friends, something of supreme value, will be lost to the world if that torch ever ceases to shine.

The obligation is, of course, reciprocal, and speaks with imperative voice to our friends in Quebec as well as to ourselves. The Bar of Canada—the whole Bar of Canada—has given an invaluable example of co-operation; and I know I express the feeling of all when I say for the Bar, that, whatever tongues may utter the language of bitterness and disunion, ours shall speak for that practice which betokens our faith in a united Canada, and which tends to generous thoughts and generous words and generous deeds between the Canadian branches of the two great races to whom Providence has committed the destinies of this country. *A great nation,* Mr. President, to paraphrase the words of Burke—*a great nation and little minds go ill together. Let us auspicate all our proceedings with the old motto of the Church, sursum corda! let us elevate our minds to the greatness of the station to which the order of Providence has called us.*

CONTRACTUAL ERROR IN ROMAN AND MODERN LAW.

The effect of error upon the formation and validity of contract is a question upon which legal theory has differed greatly from time to time and from system to system. Jurists and judges, occasionally even in Anglo-Saxon countries, refer to the same scanty texts of the *corpus juris* in support of widely divergent views. The codes which owe most to Rome have, in some cases explicitly and in others by the interpretation to which they have been subjected, adopted conclusions never reached in the doctrine of Paul and Ulpian. The object of the present article is to indicate the development and to ascertain, if possible, what differences in practice exist among certain systems.

I. Error in Persona.

There has, in the first place, been a uniform modification of the rule as to *error in persona.* The passage in the *corpus juris* most directly bearing on the subject is the excerpt from Celsus, D. 12.1.32, where it is stated that a mistake as to the identity of one party pre-

vents a contract from coming into existence. The circumstances are somewhat complicated. A has asked both B and C to lend him money. B induces his debtor D to promise A a certain sum, and A thinks that the promissor is not B's but C's debtor. He is, then, under the impression that he is entering into the contract of *mutuum* with C, whereas the circumstances are really such as to place him under an obligation to B. There is here, says Celsus, no mutual consent, therefore no contract at all, though, of course, B has a condictio against A for the recovery of money actually paid over.[1]

Confronted with circumstances such as the above, the modern jurist would generally hold that A's real object being to get the money, the exact identity of the person from whom he gets it is of very minor importance. The Code Napoléon recognizes *error in persona* as a cause of nullity only when the personality of the supposed other party constitutes the chief reason for contracting with him.[2] The Quebec Civil Code does not mention error as to the person in its article 992, which does, however, by implication contain the same rule as that adopted in France, when it declares that the mistake must refer to "something which is a principal consideration for making" the contract.[3] The fact that the French code speaks of *the* principal cause and the Quebec Code only of "a principal consideration" would not seem to indicate any difference in law. The question in both systems, as in the English, will be whether the party would have entered into the contract if he had known that the other party was the person he turns out to be.[4] Roman law ignored this distinction.[5] In the case cited, A had asked both B and C to lend him money; he was then willing to contract with either, nevertheless the transaction was void.

According to Roman law there was no consent when a man went through the form of contracting in the belief that he was assuming an obligation to a person other than the one actually participating in the agreement. The French theory is that there is consent but, if the person was an essential consideration, a vitiated consent from the consequences of which the plaintiff can be relieved. The contract is not void but voidable.[6] In England when mistake is allowed to

[1] The two other passages sometimes cited, viz., D. 47.2.52.21; 47.2.66.4, deal with cases of fraud and are therefore useless as evidence of nullity from mere error: cf. Hunter, Roman Law, 4th ed., p. 582.

[2] Article 1110. Planiol, Droit Civil, 2. ss. 1054 and 1057.

[3] Cf. Mignault, Droit Civil Canadien, 5.215.

[4] Planiol, op. cit. 2.1054, 1057; Mignault, loc. cit.; Halsbury, Laws of England, 7, p. 354.

[5] Savigny, System des Heutigen Romischesnechts, 3, 136.

[6] Planiol, op. cit. 2. 1050 & 1054. Cf. Mignault, op. cit. 5, 216, stating the same rule for the Province of Quebec.

affect an agreement at all, it is regarded as negativing consent, and so rendering the transaction void *ab initio*.[7] The difference is material, since the contract void *ab initio* cannot give rise to any rights whatever and cannot even be affirmed, whereas a voidable contract is affirmed by failure to have it set aside, the *action en nullité* being limited to ten years in the Code Napoléon (Art. 1304) and in the Quebec Civil Code (Art. 2258).

II. Error in Negotio.

Mistake as to the nature of the transaction in Roman law prevented any contract from coming into existence. So when Maevius deposits a table with Seius and the latter, believing it lent, uses it, Maevius has no action either *depositi* or *commodati*. Titius desires to make Sempronius a present of 100 aurei; Sempronius accepts the money as a loan. There is neither gift nor loan.[8]

The rule of French law is the same,[9] though there is no mention of the point in the Code Napoléon. The Quebec Civil Code specifies error as to the nature of the contract among the causes of nullity. The only English precedents are cases where the mistake was due to the fraud of a third party. Here the transaction is held void, but there would probably be some difficulty in arriving at a similar decision when the misunderstanding arises from a mere failure of one party to ascertain the other's intention.[10]

III. Error in Corpore.

When Gains stipulates for the slave Stichus from Lucius, and Lucius, though verbally promising Stichus, is really thinking of Pamphilus in the mistaken belief that Pamphilus is called Stichus, the promise is null. There has been no consent upon one object.[11] This is an instance of formal contract and in classical law, at least, the converse, viz., a difference of names in the question and answer of the *stipulatio*, would also have invalidated the promise in spite of admitted agreement as to the corpus.[12] It is clear, however, that a mere mistake of names, when the parties are agreed on the *corpus*, has no effect on the *consensual* contracts. Ulpian says in D. 18.1.9.1

[7] Halsbury, 7, p. 354; Anson, "Law of Contract," 13th ed., p. 15.
[8] D. 12.1.18.
[9] Planiol, op. cit. 2. 1051.
[10] Anson, op. cit. p. 156 et seq. This is a case of absolute nullity in French and Quebec Law. Planiol, op. cit. 2. 1052; Mignault, op. cit. 5, p. 216.
[11] Justinian's Institutes, 3.19.23.
[12] Whether this would be affected by the constitution of Leo, in C. 8.37 (38) 10, wherein he abolishes the need of exactly corresponding question and answer (confirming Ulpian's statement of the law in D. 45.1.1.1) may be doubted. The writer has not discovered any text on the point.

that a sale of the Cornelian farm is not invalidated by the fact that it is called *fundus Sempronianus* by one or both of the parties. On the other hand, here, as in the formal contracts, an error as to the identity of the object nullifies consent.[13]

The Roman rule of nullity *ab initio* in cases of mistake as to the identity of the object survives in the law of France and of Quebec,[14] though not specifically mentioned in either code. The English Courts will not admit parol evidence against the terms of a written contract on the ground of such error unless those terms are ambiguous, as where they speak of a ship "Peerless" and there are two ships of that name.[15] But the substantive law is the same, since, when evidence is admissible, the transaction is held null.

IV. Error in Substantia.

It is in connection with *error in substantia* that the greatest difficulties arise and that modern systems differ most from the Roman law and from one another. In the first place, there is the ambiguity of the word *substantia,* which has been variously interpreted as meaning (a) the material of which the object of a contract consists, (b) the qualities of the object which the parties, or one of them, had principally in mind in contracting.

The texts of the *corpus juris* are by no means clear as to the meaning of *substantia.* Ulpian avoids[16] it and speaks of *materia,* against which he sets incidental qualities. But the results which he shows as flowing from mistake regarding material sometimes arise from what to us would seem rather a mistake as to quality, and *vice versa.* Savigny has come nearest to a consistent criterion when he treats *error in substantia* always as *error in qualitate* and then limits the effects of such error according as the absence of the quality does or does not place the object in a different class of merchandise.[17] The distinction, which is adopted here, will become clearer with illustration. A silver cup is in a different class of merchandise from a gold one, and the same is true, as another example, of male and female slaves, who are employed for entirely different purposes. On the other hand, a table of citrus-wood is in the same class of goods, according to ordinary usage—and ordinary usage is here the standard —as a table of beech.

[13] D. 18.1.9 pr.
[14] For French law see Planiol, up. cit. 2, 1052. Quebec law, Mignault, op. cit. 5, p. 216.
[15] *Raffles* v. *Wichelhaus,* 1864. 2 H. & C. 906, contrasted with *Ionides* v. *Pacific Insurance Co.,* L. R. 6 Q. B. 689.
[16] Except in one instance, D. 18.1.9.2.
[17] System . . . 3 § 137.

Now, in the old formal contracts and their survivor, the *stipulatio,* given agreement as to the identity of the object, mistake as to quality, however essential, never affected the validity of the transaction. Titius enters into a *stipulatio* with Marcus, by the terms of which Marcus is to give Titius a ring worn on his finger. Titius stipulates believing the ring gold, whereas it is really brass. The contract is good; there is consent as to the identity of the object, though Titius is mistaken regarding the material of which it is made.[18]

But in the consensual contracts, where the courts were guided by equity rather than strict law, and particularly in sale, such an error came to be regarded as annulling the agreement, though this result was not achieved without some hesitation. Marcellus had written that the sale of brass for gold was valid because there was agreement on the object. Ulpian disagrees. According to him so fundamental an error in the material annuls sale.[19] Gold and brass are different classes of merchandise. For the same reason there is no contract when the purchaser, buying a specific slave, does so in the mistaken belief that the slave is male.[20] But when a plated object is bought as a solid one, there is some doubt. Julian considered the sale void.[21] In Ulpian's opinion, the discovery that a bracelet innocently sold as solid gold was for the most part brass, with only an overlay or mixture of gold, left the contract standing. There was here no complete misapprehension of the material such as existed when the object was entirely of another substance. The difference is one of degree, not of kind; the ornaments belong to the same class of goods.[22]

Further instances of the non-essential error which does not affect the validity of sale are the purchase of wine turned sour for good wine, of a table of ordinary wood for one of citrus-wood, of repaired garments for new, of a low grade of metal for a high grade.[23] The degree of importance which the purchaser attached to the quality in the particular case did not matter. Nor is there any mention in this connection of the *actio redhibitoria* for latent defects, or for the absence of declared qualities, which had been extended from its application to sales under the jurisdiction of the aediles to sale in general. There was, then, no question of the remedy, more moderate than a rule of nullity *ab initio,* accorded in such cases by certain

[18] D. 45.1.22.
[19] D. 18.1.9.2.
[20] D. 18.1.11.1.
[21] D. 18.1.41.1.
[22] D. 18.1.14. Savigny takes a different view here, making a distinction between a mixture and a plating of gold (aliquid inauratum and aliquid auro coopertum) objects made of an alloy of gold, but not gold-plated objects, being in the same class as objects of solid gold.
[23] D. 18.1.9.2; D. 19.1.21.2; D. 18.1.45; D. 18.1.10.

modern systems of law, viz., voidability on the application of the injured party.[24]

Pothier says—*Des Obligations*, §18—"*L'erreur annule la convention lorsqu'elle tombe sur la qualité de la chose que les parties ont eue principalement en vue et qui fait la substance de cette chose.*" Out of this has grown the interpretation given by the majority of French text-writers to Article 1110 of the Code Napoléon. That article speaks only of "substance," and certain writers—for example, Aubry and Rau and Huc—limit the meaning of the word to material. In their view the error, to afford grounds for annulment, must concern the very identity of the material of which the object is made, gold, silver, etc.[25] The majority opinion is, however, that the meaning of "substance" must be determined by reference to Pothier, and that error on any quality which induced a party to contract is an essential error for which rescission can be demanded. For Aubry and Rau and for Huc, mistake as to origin, antiquity, author, etc., cannot viciate consent. They therefore disapprove of decisions such as those annulling the sale of a picture believed to be a Raphael, actually a forgery, and of supposedly antique candlesticks which turned out to be modern.[26] The latter of these cases might have been decided in the same way at Rome—modern and antique candlesticks may well be regarded as different classes of merchandise—but the now accepted doctrine that the absence of any quality believed to exist, and constituting the main intention in contracting, is sufficient ground for rescission, carries us much farther than the Roman jurists went. It is by no means essential that the absence of the desired quality should place the object in a different category, and, on the other hand, a difference of material will be insufficient, if the material is of secondary importance to the purchaser. Laurent says that one principle dominates in the decisions. Would the parties have contracted if they had known that such and such quality was not present?[27]

The necessity of interpretation has been avoided in the Quebec Civil Code by the explicit provision that annulment can be secured on the ground of error as to anything constituting "a principal consideration."[28]

The English law is more conservative. If anything emerges clearly from the rather rare decisions on this subject, it is that uni-

[24] The question of compensation for the absence of the quality is, of course, distinct. There would be the *actio quanti minoris* for positive vices, but not for the absence of qualities unless such qualities were mentioned in the sale. D. 18.1.45; 19.1.21.2. Savigny, 3, 137 ad fin.

[25] Aubry & Rau, 5th ed., 4. 343 bis. Huc, 7.22.

[26] Paris, 9 jan. 1849, Sirey 49.2.80; Cassation 1886, Dalloz 87.1.105.

[27] Laurent, Droit Civil Français, XV.—§ 493.

[28] Art. 992.

lateral mistake as to material or qualities affords no ground for decision. Anson goes so far as to say that the rights of the parties "are not affected by their state of mind . . . a contract for a bar of metal is performed by the delivery of a bar of metal . . . it does not matter what the metal may be, nor does it matter what the parties may have thought that it was." [29]

It is indeed stated in Halsbury's "Laws of England," Vol. 21, p. 9, that "a mistake, common to both parties, as to the material of which the subject matter of an agreement is composed may make the agreement void, when the difference between the actual thing and the thing contracted for amounts to a difference in kind." [30] But it appears that this should be limited to cases where the attribute about which the mistake occurs is "a material part of the description by which the thing was contracted for." This is the way in which Pollock limits it,[31] and the rule so stated is as much as can strictly be derived from the actual decisions. The contract is then voidable, not, properly speaking, for error, but for non-execution. The delivery of an object not answering to the description is no fulfilment of the vendor's obligation.

There are, however, some *obiter dicta* in favour of the rule as cited from Halsbury. They are interesting chiefly for their insistence upon mutuality in the mistake. In *Stapylton* v. *Scott*,[32] Erskine, L.C., says that an error common to vendor and purchaser as to the content of certain land would be sufficient to avoid the sale at common law, a *fortiori* at equity, but "where the purchaser's inducement to the contract depends upon a mistake of his own, to which he was not led by the vendor . . . the consideration whether that avoids the contract is very different." Farwell, J., in *May* v. *Platt*,[33] says: "I have always understood the law to be that in order to obtain rectification there must be a mistake common to both parties, and if the mistake is only unilateral, there must be fraud or misrepresentation amounting to fraud."

It is by no means clear upon what theoretical grounds the English law insists upon the error being mutual. No such rule is to be found either in Roman law or in the codes which have been mentioned. In *Van Praagh* v. *Everidge*, Kekewich, J., held that the parties were *ad idem* and that there was a valid contract, although he admitted that the defendant believed himself to be getting one piece of land

[29] Op. cit. pp. 164-5; cf. Fry, Specific Performance, Canadian Edition, pp. 379-380.
[30] Cox & Prentice, 1815, 3 M. & S. 344, is the authority cited.
[31] Pollock, "Principles of Contract," 9th ed., p. 525.
[32] 1807, 13 Ves. 425-427.
[33] 1900, 1 Ch. at p. 623.

when another was actually being offered. When the case came up on appeal, where specific performance was refused on other grounds, Collins, M.R., said *obiter* that he did not think that the parties had been *ad idem*.[34] How, indeed, could they have been any less *ad idem* if both had been mistaken? They would then at least have been *ad idem* in the error.

On one point English law shows a certain affinity to the Roman. In order to set aside a contract on the ground of innocent misrepresentation inducing error, the error must be as to a quality the absence of which makes a complete difference of substance. So, in *Kennedy* v. *Panama, etc., Mail Co.*,[35] the Court refused to set aside a purchase of shares though the plaintiff proved that he had bought them in the belief, induced by innocent statement in the company's prospectus, that the company had a contract for the carriage of mails. Here there was mutual error; the company also believed in the validity of its carrying agreement. The shares were of course less valuable, but they were not completely different in substance. The Court finds a parallel decision in the passages from Ulpian cited in Digest 18.1.9, 10 and 11.

The indifference of English law to unilateral error is well illustrated in *Smith* v. *Hughes*.[36] over against which may be set a nearly parallel Quebec case, viz., *Perreault* v. *Normandin*.[37]

In *Smith* v. *Hughes, the* purchaser thought that he was buying old oats. The vendor was aware that the oats were new, but said or did nothing to induce the other's mistake. It was not disputed that Hughes would not have entered into the contract if he had known that the oats were new. The Court held that to have his bargain set aside, Hughes must prove not merely that he thought that he was buying old oats and that Smith was aware that they were new, but also that Smith knew that the purchaser thought that he was *being promised* old oats. The decision, by a distinction more subjective and subtle than anything to be found in the Roman texts, takes the whole matter out of the realm of error into that of tacit misrepresentation.

In *Perreault* v. *Normandin*, the plaintiff obtained annulment of the purchase of a receipt for ginger-beer, on the ground that the receipt was commonly known, whereas the quality which he had essentially in mind in purchasing it was its being secret. The facts, as recited in the report, do not show misrepresentation, innocent or otherwise, and the judgment is based on the provision of Article 992,

[34] 1903, 1 Ch. 436.
[35] 1867, L. R. 2 Q. B. 580, Cf. Halsbury, loc. cit. and Pollock loc. cit.
[36] 1871, L. R. 6 Q. B. 597.
[37] 1887, Cour Supérieure, 31 L. C. J., p. 118.

Civil Code, regarding errors as to anything which is "a principal consideration." The English doctrine as expounded in *Smith* v. *Hughes* calls for a searching examination into the mind of the vendor, while the question of rescission or no rescission depends in the French system on the state of mind of the purchaser. The results may be directly opposite.

P. E. CORBETT.

McGill University, Montreal.

COVENANTS AS JOINT OR SEVERAL.[1]

SECTION 7. REVIEW OF AUTHORITIES.

A review of the authorities, including those cited in Halsbury's Laws of England, follows, wherefrom certain rules of construction are deduced and stated.

(1) In *Slingsby's Case*,[2] there were a number of grantees and a covenant "with each and every of them." The covenant, in terms clearly joint and several, was held to be joint. Being a covenant with multiple covenantees it could not operate jointly and severally, so it had to be joint or several. The covenant was for title. The interests of all the grantees were alike and joint, so the covenant was held to be joint, the words of severance being rejected. This is a clear case of moulding of covenant to conform with interest. But it appears from the case that if there had been different estates granted to the covenantees, with a covenant for title with them and each of them, the interests being several and the covenant purporting to be joint and several, which it could not be, the words "them and" should be rejected and the covenant should be held to be several. *Eccleston* v. *Clipsham*,[3] and *Spencer* v. *Durant*,[4] were like cases. In each the covenant was in terms joint and several. In the first, coadventurers with like interests covenanted, each with the other and others of them. The interests of the covenantees being joint the covenant was held joint, the words "the other" being rejected. In the second case a band

[1] See p. 243 for the beginning of this article.
[2] (1587) 5 Co. Rep. 18b, 19a.
[3] (1668) 1 Saunders Rep. 153; 1 Wms. Saund. 162.
[4] (1689) Comb. 115; 1 Show. 8.