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SHIPS THAT PASS IN THE NIGHT

Smith and Jones (singular) is an exporting firm, an agent. It is formed by two partners, Smith and Jones (plural), acting jointly and is thus a small purposive group. Mary is the firm's employee. She forms part of the group insofar as her acts will be acts of the firm. Mary acts on written instructions, which means that Smith and Jones jointly direct Mary by way of instructions to which they both agree, the agreement of each partner being signified by each signing a memorandum.

Smith and Jones jointly stand to Mary as superior to inferior. The firm has a decision-making structure—a standing intention to form further, particular intentions—to this extent. Smith and Jones stand to one another as equals. The firm is to this extent a simple group in which joint action and intention requires unanimity on the part of Smith and Jones. This is the default for group action. Smith and Jones might adopt a rule—a standing intention—that each would be committed to the other's reasonable misunderstandings of proposals he makes. The rule that Mary's instructions are only operative if *signed* by both partners might suggest this. However, this rule is just as readily understood as requiring, and constituting, a written record of (true) agreement.

Mary has been instructed to undertake a certain course of action when Smith and Jones have formed the joint intention that she shall act in this way and when that joint intention is conveyed to Mary by way of written

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instructions. The question in this case is whether Smith and Jones have formed a joint intention and whether they have conveyed it to Mary by uttering the semantic content of the memorandum in the context in which it was uttered. Or, alternatively, the question is whether they have (inadvertently) conveyed some other course of action to Mary by way of their utterance, which makes it intelligible to say that Mary has been instructed to act in this way.

The question of what Mary has been instructed to do turns on Smith and Jones's joint intention, if any, in using the phrase "the ship Peerless, which is bound for Athens." That is, what plan of action (again, if any) do Smith and Jones jointly intend Mary to adopt because of their memorandum? The intended meaning of the phrase aims to articulate that plan, but it is the plan that is decisive.

It is tempting to say that there is no joint intention because there is only the appearance of agreement, an appearance which dissolves when one realizes the mistake that Smith and Jones each have made. When Smith proposes (or accepts) shipment by way of "the ship Peerless, bound for Athens," he takes for granted that this means the only Peerless of which he is aware, namely the ship by that name in Plymouth. When Jones hears this proposal, or if he proposes shipment by way of "the ship Peerless," he takes for granted that this means the ship by that name in Southampton. Neither man used the formulation to distinguish the ship from any other ship called "Peerless," precisely because no such confusion was anticipated. Likewise, neither partner was intending to convey a class —"ships called Peerless"—while merely expecting that Mary would apply the class to the ship owned by his brother (or sister). That there was more than one ship named Peerless, such that the formulation would not pick out one ship only, was not anticipated.

If Smith had proposed "the ship Peerless" intending to convey "the ship of that name based in Plymouth (and owned by my brother)," and Jones had agreed, intending "the ship Peerless" to mean "the ship of that name based in Southampton (and owned by my sister)," then there would simply have been no agreement. The two partners would not have formed a joint intention about what Mary was to do. Smith and Jones would have been talking past each other, as if, echoing Dworkin, they had agreed to meet by the bank, with one referring to the river's edge and the other to the financial institution. Even in such a case, however, Mary might have been instructed to act. Insofar as Mary knew that Smith and Jones had not truly agreed on a course of action, she would not have been instructed to do anything. Their signature would not change this analysis for it would not transmute the absence of joint intention into a true act of the partnership. But if Mary had not known this then she would reasonably have understood their intended meaning—their joint intention—to be to ship textiles on

"the Peerless." In that case, she would have been instructed, per the standing intention of the firm that she should act as the partners seem to have directed, to make the shipment by way of "the ship Peerless," an instruction that does not distinguish between the two ships. It follows that her instructions would require shipment on a ship, but either would do.

However, the better analysis is that Smith and Jones truly act on the joint intention that Mary should make the shipment by way of "the ship Peerless, bound for Athens," an intention that does not distinguish between the two ships that bear that name.

If the point of the shipment, for the firm (what each partner will admit to the other, what each has agreed to do with the other), is to ship textiles to a buyer in Athens, then their further, private intentions (what each "wants" to happen) are irrelevant. They are agreed that the shipment should be made on "the ship Peerless, bound for Athens." They have chosen this means to the end of delivering the shipment, but the means they have chosen, which they have directed Mary to adopt, turns out to be insufficiently specific to settle between the two ships. Imagine that Smith and Jones had no private intentions or plans: would this imprecision of means then matter? No, because their assumption that there was only one Peerless, based in Plymouth or Southampton, would be irrelevant to the course of action they intended *the firm* to undertake, namely, shipping textiles to a buyer in Athens. It would only be if the cost of transport to Plymouth or Southampton, or the terms demanded by the relevant ship, were different that the question "which Peerless?" would be at all relevant to the partnership's action.

The importance of this analysis is that the private intentions do *not* matter precisely because they are private, that is, not common to Smith and Jones and thus not apt to frame their joint intention. Smith and Jones may each want the private (family) gain that follows from shipment being by way of the Peerless each has in mind, but they have not put to the other partner a course of action in which the partnership (the exporting firm) agrees to act in a way that clearly has, let alone openly accepts, this side effect. Hence, each partner should understand himself to have agreed to a course of action in which the joint intention is that the shipment simply will proceed by way of "the ship Peerless, bound for Athens." One might speculate that either partner would have withheld his agreement if it were clear that the Peerless in question was not the one owned by his brother or sister. Perhaps, but regretting one's agreement is not the same as having failed to agree. One might more plausibly speculate that both

partners would resist the conclusion that they had failed to agree, if for both the point of their joint action is to make a shipment to a buyer in Athens, with the mode of carriage being relevant to the partnership only insofar as it bears on the terms of carriage.

This is a hard case because it involves reflection on how "the ship Peerless, bound for Athens" stands in the joint intention of Smith and Jones. If each partner truly intended that formulation to be understood to mean "the Peerless in Plymouth" or "the Peerless in Southampton," such that the proposed plan was to employ that particular ship and no other, then there would have been no joint intention. If Mary had been aware of a failure to agree then she would not have been instructed to do anything. But if she had not been aware, then Smith and Jones would have instructed her, in a secondary sense, to make the shipment by way of either Peerless. However, there are good reasons to think that the plan of action to which the partners have agreed, which they direct Mary to implement, is shipment by way of the Peerless, bound for Athens, a coherent but, it turns out, underspecified instruction. The partnership's failure to anticipate that there are two ships named Peerless does not mean that Smith and Jones have not formed and conveyed to Mary their joint intention. Their joint intention would not settle on which Peerless the shipment should be made, but it certainly would settle that shipment is to be made on "the ship Peerless, bound for Athens."

LET'S CALL THE WHOLE THING OFF (YOU SAY TOMATO, I SAY TOMATO)

No judge may safely apply a statute he or she has not read. However, the precise statutory text is not before this court. What is agreed is that the statute imposes a new tax on "imported fruit but not imported vegetables." The question for this court to decide is whether the tax applies to a shipment of tomatoes and kiwis. This requires the court to determine whether "fruit" should be understood to have been used in its culinary or botanical sense. If the former, then the tax does not apply to tomatoes; if the latter, it does apply. (On either reading the tax applies to the shipment of kiwifruit.) This is a question about the meaning that the legislature intended to convey in enacting the statute. The legislature introduced a new rule into the law of Lex, a rule that imposes a tax either on "fruit" in the culinary sense or "fruit" in the botanical sense, but that does not impose a tax on vegetables.

Some evidence about legislative history has been placed before this court, to which I turn below. However, the distinction the statute draws on its face, insofar as I am able to determine this without the statutory text itself, answers the question before the court. In distinguishing between imported fruit and vegetables, the legislature has made clear its intention

to impose a tax on "fruit" in the culinary sense and not in the botanical sense. No rational legislature would utter this text intending to convey the proposition that "fruit" is to be understood in its botanical sense.

If the statute imposed a tax on imported fruit and was silent on vegetables then it might be an open question whether the legislature used the term "fruit" in its culinary or botanical sense. But in drawing a distinction between fruit and vegetables this question dissolves, for no rational lawmaker, or language user, would draw this distinction and intend "fruit" to bear its botanical meaning. The reason is that the botanical meaning of "fruit" extends well into the class of vegetables, at least as the latter are understood in a culinary sense. There is no stable botanical meaning of vegetables that might rationally be adopted together with a botanical meaning of "fruit," unless one simply refers to edible plant matter—but this would include fruit. While "fruit" may in some contexts be ambiguous between botanical and culinary senses, when used in contrast to vegetables, it would be extremely unlikely to be used in the former sense. One could understand vegetables to include all edible plant matter save for fruit understood in the botanical sense, but that would be plausible only if there was some reason to read "fruit" thus. There is no such reason and on the contrary this reading attributes to the legislature an unusual intended meaning of "vegetables", which would exclude not only tomatoes, but also peppers, pumpkins, cucumbers, peas, stringbeans, eggplant, okra, olives, avocado, corn, zucchini, beans, and chickpeas. The legislature did not classify each of these types of plant matter as fruits or vegetables in the course of enacting this statute, but the need for customs and excise officials to classify them must have informed its choice of language.

I note that the statute includes the proviso that "There shall be no discrimination among types of fruit in the levying of this tax." This enactment neither requires nor forbids reading "fruit" in its culinary or botanical sense. On the contrary it takes for granted that such a sense has already been intended and then prohibits discrimination within the class. That is, I read the proviso to forbid those who are charged with levying the tax from making special provision for certain types of fruit (apples, say), to which, by hypothesis, the tax otherwise would apply. Perhaps my reading of this proviso is unintelligible, but without seeing the rest of the statute it would seem not, and it would be odd indeed to understand this provision as somehow establishing that "fruit" was intended to be understood in its botanical rather than its culinary sense. It would be highly implausible to try to convey (clarify?) that fruit is used in its

botanical sense by way of this provision. No rational legislator would think that it changed the operative provision of the tax.

It follows that I conclude that the legislature—as the rational language user and lawmaker that uttered this semantic content intending to convey a certain meaning and thus change the law in the ways that it intended them to change—intended to use "fruit" in its culinary sense. There is no need to have reference to the legislative history to understand the legislature's act. I would not even take the legislative history that has been provided in this case to be relevant to the question before the court, or to be open in principle for this court to consider, unless I am required by the law of Lex to have reference to it. I shall proceed on the assumption I am so required.

What has been put before the court is a thin account of the legislative history, which confirms the risks of referring to it. The history is silent on which legislators initiated the legislation or how or why it was understood as it was, apart from assurances falsely made by the legislative aide.

The joint intention of the legislators turns on what proposal was open to legislators and adopted by way of the procedures of the assembly, including majority vote. Legislators do not stipulate the meaning of a proposal by voting for it; rather, their vote makes it the case that the legislature (singular) adopts a proposal that has the meaning it reasonably appears to legislators (plural) to have. It is thus rather important how the third of legislators who voted against the tax understood it. I reject the implication that their understanding is irrelevant because they opposed the proposal. On the contrary, they may have opposed it precisely because they saw that it was a proposal to tax fruit in its culinary sense, or, perhaps, in its botanical sense. The point of uncovering how the minority understood the proposal is not to count heads, as if the meaning of the legislation were settled by some kind of meta-vote about meaning. Rather, the point would be to discern what proposal was reasonably understood to have been before legislators for adoption. It is for this reason that it matters who moved the proposal—and why—and how they were reasonably understood. The partial legislative history that has been put before this court implies that the legislative aide simply manipulated two subgroups of legislators into understanding the legislative proposal in incompatible ways. With respect, this is less than compelling as an account of legislative dynamics.

The premise of the dispute, insofar as it concerns legislative history, is that there were different understandings of the proposal put to the legislators (plural), such that the subgroups of legislators who made up the majority simply acted on different understandings. However, the legislature is not a simple group. It does not act only when the legislators agree. The legislature is a complex group that has a standing intention to act on the

proposals that are open to all legislators which are adopted on majority vote. Even when some legislators fail to understand the proposal that is before them, the legislature nonetheless acts on the intention that the proposal makes out (a plan for lawmaking change articulated in some meaning-content).

It is noteworthy that the different subgroups of legislators (with the exception of the minority) are said to have been assured either that the term "fruit" bears its botanical meaning or its culinary meaning. How would the legislative aide have given this assurance, save by simply asserting that this is what he or she intended in drafting the proposal? But this assertion would not suffice. Any meaningful assurance would need to consist in reasons why the proposal is better understood in one way or another, why some understanding is or should be common across the legislature, which would turn in part on how the text would be likely to be understood, by this court and other subjects of the law, if enacted by the legislature itself. For the reasons given above, I can see how assurances might plausibly have been given to those who would vote for the proposal if it imposed a tax on imported fruit in the culinary sense. I cannot see how similar assurances could have been provided to those who would only vote for a tax on fruit in the botanical sense.

Once this division amongst the legislators is known, the problem cannot easily be contained. It would have been irrational for the so-called "tomato-haters" to have assumed that "fruit" had its botanical meaning. One might say that it would also have been unsafe for the "tomato-lovers" to have assumed the opposite, but they had the support of the rationality of language use, context, and perhaps also the understanding of the voting minority. Legislative coalitions do fragment at times or misunderstand one another, but it is doubtful whether this question would matter to both subgroups, the disagreement be known, and yet both be confident that the proposal is as they understand it. The obvious answer would have been to settle the point by way of an amendment.

The legislative history implies that the legislators took some remedial measures, per the proviso, after seeing the legislative draft, which would imply that they were not so confident about how the proposal before them for enactment would be understood. The proviso does not strengthen the argument that fruit is used in its culinary sense, but can readily be explained on other grounds. As noted above, the proviso would be an inept means to reject the culinary sense. If the tomato haters understood the proviso to be a means to ensure that the tax applies to tomatoes without saying as

much, or without clearly adopting the (botanical) sense of "fruit" that would make the point clear, then they tried to legislate without forming a joint intention with other legislators, which is hopeless. That is to say, they may have misunderstood the act in which they joined and/or tried to enact more (or something different) than what was open to and adopted by other legislators.

My duty is to uphold the law the legislature enacted, which turns on its intended meaning and lawmaking intention. I can readily infer this without any analysis of legislative history, and the risk of mishandling such materials (or reviewing only a very partial account) is confirmed by this case. However, even if I consider the materials, I find no reason to conclude that the legislative act misfires, such that there is no legislative intent, or to conclude that the legislature has somehow left open to this court, or anyone else, the meaning of "fruit." I therefore hold that the legislature intended "fruit" to bear its culinary meaning and the tax does not apply to tomatoes.