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The Center for Law and Economic Studies
435 West 116th St.
New York, NY 10027-7201

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4.2 Campbell V. Wentz:
The Case of the Walking Carrots

Victor P. Goldberg

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4.2 CAMPBELL V. WENTZ: THE CASE OF THE WALKING CARROTS

Victor P. Goldberg

The prominence of *Campbell v. Wentz* stems from the eminence of its author (Herbert Goodrich, a former director of the American Law Institute) and its invocation in the *Restatements* (§208, Illustration 1 and §364, Illustration 5), the *UCC* (§302, Comment 1), and *Williams v. Walker Thomas*, one of the great casebook favorites. In a nutshell, Judge Goodrich ruled that the uniqueness of the subject matter of the contract, Chantenay red cored carrots, would have justified granting Campbell's request for specific performance. However, the harshness of Campbell's standard form contract rendered it unconscionable and, therefore, a court of equity need not enforce the agreement. I want to make two points. First, the unconscionability finding is based on a misunderstanding of the contract. Second, while the stated basis for specific performance was the uniqueness of the carrots, that is not the essential reason that Campbell (and other canners and packers) want specific performance; indeed, as the defendants observed, Campbell's behavior was inconsistent with that explanation. Instead, I believe their concern is with the enforceability of a full output contract—what might be labeled the “walking carrot” problem.

Campbell had contracts with growers of eleven different types of vegetables in seventeen different states.¹ It bought some of its needs on the spot market, and some in fixed price contracts at the beginning of the growing season. Its contracts were similar to those of other food processors. The manager of Campbell's agricultural department testified:²

Q. And do you familiarize yourself, or are you familiar with the type of contracts that other canning houses use, like Phillips, and Hurff and Heinz and so forth?

A. I am.

Q. Can you tell us whether the provisions of the Campbell Soup contract, particularly with respect to the agreement of the grower not to sell the contracted vegetables to anyone else than Campbell Soup Company is common to contracts used by these other canners?

A. To the best of my knowledge it is.

The dispute arose in one of these seasonal contracts. Campbell would buy the entire crop of the grower (up to a maximum per acre). For at least some of the produce including the carrots at issue in this case, Campbell provided the seeds to the farmers or, in the case of tomatoes, plants. It normally purchased about 30 million pounds of Chantenay carrots in a season.³ In

¹Campbell Petition for Rehearing, p. 5.

²Appendix to Campbell Brief, p. 79a. The court was not interested in looking at any other contracts than the one at issue: “If it is a valid contract, I do not care what the policy of the other companies is. I have to interpret this contract.” Id, p. 89a.

³Campbell Brief, p. 17.

June 1947 it entered into a full output, fixed price contract with the Wentz brothers for all the Chantenay red cored carrots grown on fifteen acres of their farm in the growing season of 1947-

48. Campbell reserved the right to refuse carrots in excess of twelve tons per acre. So, the Wentz carrots would account for a bit over 1% of its expected Chantenay carrot purchases. The Wentz farm was 500-600 acres and the Wentzes had been selling tomatoes to Campbell for a decade; on two previous occasions they had contracted to sell carrots to Campbell. It appears that Wentz, like other growers, went back and forth between selling under contract and selling to the spot market. It should be noted that tomatoes were a much more significant input for Campbell. (See Andy Warhol.) Its capacity for handling tomatoes during the two month packing season was more than 250,000 5/8 bushel baskets of tomatoes per day.⁴

The contract price for carrots to be delivered in January 1948 was \$30 per ton. Bad weather reduced the size of the crop and spot carrots were selling for at least \$90 per ton. This sort of shortage was not unusual—four years earlier carrot prices had jumped to \$60/ton.⁵Wentz harvested approximately 100 tons of carrots. Wentz refused to deliver at the contract price. Instead it sold 62 tons to Lojeski, a neighboring farmer. (In the previous year, when Wentz did not have a Campbell contract, it sold all its carrots to Lojeski.) Lojeski resold 58 tons on the open market, about half to Campbell. Campbell, suspecting it was buying its own contract carrots, refused to buy more from Lojeski and sued to enjoin Wentz and Lojeski to prevent further sales to others and to compel specific performance of the contract.

The trial court denied specific performance concluding that Campbell had failed to establish that the contract carrots were unique. Recognizing that the carrots were a perishable commodity and that lifting its temporary restraining order might make an appeal moot, the court gave the defendants an option. Either they could post a bond (\$5,000 for Wentz and \$600 for Lojeski which works out to almost \$150 per ton for the carrots remaining with Wentz) or they could sell the remaining carrots to Campbell at the prevailing market price with \$30 going to Wentz and the remainder to be paid into the court awaiting a determination on appeal as to whether Campbell is entitled to specific performance. Of course, if the appellate court were to find (as it did) that Campbell was not entitled to injunctive relief, then Campbell could still collect money damages; the damages during the period in which Wentz was required to sell to Campbell would be the contract-market differential, which was what Campbell had been paying into the court. If Lojeski could have sold the carrots elsewhere, then Campbell would have argued for a different remedy, which I will get to shortly. But given the perishability of carrots, the court's stopgap measure assured that Campbell would receive the carrots so that the only damages would be the market-contract differential.

On appeal, Judge Goodrich found that the carrots were unique. He cited the lower court's finding of fact (#19) that at the time of the trial it was "virtually impossible to obtain Chantenay carrots in the open market." The Chantenay carrot was distinguishable from other carrots in terms of its shape (easier to process), color, and texture. Chantenay carrots were used

⁴Campbell Soup Co. v. Diehm 111 F. Supp. 211.

⁵Appendix to Campbell Brief, p. 70a.

in 15 of Campbell's 21 varieties. "The preservation of uniformity in appearance in a food article marketed throughout the country and sold under the manufacturer's name is a matter of considerable commercial significance and one which is properly considered in determining whether a substitute ingredient is just as good as the original." [] That would have justified his granting specific performance.

However, he declined to do so, finding the contract unconscionable. While Judge Goodrich noted a few clauses that might have been some cause for concern, the one clause he found harshest was the force majeure clause, in particular the last two sentences:

Grower shall not be obligated to deliver any Carrots which he is unable to harvest or deliver, nor shall Campbell be obligated to receive or pay for any Carrots which it is unable to inspect, grade, receive, handle, use or pack at or ship in processed form from its plants in Camden (1) because of any circumstance beyond the control of Grower or Campbell, as the case may be, or (2) because of any labor disturbance, work stoppage, slow-down, or strike involving any of Campbell's employees. Campbell shall not be liable for any delay in receiving Carrots due to any of the above contingencies. *During periods when Campbell is unable to receive Grower's Carrots, Grower may with Campbell's written consent, dispose of his Carrots elsewhere. Grower may not, however, sell or otherwise dispose of any Carrots which he is unable to deliver to Campbell.* (Emphasis added)

This he characterizes as "carrying a good joke too far." That's the extent of the analysis. Properly understood, it's not that funny. If, because of force majeure conditions, Campbell is temporarily prevented from taking the carrots, Campbell does not want to allow those carrots to disappear. When the force majeure condition ends, Campbell might be able to accept the carrots, processing them at a higher rate. As long as Campbell believes that it might be able to use the carrots, it requires that the grower keep them available. When it finally determines that it cannot use them, it gives to the grower its written consent to resell elsewhere. Does the contract require that it give this consent? No. Does good business judgment? Yes. Perhaps the grower might suffer a bit while waiting as the carrots deteriorate. But Campbell wants the flexibility to gain access to the carrots in the event that the business disruption proves temporary. The gains from Campbell's flexibility outweigh the expected costs of the grower's being stuck with unsold carrots.

With its full output contracts, Campbell shifts some of the inventory risks to the growers. If Campbell waits too long under the force majeure clause, the carrots rot in the farmer's field. In fact, I suspect that the farmers were more concerned about being stuck with rotting carrots from a different Campbell decision. Campbell could reject carrots on quality grounds (notably "excessive dirt") when the contract price exceeded the market price. Wentz and two of his witnesses made this point. (Opportunism works both ways: there was some evidence that when the market price exceeded the contract price, a grower would deliberately turn in dirty carrots,

have them rejected, and then sell them at a premium in the open market.⁶⁾ Campbell denied that it behaved this way and asserted that the percentage of carrots rejected remained fairly constant in good times and bad. The scant record provides no data on this, but suppose that the growers' claim is true. Campbell cannot costlessly shift the risk of rotting carrots—it has to pay the growers to bear it. Growers know that a fraction of their crop will be unsaleable; that is captured in the price. If the growers are the superior risk bearers, then *ex ante* they should be happy to bear the costs (and *ex post* we would expect them to be quite grumpy).

Was the “unconscionable” clause essential? Hardly. Right after the decision Campbell redrafted, eliminating the offending clause and a few others cited by Judge Goodrich (but probably not, I would guess, the offending behavior). With the contract thus sanitized, courts had no trouble granting Campbell and others specific performance in similar circumstances. The ALR notes that the courts' willingness to grant specific performance to processors is the one factor distinguishing the legal treatment of grower-processor contracts from other contracts for the sale of goods: “[P]erhaps this is one instance where the nature of the contractual relationship between a grower and a purchasing processor, packer, or canner has brought about a set of rules and principles especially applicable to such relationship, with a tendency in favor of granting equitable relief because of such factors as the perishable character of the property involved, the peculiar needs of the processor, packer, or canner, and the shortness of growing seasons.”⁷

A few years after *Wentz*, Campbell sought specific performance against some farmers (and brokers) for delivery of tomatoes after the market price rose from \$30 per ton to \$50.⁸ The court rejected the unconscionability argument, noting that the offending terms had been removed. It went on at some length about the importance of performance:

The Campbell Soup Company's production of these tomato products is in accordance with a carefully devised schedule, based upon a steady flow of tomatoes of certain kinds and qualities. The Campbell Soup Company, in order to secure the desired quantity of tomatoes at fixed prices and in a steady flow of the desired qualities, necessary to assure uniformity of quality and price in the finished product, contracts with . . . growers in Pennsylvania, Delaware and Maryland, and . . . New Jersey. These contracts are entered into in March of each year immediately prior to the planting season, and five months prior to the tomato canning season.

* * *

At or about the same time that contracts are made with the tomato growers, . . . the Campbell Soup Company plans for its Fall production on the basis of the estimated contract crop. It orders the necessary tin plate for containers, the necessary labels for the containers, cases for the containers, and makes arrangements with the Continental Canning Company for the rental of sufficient machinery to handle the canning. It

⁶Appendix to Campbell Brief, p. 122a.

⁷Cite.

⁸*Campbell Soup Co. v. Diehm*, 111 F. Supp. 211.

also makes its contract with the Labor Unions for the necessary supply of labor, purchases the other ingredients to be mixed with the tomato products in the quantities necessary to meet the estimated needs. Contracts are let for advertisement, based on a percentage of the estimated amount of tomatoes to be canned. The Campbell Soup Company also enters into contracts at this time with dealers all over the world, at set prices for the sale to said dealers of well over half of its estimated production of canned tomato products.

* * *

Contracts are entered into . . . with farmers in widely diversified areas with a view to avoiding regional crop failures and also so as to make the flow of tomatoes to the canning plant more evenly distributed over the seven or eight week canning period.

Campbell's extensive reliance on its many full output contracts, the court suggested, would subject it to losses substantially greater than the contract-market price differential.⁹ Indeed, the defendants argued that if the damages were measured by the price difference, the case would not have met the jurisdictional minimum. The court rejected this argument:

The theory would be tenable if the actions herein were for specific performance of sales contracts, since the rule is that in an action for specific performance alone the actual value of the property involved is the correct measure of the amount in controversy. But it is plain that the injunctive actions herein involve much more than simple specific performances of sales contracts. They involve a carefully planned system of doing business which has been placed in jeopardy by the conduct of the defendants.

* * *

The rights that the plaintiffs are endeavoring to protect in the present injunctive actions consist of a plan of doing business and a vast system of manufacture, . . . which are being attacked by the conduct of all of the defendants. Obviously, the value of these rights by far exceeds the jurisdictional requisite.

When I first encountered *Campbell v. Wentz*, I thought it obvious that the consequential damages arising from seller's breach would be substantially greater than the contract-market differential and that the consequential damages were the commercial manifestation of "uniqueness." Perhaps they would have to shut down the cannery; or they might have to use inferior inputs, perhaps risking their brand name. The price-differential remedy would undercompensate, consequential damages would be hard to prove (was the brand name degraded because Wentz breached?), and even if you could prove the damages, the grower would not have

⁹*Fortune's* characterization of *Wentz* was pithier: "Campbell insists on Chantenay red-cored carrots because of their distinctive brightness and blunt, easy-to-process shape. It developed the species through research, furnished seed to growers, and contracted in advance for its requirements. The Wentzes and their neighbors had just about all there were. Campbell had cans and labels bought, advertising contracted for, and 6,000 employees waiting to process Chantenays carrots when the Wentzes began holding out." 39 *Fortune* 142, 144(March 1949).

sufficient resources to cover the losses.¹⁰ Moreover, it would be hard to disentangle the effects of this single breach from that of the other suppliers who reneged. Campbell did not rely specifically on a single supplier—it relied on dozens of growers to get it enough carrots or tomatoes for the season.

My initial instincts were wrong. In fact, the last argument can be turned around. Campbell's reliance was not on the individual grower (who accounted for less than three per cent of the carrots it intended to use). It was on the group of growers. This generalized reliance is quite different from the specific reliance of the coal mine located adjacent to a power plant and far from any rail lines or from the shipper who puts his goods into the hands of a negligent carrier. Here, and in other grower/processor cases, the processor's problem arises even if the goods were entirely fungible. In a raft of decisions following the disastrous cotton harvest of 1973, the courts routinely granted specific performance to buyers (often intermediaries), while, in effect, conceding that the cotton was essentially fungible.¹¹ As one court put it: "A great deal of time could be spent in discussing whether cotton as a commodity is so unique as to be the proper subject of an action for specific performance. Numerous District Court decisions in the last few months seem to indicate that cotton contracts may be specifically enforced at the present time due to the unusual interdependency of the various persons handling cotton from the time of its planting, through its sale, manufacture and delivery to the ultimate consumer."¹²

Even if we were to recognize the notion of reliance on a group of suppliers, there is no reason to believe that the consequential damages would exceed the market price. This might seem counter-intuitive at first, but it is quite straightforward. In a period of shortage, the market

¹⁰The defendants noted that inability to pay might be grounds for specific performance but denied that it was relevant in this case. "Of course, if there had been proof that the defendants were insolvent or not financially responsible—and there was not even a suggestion that such a situation existed—there might have been some force to the plaintiff's contention that it could not obtain adequate relief by way of money damages." (Lojeski Brief, p. 12)

¹¹"The present actions are the result of an unprecedented rise in the price of domestic cotton from approximately \$.30 per pound to \$.80 or \$.90 per pound between the spring and the fall of 1973. This has been the fastest rise and to the highest price known in more than a century. Suits for specific performance of cotton contracts have been brought throughout the southeastern part of the United States." *Carolinas Cotton Growers Association, Inc. v. Arnette* 371 F.Supp. 65, 66 (1974). See also *R. N. Kelly Cotton Merchant, Inc. v. York* 379 F.Supp. 1075 (1973); *T. H. Taunton v. Allenberg Cotton Company, Inc.* 378 F.Supp. 34 (1973); *Mid South Cotton Growers Association v. Woods* 380 F.Supp. 429 (1974); *West Point-Pepperell, Inc., v. O. W. Bradshaw*, 377 F.Supp. 154 (1974); *Mitchell-Huntley Cotton Co., Inc. v. Waldrep* 377 F.Supp. 1215 (1974); *Cone Mills Corporation v. A. G. Estes, Inc.* 399 F.Supp. 938 (1975); *R. L. Kimsey Cotton Company, Inc. v. J. D. Ferguson*, 214 S.E. 2d 360 (1975); *Reigel Fiber Corporation v. Anderson Gin Company* 512 F.2d 784 (1975).

¹²*Carolinas*, at 70. Or, as another court put it: "The cotton in question is unique and irreplaceable because of the scarcity of cotton described." *Mitchell-Huntley* at 1219.

price reflects the willingness to pay of the marginal customer. Who wants Wentz's carrots the most? Campbell. How much is it willing to pay? Enough to avoid the consequential damages. The market price does not understate Campbell's injury. (Indeed, if anything it overstates the harm since Campbell's demand for carrots is downward sloping, a nicety we can ignore). Perhaps someone else who values the carrots less will come into possession of them and choose to use them rather than resell to Campbell. But, by and large, we should expect Campbell to outbid the others if the consequences of a shortfall of carrots (or tomatoes) are as severe as the courts suggest. The buyer's concern is not uniqueness. It is just that there are too few carrots.

Consequential damages are, therefore, a red herring on two counts. The damages arise not because this particular contract was breached, but because there is too little to go around. One could quibble with this, and argue that it is appropriate to assign at least some of the consequential damages to the breach of this particular contract. But the second point is devastating: the so-called consequential damages are captured in the market price.

In a rather remarkable statement, Wentz's counsel made essentially this claim:

Finally, it appears from the evidence that at least part of the carrots in dispute were offered to plaintiff by Lojeski, and were refused on the ground that they were contract carrots. Furthermore, it appears that the carrots remaining at the Wentz brothers' farm were available to Lojeski at the same price he had paid for the first 124,000 pounds, and that Lojeski was perfectly willing to sell these carrots also to plaintiff. The only thing that stood in the way of delivery of the carrots to plaintiff was its own refusal to accept delivery under Lojeski's terms. And yet, plaintiff now comes into court to invoke the extraordinary remedy of preliminary injunction to compel delivery under the contract terms, asserting its remedy at law is inadequate!

The meaning of such an assertion is difficult to understand, since it is apparent that the only difference between delivery under Lojeski's terms and delivery under the contract terms is that delivery under the latter would be at a lower price. The dispute thus resolves itself into a controversy over the amount of money to be paid by plaintiff for the carrots, and, if the higher price were paid, the amount of money recoverable by plaintiff for alleged breach of contract It is obvious that plaintiff could have been made whole by an action at law, and that the invocation of injunctive relief was entirely unnecessary. (Lojeski Brief, pp. 12-13)

To paraphrase: Campbell could have mitigated by buying the contract carrots from Lojeski at the contract price and then come back to sue Wentz for the difference. If it would have suffered irreparable harm from non-delivery of the carrots, then why on earth would it reject those carrots just because they were being offered by Lojeski?¹³ The defendants are right:

¹³“With one breath the Plaintiff contends that it will suffer irreparable injury if its fails to receive these carrots and at the same time it refuses to buy the very same carrots involved here.” Wentz Brief, p. 5.

uniqueness has nothing to do with it. That raises an obvious question: Why breach? what's in it for Wentz? If the damage remedy works so well, the net effect is that Campbell pays the contract price and Wentz receives only the contract price. I will suggest two explanations: (1) the litigation process is costly and imperfect; (2) carrots walk.

If the processor's recourse is to law rather than equity, it has to take into account the vagaries of the legal system. (The two remedies are not mutually exclusive—pursuing specific performance gives the plaintiff a first bite at the apple and an indicator of how a case for damages might fare.) The processor might find compromise cheaper than pursuing a remedy, especially if damages are hard to measure, litigation is expensive, the defendant can manufacture some plausible defense, or a jury might find the farmers to be worthy of their sympathy. For example, in the cotton cases, the growers threw out a number of defenses: vagueness; fraud; unconscionability; variable quantity contracts lack mutuality; the contracts are illegal gambling contracts; and contracts for sale of goods not yet produced are unenforceable. Also, the injunction gives the goods to the processor today; the damage remedy gives the cash to the processor some time in the future. In the interim the defendant has time to lose it or hide it. Recall that while Campbell's motion was on appeal, the trial court required that the cash be held by the court. Once it lost, the lifting of the injunction terminated the court's control of the funds.

These arguments are not context-specific. One could just as easily make them with regard to a contract to deliver widgets. Perhaps, as Alan Schwartz and others have argued, the widget contract does warrant specific performance. The grower/processor contracts are not out of step—everybody else is. Is there something about the grower/processor contract that makes specific performance relatively more attractive? The answer, I believe, lies in the fact that these are fixed-price contracts for all the goods (up to a defined maximum) grown on specific acreage. The concern is that the produce will migrate depending on the contract-market differential.

The contract recognizes this problem in a number of places. The defined maximum is responsive to this problem. Suppose that there had been a bumper crop of Chantenay carrots. The surplus of carrots would have pushed the market price down. The Wentzes could take advantage of this situation by buying carrots at the market price, sneaking them on to their property and then selling them to Campbell at the higher contract price. The maximum of twelve tons per acre limits Campbell's vulnerability to this ploy. Similarly, if the grower entered into a contract with Campbell, it could not enter into a contract with any other canner for the same commodity. Thus, even though only 15 acres of the Wentzes' 500+ acres were under contract to Campbell, the Wentzes could not grow carrots for anyone else. A Campbell manager testified:¹⁴

If a man has more than one contract, or a contract with more than one canner, it would be almost impossible to trace where the vegetables would go. Speaking of carrots, and being specific, if there were two contracts on the farm, we would not

¹⁴Appendix to Campbell Brief, p. 88a. Campbell made the argument more tersely in its Brief: "As a practical matter, if carrots were grown by the grower upon a part of his acreage not covered by the contract, it would be impossible for Campbell soup company to determine whether it were receiving all of the carrots to which it would be entitled from the specified acreage, or that the growers were not including carrots from other acres." (p. 23)

be able to know which ones were coming to us and which ones were going to the other canners. It is merely a protection, knowing where those carrots will go. We permit the farmer to grow as many carrots as he wishes, but we simply state that they should come to us, and other canners do the same.

Q. So it is largely a matter of policing the contract, or enforcing the provisions of the contract, in order to give you some method of checking on the behavior of the grower under the contract that the provision is inserted?

If the market price exceeded the contract price, as in the actual case, the carrots can walk in the opposite direction. Wentz would take the carrots to Lojeski, perhaps under cover of night, and tells Campbell that its output was particularly disappointing this season.¹⁵ There was some evidence in the record of this having happened in the past—Campbell had refused to enter into a contract with Lojeski because in previous seasons it had sold some of its contract carrots to others processors.¹⁶ To enforce a damage remedy, Campbell would have to determine Wentz’s actual output. Campbell could, out of its own pocket, attempt to police the illicit movements of its contract produce, *ex ante*, or track the movements, *ex post*. Or it could let the government do it. The specific performance remedy enables it to do precisely that.

Is that enough reason to overcome the presumption against injunctive relief? My inclination would be to say Yes, but reasonable people could easily disagree. This is a very different question than whether a particular type of carrot or tomato or cotton is unique. If “uniqueness” were really the issue, then surely Goodrich was wrong, Campbell’s subsequent revision (*Diehm*) should have been unavailing, and the cotton cases were ludicrous. The carrots (and tomatoes and cotton) are not unique. Indeed, the problem arises precisely because the produce is not unique. The relevant distinction in the processor-grower cases should not be uniqueness; it should be whether the contract was an “output” contract. So, if Campbell had entered into a fixed quantity contract for Chantenay carrots, the remedy should be damages and the “uniqueness” of the carrots should only be relevant if Campbell covered with a different type of carrot.

The argument that the buyer would suffer substantial consequential damages in excess of the market price differential is a tempting one—it fooled me. But a little bit of simple economic reasoning revealed its fundamental flaw. A little more suggested what was really at stake: enforcement of a full output contract. By trying to force the argument into the uniqueness box, Campbell and Judge Goodrich and authors of casebooks and treatises have obscured the central issue and have failed to identify one motive for pursuing (and, perhaps, granting) injunctive relief.

¹⁵The court in one of the cotton cases recognized this problem: “When the cotton produced by Defendants was picked and ginned, it could be stored by them in places unknown to Plaintiff and disposed of so as to put it beyond the reach of Plaintiff.” Mitchell-Huntley at 1219.

¹⁶Appendix to Campbell Brief, p. 83a-84a.