He took a good many drinks during the afternoon and had a pint of his own. When he entered the restaurant around eight-thirty ***497** Lucy was there and he could see that he was 'pretty high.' He said to Lucy, 'Boy, you got some good liquor, drinking, ain't you?' Lucy then offered him a drink. 'I was already high as a Georgia pine, and didn't have any more better sense than to pour another great big slug out and gulp it down, and he took one too.'

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

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

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

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

She said that only one paper was written and it said: 'I

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

On examination by her own counsel she said that her husband laid this piece of paper down after it was signed; that Lucy said to let him see it, took it, folded it and put it ***499** in his wallet, then said to Zehmer, ‘Let me give you $5.00,‘ but Zehmer said, ‘No, this is liquor talking. I don’t want to sell the farm, I have told you that I want my son to have it. This is all a joke. ‘ Lucy then said at least twice, ‘Zehmer, you have sold your farm,‘ wheeled around and started for the door. He paused at the door and said, ‘I will bring you $50,000.00 tomorrow. * * * No, tomorrow is Sunday. I will bring it to you Monday.‘ She said you could tell definitely that he was drinking and she said to her husband, ‘You should have taken him home,‘ but he said, ‘Well, I am just about as bad off as he is.‘

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

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

The defendants insist that the evidence was ample to support their contention that the writing sought to be enforced was prepared as a bluff or dare to force Lucy to admit that he did not have $50,000; that the whole matter was a joke; that the writing was not delivered to Lucy and no binding contract was ever made between the parties.

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

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

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

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

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

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

If it be assumed, contrary to what we think the evidence ***502** shows, that Zehmer was jesting about selling his farm to Lucy and that the transaction was intended by him to be a joke, nevertheless the evidence shows that Lucy did not so understand it but considered it to be a serious business transaction and the contract to be binding on the Zehmers as well as on himself. The very next day he arranged with his brother to put up half the money and take a half interest in the land. The day after that he employed an attorney to examine the title. The next night, Tuesday, he was back at Zehmer's place and there Zehmer told him for the first time, Lucy said, that he wasn't going to sell and he told Zehmer, 'You know you sold that place fair and square.' After receiving the report from his attorney that the title was good he wrote to Zehmer that he was ready to close the deal.

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

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

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

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

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

[5] An agreement or mutual assent is of course essential to a valid contract but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of

his mind. 17 C.J.S., Contracts, § 32, p. 361; 12 Am. Jur., Contracts, § 19, p. 515.

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

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

***504** [7] Defendants contend further, however, that even though a contract was made, equity should decline to enforce it under the circumstances. These circumstances have been set forth in detail above. They disclose some drinking by the two parties but not to an extent that they were unable to understand fully what they were doing. There was no fraud, no misrepresentation, no sharp practice and no dealing between unequal parties. The farm had been bought for $11,000 and was assessed for taxation at $6,300. The purchase price was $50,000. Zehmer admitted that it was a good price. There is in fact present in this case none of the grounds usually urged against specific performance.

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

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

Reversed and remanded.

All Citations

196 Va. 493, 84 S.E.2d 516

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