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THE OBJECTIVE THEORY OF CONTRACT
AND THE RULE IN *L'ESTRANGE V. GRAUCOB*

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Introduction

In a recent article, J. R. Spencer criticizes the so-called rule in *L'Estrange v. Graucob*¹ on the ground that it contradicts the settled theory of agreement which underlies the law of contract generally.² It seems, he says, to be generally accepted that a person who signs a contractual document may not dispute his agreement to any of the terms which it contains, unless he can establish one of three defences: (a) fraud, (b) misrepresentation, or (c) *non est factum*.³ Spencer submits that this rule is wrong, and that there is a fourth defence which ought to be open to the party who signed the document, namely the defence that he simply did not agree to the term in question. Everyone says that the common law theory of agreement is "objective", which means that the parties have to be judged by what they outwardly appeared to decide rather than by what they inwardly meant to decide. But this, Spencer claims, is vague, and to see what this "objective" theory really means we must look at the cases upon which it is based. One of these cases is *Smith v. Hughes*.⁴ Although it usually features under "mistake", mistake is often no more than the other side of agreement. According to *Smith v. Hughes*,

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¹ [1934] 2 K.B. 394.

² Signature, Consent, and the Rule in *L'Estrange v. Graucob* (1973), 32 *Camb. L.J.* 104.

³ *Ibid.*

⁴ (1871), L.R. 6 Q.B. 597.

Spencer contends, the "objective" test of agreement means this: "Words are to be interpreted as they were reasonably understood by the *man to whom they were spoken*, not as they were understood by the *man who spoke them*."⁵ This test, Spencer extracts from the following dictum by Blackburn J:

I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not *ad idem*, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman v. Cooke*.⁶ If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.⁷

However, Spencer adds, there are at least two cases where it is fair to B, the man to whom the words were spoken, to allow A, the man who spoke them, to deny his apparent consent. The first case is where B knows, or ought to have known, that A was mistaken. In this case, B has not been misled by any appearance of consent in A, so there is no reason why A should not be allowed to say that the minds of the parties did not really meet. The second case is where it was really B's fault that A appeared to agree to something to which he did not in fact agree. Spencer cites *Hartog v. Colin and Shields*,⁸ where A offered to sell skins at prices *per pound* and B knew that he meant to sell them at prices *per piece*, as an example of the first case; and *Scriven v. Hindley*,⁹ where A bid at an auction for tow which he believed to be hemp due in part to B's negligence in confusing the arrangement of the lots, as an example of the second.

The notion that as a general rule A's words must be judged as they appeared to B, Spencer says, is so well established that some readers may wonder why it is necessary to labour the point. The reason is that in recent years an even more objective theory of agreement has been gaining ground. According to this theory, A's words must be judged not as they appeared to B, but as they would have appeared to C, a reasonable man eavesdropping on the negotiations. "The test is not what the other party would have thought, but how things would have appeared to the reasonable

⁵ *Op. cit.*, footnote 2, at p. 106.

⁶ (1848), 2 Ex. 654, 154 E.R. 652. As Spencer points out, *Freeman v. Cooke* itself had nothing to do with contract, but the rule of estoppel stated there was subsequently applied to contract cases.

⁷ *Supra*, footnote 4, at p. 607.

⁸ [1939] 3 All E.R. 566.

⁹ [1913] 3 K.B. 564.

fly on the wall."¹⁰ In some cases the two theories produce the same results, but they produce different results in cases like *Hartog v. Colin and Shields* and *Scriven v. Hindley*, where A's mistake was either known to B or partly the fault of B. According to the *Smith v. Hughes* theory, there is no contract at all in these cases. According to the more objective "fly on the wall" theory, however, there is a contract, and the decisions must be explained on the ground that the contract is set aside "on equitable grounds".

Spencer claims that in the opinion of most lawyers this is a very dubious explanation and largely the work of Lord Denning M.R. In *Solle v. Butcher* he said:¹¹

. . . once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake.

Although Denning M.R. invoked the authority of the House of Lords in *Bell v. Lever Brothers*¹² for his theory, its real origin, according to Spencer, is Williston.¹³ It has had wide influence on legal thinking in the United States, and it is reflected to some extent in the American Law Institute's *Restatement of the Law of Contracts*.¹⁴ But the "fly on the wall" theory goes against the English cases almost without exception. It does not fit with *Smith v. Hughes*¹⁵ and with *Cundy v. Lindsay*,¹⁶ as Lord Denning himself admitted in *Solle v. Butcher*. Yet, both cases have been approved and applied time out of number. Even the line of cases starting with *Solle v. Butcher*, in which Lord Denning repeated his theory, did not turn on the "fly on the wall" theory.¹⁷

¹⁰ *Op. cit.*, footnote 2, at p. 108.

¹¹ [1950] 1 K.B. 671, at p. 691. Spencer's italics.

¹² [1932] A.C. 161.

¹³ Williston on Contracts (1936-1945), ss. 1536, 1537, and his article, Mutual Assent in the Formation of Contracts (1919), 14 Ill. L. Rev. 85. Williston's views, Spencer says, are not universally accepted in the U.S.A., and are strongly refuted by Corbin: Corbin on Contracts (1952), s. 106.

¹⁴ (1931), ss. 70 and 71, especially 71(c), illustration (2). But the theory set out in the Restatement, Spencer says, is not so extreme as that of Lord Denning, since it accepts that no contract is concluded in a case like *Hartog v. Colin and Shields*. See *op. cit.*, footnote 2, at p. 109, note 33.

¹⁵ *Supra*, footnote 4.

¹⁶ (1876), 1 Q.B.D. 348; (1877), 2 Q.B.D. 96; (1878), 3 App. Cas. 459.

¹⁷ *Leaf v. International Galleries*, [1950] 2 K.B. 86; *Rose v. Pim*, [1953] 2 Q.B. 450; *Gallie v. Lee*, [1969] 2 Ch. 17, *aff'd sub nom. Saunders v. Anglia Building Society*, [1971] A.C. 1004; *Lewis v. Averay*, [1972] 1 Q.B. 198. The one exception, *Rose v. Pim*, can also be explained on other grounds. Apart from the cases in which Lord Denning was involved, Spen-

My aim here is not to join issue with Spencer's contention that the "fly on the wall" theory is contrary to authority. I think Spencer is quite right on this point. But I will take the matter further than he does, and submit that it is not supported either by its American originator Williston, or by its English champion Lord Denning, and that it is not enshrined in the American *Restatement of Contracts*. What is supported by all three is a version (though not necessarily the same version) of what has been called the "objective" theory of contract. This theory is generally contrasted with a version (though not necessarily the same version) of the "subjective" theory of contract. The "fly on the wall" theory is a very inadequate version of the objective theory which does not deserve to be taken seriously, and so far as I know has not been so taken.

I. *Williston's Objective Theory.*

Under the heading "Genuineness of consent", Williston states that this supposed requirement for the formation of contracts is not additional to that of *manifested* mutual assent:

If there has been a manifestation of mutual assent, with intent to make that manifestation, the fact that the manifestation was made under mistake or induced by fraud, duress, or undue influence, will not prevent the formation of a contract. In some instances it is true that there may seem at first sight to be a manifestation of mutual assent, and yet, in fact, be no such manifestation because the acts of apparent assent, when their real meaning is discovered, do not in truth indicate assent. In other cases, because the assent has been induced improperly, the contract may be avoided by one of the parties to it, but it is of vital importance to distinguish between a voidable contract and an agreement which lacks altogether the essential requisites of a contract.¹⁸

For the "real meaning" of the parties' expressions, Williston refers the reader to his chapter on "Interpretation". In order to determine the legal meaning of a contract or agreement, he says, a "standard of interpretation", to use Wigmore's helpful phrase, must first be established by which the meaning of the language and other manifestations of intention of the parties is to be ascertained.

It is useless to talk of the "meaning" of a contract or agreement unless it is known whose meaning is sought; and this inquiry cannot be disposed of by the answer—the meaning of the parties. The inadequacy of such an answer is obvious. The parties may not have had the same intention. Furthermore, courts, after asserting that what they are seeking

cer contends, there is only one case that can be used to support the "fly on the wall" theory, namely *Upton-on-Severn R.D.C. v. Powell*, [1942] 1 All E.R. 220, and this is best relegated from the law of contract altogether. See, *op. cit.*, footnote 2, at p. 111.

¹⁸ *Op. cit.*, footnote 13, par. 20.

is the intention of the parties, generally add that this intention can be proved only by what they say and do. In other words, it is not the intention of the parties that is material, but the meaning that the court gives to their manifestations.¹⁹

Williston emphasizes that there are at least two standards of interpretation, depending on whether or not the contract is in writing and the parol evidence rule is applicable. In the case of "informal" agreements (where the form of words used is not the full and final statement of the agreement), the standard tends to be that of "reasonable expectation", which attaches to words or other manifestations of intention the meaning which the party employing them should reasonably have apprehended that they would convey to the other party. "When A offers his promise for B's and B accepts, A will be bound not only by any meaning which A knows, but also by any meaning which A ought to know that B will attach to A's words; and, on the other hand, B's assent . . . will bind B to the meaning of the words in which he reasonably should have supposed A used them."²⁰ This test is an objective version of the subjective test put forward by Paley in his *Principles of Moral and Political Philosophy*: "Where the terms of promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended, at the time that the promisee received it."²¹ Williston adopts Archbishop Whately's correction that Paley is nearly but not entirely right. "Every assertion, or promise, or declaration of whatever kind, is to be interpreted on the principle that the right meaning of any expression is that which may be *fairly presumed to be understood by it*."²²

Whately's correction is at least ambiguous. Although the promisor is treated as a reasonable man, it is not clear whether the promisee is treated in the same way. There is a very important difference between inferring the subjective understanding of the promisee of the promise, and inferring his understanding on the supposition that he is a reasonable man. Williston's test is fully objective; it assumes that both parties are reasonable men. The test laid down in *Smith v. Hughes* follows the original subjective model of Paley. According to it, it is the actual promisor's belief about the actual promisee's belief in regard to the promise that is decisive. The promisee will be relieved only in respect of his promise, if he was mistaken in regard to the *promise*, and not merely in regard to the *quality of goods* which are the subject-matter of the promise. *Smith v. Hughes* has generally been con-

¹⁹ *Ibid.*, par. 603.

²⁰ *Ibid.*, par. 605.

²¹ (1827), Vol. 1, Ch. V., p. 79.

²² *Op. cit.*, footnote 13, par. 605, note 4.

strued to avoid a contract *ab initio* if there is such a mistake as to the promise of the other party, known to that party, but the case itself is not clear on this point.²³

It should be noticed that the "objective" test which Spencer purports to derive from *Smith v. Hughes* differs from the test laid down in that case (and from its objective versions) in another important respect. Under the latter, the viewpoint of the promisor is crucial. According to Spencer's test, on the other hand, the viewpoint of the promisee is substituted for that of the promisor. The promise is to be interpreted as it was reasonably understood by the *promisee*, not as the promisor interpreted (or ought to have interpreted) its understanding by the promisee (or by the promisee as a reasonable man). This difference is of a different logical type from the subjective-objective distinction. It should also be noticed that Spencer's objective test is not on the face of it fully objective. The promisee's interpretation of the promise must be reasonable, that is, the promisee must be a reasonable man, but the promise apparently is interpreted subjectively, and not on the supposition that the promisor is a reasonable man. Moreover, Spencer's test is taken from *Freeman v. Cooke*,²⁴ which was only quoted with approval in *Smith v. Hughes*. Hence, to name this test after *Smith v. Hughes* is to invite confusion with the very different test which is commonly regarded as having been laid down in that case.

To go back to Williston, his test is, as I have already indicated, a fully objective version of Paley's test. Both tests are based on the *promissory* theory of contract. A contract is assumed to rest on the subjective or objective promises of the parties. I shall submit that this approach creates difficulties, and that it is more fruitful to think of contract as being based on a mutual bargain. The "fly on the wall" theory is an objective bargain theory—the reasonable fly is assumed to observe the *agreement* made by the parties—and for that reason alone alien to Williston who was a "promise" man.²⁵

So far we have been concerned with what Williston calls "informal" agreements where the standard of interpretation tends to be that of "reasonable expectation" as defined above. Where the parties manifest their assent to a writing as expressing their agreement, Williston says, the standard of interpretation changes. The parol evidence rule (which, according to Williston, is not

²³ Cf. *Roberts & Co., Ltd. v. Leicestershire County Council*, [1961] 1 Ch. 555, where rectification was granted.

²⁴ See *supra*, footnote 6.

²⁵ "A contract is a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Williston, *op. cit.*, footnote 13, par. 1.

a rule of evidence or interpretation, but a rule of substantive law that defines the limits of a contract) denies effect to certain manifestations of intention which are operative in cases to which the rule does not apply.

I submit that both the "fly on the wall" theory, and Spencer's "objective" test, are inappropriate to contracts expressed in documents, whether the parol evidence rule is, or is not, watertight in the case in question. The former is inappropriate because the simile of the reasonable fly on the wall suggests an essentially passive observer who cannot discharge the sophisticated task of constructing documents, though admittedly Spencer gives him the capacity of *interpreting* speech acts.²⁶ The latter is inappropriate because in the case of documents we are concerned with their construction, and not with the promisee's reasonable understanding of the promisor's words. It is true that the ultimate aim of constructing documents should be to give effect to the parties' intentions as expressed in them, on the supposition that they are reasonable men, but the legal sophistication of this process does distinguish it from the interpretation of speech acts. For this reason, the construction of documents is treated as a matter of law for the judge to decide, while the interpretation of speech acts is left to the jury as a question of fact.²⁷

To conclude, Williston subscribed to an objective promissory theory of contract, but it is quite clear (if only from his insistence on the need for a separate standard of interpretation where the parties manifest their assent to a writing as expressing their agreement) that he did not support the primitive "fly on the wall" theory. It will be evident, moreover, from Williston's own use of the word "agreement" that contracts expressed in documents fit better with the bargain theory than with the promissory theory of contract.

II. *Two Rival Theories of "Agreement"*.

Spencer does not limit himself to showing that the "fly on the wall" theory is contrary to authority; he also seeks to show that it is unworkable and that his own theory is more meritorious:

Not only is the "fly on the wall" theory of agreement apparently contrary to authority, it is often difficult and uncertain to apply. It will work well enough where the parties are negotiating face to face. Then the reasonable eavesdropper is notionally at the keyhole, enthusiastically drawing inferences from what he hears within. But what if one of the parties is at Land's End and the other at Llandudno? At whose keyhole is the reasonable eavesdropper notionally listening then?—at the of-

²⁶ See *op. cit.*, footnote 2, at p. 112, and *infra*.

²⁷ See *infra*.

feror's, or at the offeree's—or has he ears on infinitely extensible leads, enabling him to apply one to each keyhole simultaneously? The difficulty is that the inference he will draw will depend on how much he knows, and what he will know will often depend on where he is. Furthermore, unless *Solle v. Butcher* has reversed a long line of cases, the reasonable eavesdropper will need a good deal of specialised and esoteric knowledge. He must have overheard all the previous negotiations, he will need to know all the ships sailing from Bombay to Liverpool, he will need to be an expert in cracking codes, and if we bring other Canadian cases into consideration, he will have to understand fluent German,²⁸ Ukrainian²⁹ and Finnish.³⁰ In the law of tort the reasonable man has to be imbued with qualities which are said to include the agility of an acrobat and the foresight of a Hebrew prophet. To fit him for his new role as the eavesdropper in the law of contract, "this excellent but odious creature" will also need the omnipresence of Puck and the learning of the *Encyclopaedia Britannica*. These difficulties arise from importing the fiction that a third party is listening to the negotiations when he is not, and they disappear if we abandon that fiction. We run into all sorts of difficulties if we ask ourselves "how would C, overhearing A and B's negotiations, have interpreted them?" which never arise if we ask the more sensible question, "How should B, the other party, have interpreted what A said?"³¹

The "fly on the wall" theory, moreover, Spencer adds, leads to absurd results. What happens if the parties are inwardly agreed, but outwardly at variance, or agreed on something else? Suppose, for example that two immigrants with little knowledge of English agree on the purchase and sale of a "bull" in the belief that this word means the female of the species. According to the "fly on the wall" theory, they have made a contract to buy and sell a bull. This, Spencer says, is ridiculous; yet it is the result reached by Denning L.J. in *Rose v. Pim*.³² He held that although both parties meant to deal with "feveroles", they were contractually bound to buy and sell horsebeans, because their agreement as outwardly expressed was for horsebeans. It is a platitude to say, Spencer comments, that the law of contract exists to enforce agreements. It may be acceptable for the law occasionally to force upon one of the parties an agreement he did not want; but there is something wrong with the theory which forces upon both of the parties an agreement which neither of them wants.

If we reject the "fly on the wall" theory of agreement, we are back to the less extreme theory of apparent consent established in *Smith v. Hughes*, according to which A's words are judged as B, the addressee, understood them, and not as C, an eavesdropper, would have understood them. Here it might be convenient to summarise the *Smith v. Hughes* theory as follows:

²⁸ *Streimer v. Nagel* (1909), 11 W.L.R. 325 (Man.).

²⁹ *Free Ukrainian etc. Credit Union v. Hnatkiw* (1961), 44 D.L.R. (2d) 633 (Ont.).

³⁰ *Freeman v. Kaltio* (1963), 39 D.L.R. (2d) 496 (B.C.).

³¹ *Op. cit.*, footnote 2, at p. 112.

³² See *supra*, footnote 17.

- (a) Where A leads B to believe that he agrees to B's terms, A is bound by his apparent consent, although he did not in fact agree to the terms as B understood them.

BUT

- (b) A is *not* bound by his apparent consent where B knew that A's mind did not go with his apparent consent,
- (c) nor is A bound by his apparent consent where B originally misled A, so that it is partly B's fault that A's mind did not go with A's apparent consent.³³

Let us consider now Spencer's criticisms of the "fly on the wall" theory:

His first criticism is that the theory is inadequate. It works well enough when the parties are negotiating face to face, but it does not work when they are spatially separated. I have already submitted that the "fly on the wall" theory cannot be taken seriously, and this applies even to face to face situations. As Spencer points out, the reasonable man is assumed to have all sorts of knowledge which a reasonable fly on the wall could not possess.

Spencer's second criticism of the "fly on the wall" theory is that it leads to absurd results, since the *outward* agreement of the parties would prevail over what they were inwardly agreed to, which is ridiculous. I see nothing absurd in this result, *provided* that we recognize the need for equitable relief in some cases. Spencer's example of the two immigrants is precisely a case where such relief should be given. *Rose v. Pim* is not inconsistent with giving *any* relief. Denning L.J. did not refuse to set the contract aside on the ground of *equitable* mistake; he merely refused to allow the plaintiff *rectification*:

The parties no doubt intended that the goods should satisfy the inquiry of the Egyptian buyers, namely, "horsebeans described 'in Egypt as feveroles'". They assumed that they would do so, but they made no contract to that effect. Their agreement, as outwardly expressed, both orally and in writing, was for "horsebeans". That is all that the defendants ever committed themselves to supply, and all they should be bound to. There was, no doubt, an erroneous assumption underlying the contract—an assumption for which it might have been set aside on the ground of misrepresentation or mistake—but that is very different from an erroneous expression of the contract, such as to give rise to *rectification*.³⁴

In *Harrison and Jones v. Bunten*,³⁵ where both parties mistakenly believed that the trade description "Calcutta kapok 'Sree' brand" referred to *pure* kapok, Pilcher J. refused to accept the argument that the contracts were either void on the ground of

³³ *Op. cit.*, footnote 2, at pp. 113-114.

³⁴ See *supra*, footnote 17, at p. 462.

³⁵ [1953] 1 Q.B. 646.

mutual (common) fundamental mistake or voidable in equity. The learned judge held, that there was no case here for relief in equity (though it is interesting to note that as the trial judge in *Rose v. Pim* he had allowed rectification in that case):

On the facts of the case, in so far as they appear in the award, neither party was at fault, unless it can be said that one or other or both of them should have known the composition of the commodity with which they were dealing under a trade description or brand. I am well satisfied that it would not be right on the facts of this case to say that the contracts were voidable on equitable grounds, and I do not propose to say any more about that.³⁶

Whether equitable relief on the ground of common mistake should have been given in *Rose v. Pim* and in *Harrison v. Bunten* is admittedly a moot point. The hardships suffered by the party asking for relief must be balanced against the equities of the other party and third parties, and against any policy considerations which militate against the giving of such relief. Thus the policy objective of protecting the security of transactions militates strongly against opening up apparently secure transactions on the ground of mistake. The main rationale of the objective theory of contract in imposing the standard of the reasonable man on the parties is to secure a minimum standard of business certainty and security.

According to Spencer, it is absurd to prefer the outward agreement of the parties to their inward agreement. Once it can be shown that they were inwardly agreed, then whatever they have agreed outwardly should not stand in the way of giving effect to their inward agreement. Although the parties may be *estopped* from setting up the lack of an inward agreement, there is no possible reason for such estoppel where they are in fact inwardly agreed.

Spencer presents the issue as if we were forced to choose between his own subjective theory of contract and the rival objective "fly on the wall" theory. This is not so. The mere fact that the parties are inwardly in agreement at a given point in time is not in itself significant. They may be *in* such agreement without having *entered into* an agreement at all. In that case, presumably, Spencer would not want them to be bound. Why then should they *ipso facto* be bound by an inward agreement that was not expressed in the outward agreement into which they did enter? I suggest that they should not be so bound, unless a proper case can be made out for it. I agree with Lord Denning that mistake should be treated merely as an equity which may entitle a party to avoid the contract, without making it null and void for want

³⁶ *Ibid.*, at p. 654.

of consent. Equitable mistake, unlike common law mistake, allows for flexibility in the type of relief granted. For instance, parties may be put on terms, in which case the contract is in effect modified rather than avoided. Spencer deprecates Lord Denning's achievements in this area, but I think the trend is strongly in his direction, and that before long it will be ratified by legislation.

So much for Spencer's criticisms of the "fly on the wall" theory. Now let us look at the merits of his "less extreme theory of apparent consent established in *Smith v. Hughes*, according to which A's words are judged as B, the addressee, understood them, and not as C, an eavesdropper, would have understood them".³⁷ The general principle laid down by Spencer is that "where A leads B to believe that he *agrees* to B's terms, A is bound by his own apparent consent, although he did not in fact agree to the terms as B understood them".³⁸ I have already suggested that this theory is misnamed, since the general principle just stated is taken from the estoppel case of *Freeman v. Cook* which was merely quoted with approval in *Smith v. Hughes*. The latter, as commonly interpreted, so far from laying down any *objective* test, or theory of *apparent* consent, laid down a purely subjective test according to which the viewpoint of the promisor, and not that of the promisee, is crucial.³⁹

Although Spencer's general principle appears to be based on a bargain theory of contract, it is more in tune with the promissory theory that underlies *Smith v. Hughes* from which it is allegedly derived. I have already submitted that his "objective" test is inappropriate to contracts that are expressed in documents, whether the parol evidence rule is or is not watertight in the case in question.⁴⁰ His general principle is inappropriate to such contracts for a similar reason.

Spencer's general principle is limited by the proviso that lays down two subsidiary principles:

A is *not* bound by his apparent consent where B knew that A's mind did not go with his apparent consent,
nor is A bound by his apparent consent where B originally misled A, so that it is partly B's fault that A's mind did not go with A's apparent consent.⁴¹

It should be noticed first that these principles are not really intended to be subjective, but impose the standard of the reasonable man on B (the promisee).⁴² It should also be noticed that notwith-

³⁷ See *supra*.

³⁸ See *supra*. Emphasis mine.

³⁹ See *supra*.

⁴⁰ See *supra*.

⁴¹ *Op. cit.*, footnote 2, at p. 114.

⁴² *Ibid.*, at pp. 106-107.

standing Spencer's emphasis on the *fairness* of the subsidiary principles, he does not put A's (the promisor's) claim for relief on equitable grounds. On the contrary, as we have seen, he deprecates Lord Denning's doctrine of equitable mistake. The equity for Spencer is really on the other foot. Since B knows or ought to know, or is responsible for A's mistake, it would be inequitable to hold A to his apparent consent to B's promise. Spencer is ultimately a subjectivist who supports the objective theory merely by way of estoppel. When the other party's knowledge or conduct forfeits his claim to rely on estoppel, the true subjective nature of the contract is allowed to assert itself. Spencer's position is precisely the reverse of a genuine objectivist: the basis of contract is subjective, but the promisee cannot rely on his want of consent where he is estopped on equitable grounds from raising it. For the genuine objectivist, on the other hand, the basis of contract is objective, but a party may obtain equitable relief in cases in which such relief is considered proper. The range of these cases cannot be exhaustively described in advance. They are certainly not limited to those caught by Spencer's subsidiary principles.

III. *The Problem of the Signed Document Cases.*

Spencer is anxious to show that both the rule in *L'Estrange v. Graucob*,⁴³ and the parol evidence rule, are subject to the subsidiary principles laid down in the proviso.⁴⁴ The rationale of equitable mistake, however, is in effect recognized by Spencer himself when he states that "whatever may have been Graucob Ltd.'s intentions disreputable companies put harsh exemption clauses in minute print in order to 'put one over' people like Miss L'Estrange".⁴⁵ But he goes on to reveal the very different rationale of the subsidiary principles: "Then why should people in her position not be allowed to deny their apparent consent to the clause because the company either *knew* or *ought to have known* that their mind did not go with their apparent consent?"⁴⁶

According to Spencer, the two ideas that probably led the courts to think that signed contracts deserved special treatment are the parol evidence rule and *non est factum*. The parol evidence rule, he says, has been greatly whittled down over the years. So it seems unlikely that it enables B to hold A bound by a term of a contract which A has signed not knowing it was there, if B either caused or connived at A's mistake.

⁴³ See *supra*, footnote 1.

⁴⁴ *Op. cit.*, footnote 2, at p. 114 *et seq.*

⁴⁵ *Ibid.*, at p. 116.

⁴⁶ *Ibid.*

The second idea seems to arise from a mental confusion:

The courts knew that *non est factum* is a defence of mistake which may only be pleaded in connection with signed documents. From this they deduced that *non est factum* is the only defence of mistake which may be pleaded in connection with a signed document—a different proposition from the first, and one which does not follow from it.⁴⁷

But why, Spencer asks, should mistake not be allowed as a defence to a claim on a signed contract, if the defence of fraud and misrepresentation may be so raised? Fraud and misrepresentation are after all only special cases of mistake, that is, of a state of mind not in accordance with the facts. Nowadays, Spencer says, it is generally admitted to have been an error of policy as well as of legal history to apply *non est factum* to simple contracts; and the courts were wrong to extend it to situations where no *innocent third party* was involved, let alone to hold that in such a situation it operates to exclude any other kind of defence of mistake altogether.

I see no reason why the mere fact that a document has been signed should necessarily prevent a party from obtaining relief on the ground of *equitable* mistake. In other words, I see no reason why either the parol evidence rule or *non est factum* should stand in the way of such a defence. Since equitable mistake does not avoid a contract *ab initio*, an innocent third party cannot be prejudiced by the granting of relief. On the contrary, under the guidance of Lord Denning, the doctrine of equitable mistake has begun to undermine the oversimple solution of common law mistake and *non est factum* which operates by making a contract null and void and thus affects the rights of innocent third parties.⁴⁸ We must resist the temptation of resorting to the frozen common law classifications of mistake which are at least theoretically based on the want of consent. They cannot do justice to the numerous kinds of cases where relief should be granted on grounds of equity. Indeed, there is no good reason to limit equitable relief to cases of mistake; it should be available in all cases where the application of the objective theory of contract would produce inequities.

IV. A New Objective Bargain Theory of Contract.

I have rejected the "fly on the wall" theory on the ground that it is a very inadequate objective bargain theory of contract, and

⁴⁷ *Ibid.*, at p. 119.

⁴⁸ See, e.g., *Gallie v. Lee* and *Lewis v. Averay*, *supra*, footnote 17. However, there is something to be said for allowing equitable relief against negligent third parties, including the sharing of loss by apportionment. This view was taken by Devlin L.J. in *Ingram v. Little*, [1961] 1 Q.B. 31, at pp. 73-74.

I have rejected Spencer's theory on a number of grounds, including its essentially promissory nature. It is now necessary to sketch out a model of the objective bargain theory of contract that will provide a better conceptual framework than the traditional rather vague descriptions of the objective approach. This model is not exactly *new*; I have in fact outlined it in a paper published in 1965.⁴⁹ Since, however, it will be new to most readers, it will be necessary to repeat the essence of what I said there:

A contract is usually defined either as a promise or as an agreement enforceable in law. In the United States "promise" has come to be regarded as the basic unit of contract to allow for the growing number of cases of promissory liability without agreement. Yet the concept of contract would not be what it is if it were fixed to the unilateral track of promise. The key concept of contract is "bargain", which is a special kind of agreement used to effect a business-type of exchange. The offeror offers neither a unilateral act nor a unilateral promise, but a bargain. The performance contemplated is bilateral or multilateral, and the offeror is committed only if his offer is accepted. A promise, on the other hand, contemplates a unilateral performance by the promisor, and the promisor is committed as soon as he makes the promise. The concept of consideration is implicit in the concept of bargain; but it has no intrinsic link with the concept of promise. Hence, those who regard "promise" as the basic unit of contract have little time for the doctrine of consideration.

A bargain, however, *is* not a contract any more than a contract is a bargain. The term "contract" is ambiguous, since it may refer either to the legal concept or to a particular contract. A legal concept cannot be correlated with certain facts, such as a series of acts expressing assent, or the existence of a physical document. Nor are the terms of a bargain conterminal with the terms of a contract. They may be supplemented and modified by the terms to which the parties, on the supposition that they are reasonable men, will be deemed to have tacitly agreed; by the terms which are annexed to the contract by usage or custom; and by the terms which are impressed on the contract by statute and judicial policy. The terms of the bargain may be refined by so-called rules of construction and interpretation which in fact depend on the hazards of judicial decision, and they will be settled retrospectively in the light of all the relevant evidence available at the trial of the action on the supposition that the parties are reasonable men. While they will usually overlap with the terms of the bargain, the terms of the contract are not facts which can

⁴⁹ *Performative Utterances and the Concept of Contract* (1965), 43 *Australasian Journal of Philosophy* 196.

be deduced from the expressed or inferred intentions of the parties. They are *ex post facto* constructions of the courts which strictly speaking can only be predicted, not ascertained.

The concepts of promise and agreement, different though they are, have two important features in common. Both concepts are based on a code of morality which sanctions the making of binding commitments and censures their breach; and in both cases the commitments are made by means of performative utterances, or by conduct which takes the place of such utterances. The concept of "performative utterance" was developed by the philosopher J. L. Austin, and is widely recognized to be one of the most important philosophical contributions of our time. It is interesting to observe that Austin acknowledged that the nearest approach to "performative" is the word "operative" as used by lawyers, the operative part of a legal instrument being the part that actually performs the legal act which it is the purpose of the instrument to perform. He also refers to contributions made by lawyers in his discussion of what may go wrong with performative utterances. Hence, so far from an apology being required for mixing philosophy with law, Austin's development of performative utterances is a perfect example of the new insights that philosophy can bring to law, and *vice versa*.

According to Austin, a performative utterance is typically an utterance in the first person singular indicative active. It is performative because a person making an utterance of this sort is *doing* something rather than merely saying something which is either true or false. Suppose, for example, that in the course of a marriage ceremony I say "I do"—(sc. take this woman to be my lawful wedded wife), or that I tread on your toe and say "I apologize", or that I have the bottle of champagne in my hand and say "I name this ship the *Queen Elizabeth*". In all these cases it would be absurd to regard the thing I say as a report of the performance of the action which is done. In saying what I do, I actually perform that action.

Austin was careful to point out that a performative utterance is not necessarily effective. For instance, uttering the words "I marry you", or "I divorce you" are not sufficient to perform a marriage or divorce, but the one thing we must not suppose is that what is needed in addition to the saying of the words in such cases is the performance of some internal spiritual act, of which the words then are the report. In the case of promising—for example, "I promise to be there to-morrow"—it is very easy to think that the utterance is simply the outward and visible sign of the performance of some inward spiritual act of promising. However, if we slip into thinking that such utterances are reports,

true or false, of the performance of inward acts, we open a loophole to perjurers and welshers and bigamists and so on.

Performative utterances may suffer from what Austin calls *infelicities*. An infelicity arises—that is to say, the utterance is unhappy—if certain rules are broken. The first such rule is that the conventional procedure which by our utterance we are purporting to use must actually exist. For instance, the pronouncement, “I divorce you” does not come off if delivered at home. The second rule is that the circumstances in which we purport to invoke this procedure must be appropriate. For instance, “I appoint you consul” when you are already consul will be ineffective. Another way in which a performative utterance may go wrong is if it is not backed by the expected sincerity. If I say I promise to do something without intending to do it, and without believing it possible for me to do it, there is something wrong. But it is not a misfire as in the previous cases. An insincere promise is still a promise.

Austin makes it clear that there is no one correct way of classifying infelicities, although lawyers who have to deal very much with this kind of thing, have made numerous rules which enable them to classify fairly rapidly what in particular is wrong in any given case. He also mentioned the overriding consideration that since we are doing an act when making performative utterances, we may be doing so under duress or under mitigating circumstances. Further, a performative utterance may be made in joke or in play, in which case it would not be seriously meant and we would not be able to say that we seriously performed the act concerned.

It should be noticed that the above account represents Austin's earlier view, and that he subsequently came to recognize that performative utterances could not be marked off from statements (or “constative” utterances) by means of some *formal* characteristics of these classes of utterances.⁵⁰ Performative utterances cannot be limited to a particular list of verbs or to a particular grammatical form, nor can they be insulated from truth and falsity. On the other hand, in stating something we are also *doing* something and not merely saying something; and the notion of infelicity applies to statements as well as to performative utterances. Hence, Austin was forced to start again from the ground up. He built his new edifice on a theory of *speech* acts, which is really a generalization of performatives applied to the whole field of language. This is hardly the place to stray into the mine-

⁵⁰ For the earlier view, see *Performative Utterances*, Philosophical Papers (1961); for the later view, see *How to Do Things with Words* (1962). For my own comments, see R. A. Samek, *The Legal Point of View* (Philosophical Library, 1974), p. 29 *et seq.*

field of speech act theory. I myself prefer to think in terms of different functions of discourse, and I have distinguished the performative from the assertive, the evaluative and the prescriptive functions of discourse.⁵¹ For our purpose, however, Austin's concept of performative utterances is sufficient, for it gives us the essential insight that the utterance of contractual words, such as "I offer", "I accept", "I agree", "I promise" are not merely reports of mental states, but legally significant acts in their own right.

The view that performative utterances are reports of mental states is no doubt at least partly responsible for the so-called subjective view of contract, according to which a contract is the outward expression of a union of minds. This view originated on the continent, and although considerable lip-service was and still is being paid to the Latin tag that there must be *consensus ad idem*, the so-called objective view has in fact prevailed in the common law countries. It is tempting to correlate the latter with Austin's view that performative utterances are operative in their own right, but in England at least the objective view of contract is usually stated in the form of a rule of estoppel. The parties are deemed to have promised or agreed, if this is the inference the "reasonable man" (of the law) would draw from their acts, on the supposition that they are reasonable men. In the interest of business certainty, an objective standard is set which *as a general rule* they are estopped from rebutting. The seeming need to find a technical reason for holding the parties to their utterances is a consequence of the view that the utterances themselves are reports of mental states and therefore inherently corrigible. The objective view of contract (if it is based on estoppel) presupposes the truth of the subjective view. If, on the other hand, we accept Austin's account, the parties are bound by their performative utterances, though the force of such utterances is subject to the weight given to infelicities. In those cases where the performative utterance gives rise to a moral commitment, the commitment may be rebutted or modified by showing that the infelicity will support a just claim not to be bound, or not to be bound unconditionally. Not every just claim, or *equity* as I shall call it, will be acceptable to a court of law; it will only be so acceptable if it can hold its own against possibly conflicting just claims or considerations of public policy, and a doctrinal case for its acceptance can be made out. If we accept Austin's account, there is no obstacle to the working out of a range of equities which may defeat or modify the claims based on performative utterances. But if performative utterances are assumed to be reports of mental

⁵¹ *Ibid.*, at p. 21.

states, it follows that they are inherently corrigible and not merely subject to equities. In consequence, what should be an empirical process tends to become a dogmatic line up behind either the subjective or the objective view of contract.

If we accept Austin's account of performative utterances, there is nothing absurd in allowing the outward agreement of the parties to prevail over what they are inwardly agreed to, *provided that this does not result in any inequities*. The assumption that "an agreement", "agreement" and "I agree" report mental states has led to the confusion of three very different questions: Have two parties entered *into an agreement*? Were the two parties *in agreement* when they entered into the agreement? Did one party agree to do something? The most significant implication of Austin's account of performative utterances for the law of contract is that it eliminates the source of this confusion. The statement that there is *an agreement* between two parties entails that they entered into an agreement, but the statement that there is agreement between two parties does not entail that they entered into an agreement. Conversely, the statement that two parties entered into an agreement does not entail that they are in agreement on the points agreed to. An agreement is entered into by an exchange of performative utterances which commit the parties to a course of action or inaction, or by means of conduct which takes the place of such utterances. "Being in agreement" is a fact independent of performative utterances. "Entering into an agreement" and "being in agreement" must be distinguished from "I agree". The noun "agreement" marks a *meeting* of utterances where an agreement is entered into, and of minds where two or more parties are in agreement. "I agree" is performative and does not entail being in agreement. For instance, one may agree with someone out of politeness or diplomacy without being in agreement with him. Nor does it entail entering into an agreement. Thus one may agree with someone's point of view without entering into any agreement with him.

Conclusion

Spencer's "less extreme theory of apparent consent" is an estoppel theory and therefore rests ultimately on a subjective view of contract. Although it appears to be a bargain theory, it is more in tune with the promissory theory of contract. The so-called "fly on the wall" theory, which Spencer contrasts with his own theory, is a very inadequate objective bargain theory of contract, and it has not received Lord Denning's or any other judicial support.

Unlike the "fly on the wall" theory, the estoppel theory has enjoyed considerable judicial support, but this has of late be-

come seriously eroded by Lord Denning's development of the doctrine of equitable mistake. Under this doctrine, the parties' outward acts are preferred to their states of mind, and the latter are regarded only as a factor in deciding whether any equitable relief should be granted by the courts.

The concept of performative utterances, and the recognition of the performative function of discourse, lend strong logical support to Lord Denning's position. In so far as the estoppel theory is ultimately a subjective theory, it presupposes that the subjective states of mind of the parties are crucial in the formation of contract. Once we appreciate that the parties' utterances are important in their own right, and not merely reports of their states of mind, both the logical and the moral attraction of the subjective view begins to fade. If parties can logically enter *into an* agreement, and be morally committed by it, without their minds being *in* agreement, the legal edifice of contract can be built on the *terra firma* of their outward acts, instead of on the shifting sands of subjective intentions. In this way, the legal standard of the reasonable man is projected directly into the acts of the parties themselves, thus bridging the gulf between the abstract standard of the reasonable man and the special knowledge of the parties in the particular circumstances of the case. According to the new objective theory of contract proposed here, the legal standard of the reasonable man is used merely to bring the parties up to a *minimum* standard, not to replace *their* standards with a different standard altogether.

The treatment of the parties as reasonable men bound by their outward acts, dispenses with the need to delve into their states of mind, unless they rely on them as a ground for equitable relief. Of course, we can never look into the parties' minds directly. Consequently, even the ascertainment of their *subjective* intentions requires an *objective* method of inference. The significance of the objective theory of contract, however, does not lie in the use of this objective method; its objectivity consists in the treatment of the parties as reasonable men.

Similarly, the significance of the objective theory of contract does not lie in the use of the objective method in drawing *reasonable inferences of fact* from the outward acts of the parties, on the supposition that they are reasonable men. This function must be discharged by the jury, and in the absence of a jury by the judge, on the basis of the relevant evidence that is adduced at the trial. Hence, both the question whether the outward acts of the parties on the above supposition, have resulted in the formation of a bargain, and what the terms of the bargain are, can only be settled *ex post facto* if the case goes to trial. Failing a trial, and

before it eventuates, we can only predict what inferences of fact are likely to be drawn by the jury or judge.

The jury, or judge, in drawing reasonable inferences of fact from the outward acts of the parties, on the supposition that they are reasonable men, must act reasonably, and in this sense they may be said to apply the standard of the reasonable man. But this standard is not the same as that which is imposed on the parties in virtue of their being treated as reasonable men. The standard applied by the jury, or judge, is that of a legal organ charged with this function. Hence, it is always subject to the legal norms of the system, even when it is used to draw reasonable inferences of fact. Thus, neither the jury nor the judge are legally competent to deal with facts as such; they can only deal with them as refined by the admissible rules of evidence which are themselves the creatures of law. For this reason, questions of fact can never be insulated from questions of law, for what is *in law* a "question of fact" is ultimately as much a question of law as what is a "question of law". This is not to say that we cannot draw a *legal* distinction between "questions of law" and "questions of fact", though the criterion of distinction has remained shrouded in mystery. To say that the former are for the judge, and the latter for the jury to decide, does not characterize the respective questions themselves. In effect, it substitutes a different classification by reducing "questions of law" to a list of questions that are for the judge to decide, and "questions of fact" to a list of questions that are for the jury to decide. Seeing that there are relatively few juries in contract cases, this is not a very fruitful distinction for our purpose.

I have said that the significance of the objective theory of contract does not lie in the use of the objective method in drawing reasonable inferences of fact from the outward acts of the parties on the supposition that they are reasonable men. Similarly, its significance does not lie in the use of the objective method for drawing reasonable inferences from the construction of their documents *as a matter of law*. What is significant for the objective theory of contract is that the parties will be treated as reasonable men bound by their utterances and documents. This treatment of the parties dispenses with the need to delve into their states of mind, unless they rely on them as a ground for equitable relief.

As I have already indicated, the main rationale of the objective theory of contract is to secure a minimum standard of business certainty and security. The legal standard of the reasonable man in contract is used primarily to fulfil this policy objective. I have not attempted to analyse that standard here, for to have done

so would not only have inordinately lengthened my article but taken us well beyond its scope. We must not think of the legal standard of the reasonable man as a uniform standard that can be deduced from the *essence* of the reasonable man. The reasonable man of contract is not the same as the reasonable man of tort, or of criminal law, and so on. Even within one branch of law, the legal standard of the reasonable man may be used to fulfil different policy objectives, and to impose different obligations in different circumstances and on different peer groups. Although there are interesting family resemblances between the various reasonable men, they do not share a common element or essence. For this reason alone, the popular identification of the reasonable man with the "man on the Clapham omnibus" has been unfortunate. It has also been unfortunate in at least two other respects: Firstly, it has made the abstract standard of the reasonable man too human, and so encouraged all sorts of anthropomorphic misconceptions. His ability or inability to listen at keyholes is a good example. Secondly, it has obscured the important distinction between the ordinary, average man of a particular society with the average man of a particular peer group.

It may now be argued that the objective theory of contract has introduced more uncertainties than it has resolved. This is not so. There is alas no escape from the inherent indeterminacy of *open* legal standards like that of the reasonable man. They are open because they require considerable judgment for their application, and they are useful precisely because they make it possible for such judgment to be applied. The subjective theory of contract cannot afford to dispense with the objective standard of the reasonable man. It cannot avoid its indeterminacy; it can only add to it its own.
