that plaintiff developed the idea that 'chicken' meant 'young chicken'. There is little force in this in view of plaintiff's immediate and consistent protests.

When all the evidence is reviewed, it is clear that defendant believed it could comply with the contracts by delivering stewing chicken in the 2½–3lbs. size. Defendant's subjective intent would not be significant if this did not coincide with an objective meaning of 'chicken'. Here it did coincide with one of the dictionary meanings, with the definition in the Department of Agriculture Regulations to which the contract made at least oblique reference, with at least some usage in the trade, with the realities of the market, and with what plaintiff's spokesman had said. Plaintiff asserts it to be equally plain that plaintiff's own subjective intent was to obtain broilers and fryers; the only evidence against this is the material as to market prices and this may not have been sufficiently brought home. In any event it is unnecessary to determine that issue. For plaintiff has the burden of showing that 'chicken' was used in the narrower rather than in the broader sense, and this it has not sustained.

This opinion constitutes the court's findings of fact and conclusions of law. Judgement shall be entered dismissing the complaint with costs.

RAFFLES v. WICHELHAUS
COURT OF THE EXCHEQUER
2 Hurl. & C. 906 (1864)

Declaration [i.e. Complaint]. For that it was agreed between the plaintiff and the defendants, to wit, at Liverpool, that the plaintiff should sell to the defendants, and the defendants buy of the plaintiff, certain goods, to wit, 125 bales of Surat cotton, guaranteed middling fair merchant's dhollorah, to arrive ex *Peerless* from Bombay; and that the cotton should be taken from the quay, and that the defendants would pay the plaintiff for the same at a certain rate, to wit, at the rate of 17.25 d. per pound, within a certain time then agreed upon after the arrival of said goods in England. Averments: that the said goods did arrive by said ship from Bombay to England, to wit, at Liverpool, and the plaintiff was then and there ready and willing and offered to deliver that said goods to the defendants, etc.

Breach: that the defendants refused to accept the said goods or pay the plaintiff for them.

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

Demurrer [to the Plea], and joinder therin. Milward, in support of the demurrer.

The contract was for the sale of a number of bales of cotton of a particular description, which the plaintiff was ready to deliver. It is immaterial by what ship the cotton was to arrive, so that it was a ship called the *Peerless*. The words, 'to arrive ex Peerless,' only mean that if the vessel is lost on the voyage, the contract is to be at an end. [Pollock, C.B. It would be a question for the jury whether both parties meant the same ship to be called the *Peerless*.] That would be so if the contract was for the sale of a ship called the *Peerless;* but it is for the sale of cotton on board a ship of that name. [Pollock, C.B. The defendant only bought that cotton which was to arrive by a particular ship. It may as well be said, that if there is a contract for the purchase of certain goods in a wharehouse A., that is satisfied by the delivery of goods of the same description in wharehouse B.] In that case there would be goods in both wharehouses; here, it does not appear that the plaintiff had any goods on board the other *Peerless*. [Martin, B. It is imposing on the defendant a different contract from that which he entered into. Pollock, C.B. It is like a contract for the purchase of wine coming from a particular estate in Spain or France, where there are two estates of the same name.] The defendant has no right to contradict, by parole evidence, a written contract good upon the face of it. He does not impute mispepresentation or fraud, but only says he fancied the ship a different one. Intention is of no avail, unless stated at the time of contract. [Pollock, C.B. One vessel sailed in October, the other in December.] The time of sailing is no part of the contract.

Mellish (Cohen with him), in support of the plea. There is nothing on the face of the contract to show that any particular ship called the *Peerless* was meant; but the moment it appears that two ships called the *Peerless* were about to sail from Bombay there is a latent ambiguity, and parol evidence may be given for the purpose of showing that the defendant meant one *Peerless* and the plaintiff another. That being so, there was no consensus ad idem, and therefore no binding contract. He was then stopped by the court.

Per Curiam. Judgment for the defendants.

INTERSTATE COMMERCE COMMISSION v. ALLEN E. KROBLIN, Inc.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA
113 F. Supp. 599 (1953)

OPINION: GRAVEN

The issue in this case is whether or not the interstate transportation by truck of New York dressed and eviscerated poultry is within the scope of the so-called 'agricultural' exemption of the Interstate Commerce Act . . .

In this action the Interstate Commerce Commission claims that the defendant is engaged in transporting New York dressed and eviscerated

poultry in interstate commerce without a certificate of public convenience and necessity. The Commission asks that the defendant be enjoined from so doing until he obtains such certificate. The defendant admits that it is so engaged and that it does not have a certificate of public convenience and necessity. It claims that under the provisions of Section 203(b)(6) it is not required to have such certificate. The defendant having admitted that it is engaged in interstate transportation of property by motor vehicle, the burden is upon it to establish that its activities come within the exemption.

Section 203(b)(6), above referred to, in its present form exempts from the certificate provisions of the Act:

> (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation'.

While Section 203(b)(6) includes fish as well as horticultural commodities, it is commonly and generally referred to as the agricultural exemption.

In the present case the defendant is a corporation that owns and operates a number of trucks which are used to haul New York dressed and eviscerated poultry from points in Iowa to Chicago, Illinois, and other points in other states. New York dressed poultry is defined by those engaged in the poultry trade as being poultry with the head and feathers removed and in some instances with the feet also removed. Eviscerated poultry is defined by those engaged in the poultry trade as poultry with the head, feet, feathers, and entrails removed and with the liver, heart, and gizzard cleaned, wrapped, and replaced in the carcass . . .

The parties are in agreement that live poultry is an agricultural commodity. They are in disagreement as to whether New York dressed and eviscerated poultry is an 'agricultural commodity' or a 'manufactured product'. While eviscerated poultry is somewhat more extensively processed than is New York dressed poultry, yet counsel in argument stated that no distinction is claimed as between the two so far as the agricultural exemption is concerned. Since the parties are in agreement that live fowls as they leave the farm are an 'agricultural commodity', the real disagreement between the parties is as to when they become a 'manufactured product'. It is the claim of the Interstate Commerce Commission that they probably become such upon being killed and in all events after they have been New York dressed or eviscerated. It is the claim of the defendant and the Secretary of Agriculture that by such dressing or eviscerating the fowls have not as yet reached the point where they can be properly and legally classified as a 'manufactured product' and that something further or other is required before they have that status . . .

The defendant and the Secretary of Agriculture particularly rely upon the definition of the word 'manufacture' approved in the case of American

Fruit Growers, Inc., v. Brogdex Co., 1931, 283 U.S. 1, 51 S.Ct. 328, 75 L.Ed. 801 . . . [The Interstate Commerce Commission] stated that the definition which was approved in the Fruit Growers case was the appropriate and applicable definition to be used in connection with the determination of whether a commodity is or is not a 'manufactured product' under the agricultural exemption. The definition referred to is as follows, at page 11 of 283 U.S., at page 330 of 51 S.C t.:

> '"Manufacture", as well defined by the Century Dictionary, is "the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery"; also "anything made for use from raw or prepared materials"'.

It is the claim of the defendant and the Secretary of Agriculture that under the latter definition dressed poultry is not a manufactured product. The Interstate Commerce Commission making use of the same definition concluded that dressed poultry is a manufactured product . . .

The definitions relied upon by the parties are broad, general definitions . . . This Court is of the view that the tracing out of the meaning of 'manufactured products' in the agricultural exemption by means of general definitions and the attempted definitions of those definitions would only lead into a semantic wilderness. All of the parties are agreed that the words 'agricultural commodities' and 'manufactured products thereof' used in the agricultural exemption are ambiguous words. They are not defined in the Act. Therefore, it is necessary that resort be made to decisions construing the provisions of the agricultural exemption and to the extrinsic aids of legislative history and administrative interpretation . . .

In the present case, the only relevancy of administrative construction or interpretation is to the matter of Congressional intent. The question is whether or not the agency making the particular contention or interpretation has correctly ascertained the intent of Congress. Administrative construction or interpretation is but one of several extrinsic aids in the interpretation of statutes. Another extrinsic aid is legislative history. Where the provisions of a statute are ambiguous, the legislative history may often be revealing on the matter of legislative intent and may be more satisfactory evidence of legislative intent than administrative construction or interpretation. In the present case the parties are in controversy as to whether the administrative constructions or interpretations advanced are in accord with the intent of Congress as revealed by the legislative history of the Act. All of the parties contend that the legislative history of the Act supports their respective claims as to the intent of Congress. It would then seem desirable to next give consideration to the legislative history of the Act before proceeding any further with the matter of administrative construction or interpretation.

In the present case, the matters of importance are what was the purpose of Congress in enacting Section 203(b)(6), and what commodities did it intend to include within its provisions? The parties are agreed that the

purpose of Section 203(b)(6) was to benefit the farmers . . . In the present case it was claimed in oral argument by counsel for the defendant and the Secretary of Agriculture that the biggest benefit to the farmers of exempting commercial truckers engaged in hauling farm commodities from the certificate provisions of the Act was the flexibility of operations permitted such carriers. It was stated by them that poultry is a commodity as to which the market is variable and shifting and that it is frequently necessary to be able to make shifts and changes in marketing arrangements on short notice and, in some cases, even when the commodities are en route . . .

An unusually large number of amendments have been proposed to Section 203(b)(6) and there is an unusually large amount of legislative history material available in connection therewith. The action and attitude of Congress as to proposed amendments could be indicative of Congressional intent as to the scope and coverage of that subparagraph . . .

There are two features that stand out most predominantly in the voluminous legislative history relating to amendments made or proposed to Section 203(b)(6). One feature is that every amendment that Congress has made to it has broadened and liberalized its provisions in favor of exemption and the other feature is that although often importuned to do so, Congress has uniformly and steadfastly refused or rejected amendments which would either directly or indirectly have denied the benefits of the exemptions contained therein to truckers who are engaged in operations similar to that of the defendant herein. It is believed that the actions and attitude of Congress as manifested in connection with amendments to Section 203(b)(6) are preponderantly indicative of an intent on the part of Congress that the words 'manufactured products' used in that subparagraph are not to be given the restricted meaning contended for by the Interstate Commerce Commission herein.

It is the holding of the court that New York dressed poultry or eviscerated poultry do not constitute 'manufactured' products within the intent and meaning of Section 203(b)(6). It is the feeling of the court that an opposite holding would in reality constitute an attempt to accomplish by means of judicial construction that which Congress has steadfastly refused to allow to be accomplished by legislation.

Judgment will be entered in accord with this opinion.

CALIFORNIA v. BROWN
SUPREME COURT OF THE UNITED STATES
479 U.S. 538; Argued December 2, 1986, Decided January 27, 1987

OPINION: CHIEF JUSTICE REHNQUIST delivered the opinion of the court.

The question presented for review in this case is whether an instruction informing jurors that they 'must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling' during the penalty phase of a capital murder trial violates the Eighth and Fourteenth Amendments to the United States Constitution. We hold that it does not.

Respondent Albert Brown was found guilty by a jury of forcible rape and first-degree murder in the death of 15-year-old Susan J. At the penalty phase, the State presented evidence that respondent had raped another young girl some years prior to his attack on Susan J. Respondent presented the testimony of several family members, who recounted respondent's peaceful nature and expressed disbelief that respondent was capable of such a brutal crime. Respondent also presented the testimony of a psychiatrist, who stated that Brown killed his victim because of his shame and fear over sexual dysfunction. Brown himself testified, stating that he was ashamed of his prior criminal conduct and asking for mercy from the jury.

California Penal Code Ann. § 190.3 (West Supp. 1987) provides that capital defendants may introduce at the penalty phase any evidence 'as to any matter relevant to . . . mitigation . . . including, but not limited to, the nature and circumstances of the present offense . . . and the defendant's character, background, history, mental condition and physical condition'. The trial court instructed the jury to consider the aggravating and mitigating circumstances and to weigh them in determining the appropriate penalty. But the court cautioned the jury that it 'must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling'. Respondent was sentenced to death.

On automatic appeal, the Supreme Court of California reversed the sentence of death. Over two dissents on this point, the majority opinion found that the instruction at issue here violates the Federal Constitution: 'federal constitutional law forbids an instruction which denies a capital defendant the right to have the jury consider any "sympathy factor"' raised by the evidence when determining the appropriate penalty . . . We granted certiorari to resolve whether such an instruction violates the United States Constitution.

We think that the California Supreme Court improperly focused solely on the word 'sympathy' to determine that the instruction interferes with the jury's consideration of mitigating evidence. 'The question, however, is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning.' *Francis* v. *Franklin*, 471 U.S. 307, 315–316 (1985); see *Sandstrom* v. *Montana*, 442 U.S. 510, 516–517 (1979) . . .

The jury was told not to be swayed by 'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling'. Respondent does not contend, and the Supreme Court of California did not hold, that conjecture, passion, prejudice, public opinion, or public feeling should properly play any role in the jury's sentencing determination, even if such factors might weigh in the defendant's favor. Rather, respondent reads the instruction as if it solely cautioned the jury not to be swayed by 'sympathy'. Even if we were to agree that a rational juror could parse the instruction in