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FALLACY OF THE TRANSPLANTED CATEGORY

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"Try another Subtraction sum. Take a bone from a dog; what remains?"

Alice considered. "The bone wouldn't remain of course, if I took it—and the dog wouldn't remain; it would come to bite me—and I'm sure I shouldn't remain!"

"Then you think nothing would remain?" said the Red Queen.

"I think that's the answer."

"Wrong, as usual," said the Red Queen. "The dog's temper would remain."

"But I don't see how —"

"Why, look here!" the Red Queen cried. "The dog would lose its temper, wouldn't it?"

"Perhaps it would," Alice replied cautiously.

"Then if the dog went away, its temper would remain!" the Queen exclaimed triumphantly.

L. CARROLL, Through the Looking Glass

A certain fascination surrounds the queer quirks of legal discourse, the fictions, the fallacies, the misleading metaphors by which clarity of thought and reasoning are often obscured. We may well wonder how learned lawyers of the past, supposedly clear-thinking, practical men, could allow their thought processes to become entangled in such bewildering conceptions as the building which is part of the land, the weird alchemy of equity which converts real property into personal property or the ceaseless oscillation

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of the *renvoi*.[1] Such fallacious forms of thought have the perennial quality of weeds; explain and explore them as we may, they reappear continually to confuse new generations of law students before and after graduation.

In this article it is my purpose to discuss one of the most common verbalistic errors in legal reasoning, which I shall call the fallacy of the transplanted category. It has, of course, been analyzed before in various branches of law.[2] Reduced to the simplest terms it is much like the old argumentative trick of using a word in two different senses. But in the context of any fairly complex legal problem its spurious conclusions can be made to seem very plausible.

In *Oppenheimer* v. *Frazer and Wyatt*,[3] decided in 1907, the English Court of Appeal was confronted by the familiar problem which arises when a trusting owner of goods hands them over to a swindler who, violating the owner's instructions, sells the goods at bargain prices to a good faith purchaser. Schwabacher, a dishonest diamond broker, persuaded Oppenheimer (the owner) to hand him five parcels of diamonds by representing that he knew certain named firms in the diamond trade who might wish to buy them. Oppenheimer instructed Schwabacher to offer the diamonds for sale to these named firms *only*, at certain fixed prices. Schwabacher did not offer the diamonds to the named customers; he turned them over to Broadhurst, another diamond broker, for sale for cash. Broadhurst then entered into an arrangement with the firm of Frazer and Wyatt under which he and they purchased the diamonds from Schwabacher as joint adventurers at prices considerably lower than those fixed by Oppenheimer. The diamonds were subsequently resold at a profit by Frazer and Wyatt. Schwabacher absconded without accounting to Oppenheimer for the diamonds or the money received and Oppenheimer sued Broadhurst and Frazer and Wyatt for conversion of his diamonds.

[1] For a discussion of the confusion of thought engendered by these bewildering conceptions, see Cook, Logical and Legal Bases of the Conflict of Laws (1942), pp. 253-258, 301-307 (equitable conversion and things forming part of the land) and pp. 239-246 (renvoi).

[2] See Cook, *ibid.* ch 6, Substance and Procedure, p. 154, ch 7, Domicile, p. 194; Arnold, Criminal Attempts; The Rise and Fall of an Abstraction (1930), 40 Yale L.J. 53; Shartel, Meanings of Possession (1932), 16 Minn. L. Rev. 611, especially at pp. 622 *et seqq.*; Llewellyn, Through Title to Contract and a Bit Beyond, in Law a Century of Progress (1937), vol. 3, p. 80; Jones, Vested and Contingent Remainders, a Suggestion Concerning Legal Method (1943), 8 Maryland L. Rev. 1; Niles, Rationale of the Law of Fixtures: English Cases (1934), 11 N. Y.L.Q. Rev. 560; Horowitz, California Law of Fixtures (1952), 26 Southern Cal. L. Rev. 21; Puttkammer, Consent in Criminal Assault (1925), 19 Ill. L. Rev. 617.

[3] [1907] 2 K.B. 50, 76 L.J.K.B. 806.

Frazer and Wyatt and Broadhurst contended that they were all purchasers in good faith without notice of Schwabacher's lack of authority so that the sale of the diamonds by him to them was rendered valid by section 2(1) of the Factors Act of 1889.[4] The court decided in favor of the plaintiffs with each of the three judges delivering separate concurring opinions. Fletcher Moulton L.J. rested his decision on two grounds (1) that the defendants were not purchasers in good faith,[5] (2) that Schwabacher (the "mercantile agent") was not "in possession" of the diamonds "with the consent of the owner" (Oppenheimer). It is this second ground of decision which illustrates our fallacy. The other two judges also discussed this second ground quite fully but preferred to treat it as an *obiter dictum.*

What was the basis for the conclusion that Oppenheimer did not consent to Schwabacher having the diamonds? There was some evidence that when Schwabacher obtained the diamonds from Oppenheimer he intended to violate his instructions and dispose of them for his own purposes. The evidence also indicated that he induced Oppenheimer to hand over the diamonds by false representations regarding his relations with the named customers and his own intentions to sell the diamonds to them. In these circumstances, it was argued, Oppenheimer could not be said to have given his "consent" to the change of possession of the diamonds. This argument necessarily raised a more general question; could there be a "consent of the owner" to the "possession of the mercantile agent" where the owner was mistaken about some significant fact relating to the transaction? One can, of course, conceive of a great variety of hypothetical instances involving some element of relevant error on the part of the owner, *e.g.*, the owner might hand over a parcel of diamonds believing them to be amethysts. Or the agent might be impersonating Mr. X, a reputable diamond broker. Or the agent might have deceived the owner as to the

[4] S. 2(1) "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

[5] The jury found that Fraser and Wyatt had purchased the diamonds in good faith but that Broadhurst, their co-adventurer in the transaction, had not. The court decided that in these circumstances it could not be said that "the person taking under the disposition acts in good faith" within the meaning of the proviso to s. 2 (1) of the Factors Act.

extent of his business or beguiled him with a fictitious tale of some previous "big deal". But the court was not left to wander without guidance in the wilderness of hypothetical instances which the ideas of "consent" and "mistake" might suggest. The statutory context, the other words of the section, clearly indicate that its purpose is to protect a good faith purchaser by validating a sale to him by a mercantile agent having possession of the goods sold with the owner's "consent", and acting in the ordinary course of business. And these words also indicate clearly that this good faith purchaser is to have this protection even though the mercantile agent has not authority to make the sale; the sale shall "be as valid as if he were expressly authorized by the owner of the goods to make the same." Now mercantile agents who sell goods in violation of the owner's instructions are not, as a rule, honest men and it would seem highly probable that in many of the cases where this happens the dishonest mercantile agent would have formed his dishonest intentions and made some false representations regarding these intentions (or some other matter) at the time when he obtained "possession" of the goods from the owner. If we were to say that in all such cases there was no "consent of the owner" because of the deception practised upon him we should be depriving the good faith purchaser of protection in a great many of the cases where the other phrases of the Act indicate that he is to have it. Such a narrow meaning of "consent" seems inconsistent with these other phrases of the section because they require that the good faith purchaser should be protected against a type of mercantile agent who is very likely to deceive the owner in order to get possession of the goods. Hence it would seem that the word "consent", considered in its verbal context and in relation to the factual problem which the statute deals with, ought to have been given a meaning broad enough to cover at least the deception practised upon the owner, Oppenheimer, by Schwabacher in the instant case. The court might also have found guidance in the case of *Baines* v. *Swainson*[6] where, on similar facts, it was held that the agent was "entrusted with the possession of goods," within the meaning of the Factors Act of 1842.[7]

[6] (1863), 4 B. and S. 270, 32 L.J.Q.B. 281. The Scotch case of *Vickers* v. *Hertz* (1871), 2 L.R. Scotch App. 113, and *Sheppard* v. *Union Bank of London* (1862), 7 H. and N. 661, 31 L.J. Ex. 154 (decided on demurrer) also resemble the principal case closely. In all of these cases the agent obtained possession of the goods or documents of title by fraudulently pretending that he had an order for the goods from a named customer and then disposed of the goods for his own purposes. These cases were all decided upon the Factors Act of 1842.

[7] 5 and 6 Vict., c. 39, s. 1. The Factors Act of 1889 was enacted to "amend

However, the Court of Appeal did not turn for guidance to either of the sources which have been suggested. Eschewing both the statutory context and the earlier cases the judges professed to find a ready-made meaning for the words "consent of the owner" in the common law of larceny. The relevance of the larceny category of "consent" is thus explained by Fletcher Moulton L.J. "A mercantile agent is as capable of stealing as any other man, and, if he has stolen the goods, there can be no question, in my opinion, that he must be taken to hold possession of them without the consent of the owner. . . . The law recognizes a form of larceny in which the apparent delivery of the possession of goods by the owner of them which has been obtained by a trick *animo furandi*, does not in law import consent to that possession by the owner, so that the person who obtained that possession may be treated as having taken the goods without the owners' consent." His Lordship then referred to the "well-settled law" that where a person hands over goods to a recipient without intending to transfer title to them but the recipient intends at that moment to steal them, the recipient is guilty of larceny. Since the point had been raised at the trial and the jury had found Schwabacher guilty of larceny, his Lordship proceeded to consider whether the evidence would support their verdict. He decided that it would and concluded, "assuming it [the verdict] to be correct, it negatives the existence of consent by the plaintiff to Schwabacher's possession of the goods."[8]

Briefly stated, his Lordship's argument comes to this: larceny is defined as the taking of another's goods without his consent and against his will with the intention of converting them to the use of the taker. If, at the time Schwabacher obtained the diamonds from Oppenheimer, he intended to convert them to his own use, he was guilty at that moment of a "taking" without the "consent of the owner" as those words are used in the law of larceny. Hence the court ought to hold that he did not obtain possession of the goods "with the consent of the owner," as those words are used in the Factors Act. This line of reasoning has the effect of incorporating into the Factors Act the highly attenuated category of "consent"[9] which had been evolved in the process of extending

and consolidate" all the earlier acts so the cases decided upon those acts were entitled to considerable weight as precedents.

[8] *Supra*, footnote 3, at pp. 71, 72, 75.

[9] The word "category" is used here with reference to the accumulated English decisions and dicta which might be called in aid to determine the meaning of the word "consent" as used in the law of larceny. This use of the word "category" is admittedly metaphorical and hypostatic. The

the scope of the crime of larceny.[10]

The larceny theory of non-consent is summed up in a passage from Pollock and Wright *on Possession*, which was cited to the court: "If a person obtains possession of a thing under colour of a treaty for the transfer of possession but really meaning to assume the property in it (*i.e.* to steal) the thing, the nominal consent goes for nothing and the acquisition of the possession is a taking and (*animus furandi* being present) a theft, for there is no agreement *ad idem*." [11] This doctrine is generally regarded as having originated in the famous case of *Rex* v. *Pear*[12] decided by eleven judges in 1780. Pear hired a black mare for the day, stating to Finch, the owner, that he would go to Sutton and return the same evening and giving a false address. Without going to Sutton he sold the mare and did not return. Ashurst J., who tried the case, told the jury that if Pear intended to make the journey when he hired the mare and afterwards decided to sell it he should be acquitted but if the journey was a mere pretense and he hired her with the intention of stealing her they should find him guilty. The jury found him guilty and his conviction was upheld by seven of the eleven judges.

Students of the history of larceny agree that *Pear's* case was "a sharp departure from precedent." [13] Thus, Hale's *Pleas of the Crown*, published in 1736 had stated, "If A delivers a horse to B to ride to D and return and he rides away *animo furandi* this is no

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reference is the cases. See the warnings of Cook, regarding the use of such words in An Unpublished Chapter (1943), 37 Ill. L. Rev. 418, at p. 423.

[10] The reasoning of Fletcher Moulton L.J. and the other judges in the *Oppenheimer* case is based upon the opinion of Collins L.J. in *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q.B. 643, 68 L.J.Q.B. 515. The case was decided by three judges, delivering separate concurring opinions to the effect that in that case a buyer of goods obtained possession of the documents of title to those goods with the consent of the seller within the meaning of s. 9 of the Factors Act 1889 (and the identical duplicate s. 25 (2) of the Sale of Goods Act 1893, 56 and 57 Vict., c. 71) so that he had power to transfer title to a good faith purchaser. Neither of the other two judges mentioned larceny or discussed the question whether the buyer of goods was guilty of larceny when he obtained them.

[11] Pollock and Wright, Possession in the Common Law (1888), p. 218, also pp. 101, 132, 141, 204. This influential book seems to have been written on the assumption that the category of possession is always the same no matter what legal consequences may be involved. For a demonstration to the contrary see Shartel, *op. cit.*, *supra*, footnote 2, at pp. 622-633. See also *Rex* v. *Mitchell and McLean*, [1932] 1 W.W.R. 657; *People* v. *LaPella* (1936), 272 N.Y. 81.

[12] (1779), 2 East P.C. 685, 1 Leach 212. The report in East P.C. is much fuller.

[13] Hall, Theft Law and Society (1935), p. 15, also pp. 11-19, 24-36, for an account of the social and economic developments in eighteenth century England which influenced the courts and Parliament when this and other changes in the law of theft were being made.

felony, the like of other goods."[14] But, as the foregoing quotation from Pollock and Wright indicates, *Pear's* case substituted a new interpretation for the traditional requirement of a "taking without the consent of the owner and against his will." These words were interpreted to mean merely that there must be no valid contract of bailment. If the recipient intended to steal the goods there could be no "meeting of minds", hence no contract and no "consent".[15] The "consent" of the owner of the goods was thus made to depend upon the state of mind of the accused. As an alternative rationale it could be said that the owner's consent was obtained by fraud since the accused misrepresented his intentions.

One is naturally inclined to raise the question, "why should a drastic extension of the definition of larceny, made in 1780, determine the interpretation of a commercial statute enacted in 1889?" Fletcher Moulton L.J. endeavoured to answer this question by saying that " 'consent' for the purposes of the section must be what amounts to consent in the eye of the law." But what are we to understand by the phrase "consent in the eye of the law"? It surely is not suggested that the judges who decided *Pear's* case and other larceny cases were consciously framing a definition of "consent" for use in all future statutes. Perhaps what is meant is that the framers of the Factors Act intended to incorporate the larceny definition. But this too seems unplausible. Assuming that the framers considered the matter at all, what reason would they have for deliberately choosing an exceedingly narrow definition of "consent" which would deprive the good faith purchaser of protection in every case where the mercantile agent intended, at the time of obtaining possession, to convert the goods to his own use? It seems more likely that his Lordship had in mind the canon of construction that a technical legal term in a statute should be given its technical legal meaning. But this canon had always

"The object gained, with all its attendant mischiefs, being identically the same in fraud as in larceny, good sense naturally induced a disposition to treat as theft the privation of property through deceit. This disposition inclined the authorities to listen to a refinement in reasoning which proves that a delivery of property is no delivery at all; and thus establishes (the definition of larceny) a taking from the owner without his consent: a doctrine which being at variance with the common apprehensions of mankind, and the creature of mental reservation, is with much propriety called legal construction." Hammond, Introduction to Report of the Select Committee on the Criminal Law of England (1824), p. 9 quoted in Hall, *op. cit.*, p. 19.

[14] Vol. 1, p. 504.

[15] The theory of *Pear's* case, that the fraudulent intent of the person to whom the goods are delivered prevents him from acquiring possession with the consent of the owner was not entirely new. It had appeared in a note upon *Raven's* case (1662), Keling 24, at p. 81 and in the argument for

yielded to the least suggestion of a contrary intention;[16] it provided a very feeble excuse for transplanting a category of the criminal law into a statute passed to modernize the law of commercial transactions.

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the prisoner in *Rex* v. *Meeres* (1689), 1 Shower 50. In these cases a tenant renting furnished apartments took away the furniture and sold it; the argument was made that if the tenant intended to steal it when it was first delivered to him he did not acquire possession of it with the landlord's consent so his subsequent misappropriation was larceny.

The doctrine of *Pear's case* and other cases decided soon afterward (see especially *Rex* v. *Semple* (1786), 2 East P.C. 691, 1 Leach 420) was that the larceny was committed when the prisoner converted the horse to his own use by selling it. Because his fraudulent intention or misrepresentation when the horse was delivered to him prevented the formation of a valid contract the owner retained his legal *right* to immediate possession of the horse. So it was said (confusing facts and legal results) that the owner retained "possession" and the prisoner was considered to have only a bare physical control of the horse, comparable to that of a servant in charge of his master's goods. But he was not guilty of larceny of the horse until he actually misappropriated it, thereby taking it from the owner's "possession." In a series of cases where the prisoner, after hiring the horse, merely attempted to sell it, it was argued that the attempted sale was not a sufficient conversion to constitute larceny. After some vacillation of opinion the judges shifted to a different theory; the prisoner was held to be guilty of larceny at the time he first acquired control of the horse intending to convert it to his own use. See *Spence's* case (1829), 1 Lewin 197, *Reg.* v. *Brooks* (1838), 8 C. and P. 295, *Reg.* v. *Janson* (1849), 4 Cox C.C. 42. The change of doctrine is referred to by Pollock and Wright, Possession in the Common Law (1888), p. 219. See also Scurlock, The Element of Trespass in Larceny (1948), 22 Temple L.Q. 12, at p. 19 *et seqq.*

The later theory, that larceny is committed as soon as the accused, intending to steal the goods, obtains control of them is supported by many texts and dicta but there is obviously something wrong with it. Suppose Pear had intended to steal the horse when he hired it but later changed his mind, would he have been convicted of larceny? Of course not. It was the subsequent misappropriation of the horse to his own purposes that was thought to deserve punishment, not the act of hiring it with an evil intent. Yet according to the official theory of the later English cases Pear would (in our hypothetical case) be guilty of larceny. See the instructions to the jury given by Channell J. in the *Oppenheimer* case, 76 L.J.K.B. 806, at p. 819: "If the plaintiff is right Schwabacher could have been convicted of stealing them [the diamonds] when he was walking away from the place and before he had taken them to Fraser and Wyatt. . . . If he had been caught by a policeman when he was going out of the office, then it could have been said that he was stealing them because of this misrepresentation about Pinto Leite and the other firm." Even if he had known that Schwabacher had misrepresented his relationship with diamond buying firms, it would surely have been a very bold and learned policeman who ventured to arrest him on a larceny charge "when he was going out of the office."

[16] See Maxwell, Interpretation of Statutes (5th ed., 1912), pp. 88-94. The implications of Fletcher Moulton L.J.'s theory for statutory draftsmanship are somewhat startling. Once a word is held to have a certain meaning for a particular purpose that meaning becomes its "meaning in law." Hence that meaning will be attributed to it whenever it appears in a subsequent statute. Unless the draftsman wishes it to have exactly the same meaning in the statute he is drafting, he must refrain from using it and choose another word. As more and more words acquire specialized meanings in law, the draftsman's choice would be increasingly diminished. Statutory draftsmanship would indeed become "a nightmare." (See Simpson, English Law in the Making (1940), 4 Mod. L. Rev. 121, at p. 127.)

Fletcher Moulton L.J.'s doctrine of "consent in law" appears to lead to a further difficulty. The term "consent" had been used for many years, not only in relation to larceny, but in relation to rape and assault. Classic definitions of rape required that the woman be ravished "without her consent and against her will." If there were a single uniform theory of "consent in law" we should expect to find a category of consent in the law of rape substantially similar to that prevailing in the law of larceny. But the category of consent which the judges had developed in the law of rape was quite different from that of the law of larceny and differed also from that employed in the law of assault.[17]

The English borderline cases delimiting "lack of consent" as an element of rape exhibit some conflict of ideas. In 1822 when death was the punishment for rape, eight out of twelve judges held that the accused was not guilty of rape when, in the dark, he entered the bed of a drowsy married woman who allowed him to have sexual intercourse with her, believing him to be her husband. Dallas C.J. emphasized the difference between the present case and "compelling a woman against her will."[18] In 1838, on similar facts, it was held in two cases (decided by single judges) that the accused was not guilty of rape but was guilty of a common assault.[19] Thus it was decided in effect, that where the woman acquiesced in the sexual act, believing the accused man to be her husband, there was a sufficient lack of consent to constitute the offense of common assault but not the complete and utter absence of consent necessary for the capital crime of rape. Other cases of this period suggest that some use of "force" was supposed to be a necessary ingredient of rape.[20]

After the death penalty as punishment for rape was abolished

[17] In the well-known larceny case, *Regina* v. *Middleton* (1873), 1 C.C.R. 38, at p. 56, Bramwell B. referred to the cases holding a husband impersonator not guilty of rape as "another illustration of how the common law refuses to punish an act committed with the consent of the complainant." In *Regina* v. *Hehir*, [1895] 2 Irish R. 709, at p. 728, Gibson J. referred to the conviction of rape of a husband impersonator in *Regina* v. *Dee* (1883), 14 L.R. Irish 468, 15 Cox C.C. 579 in support of his dissenting opinion in favor of a conviction of larceny. Neither of these opinions can be said to go quite so far as to argue that the definition of consent is the same for larceny as for rape. They merely indicate an assumption that the analogy of consent in the law of rape might have some relevance to the problem of consent in the law of larceny.

[18] *Rex* v. *Jackson* (1822), Russell and Ryan 487.

[19] *Regina* v. *Saunders* (1838), 8 Carr. and Payne 265, 267; *Regina* v. *Williams* (1838), 8 Carr. and Payne 286. The reasoning of these cases is explained and supported by Puttkammer, *op. cit., supra*, footnote 2.

[20] See *Rex* v. *Lloyd* (1836), 7 Carr. and Payne 318; *Regina* v. *Stanton* (1844), 1 Carr. and K. 415 and the argument of counsel in *Regina* v. *Camplin* (1845), 1 Cox C.C. 220, 1 Den. C.C. xvii, 89.

in 1841,[21] the judges seem to have adopted a different attitude toward the strict requirement that the victim of rape be ravished without her consent and against her will. In *Regina* v. *Camplin*[22] the accused had sexual intercourse with a girl of thirteen after plying her with liquor until she was "in a state of insensibility". The case was referred to the full Court of Crown Cases Reserved. Ten judges (three dissenting) affirmed the conviction for rape and the accused was sentenced to transportation for life. The majority opinion held that the sexual intercourse occurred without her consent and against her will because she had refused her consent *before* the accused made her insensible by giving her more liquor. In *Regina* v. *Fletcher*[23] the accused had sexual intercourse with an idiot girl whom the jury found to be mentally incapable of giving consent. Affirming a conviction for rape a court of five judges[24] held that the absence of consent was sufficient and proof that the sexual act was "against her will" was not necessary.[25] Thus it became established that the passive acquiescence of an unconscious or uncomprehending mind constituted a lack of consent.

In the light of these later precedents the older cases holding the husband impersonators not guilty of rape seemed somewhat anomalous. Criticism was expressed and cases of this type were referred to the Court of Crown Cases Reserved in 1854 and in 1868 but on each occasion that court ruled that the older precedents should be followed.[26] In *Regina* v. *Flattery*[27] the accused,

[21] 4 and 5 Vict., c. 38.

[22] *Supra*, footnote 20. Some of the judges voting for conviction were of opinion that the victim's insensibility showed a sufficient absence of consent to constitute rape and that her prior refusals were not material because it was not necessary to show that the act was done against her will. (See 1 Den. C.C. xvii.) The three dissents and the reliance by some judges upon the prior refusals show that the case was regarded as making new law, that the older conception of "without her consent and against her will" was being drastically compressed.

[23] (1859), 8 Cox C.C. 131. A similar decision had been given by Platt B. in *Regina* v. *Ryan* (1846), 2 Cox 115.

[24] After 11 and 12 Vict., c. 78, five judges formed a quorum for the Court of Crown Cases Reserved but in case of disagreement the case was referred to the full court of fifteen judges. The five-judge court is called the Court of Criminal Appeal in Cox's reports. See Stephen, History of the Criminal Law of England (1883), vol. 1, p. 311. Holdsworth, History of English Law (3rd ed., 1922), p. 217.

[25] Relying on the absence of the words "against her will" in the Stat. West., 2, c. 34 and the decision in *Regina* v. *Camplin*, *supra*, footnote 20. In *Regina* v. *Dee*, *supra*, footnote 17, the judges of the Irish Court of Crown Cases Reserved stated that "against her will" and "without her consent" meant the same thing.

[26] Criticism and doubt was expressed in *Regina* v. *Case* (1850), 4 Cox 220, 1 Den. C.C. 580. The problem was referred to the court in *Regina* v. *Clark* (1854), 6 Cox C.C. 412 and in *Regina* v. *Barrow* (1868), 11 Cox C.C. 191, L.R. 1 C.C.R. 156.

[27] (1877), 13 Cox C.C. 388, L.R. 2 Q.B.D. 410. As early as 1850 it was

who professed to give medical advice, had sexual intercourse with a girl of nineteen who believed that he was performing a surgical operation to cure her of having fits. Without calling on the crown counsel the five judge court held the accused guilty of rape, distinguishing the impersonation cases on the ground that the girl in the instant case did not even know that sexual intercourse was taking place. And despite the long chain of authority four of the five judges said they would like to see the impersonation cases reconsidered. In *Regina* v. *Dee*[28] a case of husband impersonation came before the Irish Court for Crown Cases Reserved; after carefully analyzing the English line of cases the six Irish judges emphatically declined to follow them and affirmed the conviction of rape. In 1885, sexual intercourse obtained by husband impersonation was declared to be rape by Act of Parliament.[29]

Despite this tendency to compress it in marginal cases the category of consent in relation to rape always remained much broader than that of consent in relation to larceny. In the larceny area, as we have seen, the owner's apparent consent "went for nothing" if the bailee intended to steal the goods and so misrepresented his intentions. In the rape area, however, the woman was regarded as giving "consent" although the grossest deception was practised upon her. A man who induced a woman to indulge him in sexual intercourse by pretending to marry her would not have been guilty of rape; neither would one suffering from venereal disease who pretended to be in good health.[30] If there is supposed to be some single, uniform theory of consent, useful for all legal purposes, how shall we explain this disparity? The judges

held that on such facts the accused might be convicted of an assault in *Regina* v. *Case*, *ibid.*, *Regina* v. *Flattery* was followed on similar facts in *Rex* v. *Williams*, [1923] 1 K.B. 340, 17 Cr. App. Rep. 56. In *Rex* v. *Harms*, [1944] 2 D.L.R. 61, 1 W.W.R. 12, 81 C. C.C. 4, the Saskatchewan Court of Appeal extended the principle of these cases even further in the case of a twenty-year-old girl who, understanding the nature of sexual intercourse, reluctantly submitted to it because the prisoner stated that it was a necessary part of a course of medical treatment. The court held that her consent was obtained by "false and fraudulent representations as to the nature and quality of the act" within the meaning of Canadian Criminal Code, s. 298 (3) [now s. 135] so that the prisoner was guilty of rape. For an argument against such an extension of the definition of rape see Puttkammer, Consent in Rape (1925), 19 Ill. L. Rev. 410.

[28] *Supra*, footnote 17.

[29] 48 and 49 Vict., c. 69. To the same effect is the Canadian Criminal Code, s. 135 (2). Note that the phraseology of the Code, in effect, suggests that *there is* some element of consent in this and the other situations listed but that it is not sufficient to take the facts out of the rape category.

[30] I believe this statement of the English law is adequately supported by *Regina* v. *Clarence* (1888), 22 Q.B.D. 23, 16 Cox C. C. 511 and dicta therein, 22 Q.B.D. at pp. 30, 44. See also *People* v. *Skinner*, [1924] 2 W.W.R. 209, 33 B.C.R. 555.

appear to have built up one theory of consent for larceny and a different theory for rape because they were influenced by different considerations of policy in each area.

When *Rex* v. *Pear* was decided in 1780, influential opinion in England favored the increased use of capital punishment to prevent crimes against property.[31] Larceny of a horse was a capital offence[32] and the rogue who stole a horse under pretext of hiring it probably seemed just as wicked to the judges as one who took a horse when no one was looking. To hang more rogues the judges extended the scope of larceny and in the process necessarily restricted the category of consent. In the rape cases, on the other hand, we see at first a tendency to restrict the scope of the offence by using a liberal definition of consent. The first three husband impersonation cases were decided in an era when public opinion was turning against capital punishment for all except the most serious crimes.[33] Since rape was still punishable with death some of the judges were reluctant to classify as a rapist a man who had used neither force nor the threat of force to obtain sexual intercourse. But since his offence was detestable it was put in the category of an assault with the result that a set of facts labelled "consent" for purposes of rape was labelled "non-consent" for purposes of assault. After the death penalty for rape was abolished, however, a contrary trend set in. Despite some initial dissents, the judges made a series of extensions of the rape category to include various border-line cases. In the course of making these extensions the judges gradually restricted the category of "consent in rape" until it came to seem quite inconsistent with the earlier cases exonerating the husband impersonator. In short, the change in the punishment produced a gradual change in policy which came to favor a more restricted definition of consent in the field of rape.

This survey of "consent in rape" brings us to the basic fallacy involved in transplanting a legal category. The scope of a legal category such as "consent in larceny" or "consent in rape" is hammered out in the process of deciding cases.[34] In deciding these

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[31] Radzinowicz, History of English Criminal Law (1948), pp. 28-31 35-37.

[32] *Ibid.*, p. 275.

[33] *Ibid.*, pp. 600-607.

[34] The process by which a legal category is built up through the accumulation of border-line cases has been carefully described and analyzed in Levi, Introduction to Legal Reasoning (1949), especially pp. 1-19. The logic of the process may, I believe, be summed up in this brief quotation found on p. 2. "The problem for the law is: When will it be *just* to treat different cases as though they were the same? A working legal system must therefore be willing to pick out key similarities and to reason from them to the *justice* of applying a common classification." (Italics added.)

cases the issue before the judges is whether or not to reach a particular legal result (guilty of rape) and the decision will be governed by policy considerations relevant to that particular issue only. Each decision will enlarge or restrict the category (consent in rape) and a series of such decisions will produce a category responsive to the policies relevant to the recurring issue (guilty of rape). Since the category has been moulded in response to these policies it is unsuitable for use in a different legal context where a different legal result is in issue to which the rape policies are not relevant. When a legal category, built up in response to policies relevant to one legal result, is imported into a different context where a different legal result (involving different policies) is in issue, the transplanted category may well suggest a result which frustrates the relevant policies which should control the determination of the new issue. *Oppenheimer* v. *Frazer and Wyatt* is a melancholy illustration of this phenomenon. A rather narrow category of consent had been established in the larceny cases in response to a policy favoring the conviction of persons who did certain acts. But the policy of the Factors Act indicated by its terms and by earlier decisions suggested the need for a consent category somewhat broader than that of the larceny cases. When the larceny category of consent was incorporated into the Factors Act in the *Oppenheimer* case the relevant and significant policy of the Act was thereby frustrated.

Fallacious reasoning in a judicial opinion may sometimes be traced to inadequate argument of counsel but not in the *Oppenheimer* case. Counsel for the defendants argued pointedly that the doctrine of larceny by a trick was irrelevant to the construction of the Factors Act and inconsistent with its policy. They then proceeded to contend that the "consent" required by the Factors Act was "consent in point of fact." This last statement implies that the category of consent as a defence to a charge of larceny differs from the category of consent in the Factors Act in that the latter is somehow more factual than the former. Such a misleading suggestion calls for adverse comment. No doubt the two categories of consent are different but the difference cannot be described by saying that one is "consent in law" and the other "consent in fact." Both these categories of consent are categories of "consent in fact" in the sense that each one refers to and may be applied to the facts of particular cases. They are also categories of consent in law in the sense that each one is applied to the facts of particular cases for the sole purpose of determining whether or not a certain legal

result should be reached.[35] The same may be said of virtually all legal categories.[36] It is simply confusing to suggest that some legal categories are more purely factual (or *de facto*) than others.

A fallacious line of reasoning which is adopted by each of three judges, writing separate opinions, must carry a certain amount of plausibility and persuasiveness. One suspects that it is probably congenial to some well-established habits of thought involving the uses of language. When we start learning, at a very early age, the categories and other verbal ideas of our language we naturally come to think that they represent the structure of the universe.[37] Though we may abandon this idea to some extent at later stages of our education we never gain complete freedom from it.[38] At these later stages, however, we are more likely to be im-

[35] The double implication of words used to symbolize legal categories was clearly stated by Holmes in The Common Law (1881), pp. 213-215. His remarks may be summarized in two quoted sentences. "Hence when we say of a man that he has possession, we affirm directly that all the facts of a certain group are true of him, and we convey indirectly or by implication that the law will give him the advantage of the situation. Contract, or property, or any other substantive notion of the law, may be analyzed in the same way, and should be treated in the same order." The same idea is expressed by Pollock and Wright, *op. cit.*, *supra*, footnote 11, p. 10. "Every legal relation is or may be an affair both of facts and of right: there are not two separate and incommunicable spheres, the one of fact and the other of right. Facts have no importance for the lawyer unless they appear to be, directly or indirectly, the conditions of legal results. . . ."

It is dangerously easy, however, to think about the possible classification of a particular set of facts under some legal category without regard to any *particular* legal result. *E.g.*, is a raft of logs a vessel? Is a wall-bed a fixture (or part of the land)? Since the law does not set up categories of fact except as a means to determine whether particular legal consequences ought to ensue, such questions are meaningless *unless* we stipulate what particular legal consequences are at stake. See Cook, *op. cit.*, *supra*, footnote 1, pp. 159-161, Horowitz, *op. cit.*, *supra*, footnote 2, pp. 54-55. For further analysis see Malone, Ruminations on Cause-in Fact (1956), 9 Stanford L.R. 60.

[36] Some legal categories such as "personal property" or "community property" are different; they are categories of *legal relations* rather than categories of facts. And the categories of constitutional law or conflict of laws require a more complex analysis.

[37] "For these children the name is an essential part of the thing; the name '*Se lève*' implies a sloping mountain, the name 'sun' implies a yellow ball that shines and has rays, *etc.* But it must also be added that for these children the essence of a thing is not a concept but the thing itself. Complete confusion exists between thought and the things thought of. The name is therefore in the object, not as a label, attached to it but as an invisible quality of the object." Jean Piaget, The Child's Conception of the World (1929), pp. 69-70.

[38] Though we come to realize that words are not parts of things, that words represent general conceptions or ideas *about* tangible objects, *etc.*, we nevertheless tend to assume that if a word has found its way into the language it must represent some single verbal idea which is important and useful. In the words of J. S. Mill: "The tendency has always been strong to believe that whatever receives a name must be an entity or being, having an independent existence of its own: and if no real entity answering to the name could be found, men did not for that reason suppose that none

pressed with the importance of knowing the conventional meanings of words in order to communicate with other people. We are inclined to think, or rather to *assume* that it is an essential requirement of this communication process that a single word ought always to have the same meaning at least when used with reference to the same subject matter.[39] When we embark on the study of law we find that we must learn the meaning of many legal terms; offer, consideration, battery, *etc.* But we tend to overlook the important distinction between the verbal ideas which these words symbolize and those of everyday language. Both types of verbal ideas are ideas about facts (people, objects, acts, states of mind, *etc.*) but where those of everyday language are purely descriptive, those of the law necessarily involve legal consequences. Moreover, we do not always realize how much the meanings of these words have been influenced by the legal consequences associated with them. Instead, we think of legal terminology as nothing more than a set of relatively precise definitions whose chief function is to enable lawyers and judges to understand what other lawyers and judges are saying. We conclude that the terms of the law have a kind of legal dictionary meaning which we call their "meaning in law."

Now we encounter the word "consent", used in various branches of the law, but always with reference to the same subject matter, the state of a person's mind in relation to a particular transaction. Considering the obvious importance of effective communication, it seems only natural to assume that the judges who decided earlier cases would normally have been guided by a desire to maintain a single consistent meaning for the word "consent." Hence it would seem to follow that one might search all the precedents of the past in which the word "consent" had appeared with the confident expectation of discovering a single uniform

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existed but imagined that it was something peculiarly abstruse and mysterious, too high to be an object of sense." (Quoted in Ogden and Richards, The Meaning of Meaning (8th ed., 1946), p. xxiv, also pp. 96, 109, 128-130.) We know that for many years judges and text writers have been writing about "consent" as a fact upon which various legal consequences depend in the law of contracts, torts and crimes. Since they used the same word "consent" we tend to assume that they were describing, or trying to describe, the same thing. If their decisions or descriptions are inconsistent, this may well be because their subject was "abstruse and mysterious."

[39] The variations in meaning according to context of such words as "club", "bridge", "suit" or "ball" do not strike us as an infringement of the assumed one word-one meaning condition because the ideas symbolized by the same word are so totally different and each one belongs to a different order of ideas or universe of discourse. Even the "ball" of one game seems to have little in common with the "ball" of another game for each game involves a quite different order of ideas as to rules, objectives, scoring, required skills, *etc.*

meaning, "consent in law." Moreover, the notion that "consent" could have different meanings seems, at first sight, to lead to a *reductio ad absurdum*; we might have to say that by one and the same act a mercantile agent had taken goods *without* the consent of the owner and yet had obtained possession of them *with* the consent of the owner.[40]

If this alleged *reductio ad absurdum* does seem illogical or absurd to us it is only because our thinking is so completely dominated by the one word—one meaning principle.[41] It is no more

[40] See the statement of Atkin L.J. in *Lake* v. *Simmons*, 95 L.J.K.B. 586, [1926] 2 K.B. 51, at p. 72, "The only authority for introducing into our law the anomaly that a man may be at the same time a thief who has taken goods 'without the consent of the owner,' and a person who is 'in possession with the consent of the true owner,' is to be found in the dicta of two members of the court who decided *Folkes* v. *King*." (*Folkes* v. *King* and *Lake* v. *Simmons* are discussed below.)

[41] There are two potential obstacles to rigorous analysis of transplanted category problems which should also be mentioned. (1) The so-called "common core" phenomenon. Suppose that in the *Oppenheimer* case Schwabacher had given Oppenheimer a drink containing a drug which made him unconscious and then carried away a packet of diamonds. Here all would agree that Schwabacher larcenously took the diamonds without Oppenheimer's consent and that Schwabacher did not obtain possession of them with Oppenheimer's consent for purposes of the Factors Act. And if we look to the cases delimiting consent in the law of rape or assault we find that they point to the same conclusion. In short, for each of four different legal purposes, the facts stated would fall in the non-consent category. To some minds this coincidence of result would suggest that there must be a single category of instances of absence of consent *in law*, uniform for all legal purposes. Situations in which a particular group of facts is classified in different ways for different purposes are explained away as troublesome border-line cases; the single category, like all legal categories, has a "penumbra," a border area of uncertainty in which such cases will necessarily arise. Being borderline cases, they are likely (it is said) to be decided either way by different courts. (This seems to be the explanation of the varying decisions regarding "procedure" and "domicile" adopted by Nussbaum, Private International Law (1943), pp. 134, 187-8.) A more realistic explanation would be that although different policies are always applied to determine the question of consent in *each* of the four different contexts, they all produce a decision of non-consent in the case of the drugged man. Testing this case by larceny policies there is no consent. Testing this case by rape policies (which are different) there is no consent. (Notice that for rape purposes the issue of absence of consent was once thought to be doubtful, see *Regina* v. *Camplin*, *supra*, footnote 2.) And so on. That the four different policy tests all produce the same result when applied to these facts is pure coincidence. That the *result* is in each case the same does not prove that the policy tests are the same or that there is a common core or a single category.

(2) Abstraction for abstraction's sake. "The intellectual maturity of a legal system may be tested by the abstract generality of its concepts." (Paton, Jurisprudence (1946), p. 177.) Some writers seem to proceed on the assumption that when a word (such as consent) is being used in relation to similar subject matter for various legal purposes, helpful clarifying ideas can be obtained by disregarding the various legal purposes and abstracting the common factual elements. See, for example, Chand, The Law of Consent (1897), pp. iv-vi. Or consider Ailes' approach to the problem of the meaning of "procedure" which, according to Cook, *op. cit. supra*, footnote 1, will be found to vary in different legal contexts. Having

illogical for "consent" to have different meanings in relation to different legal consequences than for "ball" to have different meanings in relation to different games. As for the problem of communication the answer is very simple; we must learn to make our verbal symbols reflect the complexities of the facts and the adjudications thereon which we are talking about. We must learn to speak of "consent in larceny," "consent in rape" *etc.*

Whatever the reasons may be, the idea that the meaning of a legal term will usually vary according to the legal result involved is one that some minds have apparently been quite reluctant to embrace.[42] In the 1880's several judges criticized the husband impersonation cases as "illogical" and erroneous because they held that the wife's conduct amounted to "consent" in relation to rape but not to "consent" in relation to assault.[43] Beale, in his classic article, *Consent in Criminal Law*,[44] published in 1895, assumes without even arguing the point, that throughout the field of criminal law there must be some single uniform test for determining

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accused Cook of "apparent nominalism" and "hostility to logic", Ailes carries the discussion to a higher level of abstraction in these words: "First, let us consider the purely intellectual significance of the distinction without regard to its practical consequences. It seems a reasonable conjecture that the distinction is referable to a fundamental habit of the human mind. Is it not a natural application to law of such distinctions as men have drawn from time immemorial between substance and form, between essence and accident, between the One and the Many, between the constant and the variable, between the eternal and the transitory?" Substance and Procedure in the Conflict of Laws (1941), 39 Mich. L. Rev. 392, at p. 404.

[42] One of the most notable protests of recent years is Williston's criticism of art. 2 of the proposed Uniform Commercial Code, dealing with sales of goods and purporting to eliminate, so far as possible, the question whether " the property had passed" from the adjudication of sales cases. The Law of Sales in the Proposed Uniform Commercial Code (1950), 63 Harv. L. Rev. 561, at pp. 566-569. The purpose and effect of art. 2 are explained by Latty, Sales and Title and the Proposed Code (1951), 16 Law and Contemporary Problems 3. The defects of the traditional analysis are set forth in Llewellyn, *op. cit.*, *supra*, footnote 2, see also *infra*, footnote 47.

Cook's analysis of the various meanings of "procedure" *op. cit.*, *supra*, footnote 1 was vigorously attacked by Schauer J. in *Grant* v. *McAuliffe* (1953), 41 Cal. 2d 859, 264 P. 2d 944.

[43] In *Regina* v. *Dee*, *supra*, footnote 17 and *Regina* v. *Clarence*, *supra*, footnote 30. In the latter case the prisoner, knowing that he had gonorrhoea, infected his wife (who did not know of his condition) by having sexual intercourse with her. He was indicted for an "assault" upon her "occasioning actual bodily harm," and for "unlawfully and maliciously inflicting actual bodily harm" upon her under ss. 47 and 20 respectively of 24 and 25 Vict., c. 100. His conviction under both counts was quashed by the Court for Crown Cases Reserved (nine judges to four). One of the principal arguments adopted by the majority was that the wife's conduct amounted to "consent" and so must be a defence to these charges because, if the wife's conduct did not amount to "consent" the prisoner would be guilty of rape which would be a *reductio ad absurdum*. See 22 Q.B.D., at pp. 28, 33, 34, 43; Putkammer, *op. cit.*, *supra*, footnote 2, at p. 619.

[44] (1895), 8 Harv. L. Rev. 317.

"the existence of consent." The first part of the article is devoted exclusively to a consideration of the isolated, abstract question "what is consent?" In the first three pages of this part Beale discusses several larceny cases and two cases involving different types of assault without even mentioning the nature of the crime charged or the legal consequences which a finding of consent would have entailed. Other contemporary writers who undertook to analyze "the nature of consent" proceeded upon the same assumption of a substantially uniform category, in use not only for different crimes, but also for solving various problems in the fields of contracts and torts as well.[45]

Writers or judges who proceed upon the assumption of a uniform category of consent inevitably encounter difficulty in reconciling the rape, larceny and assault cases. But if they are unwilling to abandon the idea that a uniform category exists (or ought to exist) there are several devices by which they may preserve, in part at least, the illusion of a single uniform category. One of these is the formulation of a definition of the alleged uniform category which contains one or more flexible terms of sufficient vagueness that when applied to any set of specific facts they will appear to be consistent with any desired result. Thus, in relation to the larceny, rape and assualt cases we might define "absence of consent" as an error or misunderstanding on the part of the complainant regarding some essential element of the transaction.[46] *Rex* v. *Pear* and similar cases we explain by saying that the victim was mistaken regarding the intentions of the accused, an essential element of the bailment. The cases holding the husband impersonator not guilty of rape we explain by saying that the drowsy wife knew someone was having sexual intercourse with her; her mistake merely concerned that person's identity which was not an essential element of the transaction.

The technique of flexible definition[47] will not, however, conceal

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[45] See Consent in the Criminal Law (1895), 29 Irish L.T. 427; Chand, The Law of Consent (1897).

[46] See the article in 29 Irish L.T. 427, at p. 428.

[47] In the law of sale of goods, several quite different legal consequences (*e.g.* the liability of the buyer to pay the price although the goods have been destroyed; the rights of the seller's sub-purchasers or creditors) are supposed to depend upon a set of rules for determining the "passing of the property." Traditional analysis assumes that these rules operate to reach a uniform result regardless of the legal consequence at stake. At a certain point in any given sale transaction the property is supposed to pass (according to the rules) and all the different legal consequences immediately ensue. This illusion of uniform operation has been made possible because one of the facts upon which the passing of the property depends is the *intention* of the parties. Where a case involving one legal

the inconsistency which arises when the same set of facts is held in one case to fall within the supposedly uniform category for one legal result and in another case to fall outside the category for another legal result. Thus Beale and the judges found it extremely difficult to reconcile the cases holding the husband-impersonator not guilty of rape with those holding him guilty of an assault. Confronted with this dilemma the uniform-category theorist has two alternatives. He may attack one case (or line of cases) as wrongly decided. This was the course taken by the Irish judges in *Regina* v. *Dee*[48] when they refused to follow the English cases which had held that the husband-impersonator could not be convicted of rape. The second and less drastic alternative is to insist that both the seemingly inconsistent cases (or lines of cases) come within the same category but to explain the actual decision in one case as resting upon some special and independent ground. This course was adopted by Beale.[49] Unlike the Irish judges, he approved of the holdings that the wife gave consent to sexual intercourse with the husband-impersonator and so was not guilty of rape. He explained the convictions for assault in such cases as resting upon the ground that the accused man's conduct was injurious to the public although the woman gave her consent to the act of intercourse. The theory of a uniform category of consent in criminal law was apparently preserved and reconciled with the results reached by the courts.

This device of introducing an independent rule or policy can often be used to avoid appearing to change the scope of a well-established category when it presents itself in a new and different

consequence would produce an undesirable result if followed in a case involving a different legal consequence, the court can distinguish the first case upon the elusive ground that the intentions of the parties were different in the two cases. See for instance *Young* v. *Matthews* (1866), L.R. 2 C.P. 127; *Mirabita* v. *Imperial Ottoman Bank* (1878), L.R. 3 Ex. D. 164, 47 L.J. Ex. 418. Despite the awkwardness of attempting to harness several distinct legal questions to a single set of rules, the illusory nature of the traditional analysis was not perceived even by experts in the field until denounced by Llewellyn, *op. cit., supra,* footnote 2, as "lump concept thinking." A similar situation exists in the law of fixtures; the curious notion that various legal consequences all depend upon the uniform application of three rules for determining in all cases whether a chattel has become part of the land, has been preserved by the judicious use of the element of *intention* in the rules. See Horowitz, *op. cit., supra,* footnote 2, at p. 28 and pp. 34-40. In his chapter on Domicile, *op. cit., supra,* footnote 1, W. W. Cook demonstrates that a factual relation between a person and a place which would be put in the domicile category for one legal purpose would not be so classified for another legal purpose. The traditional definitions of domicile, supposedly applicable no matter what the legal consequence, lean heavily on the flexible element of "intention."

[48] *Supra,* footnote 17.

[49] *Op. cit., supra,* footnote 44, at p. 326.

context.[50] Indeed the reader may well be wondering whether Beale's analysis is any less satisfactory than that advocated in this article. Why is it preferable to say that the particular kind of consent found in the husband-impersonation cases is a sufficient consent in relation to rape but is not a sufficient consent in relation to assault? Is not Beale's analysis equally satisfactory? He would say that there is consent in relation to both rape and assault but that the impersonator should be punished for assault because there is an injury to the public. No doubt Beale's explanation would satisfy a good many people but on careful consideration *three* difficulties will appear. First, if the woman were not deceived at all her "consent" would be a complete defence to the charge of assault; so a further distinction must in any event be made between the kind of consent which would prevent a conviction for assault and this particular kind of consent (obtained by fraudulent personation) which would not prevent a conviction because the protection of the public requires that the personator be punished. Beale's analysis does not completely succeed in preserving the idea of a uniform consent category. Second, the crux of the assault problem is that the woman's alleged "consent" is of such a flimsy character that we feel the accused ought to be punished. Beale's analysis glosses this over, leaving the impression that this kind of consent is the standard brand of "consent in criminal law." Third, the protection of the public is involved, to a degree, in determining the scope of all crimes great or small including rape as well as assault. The ruling that the husband-impersonator may be punished for an assault but not for a rape is quite sufficiently explained by the seriousness of rape and the severity of the punishment without resorting to any unique concern for the protection of the public in this particular area.

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[50] In the law of fixtures it has long been recognized that a tenant for years may, during his term, remove articles which he has affixed to the soil or buildings in such wise that if he were the owner of the land and executed a conveyance of it the grantee would acquire title to the articles in question. This situation has sometimes been described by saying that the title to the articles in question remains personal property and that they do not become part of the land. This formulation necessarily involves the proposition that the same article affixed to the land might be part of the land in one legal context, and not part of the land in another. Since this appears illogical to some minds another formulation has been worked out; the article is regarded as part of the land for *all purposes* — but the tenant has a privilege of removal. (For discussion and authorities see the interesting case of *Trabue-Pittman Corp.* v.. *Los Angeles* (1946), 29 Cal. 2d 385, 175 Pac. 2d 512.) For an example of necessary ingenuity to avoid upsetting a stubborn judicial predilection for "lump concept thinking" about community property see the story of California's Probate Code 201.5 as told in Note (1947), 35 Cal. L. Rev. 121.

These criticisms notwithstanding, Beale's analysis remains a very valuable lesson in advocacy. For although some judges are aware of the fallacy involved in transplanting legal categories, others are not, and some of the latter may be positively unwilling to accept the idea that the meaning of a legal term will usually vary according to the result involved. In presenting a case involving such a legal term to a judge whose mind has fallen under the spell of the one word—one meaning reaction, an argument framed along the lines indicated by Beale would obviously be much more persuasive than a forthright attempt to demonstrate the contentions of this article. We must not allow our enthusiasm for clarity of analysis to lure us into adventurous attempts to reconstruct a judge's intellectual machinery.

In some situations, of course, it may not be possible to suggest a plausible theory or policy with which to avoid the consequences of a transplanted category. Thus, in *Oppenheimer* v. *Frazer*, if we were to concede that the larceny definition of consent had been incorporated into the statute, the conclusion would be inescapable that the statute could not be applied to transfer title to the good faith purchasers. In such a situation there is no alternative except to meet the fallacy head-on and endeavour to expose it.

One of the problems which a study of this (or any other) verbalistic fallacy suggests is the difficulty of determining what effect, if any, it will have on the mind of a particular judge in a particular case. In *Oppenheimer* v. *Frazer and Wyatt* the argument that the larceny definition of consent should be transplanted into the Factors Act was addressed to Channell J. at the trial but he rejected it, relying upon the earlier cases.[51] Yet the three judges in the Court of Appeal reversed his decision, ignored the earlier cases, and adopted the fallacy in the very terms in which he had rejected it. Fifteen years later in *Folkes* v. *King*[52] two of three judges in the Court of Appeal criticized the reasoning of their predecessors in the *Oppenheimer* case, holding that the larceny definition of consent was immaterial in construing the Factors Act. Only four years after *Folkes* v. *King*, however, their criticism was criticized in turn by Atkin L.J. but approved by Warrington L.J. in *Lake* v. *Simmons*.[53]

[51] See [1907] 1 K. B. 519.

[52] *Folkes* v. *King*, [1923] 1 K.B. 282, 92 L.J.K.B. 125.

[53] *Lake* v. *Simmons supra*, footnote 40. In *Pearson* v. *Rose and Young Ltd.*, [1951] 1 K.B. 275, [1950] 2 All. E. R. 1027, Somervell L.J. and Denning L.J. expressed a preference for the view taken by the judges in *Folkes* v. *King* rather than that of the judges in the *Oppenheimer* case. See [1951] 1 K.B. 275, at pp. 296, 305.

Folkes v. *King*, which closely resembled the *Oppenheimer* case, provides some slight basis for a suggestion regarding the kind of case in which a certain type of judge may be expected to reject and expose a verbalistic fallacy. The plaintiff turned his car over to Hudson, a cheat engaged in the business of selling cars on commission, with instruction to sell it for £575 or more. Hudson sold it for £340 to another dealer who, it was conceded, purchased it in good faith; after two subsequent sales it was purchased by the defendant. The trial judge found that Hudson (who had misappropriated the proceeds) intended to steal the car and was guilty of larceny at the very moment he obtained possession of it. Following the *Oppenheimer* case the trial judge held that the defendant did not obtain a title under the Factors Act and gave judgment for the plaintiff[54] which was reversed by the Court of Appeal for the reasons we have indicated.[55] Scrutton L.J., a noted authority on commercial law, stated with his customary vigor, "That Act intended to protect a purchaser in good faith carrying out an

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The theory of the *Oppenheimer* case that larceny negatives consent has not been limited in its application to s. 2 (1) of the Factors Act, 1889. It had its origin, as we have seen, in the judgement of Collins L.J. in a case arising under s. 9 of the Factors Act 1889, (duplicated since 1893 by s. 25 (2) of the Sale of Goods Act) giving a buyer in possession of goods with the consent of the owner power to transfer title to a good faith purchaser and it has been discussed in subsequent cases arising under those sections. See *supra*, footnote 10 and *Whitehorn* v. *Davison*, [1911] 1 K.B. 463, 80 L.J.K.B. 425.

There are also certain cases involving only common-law principles in which, a cheat having obtained possession of goods and sold them later to a good faith purchaser, the court had to decide whether the deceived owner of the goods was induced to enter into a contract of sale or not. Some judges appear to have thought that they could best resolve this question by first deciding whether or not the cheat had been guilty of larceny at the time he got possession of the goods. See Hamson, The Effect of a Secret Fraudulent Intent (1935), 51 L. Q. Rev. 653; Comment (1935), 13 Can. Bar Rev. 188.

[54] See [1922] 2 K.B. 348.

[55] Strictly speaking, only Bankes L.J. and Scrutton L.J. took the view that the meaning of "consent" in the Factors Act was not the same as in the law of larceny. Bankes L.J. also rested his opinion upon the alternative ground that, assuming the larceny definition of consent to be applicable in Factors Act cases, Hudson was not guilty of larceny because the plaintiff owner had given him a limited power to transfer the property in the car and therefore an absence of "consent" had not been made out. This reasoning, with which the other two judges agreed, seems to involve a *non-sequitur*. To hold that Hudson was guilty of larceny it would be necessary to establish (1) that he obtained the car without the consent of the owner (2) that the owner did not agree that he might buy it himself or sell it to another person. If the second point were not established Hudson would not be guilty of larceny but it would not follow from this that the first point could not be established. Even if we assume that we may logically look to the law of larceny for a definition of consent as used in the Factors Act the issue before the court will not be, "was Hudson guilty of larceny," but "was there a *consent* to Hudson's possession of the car as that term is defined in the law of larceny?"

ordinary mercantile transaction with a person in the position of a mercantile agent. . . . I do not think Parliament had any intention of applying the artificial distinctions of the criminal law to a commercial transaction, defeating it if there were larceny by a trick, but not if there were only larceny by a bailee or obtaining possession by false pretences. . . . The history of the Factors Acts is restriction of their language by the Courts in favour of the true owner, followed by reversal of the Courts' decisions by the Legislature. Willes J.'s discussion in *Fuentes* v. *Montis*, that where the owner had revoked his consent to the agency, the earlier Factors Acts did not apply, was nullified by legislation . . . and there are numerous other instances of the same tendency."[56] These expressions of Scrutton L.J. may be thought to indicate that the best antidote to a legal fallacy is a lively appreciation by the judge of the policy of the rule of law involved and the decision to which that policy points. If the fallacy would obstruct the policy the judge will soon demolish it. Scrutton L.J. thought that the courts should abandon the practice of restrictively interpreting the Factors Acts in marginal cases and should try to carry out the policy which their framers apparently had in mind. This approach contrasts sharply with the somewhat aloof attitude expressed by Fletcher Moulton L.J. in the *Oppenheimer* case.[57]

Dicta of the judges in *Folkes* v. *King*[58] suggest a hypothetical case which would bring the fallacy into play in a much more subtle and persuasive form than that which we have discussed. Suppose a respectable jeweller named John Black carries on business at 222 Pine Street. A cheat named John Black has a jewellery business at 22 Pine Street. He writes a letter to Gold, a jewellery manufacturer, soliciting business. Gold, who knows the reputation of the respectable John Black and believes the letter comes from him,

[56] See [1923] 1 K.B. 282, at p. 305.

[57] "I confess I do not feel much affected by the arguments of counsel dwelling upon the necessity of giving a wide interpretation to the provisions of the Factors Act, 1889, because the operations by way of selling or pledging goods effected by persons in the position of a mercantile agent are of such magnitude and importance. I do not think that a Court, in construing an enactment of this kind, has any right to lean in either direction. It is for the Legislature to decide how far the protection to be given in such cases shall extend. What its decision in that respect has been must be gathered from the language of the enactment". [1907] 2 K.B. 50, at p. 69. Fletcher Moulton L.J. seems to be saying that in construing the Act no consideration should be given to (1) the facts of English commercial life which the Act was passed to regulate, or (2) the policy which the statute was designed to effectuate, (what Coke would have called "the reason of the law"). So, having rejected these sources of guidance, he ends up with an exceedingly narrow definition of consent taken from the law of larceny.

[58] See per Bankes L.J. [1923] 1 K.B. 282, at p. 298, per Scrutton L.J., at p. 305.

enters into correspondence with John Black the cheat and agrees to send him some diamond rings which he is authorized to sell at certain fixed prices as the agent of Gold for a commission. Gold sends the rings to John Black at 22 Pine Street. Black sells the rings to Perch for less than the fixed prices and absconds with the proceeds. Gold sues Perch for conversion of the rings and Perch, who bought the rings in good faith, contends that John Black the cheat was a mercantile agent in possession of the rings with the consent of Gold within the meaning of section 2(1) of the Factors Act, 1889.

Let us begin our consideration of this case by describing carefully Gold's rather complex state of mind when he sent the rings to John Black of 22 Pine Street. (1) Gold believed he was dealing with the person at 22 Pine Street who had written the letters to him. (2) Gold believed he was dealing with John Black the respectable jeweller of whom he had previously heard. (3) Gold believed that the person who had written the letters to him from 22 Pine Street and John Black the respectable jeweller were one and the same person. As Glanville Williams has pointed out,[59] the loose verbal ideas of everyday language make it easy to concoct ambiguous statements which, when applied to such a set of facts as this, become dangerously misleading half-truths. Take, for example, the statement, "Gold intended to deal with John Black the respectable jeweller." At first sight this seems to be a truthful and unobjectionable assertion of fact. Yet, standing alone, it is not the "whole truth" and is therefore somewhat misleading. If, in the normal case of dealing with a single person, you think you are dealing with A, it necessarily follows that you do not think you are dealing with B. In the instant case, however, where Gold erroneously believed that only one John Black was involved, he intended also to deal with the person who had written to him who was doing business at 22 Pine Street. The statement, "Gold never intended to deal with John Black of 22 Pine Street," is even more equivocal and misleading. It expresses the narrow truth that Gold did not mean to deal with Black of 22 Pine Street as a person other than John Black, the respectable jeweller. But it is quite untrue insofar as it negatives the assertion that Gold intended to deal with the person who had written the letters to him and carried on business at 22 Pine Street.

Thus we reach the critical question, was Black of 22 Pine Street

[59] See Williams, Mistake as to Party in the Law of Contract (1945), 23 Can. Bar Rev. 271, 380, at pp. 290 and 385-392.

in possession of the rings with the consent of Gold for the purposes of the Factors Act? On behalf of Perch it could be argued that there was at least that degree of consent on the part of Gold that is indicated by his intention to send the rings to the person doing business at 22 Pine Street who had written to him, even though he believed that that person was the John Black, jeweller, of whom he had heard. Moreover, accepted usage of the word "consent" is loose enough to countenance its application to such a case as this.[60] As for the policy of the statute, its application to this case would be desirable because Gold might have prevented the fraud by exercising greater care in his selection of a mercantile agent. On the other hand, one might argue for Gold that when the Act speaks of "consent of the owner" it refers to a more normal state of mind than the intricate and confused condition of Gold's mind in the present case. The judges ought not to apply the statute to a marginal case such as this without some more specific direction from Parliament.

The foregoing attempt to state the parties' arguments without resort to the fallacy may indicate why I have suggested that this case would probably bring the fallacy into play. Surely no experienced counsel would go before the court armed only with arguments such as these. They are too baldly realistic, they expose too much the naked discretionary power of the judge to decide whether or not the policy of the Act should be extended to this unprovided case. Tradition requires that this discretionary power should be decently concealed by principles and precedents.[61] Counsel for both sides will strive to unearth some definition or decision relating

[60] I do not mean to suggest, of course, that the common usage of the word "consent" should determine exclusively the coverage of the statute. The meaning of words in a statute should be determined by their verbal context, by the policies of the statute and by the nature of the factual problems which the statute is designed to deal with. Hence the meaning of the individual words in the statute must be sometimes narrower, sometimes broader than that indicated by the vagaries of general linguistic behavior. For a recent excellent and succinct discussion of this point, see Fuller, Positivism and Fidelity to Law (1958), 71 Harv. L. Rev. 630, at pp. 661-669. The dictionary meaning of a word in a statute is merely the point of departure from which we should proceed to ascertain its particular meaning in the particular context of the statute, its history and policy, the social problem involved, the legal result at stake, *etc.* The so-called "plain meaning" doctrine which would import the dictionary meaning of a word into a statute is a special and outstanding example of the fallacy of the transplanted category.

[61] As Julius Stone has pointed out, it is a fact, "well-known to counsel, that even in cases of first impression, they are likely in most courts to fare better with holdings *sub silentio*, tenuous dicta, verbal analogies, and syllogistic deductions, than with a straight forward argument based on the social facts to be regulated and the policies applicable thereto." The Province and Function of Law (1946), p. 169.

to "consent" which, whatever its source, appears to assist their contention. And in this quest, good fortune will favor the plaintiff Gold, he can rely upon *Cundy* v. *Lindsay*.[62] This case was not, of course, one of construing the Factors Act; indeed it did not involve any question of agency at all. It was a case in which A.B., a cheat occupying a room at 37 Wood Street sent letters signed "Blenkiron & Co." to Lindsay and Co. (the plaintiffs) ordering large quantities of goods on credit. Lindsay and Co., who believed the letters came from the respectable firm, Blenkiron and Co. of 123 Wood Street, sent the goods to "Blenkiron & Company, 37 Wood Street." A.B., who never paid for the goods, got them and sold them to Cundy (the defendant) who bought them in good faith. As a defence to the plaintiff's suit for conversion of the goods the defendant contended that the plaintiff had made a contract with A.B. which, though voidable for fraud, gave him the power to transfer title to a good faith purchaser. The House of Lords held that under these circumstances there was no contract between the plaintiffs and A.B. which would give him such a power. Consequently the defendant obtained no title to the goods and was liable for their conversion.

When *Cundy* v. *Lindsay* was before the courts in 1878 it seems to have been regarded as a difficult novel case in which the point of law might well be decided either way. In the Queen's Bench Division Blackburn J. (a distinguished authority on commercial law) Mellor and Lush JJ. gave a unanimous judgment for the defendant. Blackburn J. reasoned that although the plaintiffs believed they were dealing with the respectable firm of Blenkiron and Co., their intention to deal with the person carrying on business at 37 Wood Street provided a sufficient basis for holding that a contract (voidable for fraud) was made with him. Although this judgment was overruled by the Court of Appeal and the House of Lords, the opinions of the judges in those courts clearly indicate that none of them really grasped the point of Blackburn J's analysis, namely, that Lindsay and Co. (whatever else they believed) knew they were dealing with an individual who was sending them letters from 37 Wood Street.[63] As their opinions demonstrate, they all

[62] (1878), 3 App. Cas 459, 47 L.J.Q.B. 481, affirming (1877), L.R. 2 Q.B.D. 96, 46 L.J.Q.B. 233 which reversed (1876), L.R. 1 Q.B.D. 348, 45 L.J.Q.B. 381.

[63] See L.R. 1. Q.B.D. 348. The analysis of impersonation cases suggested by Blackburn J. and recently put forward with clarity and vigour by Glanville Williams, *op. cit.*, *supra*, footnote 59, reduces to the point of triviality the supposed distinction between *Cundy* v. *Lindsay* and *Phillips* v. *Brooks*, [1919] 2 K.B. 243 in which it was decided (by a single judge) that a swindler who entered a jeweller's shop and induced the

made the erroneous assumption that because Lindsay and Co. believed they were trading with the known and respectable Blenkiron and Co. they could not possibly have meant to trade with the man who sent the letters. "Of him," said Lord Cairns, "they knew nothing, and of him they never thought. With him they never intended to deal."[64] Thoroughly bemused by this assumption, Mellish L.J. even argued that if Blackburn J. was right the cheat A.B. ought not have been convicted of obtaining the goods by false pretences![65] One cannot help thinking that if Blackburn J. (who had become a member of the House of Lords before the case reached that court) had participated in the decision of the case in the House of Lords, it might have been differently decided. Though the judgment of the House of Lords settles the point for English law, *Cundy* v. *Lindsay* remains in the books as an ultra-marginal case, fixing the limits of the rule that a person who obtains possession of goods under a contract of sale induced by fraud has a legal power to transfer title to a good faith purchaser.

Let us return to our hypothetical case of *Gold* v. *Perch*. Obviously it resembles *Cundy* v. *Lindsay* in that in both cases an owner of goods hands them over to a fraudulent intermediary who "sells" them to a good faith buyer. The original relationships, however, are different. *Cundy* v. *Lindsay* involved a sale of goods governed by common law principles; *Gold* v. *Perch* involves an agency relationship raising an issue under section 2(1) of the Factors Act; was Black in possession of the jewels with the "consent" of Gold? Yet the policy of the common-law rule is surely somewhat similar to that of the Factors Act in protecting the good faith purchaser rather than the trusting owner of the goods. What,

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jeweller to "sell" him a diamond ring by pretending to be a well-known individual obtained thereby a legal power to transfer title to the ring to a good faith purchaser. *Cundy* v. *Lindsay* was distinguished on the ground that in *Phillips* v. *Brooks* the jeweller intended to sell the ring to the person whom he saw and heard in his shop. It could be said with equal accuracy, however, that in *Cundy* v. *Lindsay*, Lindsay and Co. intended to sell the goods to the person actually sending them letters from 37 Wood St. (or causing the letters to be sent).

[64] See (1878), 3 App. Cas 459, at p. 465. That the judges in the House of Lords overlooked the duality of Lindsay's intentions is further indicated by their failure to distinguish the case before them from prior cases in which an owner of goods had delivered them to A on the understanding that A was authorized, as agent of B, to negotiate a contract of sale between B and the owner of the goods but A had, in fact, no such authority. These prior cases had held that A had no power to transfer title to a good faith purchaser. But in those cases, unlike *Cundy* v. *Lindsay*, the owner of the goods had no intention whatever of entering into a contract with A as principal. It could *not* be said that he intended to sell his goods to the person to whom he was speaking or listening (at pp. 468, 471.).

[65] See L.R. 2 Q.B. D. 96, at p. 100.

then, is the relevance of *Cundy* v. *Lindsay* to the construction of the Factors Act in *Gold* v. *Perch*? This is not a question to be answered briefly and dogmatically but perhaps we may agree upon certain propositions leading towards an answer.

First, we must avoid the fallacy of the transplanted category in its crudest form. *Cundy* v. *Lindsay* decided that on the facts there present there was not sufficient "consent" to create a contractual legal relationship empowering A.B. to transfer title to a good faith purchaser. We must not argue that the case decides that on those facts there was no "consent in law," hence no "consent" within the meaning of the Factors Acts. Secondly, it should be recognized that whatever the relevance of *Cundy* v. *Lindsay* may be, there are other and more important considerations which take priority over it. In determining the nature of the consent which the Act requires the court should look primarily to the statutory context, to the kind of problem with which the statute deals, to the history of the Factors Acts and the "mischief" they were designed to correct. Third, though *Cundy* v. *Lindsay* is relevant as showing what the courts have done with an analogous problem involving similar policies, it is, nevertheless, a decision upon a marginal set of facts which originally formed a basis for strong arguments on both sides. Its authority as a decision on the point of law involved ought not to preclude a careful examination of the propriety of a similar decision in *Gold* v. *Perch* in the light of the history and policy of the Factors Acts. The construction of a statute and its application to a marginal situation ought not to be conclusively determined in advance by a common-law case, adjudicating a different (though analogous) question. But since it is impossible to say that *Cundy* v. *Lindsay* is totally irrelevant, and judges are usually anxious to base their decisions upon prior precedents there is a dangerous likelihood that, in such a case as *Gold* v. *Perch* the judges would embrace the fallacy and treat *Cundy* v. *Lindsay* as a controlling authority.

While *Folkes* v. *King* suggests a type of case in which the fallacy will probably be exploded, *Lake* v. *Simmons*[66] provides an example of the opposite tendency. Rarely has the fallacy blossomed so profusely as in this curious case. It involved the construction of an insurance policy insuring a jeweller against the loss of his stock-in-trade of goods by fire, theft or accident whether in his custody or in that of any other person to whom he might have entrusted them.

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[66] [1927] A.C. 487, 96 L.J.K.B. 621, reversing [1926] 2 K.B. 51, 95, L.J.K.B. 586, which reversed [1926] 1 K.B. 366, 95 L.J.K.B. 586.

From this general coverage the policy excepted the "loss by theft or dishonesty committed by . . . any customer or broker or broker's customer in respect of goods entrusted to them by the assured, . . . unless such loss arise when the goods are deposited for safe custody." Esme Ellison, an experienced woman thief posing as the wife of one Van der Borgh and having gained the jeweller's confidence by making several purchases, induced him to let her take away two pearl necklaces for the purpose of showing them to her alleged husband and a fictitious Commander Digby. He entered the necklaces in his books as "on appro." to Mr. Van der Borgh and Commander Digby. The necklaces were disposed of by Ellison and never recovered. The insurers resisted the jeweller's suit against them for the value of the necklaces on the ground that his loss was one excepted from the policy coverage. Reversing the Court of Appeal, five judges of the House of Lords unanimously held that the exception did not apply to this case.

Most of the discussion in both courts centered on the question whether the necklaces were "entrusted" to Esme Ellison within the meaning of the exception.[67] It would surely not be straining the usage of everyday speech to say that the jeweller "entrusted" them to her although she pretended to be married to Van der Borgh. And if we turn to the context, to the policy itself, we find that it contemplates an entrusting to a customer who commits "theft or dishonesty." One would almost expect such a customer to tell some untruth to get control of the jewels. This context seems quite inconsistent with any narrow meaning of "entrusted" which would limit it to a case where the jeweller was not deceived. When we read the opinions of the judges, however, we find ourselves confronted by a variety of arguments in favor of such a narrow meaning. Lord Haldane turned for guidance to *Cundy* v. *Lindsay* which he regarded as authority for a ruling that in the present case there was no contract of bailment between Ellison and the jeweller because he was deceived as to her identity. The word "entrusted," requires a bailment, a bailment is a contract and so we complete the chain of reasoning from *Cundy* v. *Lindsay* to the conclusion that the necklaces were not "entrusted" to Ellison within the meaning of the exception.[68]

[67] Lord Blanesburgh held in a rather short opinion that Ellison was not a "customer" with respect to the necklaces which had been handed to her to show to her alleged husband and the fictitious Commander Digby as proposed buyers and therefore she was not a "customer" within the meaning of the exception. The other law lords concurred briefly in this reasoning but devoted most of their opinions to the problem of the meaning of "entrusted".

[68] Even if we were to agree with Lord Haldane that entrust "means a

A different chain of reasoning, shorter and less subtle, appealed to the other law lords and to Atkin L.J. in the Court of Appeal. It began with the proposition, on which all the judges agreed, that when Esme Ellison received the necklaces she was guilty of larceny. From this foundation the fallacy was launched in its most persuasive form. In the words of Atkin L.J., "that at one and the same time she could both take the goods without the consent of the owner and be entrusted with the goods by the true owner, is to my mind a logical absurdity which I do not find it necessary to admit into our law."[69] Lord Sumner stated the argument so vigorously that he produced a legal fiction: "when Ellison took the necklaces from the hand of Mr. Lake she took them as a thief and with no more consent on his part than if she had picked his pocket."[70] If the case were really the same as pocket-picking it would be difficult indeed to conclude that she was "entrusted."

How shall we account for the extraordinary proliferation of the fallacy in this case? In *Folkes* v. *King* the court rejected the

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definite contract" (see [1927] A.C. 487, at p. 499) and that *Cundy* v. *Lindsay* is relevant to show when a mistake of identity prevents the formation of a voidable contract, there remains an important distinction between the facts there and those of *Lake* v. *Simmons*. In *Cundy* v. *Lindsay* there really was a respectable firm of Blenkiron & Co. and the deceived owner of the goods had independent knowledge of that firm. The reports of *Lake* v. *Simmons* do not show whether Mr. Van der Borgh actually had a wife or whether the jeweller had ever seen or heard of her. *Lake* v. *Simmons* (on the facts reported) is really more like the long firm fraud cases in which it has been held that a contract is made despite the fraud relating to identity. See Williams, *op. cit.*, *supra*, footnote 59, at p. 288.

[69] See [1926] 2 K.B. 51, at p. 70. Lord Atkinson expressed the same idea in different words: "The entrusting of goods to a customer mentioned in the exception cannot mean the delivery in all good faith of goods to a customer which that customer has planned to steal, and by that very delivery enabling the customer to effect her felonious purpose. The *true character of the operation* was larceny of the appellant's goods by means of a trick." (Italics added). [1927] A.C. 487, at p. 512. See also the remarks of Lord Sumner on p. 508. "If there was a trick, which prevented any true consent arising, there could be no entrusting. . . . The terms are mutually exclusive."

[70] See [1927] A.C. 487, at p. 504. Since the policy insured the jeweller against loss by "*theft* or *dishonesty* of a customer" the trial judge had made a finding of fact that Ellison was guilty of larceny by a trick at the time when she obtained possession of the necklaces. In the House of Lords Lord Sumner stated that this finding amounted to a "conclusion that his [the jeweller's] state of mind was an appearance of consent produced by the trick and not a real consent induced by fraud." See [1927] A.C. 487, at p. 502. For this extraordinary proposition to which he recurred several times in the course of his opinion no authorities were cited nor could have been. Of course, as Lord Sumner himself had pointed out in arguing the *Oppenheimer* case (see arguments of J. A. Hamilton K.C., [1907] 2 K.B. 50, at p. 55), a finding of larceny by a trick means nothing more than that the bailee intended to steal the goods at the time he got possession of them. It tells nothing about the victim's state of mind except that he did not intend to transfer title or power of sale to the bailee.

fallacy because it would have placed an absurd limitation upon the application of a statute, quite inconsistent with the legislative policy. But *Lake* v. *Simmons* is an entirely different type of case. The court is not called upon to determine the purpose and scope of a statute or common-law principle. The primary task of the court is to apply the terms of a private agreement to a given set of facts. In short, it is a case involving a problem of construction and, viewing it as such, one is inclined to agree with Glanville Williams' comment that, "the decision is open to criticism on the question of construction for . . . the exception clause, on the interpretation that would be given it by the man in the street, covered the situation that had arisen."[71] The "man in the street" would no doubt have arrived at his interpretation without the assistance of *Cundy* v. *Lindsay* or the distinctions of the law of larceny. But the prominence given to these transplanted categories in the opinions may suggest that a psychological difficulty confronts the judge in such a case as this; he is not "a man in the street." When he thinks about the facts of the case in relation to the words of the policy various ideas arise in his mind which have been impressed upon it by his long course of training and experience as student, practitioner and judge. The facts suggest larceny or false pretences; further reflection indicates that larceny is the correct category; larceny in turn suggests an absence of consent; absence of consent suggests serious doubts about the word "entrusted." Or, following a different train of thought, "entrusted" suggests a bailment; bailment suggests a contract and contract stimulates the recollection of mistake as to identity of parties illustrated by the famous old case of *Cundy* v. *Lindsay*.

The judge may realize at some point in his thinking that these technical legal conceptions would never occur to the "man in the street" or to the parties to the contract.[72] Their notions of the

[71] See Williams, *op. cit., supra*, footnote 59, at p. 288. In *Abrams* v. *Great American Insurance Co.* (1935), 269 N.Y. 90, 199 N.E. 5, a case whose facts were virtually identical with those of *Lake* v. *Simmons*, even to the wording of the policy, the New York Court of Appeals held that the jewellery was "entrusted" to the woman thief because that word in the policy should be given such a meaning "as common thought and common speech would now imagine and describe it." The court expressed its agreement with the decision of the Court of Appeal in *Lake* v. *Simmons* rather than that of the House of Lords. The Appellate Division, whose decision was reversed, had decided in favor of the plaintiff jeweller without written opinions except that of Untermeyer J. (dissenting) which indicates that the majority followed the same line of reasoning as the House of Lords in *Lake* v. *Simmons*.

[72] Possibly the judges in the House of Lords may have felt that even if their reasons for a narrow construction of the word "entrust" were not entirely convincing they were sufficient to cast doubt upon the meaning of

meaning of "entrusted" would be much more vague and imprecise, perhaps too vague to be of any use in arriving at a definite solution to the problem. On the other hand, the distinctions in which the judge has been trained are clear and sharp; if adopted they will decide the case.[73] They will also enable him to write an opinion which other judges and lawyers, trained in the same distinctions will readily understand. In the end, the judge willingly takes refuge in that verbalistic paradox which is the fallacy in its most deadly form.

If the conceptual background and training of the judges played such a decisive role in *Lake* v. *Simmons* how shall we account for the two judges in the Court of Appeal who took a different view and held that the theft of Ellison was covered by the exception clause? Their approach to the problem is also susceptible of a psychological explanation. In the Court of Appeal counsel for the jeweller argued that the word "entrust", which had appeared in the Factors Acts before 1889, was "a well known term of art" which must be given the same meaning in the policy as it had in those acts. This argument, which surely smelled a little of the lamp, did not appeal to any of the judges but it led to a discussion of *Folkes* v. *King* and the judges' criticism there of the reasoning in the *Oppenheimer* case. Bankes L.J., who had been a member of the

the exception clause and so to bring into play the well-known canon of insurance law (referred to in argument) that an ambiguous exception must be construed against the insurer. See [1927] A.C. 487, at p. 488, argument for appellant (plaintiff).

The opinion of Lord Sumner is particularly interesting in this respect for it was he who, as counsel for the good faith purchaser in the *Oppenheimer* case, had pointedly argued that the question whether the mercantile agent had committed larceny should have no bearing upon the meaning of "consent" in the Factors Act and had stigmatized the entire doctrine of larceny by a trick as "a legal fiction." See [1907] 2 K.B. 50, at p. 55. It is not easy to believe that the same man who made this argument (later adopted by Scrutton and Bankes, L.JJ. in *Folkes* v. *King*) could be so easily convinced that the larceny definition of consent was a relevant and helpful guide to the construction of the insurance policy in *Lake* v. *Simmons*. Nor are one's doubts removed by his rather lame remark that, "after all, criminal law is still law and so are its definitions and rules." [1927] A.C. 487, at p. 509. However, Lord Sumner also referred to the rule that an ambiguous exception should be construed against the insurer. *Ibid.*, at p. 508.

[73] Somewhat analogous to *Lake* v. *Simmons* but simpler are cases in which the attempt is made (sometimes successfully) to transpose the technical legal meaning of a word such as "wife", or "children" into a will although the surrounding circumstances indicate that the testator must have had a different meaning in mind. Although the propriety of considering such surrounding circumstances is well established some judges evince a strong preference for the meaning which a lawyer would normally have in mind when using the word. See *e.g. In re Fish*, [1894] 2 Ch. 83 ("my niece Eliza Waterhouse"); *Marks* v. *Marks* (1908), 40 S.C.R. 210 ("my wife") *per* Maclennan J. (dissenting); *In re Soper's Estate* (1935), 196 Minn. 60, 264 N.W. 427 ("my wife") *per* Olsen J. (disssenting).

court in *Folkes* v. *King*, realized that the same kind of argument which he and Scrutton L.J. had then rejected was being pressed on him in *Lake* v. *Simmons*. He rejected it again, referring to *Folkes* v. *King* and saying, "I do not think the parties to this contract had any intention of applying the artificial distinctions of the criminal law to a commercial transaction."[74] Warrington L.J. delivered a less emphatic opinion following the same train of reasoning and treating the larceny distinctions as immaterial.

In 1942 a case was argued before the Supreme Court of Canada[75] in which *Lake* v. *Simmons*, *Cundy* v. *Lindsay* and *Folkes* v. *King* were all cited as relevant and helpful authorities. Yet the legal result at stake in this case was entirely different from that involved in any of the cases cited. It concerned the statutory liability of the owner of an automobile for its negligent operation by another person. The fallacy of the transplanted category has contributed (as we noted) an additional terror to statutory draftsmanship; the controlling statute in this case contained the unfortunate word "consent."[76] A person named Walker had induced the manager of Vancouver Motors U-Drive, Ltd. (defendant) to rent him an automobile by producing the driver's licence of one J. G. Hindle, pretending to be J. G. Hindle, and signing Hindle's name to the rental agreement. The manager compared this signature with that on the driver's licence and found them to be similar. Walker also told the manager that he had previously rented a car from the company; checking the records the manager found that a car had been rented to J. G. Hindle about a year before. While driving the rented car Walker negligently injured the plaintiffs. On behalf of the defendant company it was argued that since Walker obtained the rented car by impersonating Hindle, he did not acquire possession of it with the consent of the owner within the meaning of the statute.

Statutes such as this have two fairly obvious purposes, (1) to give the injured person recourse against the owner of the car as well as the driver, (2) to discourage owners from entrusting their cars to persons not well qualified to operate them. Here the de-

[74] See [1926] 2 K.B. 51, at p. 64.

[75] *Vancouver Motors U-Drive Ltd.*, v. *Walker and Terry*, [1942] S.C.R. 391, 4 D.L.R. 399, affirming 57 B.C.R. 251, [1942] 1 D.L.R. 407, affirming 56 B.C.R. 460, [1941] 3 D.L.R. 752.

[76] R.S.B.C., 1936, c. 195, s. 74A (Am. 1937, c. 54, s. 11): "Every person driving or operating a motor vehicle who acquired possession of it with the consent, express or implied, of the owner of the motor vehicle, shall be deemed to be the agent or servant of that owner and to be employed as such, and shall be deemed to be driving and operating the motor vehicle in the course of his employment."

fendant's manager had that complex type of intention which we have previously analyzed; he intended to deliver the car to the person before him but he believed, after making some investigation, that this person was Hindle and that (most important of all) he had a driver's licence. Does the policy of the Act require its extension to this complex marginal type of consent? Only a court can answer this question. For an unprovided case such as this the judges must of necessity make new law. This the Supreme Court proceeded to do, by deciding in favor of the plaintiff because "possession was acquired as a result of the free exercise of the owner's will." The court declined to attempt to apply any of the proffered authorities on the meaning of consent and pointed out that "the word 'consent' may have different meanings in different statutes."[77] Unsupported by any authority, the opinion of the court has a certain flavor of "this-is-the-law-because-we-say-so." Yet surely the court was right in rejecting as irrelevant the cases referred to, none of which involved the question of law and policy then before it. In the language of Murphy J. (the trial judge) their consideration "merely tends to befog the real issue."[78]

Not all the judges who participated in the case were willing to dismiss the proffered authorities so lightly. In the Supreme Court of Canada, Taschereau J. delivered a dissenting opinion based largely upon *Cundy* v. *Lindsay* and concluding that there was neither "possession" nor "consent" within the meaning of the statute because "there has been no contract at all, there being no consent, no concurrence of the wills."[79] Similarly, in the British Columbia Court Appeal, O'Halloran J. adopted the view that if there had been no contract between Walker and the company because of the impersonation there could be no statutory consent. But having adopted this fallacious premise he proceeded to argue that the impersonation did *not* prevent the formation of a contract because the "personal identity" of the man renting the car was not material to the rental contract. This ingenious argument involved a second fallacy which merits further analysis. O'Halloran J. was apparently applying the materiality principle formulated by Pothier and frequently quoted in the English cases as follows, "when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should

[77] [1942] S.C.R. 391, at pp. 394, 395. In a similar case involving a similar statute (using the word "permission" instead of "consent") a California court reached the same result. See *Tuderios* v. *Hertz Driveyourself Inc.* (1945), 70 Cal. App. 2d 192, 160 Pac. 2d 554.

[78] 56 B.C.R. 460, at p. 463. [79] *Supra*, footnote 77, at p. 399.

have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand."[80] Having inferred from the evidence that the defendant company would have willingly rented a car to *anyone* who was licensed to drive, (including Walker if he had had a licence), he decided that this was "not a case where personal identity or individuality is a fundamental ingredient to the formation of the particular contract." Hence a voidable contract was made between Walker and the defendant company.[81]

One of the many tricks which our language plays upon us is to suggest distinctions or separations which have no counterparts in the world of reality. Because we can say (or think), "George has a Master of Arts degree," we may tend to think of George as having a kind of independent existence apart from this special attribute or qualification. And indeed we can separate the idea of George from the idea of his degree in our minds. But there is no *real* George existing independently of the person who has taken the degree. Such verbal ideas as identity or individuality, used in opposition to ideas like attribute or characteristic, have a similar tendency to suggest that there must be, in the very nature of things, some well-established criterion for distinguishing a person's identity from his attributes. In fact there is none. A man's identity is nothing more than the sum total of all his attributes. If we wish to distinguish between identity and attributes we must formulate a special definition of our own.[82]

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[80] Pothier, *Traité des Obligations*, s. 19, quoted by McDonald C.J. in the instant case, 57 B.C.R. 251, at p. 255. O'Halloran J. does not refer to Pothier's statement of the materiality principle but he relies upon three English cases in each of which Pothier's statement is quoted with approval. The materiality doctrine has been criticized by several writers but is staunchly defended and explained by Glanville Williams, *op. cit.*, *supra*, footnote 59.

[81] McDonald C. J. appears to have agreed with the reasoning of O'Halloran J. summarized in the text (see 57 B.C.R. 251, at p. 256) so it probably should be regarded as the majority rule of decision of the British Columbia Court of Appeal. O'Halloran J. also based his holding that a voidable contract was made between Walker and the defendant company upon the fact that Walker was personally present and identified by sight and hearing during the negotiations. This ruling is supported by *Phillips* v. *Brooks*, *supra*, footnote 63 and *Edmunds* v. *Merchants' Despatch Co.* (1883), 135 Mass. 283. But McDonald C.J. expressed his disagreement with this ground of decision. Sloan J., the remaining member of the court, stated briefly that he agreed with Murphy J., the trial judge. Murphy J. ruled, in effect, that the question of the existence of a voidable contract was not relevant to the problem of construction of the statute. All four judges agreed in the result.

[82] See Williams, *op. cit.*, *supra*, footnote 59. The illusions generated by the use of such words as "unity" and "identity" and their influence upon legal thinking is further discussed in Williams, Language and the Law

In the instant case the mistake of identity was made by the defendant's manager; he believed he was dealing with a real person who (1) had the name J. G. Hindle, (2) had rented a car before, (3) was licensed to drive. These three attributes were all that went to make up the "identity," in the manager's mind, of the person to whom he believed he was renting, and in his mind they constituted a single person. The idea of being a licensed driver was just as much a part of that identity as either of the other two attributes. But when we turn to Justice O'Halloran's opinion we find that although he recognizes the importance of the licence qualification to the company he goes on to say that "this is not a case where personal identity or individuality is a fundamental ingredient" of the contract. How shall we explain this statement? Perhaps he means that it is not sufficient to show that one attribute of Hindle (such as having a licence) was fundamental to the contract; the law requires a showing that it was fundamental to the contract that the other party should be J. G. Hindle and no one else because the manager was unwilling to deal with anyone else. This interpretation is so extreme that it is impossible to believe the judge intended it. It seems more plausible to conclude that the judge intended merely to use the words "personal identity" in some restricted sense which would exclude from consideration the attribute of having a licence.

But suppose that the company had been very particular and would rent its cars only to persons who were (1) rich, (2) honest, (3) residents of British Columbia, (4) licensed to drive, that Hindle had all these qualifications and had rented a car before, that X, having none of them, induced the manager to rent him a car by pretending to be Hindle. Would this be a case where the "personal identity" of Hindle was not fundamental to the contract because mere attributes should be disregarded? And why in the principal case does the "personal identity" of Hindle not include the attribute of being licensed? Justice O'Halloran's opinion gives no answer to these questions. He uses the term "personal identity" *four* times without the slightest attempt to explain it. Apparently he is making the fallacious assumption, suggested by the word "identity," that there must be inherent in reality, some well-established distinction between personal identity and mere attributes. Unfortunately, no such distinction exists and an explanation of the decision in terms of "personal identity" turns out, upon analysis, to be no explanation at all.

(1945), 61 L. Q. Rev. 71 at pp. 293-297 and in Fuller, Legal Fictions (1930), 25 Ill. L. R. 363, at pp. 372, 898.

The view is sometimes expressed that the fallacies of legal reasoning are comparatively harmless because the trained intuition of the judges often guides them to results which most lawyers would consider sound although the reasoning by which they are reached is open to criticism. Perhaps this observation throws some light upon the opinion of O'Halloran J. in the present case. He begins by adopting the fallacious premise that there can be no statutory consent without a contract which would lead to the conclusion that, since there was no contract, the statute would not be applied. He manages to avoid this conclusion, however, by deciding that a contract was actually made, thus reaching the same result as the six judges who rejected the fallacy in its entirety. But although he reached an apparently sound solution it would be too optimistic to conclude that his resort to the fallacy was "harmless." The reasoning by which he sustains the contract, on the ground that the error of identity was not material, is itself based upon a fallacious assumption and cannot be reconciled with the prior authorities.[83] Lawyers and judges who are concerned with the problem of materiality of error will derive no help from this opinion; it can only puzzle and bewilder them. Though the result in the present case be sound, the law does not go unscathed; the fallacy always takes its toll.

Since eight of the nine judges who participated in this case reached a result directly contrary to the persuasive pull of the fallacy and six of them rejected the fallacy completely,[84] we may classify it along with *Folkes* v. *King* as a case in which the fallacy went down to defeat before the judges' vigorous sense of the policy aspects of their problem. This near unanimity of judicial thinking renders all the more striking the solitary dissent of Taschereau J. So far as can be gathered from his opinion, the only reason for his disagreement with all the other judges in the case was his adherence to the fallacy.

[83] Pothier's statement of the materiality rule, (see text *supra*, footnote 80, quoted with approval in several English cases) indicates that where A purports to contract with B in the belief that B is C, no contract is formed *unless* A would have been just as willing to contract with any person whatever as with C. In the *Vancouver Motors U-Drive* case, *supra*, footnote 75, the defendant company was *not* willing to contract with any person whatever (*e.g.*, a person without a driver's licence) so, if Pothier's test is applied, there was no contract with Walker. See also the judgment of Taschereau J. in the Supreme Court of Canada, much of which is devoted to demonstrating that the belief of the defendant company's manager that Walker was Hindle was a material error within the meaning of prior authorities on the subject of voidable contracts.

[84] The six judges who rejected the fallacy entirely were: Murphy J., the trial judge (who remarked that it "merely tends to befog the real issue"), Sloan J. in the British Columbia Court of Appeal who said he agreed with

We have already touched, at several points, upon the various reasons why a judge may find the fallacy of the transplanted category persuasive and incorporate it into his opinion. Let us conclude with a brief review of these reasons. First, the fallacy may appeal to the judge because it furnishes a definite answer to his problem. It frequently happens that when a legal controversy is considered in the light of the policies and purposes of the appropriate rules of law these policies appear to conflict with one another so that the settlement of the controversy requires a kind of balancing of the two conflicting policies. The judge may be uncertain as to which policy should prevail. Or, he may have an intuition that one policy should be preferred in the case before him but find difficulty in stating a clear, convincing reason for this conclusion.[85] In either event he may be inclined to welcome a precedent which deals with a similar set of facts and appears to tell him definitely how those facts should be classified. A second reason for resort to the fallacy, closely connected with the first, is that it provides the judge with an authority which he may cite in support of his decision. Tradition requires that even in novel cases a judge should find some way of relating his judgment to the existing materials of the law. And if the proffered precedent comes from a higher court, a judge who has not analyzed the fallacy may believe that he is bound to follow it.

We have suggested that a judge who understands the purpose and policy of a statute or rule of common law is likely to resist the persuasion of the transplanted category. But the fallacy has, on the other hand, a strong tendency to obscure matters of policy and prevent the judge from thinking about them. For the fallacy purports to be more than a mere argument for one side; it purports to be a statement of the issue, a set of thinking tools to be used for deciding the case. For example, if we adopt the fallacy as our guide in analyzing the *Vancouver Motors U-Drive* case we shall begin by asking whether there was "consent of law". This leads us into the law of contracts and *Cundy* v. *Lindsay*. We inquire whether the result in that case would have been different if the parties had dealt face to face. We start to consider whether

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Murphy J; Kerwin J. and his three concurring colleagues in the Supreme Court of Canada. The three judges who became involved with the fallacy were O'Halloran J. and McDonald C.J. in the British Columbia Court of Appeal and Taschereau J. in the Supreme Court of Canada.

[85] This seems to have been the situation in which the majority of the judges in the Supreme Court of Canada found themselves in the *Vancouver Motors U-Drive* case, *supra*, footnote 75, but they nevertheless resisted the persuasion of the fallacy because it led to an unpalatable conclusion.

the error was really material to the contract. And so on. So long as our thought flows in these channels, so long as we accept the meaning of "consent in law" as the central issue of the case, we are not likely to give much attention to the policy of the statute or the common law "mischief" it was designed to remedy. This tendency to produce a false statement of the issue and to force the judge's thoughts into barren paths is the fallacy's most undesirable characteristic.[86] For instance, in the venerable law of fixtures where the fallacy has put down deep roots each of several significantly different types of problems is supposed to be solved by a thought-process which begins with the inquiry, "did the chattel become real property (or part of the realty)?" This inquiry leads in turn to three general principles which are so flexible that a court can reach almost any result desired. But the real issues of policy involved in each of the several different types of problems are almost completely concealed by the metaphysical, all-purpose realty-personalty mode of stating the issue and by its three derivative principles.[87]

Just as a lively conception of policy may cause a judge to reject the fallacy so, on some occasions, it may cause him to embrace it. For the fallacy, like any other bad argument, may be used in a good cause. Thus, in *McCreary* v. *Coggeshall*[88], the court was confronted with a situation in which a life tenant had apparently conveyed her estate to the reversioner. On orthodox common-law principles this would have the effect of destroying an intervening contingent remainder by merger of the other two estates. After expounding this principle and expressing regret that the legislature had not seen fit to abolish it, the court moved on to a discussion of a problem in the law of mortgages which arises when a first mortgagee acquires the interest of the mortgagor subject to the lien of a second mortgage. A series of earlier cases had held that the first mortgagee had priority over the second mortgagee for the amount of the first mortgage on the ground that the lien of the first mortgage would not merge with the interest conveyed by the mortgagor if the mortgagee intended that such a merger should not take place. The court then proceeded to apply the mortage doctrine to the contingent remainder problem and concluded that the contingent remainder was not destroyed by merger because the reversioner did not intend that the estates should merge. Of course these two problems have nothing in common except the

[86] This unfortunate phenomenon is clearly illustrated by the *Oppenheimer* case, *supra*, footnote 3, and by *Lake* v. *Simmons*, *supra*, footnote 40.

[87] See *Horowitz*, *op. cit.*, *supra*, footnote 2, at pp. 21-29.

[88] *McCreary* v. *Coggeshall* (1906), 74 S. Car. 42, 53 S.E. 978.

lucky coincidence of that beguiling word "merger"; a more fantastic illustration of the fallacy would be difficult to find. But the court was happy to embrace the fallacy as an apparently respectable juristic device for giving the *coup de grâce* to the harsh old doctrine of destruction.

These, then, are the reasons why judges are attracted by the fallacy.[89] Had the judge an opportunity to subject the fallacy to ruthless analysis and so to realize that it was a subtle verbalistic device for introducing irrelevant matters into his consideration of the case the foregoing attractions would doubtless cease to influence him. For the occasions must surely be rare on which a judge would deliberately write into his opinion an argument which he believed to be irrelevant and misleading.[90] But the irrelevance of the transplanted category is something not readily perceived. In each of the cases which we have considered where the fallacy was adopted, a clear and convincing argument against it was advanced by counsel and by one or more judges. Why does the fallacy so often resist analysis? This I have already tried to explain. The fallacy is deeply rooted in our habits of talking and thinking. We habitually assume that when language is being used properly to communicate ideas the same word applied to the same subject matter ought always to have the same meaning. This assumption is buttressed by an earlier notion which we acquire through our use of words in childhood, that words have an essential connection with the ideas or objects they symbolize. It is from this basic assumption that we derive a sense of paradox when confronted by the question: how can you say that simultaneously X gave consent and did not give consent? I suppose we can all remember a time when this would have seemed to us to be an argument of unanswerable logic.

The fallacy of the transplanted category is not just another erroneous theory of law (like the meeting of minds theory of contract) which can be controverted by a demonstration that it produces undesirable results or cannot be reconciled with the cases. It is a basic bad habit of legal thinking for which we all receive preparatory training from childhood onward. Critical writing may alleviate its influence in particular instances but the novel op-

[89] In at least one unfortunate instance, the fallacy of the *Oppenheimer* case has apparently been allowed to crystallize into a rule of law. See *Sweet* v. *Provident Loan Society* (1939), 279 N.Y. 540, 18 N.E. 2d 847, affirming 254 App. Div. 242, 4 N.Y.S. 2d 727.

[90] One example of such an occasion might be a situation in which it was believed that a fallacious argument would be necessary to win the vote of an intransigeant colleague. See also *supra*, footnote 72.

portunities for its application, especially in the construction of statutes, are virtually unlimited. Every new generation of lawyers and judges must encounter it afresh and struggle to overcome it. Perhaps this is what that great fallacy-hunter, Walter Wheeler Cook, had in mind when he wrote,[91] "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against."

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[91] Cook, *op. cit., supra,* footnote 1, p. 159.