THE CANADIAN BAR REVIEW

VOL. XIX JUNE, 1941 No. 6

MISTAKE IN THE LAW OF CONTRACTS SMITH v. HUGHES[1]

Generations of students have admired although they probably have not presently understood Anson's "Dresden China Case"[2] which is itself founded upon *Smith* v. *Hughes*. This admiration has been seasoned, one fears, in a great many cases, by serious doubts as to the morality of some of the propositions involved[3] and yet the House of Lords has reiterated in no uncertain voice that *Smith* v. *Hughes* is still a part of the law of England.[4] Lord Atkin in his speech in the *Bell Case*[4] gives a series of hypothetical cases in which the *caveat emptor* principle applies.[5] It is admitted that the cases given[6] would appear to most people to impose an unjust hardship on one of the parties. They are to be supported on the ground that "it is of paramount importance that contracts should be observed".[7] We are given, therefore, illustrations of cases in which the law reaches a result which, in the opinion of most people, is unjust but which is to be supported on the ground of expediency. Injustice and expediency are apparently not necessarily repugnant.[8]

[1] L.R. 6 Q.B. 597.

[2] ANSON'S LAW OF CONTRACT, 18th ed. 156.

[3] J. D. Falconbridge, *Desirable Changes in the Common Law*, Proc. C.B.A. 1927 at p. 209; *cf.* POTHIER, TRAITÉ DU CONTRAT DE VENTE, Pt. 2, c. 2.

[4] *Bell* v. *Lever Bros.*, [1932] A.C. 161.

[5] [1932] A.C. at p. 224. "The principle of *caveat emptor* applies outside contracts of sale" (at p. 227).

[6] Most of the hypothetical cases are given below.

[7] [1932] A.C. at p. 224. Lord Atkin in *Fender* v. *Mildmay*, [1937] 3 All E.R. at p. 406 reiterates the paramount public policy that contracts should be observed, quoting from the judgment of Jessell M.R. in *Numerical Printing Co.* v. *Sampson*, L.R. 19 Eq. at p. 465.

[8] ". . . *Nec utile quicquam quod non honestum.*" (*De Officiis*, III, 3, 11) "*Est enim nihil utile, quod idem non honestum, nec, quia utile, honestum, sed, quia honestum, utile.*" (III, 30, 110.) "*Tanta vis est honesti, ut speciem utilitatis obscuret.*" (III, 11.) ". . . *quod turpe sit, id numquam esse utile, ne tum quidem, cum id, quod esse utile putes, adipiscare; hoc enim ipsum, utile putare, quod turpe est, calamitosum est.*" (III, 12.) Cicero is probably considering expediency more from the standpoint of the individual. Lord Atkin is balancing broader general interests. Particular cases may involve

The cases may be divided into four classes:

Class One

A and B have in view a particular parcel of oats. A is the owner. B is a prospective buyer. A knows the oats are new oats. B thinks they are old oats. A does not know that B so thinks. Nothing has been said by either as to the oats being old or new. There is no fraud or innocent misrepresentation by A. B agrees to buy the oats but there is no term in the contract that the oats are promised to be old oats. Further, B does not make it a basic condition of the contract coming into being that the oats shall be old oats although it is now clear that he (B) would not have considered buying the parcel if he had known the oats were new oats. This is a case of unaided self-deception by the buyer, not known to the seller, and he contract stands. *Falsa causa non nocet. Caveat emptor.*[8A]

Class Two

The facts are as in Class One except that A knows that B thinks the oats are old oats and that B would not buy new oats. Here *caveat emptor* comes into play and B must take the oats. The result admittedly works an unjust hardship on B but it is of "paramount importance that contracts should be observed" ([1932] A.C. at p. 224).[9] It is apparently not

hardships to individuals which, considered by themselves, might appear unjust. This is the necessary price paid for the general preservation of the sanctity of contracts. *Pacta servanda sunt.*

[8A] The expression *caveat emptor* literally taken would suggest a rule confined to buying and selling. But as pointed out above, the rule is not so confined. See Note 5, *supra*. See the language of Beck J.A. in *Gray-Campbell* v. *Flynn*, [1922] 3 W.W.R. at pp. 1039-40. Whether the subject-matter of the contract is a physical *res* or an intangible, the rule is the same, leaving contracts *uberrimae fidei* on one side. *Caveat emptor*, in certain circumstances, may apply to title as well as quality. See *Electric Fireproofing Co.* v. *Electric Etc.*, 43 S.C.R. at pp. 189, 192.

[9] The matter is discussed by SIDGWICK, THE ELEMENTS OF POLITICS, p. 88: "Now it is obvious that if a seller's erroneous idea of the value of a purchased commodity, even when shared by the buyer, were broadly held to be a ground for treating the transfer as substantially invalid, the insecurity thus introduced into agreements would be so widespread as to be intolerable: no purchaser (*e.g.*) of a picture would ever know whether the exchange was really completed or not. The only question that raises any doubt is, whether A should not be bound to disclose all material facts *known to him*, which are such as would affect B's judgment if he knew them, supposing B to be a person of ordinary common sense. I think that our first impulse would certainly to affirm that he ought: but reflection seems to show that if the knowledge was of a kind that it was equally open to B to acquire, it accords with our principle that A should profit by his superior knowledge, and B bear the loss arising from his ignorance—provided that his mistake is not caused by wilful or careless misrepresentation on A's part. And even when—as in ordinary cases of sale—the seller may be supposed to have superior knowledge of the qualities of the

thought to be beneath the dignity of a court to assist A in gathering in the profits which may proceed, in whole or in part, from the self-deception of B, known to A and taken advantage of by him. Self-deception is still deception.[9A]

The morality of such a conclusion has been debated at least since the time of Cicero.[10] The common law view which still applies *caveat emptor* in the absence of active misleading[11] no doubt goes back a long way. The intensely individualistic character of the common law is illustrated in the criminal field in the development of the law of obtaining by false pretences. If the accused resorted to false weights or measures or hall-marks, things which might deceive people in general, an offence might be committed. But, where there was a mere private lie, although positive in character, there was no offence although a tort came to be recognized in such cases. "Shall we indict a man for making a fool of another?"[12]

The Legislature, in the matter of positive false pretences, at last (1827) gave an affirmative answer to this question which the

articles sold to the buyer: still it is *prima facie* in accordance with the principle of mutual non-interference that each should be left to ascertain unaided the adaptation to his needs and desires of the thing or service that he transfers or receives in exchange." Sidgwick then goes on to recognize that there are certain relationships which prevent the bargaining parties standing on a basis of equality. In such cases he admits that his principle requires modification. The exceptions he allows are similar to situations in which contracts are said in law to be *uberrimae fidei*. Sidgwick's discussion is from the utilitarian point of view. The "security of transactions", "Finality and certainty of business affairs" ([1924] S.C.R. at p. 146) are reasons explaining the result reached. The same type of reason is given by Lord Atkin in the *Bell Case*, *supra*, and by Lord Thurlow in *Fox* v. *Mackreth*, *infra*. For a moralist's views, see FULLER, THE GOOD MERCHANT, c, 17, The Holy State, where views similar to Cicero's are expressed; PALEY, MORAL & POLITICAL PHILOSOPHY, Bk. iii, c. 7; JEREMY TAYLOR, OF HOLY LIVING, c. 3. s. 3.

[9A] *Si quis virginem se emere putasset, cum mulier venisset, et sciens eum venditor passus sit, redhibitionem quidem ex hac causa non esse, verum tamen ex empto competere actionem ad resoluendam emptionem, et pretio restituto mulier reddatur*. Nondisclosure in such a case was looked upon as a species of fraud. *Cf.* D. 18, 1, 2, 1. See MACKINTOSH, THE ROMAN LAW OF SALE, 2nd ed., 158. Apparently the Roman law treated the seller's taking advantage of the known ignorance as fraud. The law is otherwise under *Smith* v. *Hughes*.

[10] ". . . . *quoniam juris natura fons sit, hoc secundum naturam esse neminem id agere, ut ex alterius praedetur inscitia.*" (Cicero, *De Off.* III, 17, 72.) See *De Off.* Bk. III, cc. XII, XIII, XIV, XV, XVI, XVII, XVIII; COCHRANE, CHRISTIANITY AND CLASSICAL CULTURE, 55-56; GROTIUS, DE JURE BELLI AC PACIS. Bk. 2, c. 12, 9; POTHIER, TRAITÉ DU CONTRAT DE VENTE, Pt. 2, c. 2, Art. 1, 2, 3; STORY, EQUITY JURISPRUDENCE, Vol. 1, s. 205; SIDGWICK, *supra;* SPENCER BOWER, ACTIONABLE MISREPRESENTATION, 426; FRY, SPECIFIC PERFORMANCE, 705; *Cornfoot* v. *Fowke*, 6 M. & W. at p. 380; 3 WILLISTON, CONTRACTS (1st ed.) 2663; *Laidlaw* v. *Organ*, 2 Wheat. 178 (Marshall C.J.).

[11] Cases of contracts *uberrimae fidei* are, of course, in a class by themselves.

[12] Lord Holt, *Reg.* v. *Jones*, 1 Salk. 379.

common law did not give. The common law took the view that people were to look out for themselves and not come whining to the courts when things went wrong. Contributory negligence, *volenti non fit injuria*, and common employment were illustrations of the same attitude in other fields. At last Adam Smith gave wide currency to a view which was more comforting and refined. By a miraculous coincidence, through the workings of an "invisible hand", it happened that the individual, in pursuing his own ends, was at the same time promoting the public welfare. The individual, in amassing private profits, could lay the flattering unction to his soul that he was being at the same time a public benefactor.[12A] This view, which was not original with Adam Smith, seems to have come into prominence at least as early as Puritan times.[13] It was eagerly seized upon at a time when science and exploration were opening up new worlds to conquer. Individual energy was a great asset under such conditions. Just now when there are not so many fresh worlds to conquer, there is no longer the same belief in the automatic action of the "invisible hand". Price-fixing and trade regulation by the legislature or by government boards are being more and more relied on in place of the silent and automatic action of the "invisible hand", a hand which may have become tired or disgusted. Solidarity and cooperation are coming into favour at the expense of atomistic individualism.[14] Some say the tide is rapidly setting from contract to status again.[15] We no longer encourage individual enterprise and action by making civil lia-

[12A] Pope brings this out :

"Thus God and Nature formed the general frame
And bade self-love and social be the same."

Maitland speaks of ". . . the 18th century conception of God, the Being who turns selfishness into benevolence." (1 COLLECTED PAPERS at p.105.)

[13] See TAWNEY, RELIGION AND THE RISE OF CAPITALISM. Tawney shews that business, in effect, became secularized. The Church came to lose interest in questions of usury, just price, etc. See MAITLAND, COLLECTED PAPERS, Vol. 1 at p. 103. Adam Smith, himself, probably did not attach very much real importance to the idea of harmony which was in the air. See Hamilton, *The Ancient Maxim of Caveat Emptor*, 40 Yale L.J. 1133; Llwellyn, *Of Warranty of Quality and Society*, 36 Columbia L.R. 969.

[14] See DURKHEIM , DE LA DIVISION DU TRAVAIL SOCIAL; and the same theme runs through the works of Duguit. Emphasis is shifted from rights to duties.

[15] VINOGRADOFF, 2 COLLECTED PAPERS, 230; ALLEN, LEGAL DUTIES, 35; DICEY, LAW AND OPINION, 283; POLLOCK'S NOTES to MAINE'S ANCIENT LAW, Note L; POUND INTERPRETATIONS OF LEGAL HISTORY, 53; SPIRIT OF THE COMMON LAW, 28 - 31; BARKER, POLITICAL THEORIES FROM SPENCER TO TO-DAY, 93, 117, 165; but see BAGEHOT, PHYSICS AND POLITICS, c. 5, pt. 1; HENRY SCOTT HOLLAND, *Property and Personality*, in PROPERTY AND ITS DUTIES; DURKHEIM, *op. cit.* at c. 7 of Bk. III, c. 2; BOSANQUET, THE PHILOSOPHICAL THEORY OF THE STATE, at s. 277; *Workmen's Compensation Board* v. *C.P.R.*, 48 D.L.R. at p. 223 (Lord Haldane).

bility depend exclusively upon fault. With the general trend in this direction, it is interesting to try to estimate how long unmitigated *caveat emptor* as exhibited by this branch of *Smith* v. *Hughes*, re-emphasized by Lord Atkin in the *Bell Case*, will survive. However this may be, the "invisible hand" doctrine was consoling while it lasted. It was, in effect, a patented process whereby man might really serve God and Mammon, in spite of excellent authority to the contrary.[16] Unfortunately the patent now seems to have expired.

It is interesting to compare certain cases put by Cicero, a pagan professing stoic doctrines, with analogous situations which have been raised by the courts:

I

There is a famine at Rhodes and the prices of corn are fabulous. A comes from Alexandria with a shipload of corn for sale. He knows other ships are soon to arrive with cargoes of corn and that the famine will soon end. The Rhodians do not know this. Is A to report this? Cicero is in no doubt about the existence of this duty. See *De Officiis*, Bk. III, c. xi; xiii.[17]

B buys a roadside garage business from A, abutting on a public thoroughfare. Unknown to B, but known to A, it has already been decided to construct a bye-pass road which will divert substantially the whole of the traffic from passing A's garage. B has no remedy. (Lord Atkin in the *Bell Case*, [1932] A.C. at p. 224.) See also *Laidlaw* v. *Organ*, 2 Wheat. 178; 3 WILLISTON ON CONTRACTS (1st ed.) 2663.

A has bonds of State P. A has secret information that State P intends to repudiate these bonds tomorrow. A hurries to sell the bonds to one who is known not to be in the secret. Bagehot (*Economic Studies*, 135) assumes this to be an ordinary and prudent course to take. (*Cf. Hecht* v. *Batcheller*, 147 Mass. 335.)

[16] We have been authoritatively told that Christianity is not *per se* part of the Law of England. See *Bowman* v. *Secular Society*, [1917] A.C. 406 and see LORD MACMILLAN, *Law and Religion*, in LAW AND OTHER THINGS.

[17] The Rhodian case put by Cicero is discussed by Pothier. He thinks Cicero goes too far. No one, he says, accuses Joseph of injustice because he profited from his advance knowledge of the coming bad years. (TRAITÉ DU CONTRAT DE VENTE, Pt. 2, c. 2, art. 3.) See also GROTIUS, *op. cit.* Bk. 2, c. 12, 9; SPENCER BOWER, ACTIONABLE DEFAMATION, 426; KENT'S COMMENTARIES, Vol. 2, 491. Aristotle in his *Politics* (Bk. 1, cxii) discusses a similar matter. Thales of Miletus, being upbraided with the uselessness of philosophy as evidenced by his poverty, ascertained by his knowledge of astronomy that there would be an abundant crop of olives. He contracted for all the olive-presses in Miletus. When the abundant crop arrived, Thales was able to let out the presses on his own terms. He thereby amassed a large sum of money. Aristolte uses this illustration to prove that philosophers could easily be wealthy if they chose. But they do not choose, having other more laudable things to think about.

II

A sells his house because of certain vices of which A knows but of which others are ignorant. It is unsanitary but is generally thought to be healthful; vermin are to be found in the bedrooms; it is built of unsound materials; it is likely to collapse. No one knows this except A. B buys in ignorance of these facts at a price far higher than he would have paid had he known the facts. Cicero has no doubt that the seller ought to disclose the facts he knows but which B does not know. (*De Off.*, Bk. III, c. xiii.)[18] See *Cornfoot* v. *Fowke*, 6 M. & W. at p. 380.

A seller offers for sale wine which he knows is spoiling. Ought he to tell his customers? A man is selling a slave. Should his faults be declared — not only those which the seller is bound by the civil law to declare, but also the fact that the slave is untruthful, a gambler, a thief or a drunkard? Cicero states that such points were much disputed by the Stoics. He himself has no doubt that there is such duty. Cicero treats the allowing of a buyer through haste or mistaken judgment to make a contract which entails serious loss as being analogous to refusing "to set a man right when he has lost his way", something which was looked upon as especially disgraceful. The

B agrees to take on lease or buy an unfurnished house from A. The house is in fact uninhabitable. B would never have entered into the bargain had he known the facts. B has no remedy, and the position is the same whether A knew the facts or not, so long as he made no representation or gave no warranty. (Lord Atkin in the *Bell Case*, [1932] A.C. at p. 224.)[19]

A has pigs which he knows are suffering with typhoid fever. He sends them to market although sending such diseased pigs to a public market is contrary to law. A sells the pigs to B who is ignorant of their condition. The pigs are sold with all their faults without any warranty whatever. B takes the pigs home and they infect his healthy pigs. B can recover nothing from A although A was well aware of the state of the pigs. There was no positive misrepresentation, express or implied, any possibility of such being excluded by the express terms on which the pigs were sold. B cannot rely upon the argument that diseased animals as these were, were not "pigs" in a market sense. (*Ward* v. *Hobbs*, 4 App. Cas. 13. *Cf. Peters* v. *Planner*, 4 T.L.R. 169.) ". . . . The mere fact of offering a defective chattel for sale, where nothing is said about quality and condition, and nothing is done to conceal the

[18] This case put by Cicero is referred to by Lord Abinger in *Cornfoot* v. *Fowke*, 6 M. & W. at p. 380. See JANET, ELÉMENTS DE MORALE, s. 45.

[19] "Fraud apart, there is no law against letting a tumble-down house." Erle C.J. in *Robbins* v. *Jones*, 16 C.B.N.S. 221, approved in *Cavalier* v. *Pope*, [1906] A.C. at p. 430. See *Scythes* v. *Gibson*, [1927] S.C.R. at p. 358; *Taylor* v. *People's etc.*, [1930] S.C.R. at p. 192; *Heake* v. *City Securities*, [1932] S.C.R. at p. 256. For the law of Scotland see *Cameron* v. *Young*, [1908] A.C. 176; 51 Jur. Review 337. Apart from warranty or fraud there is generally no liability in tort or contract on the selling or letting of a ruinous or tumble-down unfurnished house, whether to the purchaser or lessee or to a stranger. This seems to be still so, notwithstanding the 'Snail in the Bottle Case'. See *Donoghue* v. *Stevenson*, [1932] A.C. at p. 597; *Hoskins* v. *Woodham*, [1938] 1 All E.R. 692; *Bottomley* v. *Bannister*, [1932] 1 K.B. at p. 468; *Otto* v. *Bolton*, [1936] 1 All E.R. at p. 965; 17 Can. B.R. 448; *Davis* v. *Foots*, [1939] 4 All E.R. 4. The sale of an uncompleted house to be completed by the seller may be a different matter. *Miller* v. *Cannon Hill Estates*, [1931] 2 K.B. 113.

common law is not so tender to the one who has lost his way. You see your enemy who has lost his way on a foggy night approaching a precipice. You need not warn him, as far as the law is concerned. Unless there is some special relationship (parent and child, husband and wife, etc.) or some special statutory or contractual duty in the circumstance, you need not raise a finger. Mere nonfeasance, in such circumstances, does not entail liability. But you must not positively mislead. Active misleading may be fraud. A insures B. There is a condition in the policy that, on certain things being done, A may treat the contract as void. A knows that B is about to do something, probably through forgetfulness or inadvertence, which will have this effect. "A man does not disentitle himself to rely on a condition when, knowing the other party intends to do something which will be a breach, he simply stands by and leaves him to take his course." (Lord Sumner in *Samuel* v. *Dumas*, 40 T.L.R. at p. 389.)

defect, gives no cause of action, though the seller knows of the defect, and he knows that if the purchaser even suspected him of the knowledge he would not buy. Such conduct seems to me to be immoral and dishonest, and dishonest to a high degree, yet there is no remedy because there is no representation." (Brett L.J. in *Ward* v. *Hobbs*, 3 Q.B.D. at p. 162.) See Falconbridge, 1927 Proceedings of Can. Bar. Assoc. at 209.

Generally when there is actual, positive fraudulent misrepresentation, the party guilty cannot protect himself by a term in the contract that any fraud cannot be relied upon. (See *Pearson* v. *Dublin Corp.*, [1907] A.C. 351; *Railton* v. *Hamilton*, [1925] 3 W.W.R. 136. *Illud nulla pactione effici potest ne dolus praestetur*. Nevertheless, in cases not involving fraud, a party may contractually provide that he is a "non-disclosing" person. And this will protect him from the consequences of mere non-disclosure notwithstanding that the contract would normally be *uberrimae fidei*. See Lord Atkin in *Trade Indemnity Co.* v. *Workington etc.*, [1937] A.C. at p. 18.

III

A owns a house on the Caelian Hill. This interfered with certain observations which the Augurs were proposing to make. They ordered A to pull down parts of the building which obstructed the view. A at once advertised his property for sale, not disclosing what had happened. B bought the property, in ignorance of the Augurs' intentions. He got similar instructions. B discovered what A had done. B can recover damages against A. (Cicero, *De Officiis*, Bk. III, c. xvi).

Pothier suggests that good faith imposes a duty to disclose not only

Cf. Danforth Heights v. *McDermid Bros.*, 52 O.L.R. at p. 434; *Fong* v. *Kerwin*, [1929] 3 D.L.R. at p. 612; *Bolesworth* v. *Davis*, 3 T.L.R. 214. In *Coles* v. *White City*, 45 T.L.R. 230, a company issued a prospectus stating that the company owned land "eminently suitable" for a greyhound track. The site was scheduled under a town-planning scheme. This was not disclosed, probably because the directors were ignorant of the fact or they did not appreciate its importance. Plaintiff was held entitled to rescission. Non-disclosure *simpliciter* is not equal to misrepresentation and would not be a

intrinsic defects in the thing but also extrinsic matters which might seriously affect the user of the thing and which, if they had been known would have induced the buyer not to buy at all or to pay a smaller price. He instances disclosure of the character of the neighbors: *Si quis in vendendo praedio confinem celaverit, quem emptor, si audisset, empturus non esset, teneri venditorem.* POTHIER, TRAITÉ DU CONTRAT DE VENTE, Part II, c. II, Art. 2. JANET, ELÉMENTS DE MORALE, s. 45; D. 18, 1, 35, 8.

ground of rescission. But *suppressio veri* is equivalent to *suggestio falsi.* What was said took on a new color by reason of the nondisclosure with the result that the actual statement made was false. (See Rigby L.J. in *McKeown* v. *Boudard Peveril Gear Co.*, 74 L.T. 712.) Half a truth may be a lie. ". . . . If you rely as a ground for rescission of a contract on the omission of a statement, you must show that the omission of that statement makes what is stated misleading. It is not that the omission of material facts is an independent ground for rescission, but the omission must be of such a nature as to make the statement actually made misleading." (74 L.T. 712; 45 T.L.R. at p. 231.) If the nondisclosure is deliberate with the view of stating a misleading half-truth, there may be criminal consequences. See *R.* v. *Kylsant*, [1932] 1 K.B. 442; *R.* v. *Bishirgian*, 25 Cr. A.R. 176; *Rex* v. *McLeod*, [1941] 1 D.L.R. 773.

A owns a house next door to a bawdy house in a large way of business. B wishes to rent a house as a home for his daughters who are just about to "come out". B would not have considered the house had he known the facts. In *Cornfoot* v. *Fowke*, 6 M. & W. 358, it seems to be assumed that B would have to take the house if there was no actual misrepresentation and the case seems to be concerned with whether there was or not and whether if there was, the representation was imputable as fraud to the lessor. Lord Abinger C.B., however, refers to Cicero (at p. 380). See Rose J. in *Danforth Heights* v. *McDermid*, 52 O.L.R. at p. 434, where *Smith* v. *Hughes*, L.R. 6 Q.B. at p. 604 is cited for the distinction between "extrinsic circumstances affecting the value of the subject-matter of sale" and "intrinsic circumstances appertaining to its nature, character and condition".

IV

B owns a farm. A is desirous of buying it. A asks the price. B, for some reason, asks much less than the farm is worth. A thereupon offers 100,000 sesterces more than is asked. Cicero, no doubt speaking as a moralist rather than as a lawyer, says this is the act of an honest man. Some would say the act was honest but not the act of a worldly-wise man — a distinction which Cicero deplores because it is not proper to draw a distinction between uprightness and wisdom. (Cicero, *De Officiis*, Bk. III, c. 15.)

So also, in this case. If a man thinks that he is selling brass, when he is actually selling gold, an upright man should inform the seller that his stuff is gold. It is not the act of an honest buyer, to buy for a shilling what is worth a thousand. (Cicero, *De Officiis*, Bk. III, 23, 92.)

"The great and only doubt which I have had . . . . is whether the ground upon which I must go . . . . will not by necessary implication extend to many cases, in which I shall run the hazard of undoing all the common transactions of mankind and of rendering all their dealings insecure. I do not agree with those who say that wherever such an advantage has been taken in the course of a contract by one party over another, as a man of delicacy would refuse to take, such a contract shall be set aside. Let us put this case. Suppose A, knowing of a mine in the estate of B, and knowing at the same time that B was ignorant of it, should treat and contract with B for the purchase of that estate at only half its real value, can a Court of Equity set aside this bargain? No. But why is it impossible? Not because the one party is not aware of the unreasonable advantage taken by the other of his knowledge, but because there is no contract existing between them by which the one party is bound to disclose to the other the circumstances which have come within his knowledge; for if it were otherwise, such a principle must extend to every case in which the buyer of an estate happened to have a clearer discernment of its real value than the other." (Lord Thurlow in *Fox* v. *MacKreth*, 2 Cox 320.) See KENT'S COMMENTARIES, Vol. 11, 490. *Cf. Lange* v. *Barton*, 7 T.L.R. 45.[20]

[20] "This therefore is the logic of the bilateral contract; *viz.*, each one looks for his own advantage and knows that the other does the same, and the law admits their right to do so. It allows egoism free play, so far as the latter does not make use of prohibited means for carrying out its purpose." (IHERING, LAW AS A MEANS TO AN END, MODERN LEGAL PHILOSOPHY SERIES, Vol. 5, 93.) Ihering then quotes D. 19, 2, 22, 3: *Quemadmodum in emendo et vendendo naturaliter concessum est, quod pluris est, minoris emere, quod minoris sit, pluris vendere et ita invicem se circumscribere, ita in locationibus quoque et conductionibus juris est.* Ihering goes on to say: The nature of a relation of trust and confidence (agency, guardianship, partnership etc.) gives rise to the opposite state of affairs. Here "dolus" begins as soon as one pursues his own advantage, whereas in business relations there is no "dolus" unless one pursues his own advan-

Lord Thurlow held, in the actual case, that there was a duty to disclose because of the existence of a fiduciary relation. (See *Bentley* v. *Naismith*, 46 S.C.R. 477.) And Lord Atkin in the *Bell Case* points out that there is a similar duty in the case of contracts *uberrimae fidei* generally.[20A]

A is about to buy property belonging to B. A has discovered factors which would enhance the value of the property if known. A knows that B is ignorant of these facts. Lord Halsbury in *Dougan* v. *MacPherson*, [1902] A.C. at pp. 202, 203 (and see p. 205), thought that such disclosure would not be the act of a normal or ordinary person. In the actual case, however, A was a trustee buying from his *cestui* and the duty of disclosure which would not exist normally, arose.

V

B, while on a vacation, is anxious to buy a house. A hears of B's intention. A tells B that he (A) has a house which is not for sale but that B is welcome to make use of. A invites B to dinner for the

There is good reason for thinking that this would be fraud under English Law too. A seller who exposes "mutton dressed as lamb" or "skim milk masquerading as cream" can hardly be offended if one applies

tage by means of conscious suppression of the truth. See Note 9A, *supra*. In ordinary business relations when the parties are at arm's length, Ihering states that the "law recognizes egoism as the determining factor and a just one. The conception from which the law starts is that each of the two parties has in mind his own advantage, each one endeavors to use the disadvantage of the other man's position in his own favor." In *pretio emptionis et venditionis naturaliter licere contrahentibus se circumvenire.*) (D. 4, 4, 16, 4.) *Ita in locationibus quoque et conductionibus juris est.* (Cod. 4, 44, 10.) Ihering, *op. cit* at p. 100. Ihering recognizes that egoism under a regime of freedom of trade is the motive power of commerce. He strongly asserts the view, however, that society has the right and the duty to check excessive egoism when dangerous to society. All contracts have not a claim to the protection of the law. (*Op. cit* at p. 105.)

[20A] "Mere silence cannot amount to a representation, but where there is a duty to disclose, deliberate silence may become significant and amount to a representation." (Lord Tomlin in *Greenwood* v. *Martins Bank*, [1933] A.C. at p. 57.) See *Taylor* v. *London Assurance*, [1934] 2 D.L.R. at p. 664; *Henderson* v. *Thompson*, 41 S.C.R. 445. It must be remembered that 'industrious concealment' may, under certain circumstances, be treated as actual misrepresentation.) (See Duff C.J. in *Richardson* v. *Tiffin*, [1940] S.C.R. at p. 642.) And the telling of merely part of the truth may be equivalent to actual misrepresentation. *Suppressio veri* may be *suggestio falsi*. (*R.* v. *Kylsant*, 23 Cr. A.R. 83; *R.* v. *Bishirgan*, 25 Cr. A.R. 176; *R.* v. *McLeod*, [1941] 1 D.L.R. 733 (S.C.C.)

following day. A gets all the fishermen in the district to fish on the sea in front of the place to lead B to believe that the place is very desirable. B is made thereby exceedingly anxious to purchase as A had intended from the start and he readily agrees to pay the very large price A demands. Next day B invites his friends to dinner. No fishermen appear. B makes inquiry and he finds out about the stage-dressing. Cicero thought this was fraud. (Cicero, *De Officiis*, Bk. III, c. xiv).

the epithet of fraudulent to his conduct. He does not necessarily speak a word. But actions sometimes speak more loudly than words. If one paints a sparrow to look like a canary and sells it without saying what it is, he may well be convicted of obtaining the price by false pretences. (KENNY, OUTLINES OF CRIMINAL LAW, 6th ed., 245.)

A has a gun to sell. He knows it has a flaw. He uses a contrivance to hide the flaw. B buys without inspection. A certainly has *mens rea*. He intended to defraud B but his fraud is not relevant in the civil law inasmuch as it is not *fraus dans locum contractui*. Had B inspected the gun and been misled by the contrivance it would be otherwise.[21] Active concealment of fact which has an operative effect is of the same effect as an actual statement that the fact does not exist. *Aliud est celare, aliud tacere*. Probably also the taking of active steps—by diverting attention or otherwise—to prevent B's finding out defects for himself is fraud.[22] See [1932] A.C. at p. 221. *With* v. *O'Flanagan*, [1936] Ch. at p. 581. "Industrious" concealment may be rendered by the circumstances of the case the equivalent of positive representation. (Duff C.J., [1940] S.C.R. at p. 642.)

VI

A has a villa for sale which he does not like. A hires an auctioneer to sell it. The auctioneer puts up a placard "For Sale: A Fine Villa: Well Built". The villa is not good or well built. This is not considered

A has property for sale. An agent publishes an advertisement in *The Times* describing the property as "in first-rate order throughout: strongly recommended by Messrs. A". A goes over the house with B.

[21] *Horsfall* v. *Thomas*, 1 H. & C. 90; Cockburn C.J. dissents from this view in *Smith* v. *Hughes*, L.R. 6 Q.B. at p. 605. But Pollock considers it good law. (POLLOCK, CONTRACTS, 10th ed. at p. 570(c).)

[22] *Leeson* v. *Darlow*, 59 O.L.R. 421. *Dolum malum a se abesse praestare venditor debet, qui non tantum in eo est qui fallendi causa obscure loquitur, sed etiam qui insidiose obscure dissimulat.* D. 18, 1, 43, 2. CUQ, MANUEL, 2nd ed. at p. 392 (n. 5), in speaking of this passage says: Acôté du dol positif, il y a le dol négatif qui consiste en une réticence intentionelle et de mauvaise foi.

to be swindling. *A fortiori*, it is not swindling if the vendor merely says nothing although he knows the house to be undesirable and not well built. *"Quid vero est stultius quam venditorem eius rei quam vendat, vitia narrare?" Ubi enim judicium emptoris est, ibi fraus venditoris quae potest esse?* This is the view which Cicero opposes. A person who so acts is really a knave. Mere words of puffery are not to be taken seriously as a promise. *Simplex commendatio non obligat.* Mere dealer's talk does not bind. There is a certain licence to indulge in laudatory generalities. See D. 4, 3, 37.

A says the house is in good condition. A further advertisement is published by the agent in which the property is described as "a desirable freehold residence in perfect order". B bought the house and took title, relying on these statements. The representations were innocent. The statements of the agent could not be treated as warranties, as parts of the contract. The statements of A, likewise, were merely representations inducing the contract but not part of it. These misrepresentations might be an effective defence to an action for specific performance brought by A against B. They were not contractual terms which enabled B to recover damages in the event of the house turning out to be in bad order if title is taken. (*Lawrence* v. *Hull*, 41 T.L.R. 75.)

Of course many of these instances given by Cicero are not intended by him to represent the actual law at his time but rather the law as it ought to be. He is speaking more as a moralist than a lawyer.[22A] Some of his views are counsels of perfection which have never yet been attained. Nevertheless the Roman law seems to have had more concern with the duties of vendors, particularly of slaves and of animals. The Aediles seem to have had regulations of a fairly drastic nature for the protection of buyers and similar principles may have penetrated to some extent into other branches of the law. Nevertheless, the existence of detailed rules of this class does not necessarily indicate a high standard of commercial morality. It may indicate the reverse. *In corruptissima republica plurimae leges.* The relatively few cases in our reports in which buyers appear to be cheated with the sanction of the law, represent merely the pathology of business and not its normal functioning. Knavery in business affairs probably does not pay as a consistent policy. (See *Marshall, Principles of Economics*, 7, as to the relative prevalence of business knavery now and in former times).

There are a few interesting cases in which this particular branch of *Smith* v. *Hughes* has been applied :

[22A] *Sed aliter leges, aliter philosophi tollunt astutias, leges, quatenus manu tenere possunt, philosophi, quatenus ratione et intelligentia.* (Cicero, *De Officiis*, II, 17.)

A has a cargo of coal in Buenos Ayres which he wishes to sell. A approaches B, in London, who has a branch in Buenos Ayres, and asks him to make an offer for the coal. B agrees to investigate if A will pay the cost of a cable to B's branch. A agrees to do so. A cable is sent by B and an answer received from B's agent in South America. This reply cable is garbled in transmission and is in fact partly unintelligible. B thinks he gets a meaning out of the cable. Negotiations are continued and B agrees to buy the coal at an excessive price. In so acting B relied on the cable. A in no way contributed to B's mistake. A did not know of the mistake before the contract was made. There was no fraud or misrepresentation by A. The contract was not conditioned upon the truth of the cable as interpreted. There was no disparity between B's intention and his expression. His mistake was merely as to a reason for entering into the contract. Mistake which merely affects one party's motives for entering into the contract does not negative *consensus ad idem*. Lindley L. J. goes so far as to say that the result would have been the same if A had known of B's mistake as to the matter affecting his motive unless A had caused the mistake or had done something to confirm it or he had warranted the matters mistaken. Had B's mistake been as to parties, subject-matter, or consideration, there might have been no *consensus ad idem*.[23]

[23] *Pope & Pearson* v. *Buenos Ayres New Gas Co.*, 8 T.L.R. 758 (C.A.). *Cf. Sykes* v. *The King*, [1939] 3 D.L.R. 585; *Doe* v. *Canadian Surety Co.*, [1937] S.C.R. 1; AMERICAN LAW INSTITUTE, RESTATEMENT, CONTRACTS, s. 503. That a mistake of one party producing in himself merely a mistaken reason or motive for his entering into the contract but not producing *error in negotio* (*e.g. non est factum*), or *error in corpore* or *in substantia* or *in persona*, is not such a mistake which precludes *consensus ad idem* is abundantly established by the authorities. BENJAMIN on SALES, s. 54; SALMOND & WINFIELD, CONTRACTS, 189. ". . . *L'erreur dans le motif ne détruit pas la convention; il suffit que les parties n'aient pas erré sur la chose qui en fait l'objet et in eam rem consenserint.*" POTHIER, TRAITÉ DES OBLIGATIONS, Pt. 1, c. 1, s. 1, Art 3; HOLLAND, 1 ed. 117; SAV. SYSTEM, II, 263; 52 L.Q.R. at p. 80; POLLOCK, CONTRACTS, 10th ed. 489; WHARTON, CONTRACTS, Vol. 1, 193; STORY, EQUITY JURISPRUDENCE, 150; ANSON, CONTRACTS, 18 ed. at p. 145, 146; *Colonial Investment* v. *Borland*, 5 Alberta L.R. at p. 81; *Cockburn* C.J. in *Smith* v. *Hughes*, L.R. s. 6 Q.B. at p. 606; *Lindsey* v. *Heron & Co.*, 64 D.L.R. 92; *United States of America* v. *Motor Trucks Ltd.*, 39 T.L.R. at p. 728; *Kennedy* v. *Panama Mail Steamship*, L.R. 2 Q.B. 580, quoted with approval by Lord Thankerton in the *Bell Case*, [1932] A.C. at p. 235 and by Lord Warrington at p. 297; *Milk Farm etc.* v. *Buist*, 35 O.L.R. at p. 334. If the mistake is not as to the essentials of the agreement but merely relates to factors which provide a motive operating on the will as an inducement to enter into the agreement, the contract is good. A party may be actuated by an unfounded belief or expectation of some advantage which is to flow from the contract. The other party may know of this unfounded expectation. If there is no term in the contract covering the matter and if there is no misrepresenta-

tion, the case not being one in which *uberrima fides* is required, the unilateral, self-induced mistake is irrelevant. This is involved in *Smith* v. *Hughes* and in *Bell* v. *Lever Bros.*, *supra*. See D. 12, 6, 65, 2, and 52; D. 12, 4, 3, 7. Fraud may go to essentials in which case there is no contract at all. Ordinarily, however, it goes merely to a matter of motive. In such case, the contract may be defeasible at the instance of the defrauded party. But there is still a contract to start with. (See Duff J. in *Sovereign Bank* v. *MacIntyre*, 54 S.C.R. at p. 177.) Duress or undue influence equally operate on motive and not on intention. The transaction so induced is not a nullity though it may be defeasible. *Tamen coactus volui*. D. 4, 2, 21, 5. See *Fairbanks* v. *Snow*, 145 Mass. 153 (Holmes J.); *Robinson* v. *Midland Bank*, 41 T.L.R. at p. 406.

A gives B $100 because he (A) thinks B had rendered him (A) a good turn. A is mistaken in this. C and not B had rendered A the good turn. A does not think B is C. Apparently the gift is good. A intended to give and he has given. The mistake is merely as to a matter furnishing a motive. (D. 12, 6, 65, 2.) A gives B $100, as above, thinking B to be C. A (probably) can recover the $100. The mistake is not merely as to a matter of motive but as to a factor of the giving itself. See *Morgan* v. *Ashcroft*, [1937] 3 All E.R. at p. 99; *Ayres* v. *Moore*, [1939] 4 All E.R. at pp. 354-5; Lord Dunedin in *Sinclair* v. *Brougham*, [1914] A.C. at p. 431; *Jones* v. *Waring & Gillow*, [1926] A.C. at p. 696; *Lake* v. *Simmons*, 43 T.L.R. at pp. 419, 420, 421. *Cf. Lady Hood* v. *MacKinnon*, 25 T.L.R. 290; *Ellis* v. *Ellis*, 26 T.L.R. 166. A pays B $100, mistakenly believing in facts which make it desirable or honorable to pay but which facts are not relevant to legal liability to pay. Such mistake has the effect of mistake as to matter of motive only and the money cannot be recovered by A on finding out the true state of affairs. (*Morgan* v. *Ashcroft*, [1937] 3 All E.R. 92; *Aiken* v. *Short*, 1 H. & N. 210; *Steam Saw Mills* v. *Baring*, [1922] 1 Ch. at p. 250; *Home & Col.* v. *London etc.*, 45 T.L.R. 134; *In re Thelluson* [1919] 2 K.B. at pp. 738, 753; *Standard etc.* v. *Whalen*, 64 S.C.R. at pp. 96, 99, 103; *Weld Blundell* v. *Synott*, [1940] 2 All E.R. 580; *Trusts* v. *Toronto*, 30 O.R. 209; *Mtge Ass.* v. *Regina*, [1917] 1 W.W.R. at p. 1134.)

A, a bookmaker, overpays a bet to B. A cannot recover the amount of the overpayment. There was no fundamental mistake, no mistake as to a matter affecting legal liability. "To pay 24l. for a betting debt is just as much in the eye of the law, a purely voluntary gift as a wedding present of 24l.: the law prevents the plaintiff from saying he intended anything but a present." (Scott L.J. in the *Ashcroft Case*, [1937] 3 All E.R. at p. 105.) But if A paid B, thinking he was C, different considerations might arise. So if A handed B a 5l. note and there were two five pound notes sticking to-gether, it does not follow that A could not recover the additional note of which he had no knowledge. His mind did not go with his act.

A insures B's cargo of lemons against certain perils. A and B both think the lemons have been lost through the action of one of these perils. A pays B the value of the lemons. It turns out later that the lemons were not so lost. A did not intend to pay except on the basis of a loss by the perils insured against. He did not intend to make a gift. A can recover the amount so paid. The mind of A did not go with the payment at all. His mind went with another transaction. (Lord Wright in *Norwich Union* v. *Price*, [1934] A.C. at p. 462, where Lord Sumner's speech in *Jones* v. *Waring & Gillow*, [1926] A.C. at p. 696 is cited.) This result is said by Lord Wright [1934] A.C. at p. 463) to be consistent with *Bell* v. *Lever Bros.*, [1932] A.C. 161. In this last case A paid money to B to be relieved from an existing contract of service. There was in fact an existing contract of service but it was defeasible at A's instance, without any payment, if A had known certain facts which he did not know. The majority of the House of Lords held that A could not recover the money so paid to B. He got the release of the very contract he intended. The mistake was merely as to a matter affecting expediency of the act A was doing. It did not relate to the essentials of the very act A was doing and intended to do. Many of these cases deal with the recovery of money paid under mistake of fact. But the same differentiation between factors going merely to desirability and factors going to essentials of the transaction itself applies.

A has certain jewels for sale. They have an appearance of antiquity and are taken by B to be historical jewels. "The case cannot be decided against the sellers on the ground of their silence . . . . and nondisclosure only; nor on the ground of the *apparent* antiquity of the articles; nor because the plaintiff believed them old; nor even because the vendors were aware that B was under that belief and did not undeceive her. For the contention that when a seller gives no warranty the buyer must protect himself must be conceded." (*Patterson* v. *Landsberg*, Session Cases, 1904–5, p. 675.) In this case the sellers were found to have been guilty of active falsehood.

It is to be remembered that this branch of *Smith* v. *Hughes* relates only to self-deception of the buyer B as to the quality of the *corpus* as to which both buyer and seller are agreed. A mistake as to the *corpus*, the *identity* as distinct from the *quality* of the subject-matter may involve

generally in the field of formation of contracts. (See *Ayres* v. *Moore*, [1939] 4 All E.R. 351.) Lord Wright seems to aequiparate the situations in the *Norwich Case, supra.*

The same underlying principle arises in cases which are alleged to involve *error in persona.* B intends to marry A, a real person. AA is substituted for A. B does not detect the substitution. Presumably there is no marriage. (See the case of Rachel and Leah; Browning's The Ring and the Book, c. 5, p. 213 (Nelson); Sir Walter Scott's St. Ronan's Well c. 14.) If, however, B intends to marry a lady, definitely identified to him 'by sight and hearing' under the false belief that the lady so identified is A, the marriage is good. (See Browning, *supra.*) The marriage is not even voidable in English law in such a case. There can be no *restitutio in integrum.* If the case is one of a merely commercial character, the contract ensuing may be voidable if there is fraud on the pseudo—A's part. See *Phillips* v. *Brooks*, [1919] 2 K.B. 243, with which compare Lord Haldane's view of that case in *Lake* v. *Simmons*, [1927] A.C. 487.) In the one type of case, it may be said there is absence of intention on B's part to marry the person, AA, actually participating in the ceremony. In the other type of case it may be said there is that actual intention, although that intention has been induced by the operation of motives fraudulently produced.

In the ordinary commercial contract, if the mistake as to motive is procured by the fraud of the other party, generally avoidance may be permissible if there can be *restitutio.* (See *Barnrad* v. *Riendeau*, 31 S.C.R. at p. 239).) But "Where parties are contracting with one another, each may, unless there be a duty to disclose, observe silence even in regard to facts which he believes would be operative upon the mind of the other: and it rests upon those who say that there was a duty to disclose, to shew that the duty existed." (Fry J. in *Davies* v. *London etc.*, 8 Ch. D. at p. 474, quoted with approval by Lord Wright M.R. in *With* v. *O'Flanagan*, [1936] Ch. at p. 582. And see Newcombe J. in *Williams* v. *Moore*, [1926] 4 D.L.R. at p. 581 where the judgment of Blackburn J. in *Smith* v. *Hughes*, L.R. 6 Q.B. at pp. 606–7 is cited with approval.) If a statement is made to induce a contract and this statement is true when made but subsequently becomes untrue, there is an active duty on the person who made it to provide a correction. Otherwise mere silence after knowledge of new facts which now make the statement false, may amount to fraud. This applies to cases which are not *uberrimae fidei.* (See *With* v. *O'Flanagam*, [1936] Ch. 575.)

different considerations. See Lindley L.J., *Pope & Pearson* v. *Buenos Ayres Gas Co.*, 8 T.L.R. 758. (See Rinfret J. in *Clay* v. *Powell*, [1932] S.C.R. at p. 217; *American Seamless* v. *Goward*, [1931] 1 D.L.R. at p. 884, where *Smith* v. *Hughes*, L.R. 6 Q.B. at p. 607 is referred to. In *Smith* v. *Hughes* the buyer got the specific articles he intended to buy. It merely did not answer to his expectations as to quality. (See Rinfret J. in [1932] S.C.R. at p. 217, with which compare Macdonald J.A. in the same case [1931] 2 W.W.R. at p. 331, where apparently a different view of the facts was taken.) But it is sometimes hard to determine where quality ends and identity begins. (See *International Casualty* v. *Thomson*, 48 S.C.R. at p. 200.)

B wishes to go on a pleasure cruise to Australia to recover from insomnia. She arranges with A, a steamship company, for a return ticket. B thinks she is contracting for a pleasure cruise with all its incidents. The representatives of A think the contract calls for an ordinary commercial return voyage on a named ship which both had in mind. A's representative knew nothing of B's belief as to the terms of the contract in so far as that belief related to a pleasure cruise being contracted for. Branson J. (*Macmillan* v. *Orient Steam Navigation Co.*, 40 Com. Cas. 182) thought there was no *consensus ad idem* and hence no contract. Apparently there was no fraud or misrepresentation by A's agent. Nothing is said about B's being affected by something in the nature of an estoppel. Both parties had in contemplation a voyage on a named ship. Is this a mere mistake as to quality, self-induced, or is it a mistake in identity of the thing contracted for? Is the difference between a pleasure cruise and an ordinary commercial cruise a difference in kind and not a mere difference in quality? Pigs dying of typhoid fever are still pigs. (*Ward* v. *Hobbes*, *supra*.) It may be that in the *Macmillan Case* the not-meeting of the minds of the parties was as much attributable to one party as to the other. The facts given in the report are not very full on that point. In any event it may be that differences of quality if extensive enough, may result in differences of identity of the thing contracted for. Rinfret J. thought that "treasury shares" and shares in the same company coming not from the company but from a shareholder, involved differences of identity and not quality merely. (*Clay* v. *Powell*, *supra*.) *Smith* v. *Hughes*, in the

view of Rinfret J. had to do with mistake as to mere quality. A mistake on both sides as to a quality which is looked upon as the substance of the thing, not being as to a quality which is merely accidental but which is of such seriousness as to put the thing as it is in a different commercial category from the thing as it was thought by both to be, has the same effect as a mistake by both as to the physical existence of the thing itself.[24] Mistake by one party, self-induced, as to an accidental quality, is merely a mistake in a matter of motive and "l'erreur dans le motif ne détruit pas la convention; il suffit que les parties n'aient pas erré sur la chose qui en fait l'objet et *in eam rem consenserint.*" (Pothier, Obligations, Pt. I, C. 1, S. 1, Art. 3, 18). Identity is one of the *essentalia* of the contract whereas a quality, which is merely incidental, is of the *accidentalia.* (*Pothier: Oblig.*, Pt. I, c. 1, sec. 1, Art. 1, s. III.) See *City of Woodstock* v. *County of Oxford,* 44 S.C.R. 603.

Lack of agreement as to the subject-matter, as to identity, as distinct from accidental quality,[24A] may sometimes, though not always, preclude the coming into being of a contract. The following instances illustrate the law :

(1) A offers a cargo of cotton "Ex Peerless from Bombay" to B. B accepts. There are two ships named "Peerless" carrying cotton from Bombay — ship X and ship Y. A has ship X in mind. B has ship Y in mind. Here there is an apparent coincidence of offer and acceptance which, on the surface, generates a contract. But it is only on the surface. Further investigation shows that each party not merely meant but said a different thing.[25] It is an illustration of the ambiguity that sometimes lurks in proper

[24] POTHIER, TRAITÉ DES OBLIGATIONS, Pt. 1, c. 1, s. 1, art. 3, si, 18. The question of *error in substantia* as distinct from *error in corpore* is discussed below.

[24A] "Error is the object of a contract amounting to mistake in its identity precludes consent with the result that the obligation is non-existent or absolutely null. Error concerning the object short of this, however substantial, does not preclude consent and therefore an obligation results, although voidable and subject to rescission." (Anglin J., dissenting, in *Montreal Investment* v. *Sarault,* 57 S.C.R. at p. 477, and see Fitzpatrick C.J. at pp. 468–9.) In this case a question arose as to whether a difference as to location of lots meant difference of identity.

[25] HOLMES, COMMON LAW, 309; *Lindsey* v. *Heron & Co.*, 64 D.L.R. at p. 100; I. 3, 19, 23; AMERICAN LAW INSTITUTE, RESTATEMENT, Vol. I, p. 76; Vol. 2, 961; HOLMES, THEORY OF LEGAL INTERPRETATION, COLL. LEGAL PAPERS, at p. 205; 41 Col. L.R. 381 (Z. Chafee, Jr.).

names. The case[26] is one of "incurable ambiguity" and not one of mistake, "mutual" or otherwise.[27] There is a "*simulacrum*" of a contract only.

(2) A offers as in (1) and B purports to accept in the same terms. There is a ship "Peerless" and a ship "Peeress" both sailing from Bombay with cotton. A means what he says, the ship "Peerless". B is thinking of the ship "Peeress" although he accepts A's offer affirmatively, not noticing that the ship is "Peerless" and not "Peeress" as he supposes. This is a case of mistake and not merely one of ambiguity in the use of proper names. There is no true *consensus ad idem*, subjectively considered. Nevertheless to ensure the security of transactions the law normally raises something in the nature of an estoppel which precludes B from showing the lack of coincidence of his intention and its expression.[28] If A knew of B's real intention, A could not compel B to take the cotton "Ex Peerless".[29] Probably also, although A did not know that B meant "Peeress", if A's conduct, or the conduct of those for whom A was responsible, in some way contributed to B's error, A might not be able to compel B to take the cotton "Ex Peerless".[30]

(3) A agrees to buy and B agrees to sell to A a specific farm for 3700 shares in a syndicate to be formed "for the

---

[26] *Raffles* v. *Wichelhaus*, L.R. 6 Q.B. 597. *Cf. Boyd* v. *South Wpg. Ltd.*, [1917] 2 W.W.R. at p. 501; *Kyle* v. *Kavanagh*, 103 Mass. 356; *Keele* v. *Wheeler*, 7 M. & G. 665; *Lever* v. *Jackson*, noted in 30 Sol. Jour. p. 7 and referred to in *Hanley* v. *Can. Packing Co.*, 21 O. A.R. at p. 123.

[27] BUCKLAND AND MCNAIR, ROMAN AND COMMON LAW, 162; D. 18, 1, 9; HOLLAND, JURISPRUDENCE, 11th ed. 263; *Riley* v. *Spotswood*, 23 U.C.C.P. at p. 326; *Smith* v. *Hughes*, L.R. 6 Q.B. at p. 609; *Si plures sint eiusdem nominis servi, puta Erotes, nec appareat de quo actum sit, Pomponius dicit nullam fieri condemnatio*—D. 6, 5, 5; *Si Stichum stipulatus de alio sentiam, tu de alio, nihil actum erit . . . nam stipulatio ex utriusque consensu valet*—D. 45 1, 83, 1; *Si hominem stipulatus sim et ego de alio sensero, tu de alio, nihil acti erit: nam stipulatio ex utriusque consensu perficitur*—D. 45, 1, 137, 1. *Raffles* v. *Wichelhaus, supra*, may be compared with *Hanley* v. *Canadian Packers*, 21 O.A.R. at pp. 122–3; SALMOND & WINFIELD, CONTRACTS, at p. 181.

[28] HOLMES, COMMON LAW, 309; BUCKLAND, ELEMENTARY PRINCIPLES OF ROMAN LAW, 288. See Sedgewick J. in *Murray* v. *Jenkins*, 28 S.C.R. at p. 577. Circumstances may be such as to entitle a person to show that he had a different thing in mind from the other party (*Thornton* v. *Kempster*, 5 Taunt. 786) or the words used may have an ambiguity in them, objectively, which precludes *consensus ad idem*, insofar as the subject-matter is concerned, (*Keele* v. *Wheeler*, 7 M. & G. 665).

[29] This is involved in the last head of Anson's Dresden China Case which, in turn, is based upon *Smith* v. *Hughes*.

[30] *Baker* v. *Guaranty Savings*, [1931] S.C.R. 199; *Scriven* v. *Hindley*, [1913] 3 K.B. 564. For quite different interpretations of *Scriven* v. *Hindley*, see ANSON, (18th ed.) at p. 157 and SALMOND & WINFIELD, CONTRACTS, 179. See POLLOCK CONTRACTS, (10th ed.) p. 484 (n.y.); 2 C.E.D. (Ont.) at p. 855 seems to adopt the view of SALMOND & WINFIELD.

purpose of developing" the farm as a mining property. The word "developing" had a multitude of possible meanings in the context. A sues B for specific performance. B sets up by way of defence that he was to receive shares in a syndicate which was to "develop" the farm and that the shares tendered were not shares in a syndicate equipped with working capital adequate to "develop" the farm. B said, therefore, that the shares tendered were not the kind of shares he bargained for. Lord Atkinson had this to say: "The case is, in truth, a case of the purchase and sale of land, where the price to be paid for the land—the thing to be given in exchange for it—is uncertain, not only in value, but in nature and character, namely, a given number of shares in a syndicate the nature of whose objects, the extent and character of whose operations, and the adequacy of whose working capital are not defined, or ascertainable with precision, so that, if the construction of the contract contended for by the plaintiff be adopted, it may reasonably be supposed to have an effect which the defendant did not contemplate. In such a case the Court will not enforce the agreement, though the defendant may, himself, be responsible for the ambiguity, on the ground that 'it is against conscience for a man to take advantage of the plain mistake of another, or, at least, that a Court of Equity will not assist him in doing so'. (*Manser* v. *Back*, 6 Hare 443 at p. 448.) In *Calverley* v. *Williams* (1 Ves. Jr. 210) Lord Thurlow goes the length of holding that, in such cases, there is no contract, the parties misunderstanding one another, the one proposing to buy one thing, the other to sell another. (See *Clowes* v. *Higginson*, (I Ves. & B. 524)." —*Douglas* v. *Baynes*, [1908] A.C. at p. 485.[30A] In such cases the subject-matter is not necessarily a physical *res*. The words used are capable of a variety of meanings and there may, in the result, be no *consensus ad idem* because each party reasonably attaches a different meaning to the words used. See *Kidston* v. *Stirling & Pitcairn Ltd.*, 55 D.L.R.

[30A] *Cf. Kennedy* v. *Panama Mail Steamship*, L.R. 2 Q.B. 580. A similar question arises where a party wishes to rescind for fraud or other reason producing defeasibility. Can he restore the same thing? See *Clark* v. *Dickson*, E.B. & E. 148; *Armstrong* v. *Jackson*, [1917] 2 K.B. at p. 289. In *Dominion Royalty* v. *Goffatt*, [1935] 1 D.L.R. 780; [1935] 4 D.L.R. 136, B purchased some shares in an oil well to be completed. When he wished to rescind he can give only shares in a dry hole in the ground. These were different things and B could not give true *restitutio in integrum*.

at p. 372 (Anglin J.); *Barber* v. *Snell*, [1923] 2 W.W.R. at pp. 683-4.[30AA]

Most cases as to non-agreement or *dissensus* as to the subject-matter of an alleged contract can be brought within the principles underlying these illustrations.

Of course the parties to a contract can make the operation of the contract depend upon any condition which they please.[31] The condition being part of the actual agreement of the parties, "derives its efficacy from the consent of the parties, express or, implied".[32] There may be a term in the contract, express or

[30AA] In *Murray* v. *Jenkins*, 28 S.C.R. 565, a case which probably involves agency more than mistake, A had certain swamp lands for sale. A instructed B to get a buyer. B's authority was strictly limited to negotiating for the sale of the swamp lands. B gets an offer from C which in terms related to the swamp lots, plus 16 others. B erroneously assumed this related to the swamp lots only. B told A that he had been offered $1,000 for the swamp lots. A told B to accept which B did and he received a deposit from C. Sedgewick J. suggested that a unilateral fundamental mistake such as this might have precluded there being a contract even between B and C had B been himself the owner and not merely an agent for the owner (at p. 577). This was not necessary to be decided. But A was not bound. B was not held out as agent except as to the swamp lots. There was no estoppel precluding A from showing her real intention. The case is treated as analogous to *Foster* v. *MacKinnon*, L.R. 4 C.P. 704. A's mind did not go with her words or her pen. The parties were not *ad idem*, each having a different view of the subject-matter. (*Wilding* v. *Sanderson*, [1897] 2 Ch. 534.) See *Pither* v. *Leiser*, 9 B.C.R. 257; 32 S.C.R. 651; *Gordon-Cumming* v. *Houldsworth*, [1910] A.C. at pp. 543, 544-45-549-50, 557; *Falck* v. *Williams*, [1900] A.C. 176; *Hanley* .v *Can. Packers, supra; Hobbs* v. *Esquimault etc.*, 29 S.C.R. 450; *Malins* v. *Freeman*, 2 Keen. 253; *Tamplin* v. *James*, 15 Ch. D. 215; *Van Praagh* v. *Everidge*, [1902] 2 Ch. 266; SALMOND & WINFIELD, at p. 179. Where the mistake as to subject-matter is due to the error of an intermediary for whom neither party is deemed responsible, see *Henkel* v. *Pape*, L.R. 6 Ex. 1.

[31] Leaving out of account questions of impossibility, or conditions *contra bonos mores* or actually illegal. See SALMOND & WINFIELD, CONTRACTS, 192-3; Lord Blackburn in *Thomson* v. *Weems*, 9 App. Cas. at p. 683; Lord Haldane in *Dawson's Ltd.* v. *Bonnin*, [1922] 2 A.C. 413; *Union Insurance* v. *Wills*, 32 T.L.R. 196; *Bannerman* v. *White*, 10 C.B.N.S. 844; Du Parcq L.J. in *Kleinwort Sons* v. *Ungarische*, [1939] 2 K.B. at p. 698. Sometimes the courts set their faces against implying terms or conditions in a contract. See [1940] 1 All E.R. 603, 39 T.L.R. at 340.

[32] Lord Atkin in *Bell's Case*, [1932] A.C. at p. 225; Willes J. in *Lakeman* v. *Mountstephen*, L.R. 7 Q.B. at p. 202. As to implying conditions in a contracts, see further, Duff J. in *Roche* v. *Johnson*, 53 S.C.R. at pp. 36-39 where *Dahl* v. *Nelson*, 6 App. Cas. at p. 59, and *Hamlyn* v. *Wood*, [1891] 2 Q.B. at p. 491 are cited. See also the speech of Lord Wright in *Luxor Ltd.* v. *Cooper*, 57 T.L.R. 213. The expression "implied term" is there stated to be used in two senses. In some cases it is implied by law purely and simply. In other cases it is truly consensual. It rests upon true intention but is found secreted in the interstices of the parties' language. The speeches in this case show the reluctance of the courts to make contracts for the parties by implying terms when there is no absolute necessity to do so, especially when the contents of the implied term cannot be formulated with precision. In *Merchant's etc.* v. *Hunt*, 57 T.L.R. 208, it was unsuccessfully argued that non-disclosure and misrepresentation as defences to an action on an insurance contract rested upon an implied term in the contract. That the defence resting upon misrepresentation

implied, that the operative effect of the contract depends upon a certain state of affairs then existing. A has a specific horse which B wishes to buy. A agrees to sell the horse and B agrees to buy it. Unknown to both, the horse is already dead. There is no operative contract because both the parties contract upon the implied, basic, condition that they are dealing with respect to a living horse (*de certo corpore*, 39 T.L.R. at p. 321). The fundamental underlying condition is not satisfied and no effective contract emerges. This follows from the implied term of the agreement itself. "The question of the existence of conditions, express or implied, is obviously one that affects not the formation of contract, but the investigation of the terms of the contract when made. A condition derives its efficacy from the consent of the parties, express or implied. They have agreed but on what terms. One term may be that unless the facts are or are not of a particular nature, or unless an event has or has not happened, the contract is not to take effect."[33] Of course

rested on an implied term was unequivocally rejected (at pp. 210, 212). The question as to non-disclosure was left open by Luxmoore L.J. (at p. 212). Scott L.J. inclined to the view that the defence arising from non-disclosure did not rest upon an implied term (at p. 210). See note 40, *infra*.

[33] Lord Atkin in *Bell's Case*, [1932] A.C. at pp.224–5; Lawrence J. in same case, [1931] 1 K.B. at p. 590; POLLOCK, CONTRACTS, 10th ed. at p. 491; *Munro* v. *Meyer*, [1930] 2 K.B. at p. 333; Greene L.J. in *Craven-Ellis* v. *Canon's Ltd.*, [1936] 2 K.B. at p. 413 where SALMOND & WINFIELD, at p. 296, is cited and approved; *The Salvador*, 26 T.L.R. 149. *Cf. Palmer* v. *Wallbridge*, 15 S.C.R. 650. Pothier treats the antecedent destruction of the subject-matter as a destroying of one of the *essentalia* of the sale as imposed by law. The existence of the thing sold is, as it were, a *conditio juris*, a condition of the class *quae tacite insunt*. If an essential condition is not satisfied it is legally impossible to have a sale. (POTHIER, OBLIGATIONS, Pt. 1, c. 1, s. 1, art. 1, s. 3.) In view of the fact that the failure of a really operative contract to come into being, is due to the non-satisfaction of a consensually implied term, doubts have been expressed as to whether this type of case involves mistake at all. See ANSON CONTRACTS, 18th ed. 144; POLLOCK, 10th ed. 491; SALMOND & WINFIELD, at p. 193. The Sale of Goods Act adopts the common law rule on this matter of the perishing of specific goods unknown to the parties and the antecedent perishing of a substantial part of the goods has the same effect. *Barrow* v. *Phillips*, [1929] 1 K.B. 574. 41 Col. L.R. at 386 (Z. Chafee, Jr.).

The specific subject-matter need not be a physical *res*. It may be merely an intangible, a title or a right. Thus the purchase of an assignment of an annuity on the life of a person already dead but thought living by both parties, is ineffective. *Strickland* v. *Turner*, 7 Ex. 208. See *Kennedy* v. *Thomassen*, [1929] 1 Ch. 426. The same applies to the sale of a life policy on a life already expired, unknown to both parties. *Scott* v. *Coulson*, [1903] 2 Ch. 249, discussed in *Munro* v. *Meyer*, [1930] 2 K.B. at p. 334, and in the *Bell Case*, [1932] A.C. at pp. 206, 236. See AMERICAN RESTATEMENT, s. 456; 5021. *Cf. Smith* v. *Becker*, [1916] 2 Ch. 86.) But, of course, the nature of the transaction may mean that the parties are deliberately dealing in a risk, a mere *spes*. In such a case the non-existence of the right or thing may not preclude a contract coming into being and being effective. *Electric etc.* v. *Electric*, 43 S.C.R. at p. 19; D. 19, 1, 121.

Mutual mistake as to the existence of a right may exist in the case of purchase of *res suae* where both parties believe that the seller is entitled, it subsequently becoming clear that the buyer was already the owner.

the condition may relate to a time after the contract is made. Then, failure of the condition works a frustration. The contract comes into being and is not void *ab initio*. The failure of the basic condition which the parties impliedly put into their contract works a frustration only from the moment of the failure.[34]

It is with respect to implied conditions involving the quality of the subject-matter that the principal difficulty is involved. *Smith* v. *Hughes* shews that a one-sided belief by the buyer as to a quality in the goods which are the subject-matter of the sale is not sufficient to prevent an effective contract coming into being, notwithstanding that the possession of that quality is vital for the buyer's purposes. This is true notwithstanding that the seller knows the buyer thinks the goods have that quality and that he would not buy them unless they had it. Fraud or warranty apart, the buyer's self-deception is *nullius momenti*. The buyer, however, can stipulate that he enters into the contract only on the assumption that a certain quality exists. Whether this is a condition merely, or a promise in addition to a condition in the strict sense, depends on the facts of each case. "The question of the existence of conditions, express or implied, is obviously one that affects not the formation of the contract,

---

Here the basic, mutual mistake prevents a contract coming into being. *Copper* v. *Phibbs*, L.R. 2 H.L. 140; discussed in [1932] A.C. at pp.218, 236; [1934] A.C. at p. 462; *Richardson* v. *Tiffin*, [1940] 3 D.L.R. at p. 490; *Munro* v. *Meyer*, [1930] 2 K.B. at p. 334; *Cole* v. *Pope*, 29 S.C.R. at pp. 295–6; SALMOND & WINFIELD, CONTRACTS, 192–51. See further as to *res suae*, note 61, *infra*.

A contract may be subject to a suspensive condition relating even to extraneous matters upon which its becoming operative at all depends. This condition may be express or it may be implied from the circumstances. *McKenna* v. *McNamee*, 15 S.C.R. 311. The surrounding circumstances may show that a basic condition has to be, or is to become, satisfied before the contract operates as such at all. The implication of this basic condition, accepted as such by both parties, may be made notwithstanding that the contract is in writing and the writing itself makes no reference to it. Such parol condition does not contradict the writing within the meaning of the parol evidence rule. It negatives the existence of a contract at all until the basic condition is satisfied. *Pym* v. *Campbell*, 6 E. & B. 370; *McKenna* v. *McNamee*, 15 S.C.R. at p. 317. In the frustration cases a contract arises in the first instance but it is later terminated through the operation of an implied resolutive condition. The contract, in such cases, is not void *ab initio* but merely from the time at which the resolutive condition comes into play. *Cheong Yue S.S. Co.* v. *Hirji Mulji*, [1926] 1 W.W.R. at pp. 926–7, Lord Sumner.

[34] Lord Atkin in the *Bell Case*, [1932] A.C. at p. 225; Lord Sumner in *Cheong Yue Steamship Co.* v. *Hirji*, [1926] 1 W.W.R. 917; *Larringa & Co.* v. *Societe Franco-Americaine*, 39 T.L.R. at pp. 318, 320, 321; *Ocean Trawlers* v. *Maritime etc.*, [1935] 2 W.W.R. at p. 610 (Lord Wright); *Battle* v. *Willox*, 40 S.C.R. at p. 205. Whether the implied condition in the frustration cases is truly consensual or is a fiction implied by law has been discussed. See LORD WRIGHT, LEGAL ESSAYS & ADDRESSES, 255; 2 Modern Law Rev. 233; 4 Modern Law Rev. 63; Lord Wright, *Luxor* v. *Cooper*, 57 T.L.R. at p. 221.

but the investigation of the terms of the contract when made."[35] "It may appear that the parties contracted that the article should possess the quality which one or other or both mistakenly believe it to possess. But in such a case there is a contract and the inquiry is a different one, being whether the contract as to quality amounts to a condition or a warranty . . . ."[36] On the other hand, the implied condition may be a condition *stricto sensu* only. There is not a promise that it is to be fulfilled, but its being so is a condition upon which the existence of an effective and operative contract depends, or, if the condition is inserted for the benefit of one party only, that party can insist upon treating the contract as ineffective. In this latter case, it may be that the party for whose benefit it is inserted, has the option of waiving the breach of the condition and insisting upon the carrying out of the contract.[37] Or there may be cases in which the condition is such that, on its not being satisfied, either party can say that the contract, by its own terms, express or implied, is to be ineffective without liability being incurred by either for breach. This is the situation which arises in the case of the sale of *res exstinctae*. The parties have in mind specific goods. The goods, unknown to both, have perished or changed their vital character.[37A] The contract contains an implied condition that the effectiveness of the contract depends upon the existence of the goods. If they do not exist, the contract itself provides for the result. "..... If the contract expressly or impliedly contains a term that a particular assumption is a condition of the contract, the contract is avoided if the assumption is not true."[38] But the courts are not lightly to imply conditions having this effect. Obviously a condition cannot be implied in a contract unless both parties treated the matter of it as vital. The state of facts as they are must be so important that the subject-matter of the contract would be different in kind from the subject-matter of the contract which would have existed if the facts had been as both believed them

[35] Lord Atkin in *Bell's Case* [1932] A.C. at pp. 224–4.

[36] *Ibid.* at p. 218.

[37] Lord Atkin, [1932] A.C. at p. 225; See Lord Haldane in *Dawson* v. *Bonin, supra*. Where a contract is to become void on a certain event, a party cannot take advantage of this condition where his own conduct has caused the situation. *N.Z. Shipping Co.* v. *Societe*, [1919] A.C. 1; *Commissioner etc.* v. *Irwin*, [1940] O.R. 489. *In jure civil receptum est quotiens per eum, cujus interest conditionem non impleri, fiat quo minus impleatur, perinde haberi, ac si impleta condicio fuisset.* D. 50, 17, 161.

[37A] For an instance of change in vital character without actual physical destruction, see *Asfar* v. *Blundell*, [1896] 1 Q.B. at p. 127; *Rendell* v. *Turnbull*, 27 N.Z.L.R. 1067.

[38] Lord Atkin, [1932] A.C. at p. 225.

to be.[39] The condition implied must relate "to something which both must necessarily have accepted in their minds as an essential and integral element of the subject-matter".[40] In effect, mistake as to quality, apart from warranty or fraud, must, if it is to affect the effectiveness of the contract, be the mistake of both parties "as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be".[41] The quality must be the subject-matter of an erroneous assumption on the part of both parties and it must be of such "a fundamental character as to constitute an underlying assumption without which the parties would not have made the contract they in fact made".[42] It is to be distinguished from "a common error as to a material element, but one not going to the root of the matter and not affecting the substance of the consideration".[43] In effect, the court seems

[39] *Ibid.* at p. 226; *cf.* at p. 218.

[40] Lord Thankerton, [1932] A.C. at p. 235. The practice of implying conditions in contracts in order to make the contract conform to the court's idea of justice under the circumstances is recognized to be a dangerous one. "Nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which they have not in terms made by importing implications which would appear to make the contract more businesslike or more just. The implications to be made are to be no more than are 'necessary' for giving business efficacy to the transaction and it appears to me that both as to existing facts and future facts, a condition would not be implied unless the new state of facts makes the contract something different in kind from the contract in the original state of facts." (Lord Atkin in the *Bell Case*, [1932] A.C. at p. 226.) See Lord Wright in *Luxor* v. *Cooper*, 57 T.L.R. at p. 221; *Kelly* v. *Watson*, 61 S.C.R. 482. *See* note 32, *supra*.

[41] Lord Atkin, [1932] A.C. at p. 218.

[42] Lord Warrington, diss., [1932] A.C. at 208.

[43] *Ibid.*, and see Lord Atkin at pp. 218, 226. A has a specific cow for sale. B buys it. Both believe that the cow is sound but there is no warranty, fraud or misrepresentation to that effect. The contract is good. (Lord Atkin in *Bell's Case* at p. 226.) A buys a thoroughbred cow from B. Both believe that the cow is sterile. It is accordingly sold as a "beef" cow at a "beef" price, viz. $80. The cow was in fact in calf at the time and is, in consequence, worth $750–1,000. The Court (*Sherwood* v. *Walker*, 33 N.W. 919) held there was no contract. There was no mistake as to the identity of the animal. However, the mistake was not merely as to an accidental quality of the animal. It went to the very nature of the thing. "A barren cow is substantially different from a breeding one." See *Thwaites* v. *Morrison*, 14 Alberta L.R. at p. 18; *Gill* v. *McDowell*, [1903] 2 Ir. R. 643; *Cotter* v. *Lackie*, [1918] N.Z.L.R. 811. See *Brooks* v. *Cripps*, [1930] 1 W.W.R. 595: both parties think a car dealt in is new. It is in fact old (secondhand). This was held to be merely a mistake as to an accidental quality. (*Cf.* D. 18, 1, 45.) The parties to a sale have in view a specific parcel of potatoes. The 'potatoes' look like potatoes. Unknown to both they suffer from 'second growth' which is not readily capable of detection until the potatoes are cooked. They are completely useless as potatoes. There is no contract. It is as if the potatoes had physically perished. *Rendell* v. *Turnbull*, (1908), 27 N.Z.L.R. 1067. A sells to B what both think is a bill. Unknown to both it is void because of forgery or noncompliance with the stamp laws. The transaction is a nullity and A must return what he received. *Gompertz* v. *Bartlett*, 2 E. & B. 849; *Gurney* v. *Womersley*, 4 E. & B. 133. These cases are referred to

by Blackburn J. in *Kennedy* v. *Panama etc.*, L.R. 2 Q.B. 580 and in *Hobbs* v. *Esquimault etc., Ry.*, 29 S.C.R. at 465, and in the *Bell Case*, [1932] A.C. at pp. 219, 234. *Cf. Guaranty Trust* v. *Hannay*, 34 T.L.R. at p. 429. If the bill in these cases had been legally a bill and not a complete nullity, the fact that a party to it had, unknown to both parties, become insolvent or stopped payment, is merely an accidental matter and does not make the transaction a nullity. (*Hecht* v. *Batcheller*, 147 Mass. 335; *Sullivan* v. *Home Bank*, [1927] S.C.R. 115. *Cf. Emmerson's Case*, L.R. 1 Ch. App. 433.) Error as to quality may be merely as to an accidental quality unless it is so serious as to go to the generic character of the thing. This means that the error is so serious that the thing as it is, falls into a different commercial category from a thing having the quality which both parties believed it to have. In *Smith* v. *Hughes*, 'old' oats and 'new' oats were of the same genus. In certain circumstances, the parties may have set up their own genus. In such a case a mutual mistake as to the thing falling within this special genus may prevent a contract arising. See *Frear* v. *Gilders*, 50 O.L.R. 217; *cf. Bannerman* v. *White*, 10 C.B.N.S. 844. Mutual error as to fundamental quality, the existence of which the parties treated as basic, is not merely a question of error as to a matter furnishing a motive for entering into the contract. It is treated as having the same effect as the antecedent perishing of specific goods, unknown to the parties.

There are cases in which the parties have a common belief as to the quality of the subject-matter but the truth of this common belief is not made a basic condition upon which the contract is founded. There may be an element of dubiety or uncertainty or speculation in the matter which both parties realize. A finds a stone. He takes it to B, a country jeweller. Both think it a topaz but there is no certainty in the matter. B offers A one dollar for the stone. A accepts. Later the stone turns out to be an uncut diamond worth several hundred dollars. The contract stands. (*Wood* v. *Boynton*, 25 N.W. 42.). *Cf.* AMERICAN LAW INSTITUTE, RESTATEMENT OF CONTRACTS, Vol. 2, p. 968: WHARTON, CONTRACTS, Vol. 1, 171, 172; *Gowan* v. *Christie*, L.R. 2 Sc. App. 273; *Electric etc.* v. *Electric*, 43 S.C.R. at p. 195; *Holmes* v. *Payne*, 46 T.L.R. 413; *Howell* v. *Stagg*, [1937] 2 W.W.R. at p. 337; *cf. Norwich Union* v. *Price*, [1934] A.C. 453.

A intended to pay B by giving him a fifty-cent piece. A gave a gold coin of a private California issue by mistake. B received the 'coin' as fifty cents and he in turn passed it to C. The property in the pseudo-coin never passed. A could recover its value from C. *Chapman* v. *Cole*, 12 Gray 141 (Mass.). See *R.* v. *Ashwell*, 16 Q.B.D. 190; 1 WHARTON, 187; *R.* v. *Middleton*, L.R. 1 C.C.R. at 45, 57; POLLOCK & WRIGHT, POSSESSION, at p. 109. A agrees to sell B and B agrees to buy "these barrels of mackerel". The barrels, contrary to the belief of each, contain salt. Holmes says the contract is void. (HOLMES, COMMON LAW, at p. 310, and *cf. Connor* v. *Henderson*, 15 Mass. 319.) If the barrels contained mackerel which was so rotten as not to be marketable as mackerel in the trade, the same result would probably follow. The mackerel, a specific subject-matter, would really have ceased to exist as such. If the contents could be properly described as 'mackerel', it would make no difference that the 'mackerel' was of a low or deteriorated quality, there being no warranty of fraud. A agrees to sell and B agrees to buy a cask containing a liquid which both believe to be wine. It really contains vinegar. There is no contract. If it contains wine gone slightly sour, there would be a good contract in the absence of warranty or condition. (D. 18, 1, 9, 2.) If a specific farm is sold for a lump sum, both parties believing it to contain about 271 acres, the contract is good although it turns out there are only 167 acres, there being no warranty or fraud. *Hansen* v. *Franz*, 57 S.C.R. 57. If the farm had been sold at so much per acre, there could be recovery for overpayment on the basis of an action for money paid under mistake of fact. The same would follow where a silver bar is sold, on the basis of an assay. An overpayment due to a mistaken assay could be recovered on the same ground. *Cox* v. *Prentice*, 3 M. & S. 345; *cf. Clarke* v. *White*, 3 S.C.R. at p. 315.

B agrees to guarantee a secured advance made by A to C. The advance is made but there is no security. B is not liable. A secured and an unsecured advance are different in substance (*Greer* v. *Kettle*, [1938]

to assimilate the case of fundamental, bilateral mistake as to quality to the case of specific goods believed to exist but which have in fact perished, unknown to the parties. The thing which exists without the fundamental qualities assumed by both parties to exist is "essentially different from the thing as it was believed to be".[44] The thing, therefore, in effect, does not exist. The condition which both parties, by implication, include in their agreement as a basic condition of its effectiveness is not satisfied and there is, in each case, the result that the agreement, by reason of its own implied term, fails to become an effective, operative contract.[45]

By treating a mistake of both parties as to some essential quality in the specific subject-matter as bringing into play an implied condition, consensually interposed, the contract is just allowed to work itself out in accordance with its own terms. The condition operates and the contract is thereafter ineffective. But it is not right to say that the contract is void. The condition itself is part of the contract and that certainly operates.[46]

A.C. 156. See *Chauret* v. *Joubert*, [1923] S.C.R. at pp. 6, 15.) A agrees to sell and B agrees to buy shares in a specific steamship company. Both believe the company has a valuable government mail contract and B is largely influenced in buying by this belief. The company has not the government contract. The contract to buy the shares stands. The shares exist and there is no error *in substantia*. *Kennedy* v. *Panama etc., supra.*

[44] Lord Atkin in the *Bell Case*, [1932] A.C. at p. 218; ANSON, CONTRACTS, 18th ed. 148–9.

[45] *See* POLLOCK, CONTRACTS, 10th ed. at p. 491.

[46] Lord Atkin recognizes that the 'implied condition in the contract' theory is just an 'alternative mode of expressing the result of mutual mistake'. [1932] A.C. at p. 224.) The alternative mode he outlines at p. 218: "Mistake as to quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties and is as to the existence of some quality which makes the thing without the quality essentially different from the thing it was believed to be." Is this *error in substantia*? See generally 52 L.Q.R. 79 (Lawson); BUCKLAND & MCNAIR, ROMAN & COMMON LAW, 160 *et seq.;* ANSON, CONTRACTS, 18th ed. 145–9; POLLOCK, CONTRACTS, 10th ed. 495 *et seq.;* 51 L.Q.R. 650; 52 L.Q.R. 27; 53 L.Q.R. 118; SALMOND & WINFIELD, 192–5; HOLMES, COMMON LAW, 310; MOYLE, CONTRACT OF SALE IN THE CIVIL LAW, 55; MACINTOSH, ROMAN LAW OF SALE, (1st ed.) 39, 94; WHARTON ON CONTRACTS, Vol. 1, 177, 187, 188, 189; 2 KENT'S COMMENTARIES, 471; POTHIER, OBLIGATIONS, Pt. 1, c. 1, s. 1, Art. 3; *Kennedy* v. *Panama Mail Steamship*, L.R. 2 Q.B. 580; *Frear* v. *Gilders*, 50 O.L.R. 217; *Douglas* v. *Baynes*, [1908] A.C. at p. 485; *Lings* v. *Zbryski*, [1930] 3 W.W.R. at pp. 416, 418; *Hansen* v. *Franz*, 57 S.C.R. at p. 79; *Redican* v. *Nesbitt*, [1924] S.C.R. at p. 146; *Brownlee* v. *Campbell*, 5 App. Cas. at p. 937; *Thwaites* v. *Morrison*, 14 Alta. L.R. at pp. 11, 18–21; *Cotter* v. *Lackie*, [1918] N.Z.L.R. 811; *Galloway* v. *Galloway*, 30 T.L.R. 531; *Law* v. *Harragan*, 33 T.L.R. 381; *Thomspon* v. *Crawford*, [1932] 4 D.L.R. 206; *Fowke* v. *Fowke*, [1938] Ch. 774: *Re Eaves*, [1939] 4 All E.R. 260; *Holmes* v. *Payne*, 46 T.L.R. 413; In *re Thelluson*, 35 T.L.R. 499, 732; *Hecht* v. *Batcheller*, 147 Mass. 335; *Sherwood* v. *Walker*, 66 Mich. 568; *Wood* v. *Boynton*, 64 Wisconsin 265; *Danforth Heights* v. *McDermid*, 52 O.L.R. at p. 419; *Cavanagh* v. *Tyson*, 227 Mass. 437; *Howell* v. *Stagg*, [1937] 2 W.W.R. at pp. 337; 338; *Smith* v. *Becker*, [1916] 2 Ch. at pp. 92, 93, 99.

The alternate method of expressing the effect of mutual mistake as to quality, apart from importing an implied condition into the agreement itself whereby the government loses its effectiveness if the condition is not satisfied, involves difficulties. Lord Atkin[47] in dealing with the matter apart from the 'implied condition theory' requires the mistake as to quality to be shared by both parties and to be as to the "existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be".[48] The test of the essentiality is apparently objective. It is not enough that both parties regard the possession of the quality as "a fundamental reason for making [the contract]".[49] But apparently if the existence of the quality is "in the opinion of both parties fundamental to the . . . . validity of the contract" or if it is "a foundation essential to its existence"[49A] that is sufficient. These last three expressions are used by Lord Atkin in dealing with the 'implied condition' method of approach and they, in themselves, suggest that the parties may determine essentiality. But Lord Atkin then goes on to say that "a condition would not be implied unless the new state of facts makes the contract something different in kind from the original state of facts."[50] This seems to be a reversion again to the objective measure of essentiality which would mean that not the parties but at least three members of the House of Lords, sitting judicially, must determine essentiality. If the condition is truly consensual, why not let the parties determine its content? Or is the 'implied condition' entirely constructive—a 'quasi-condition'—conjured up to provide a rationalization for the effect of bilateral, basic mistake as to quality?[50A] Lord Atkin, probably, in adopting the objective

[47] Lord Atkin, [1932] A.C. at p. 224.
[48] [1932] A.C. at p. 218.
[49] [1932] A.C. at pp. 225–6; *cf.* RESTATEMENT, s. 502.
[49A] *Ibid.*
[50] [1932] A.C. at p. 226.
[50A] The technique of the implied condition may be used to produce almost any desired result, provided the right conditions are implied. For instance, in the matter of impossibility, the courts got into a *cul-de-sac*. The implication of a *rebus sic stantibus* condition was a "device by which the rules as to absolute contracts are reconciled with a special exception which justice demands." (Lord Sumner in *Cheong Yue S.S. Co.* v. *Hirji Mulji*, [1926] A.C. at p. 510, referred to by Lord Wright in *Ocean Trawlers* v. *Maritime etc.*, [1935] 2 W.W.R. at 610.) Lord Wright, in the case last cited, thinks that the implying of conditions is not to be unduly extended. The courts, in fact, which implied a resolutive condition in the frustration cases were not in a whole-hearted implying mood. They refused to go on and imply a further positive term that money paid before frustration should be refunded. (*Chandler* v. *Webster*, 20 T.L.R. 222.) See the Report of the Law Revision Committee on the rule in *Chandler* v. *Webster*, 51 Jur. Rev. 344. Lord Atkin, also, in the *Bell Case*, [1932] A.C. at p. 226 sounds a warning against a too generous implying of terms. He says the

view, was resisting any attempt to give effect to *falsa causa*. Admittedly a false reason by one party is immaterial.[51] And Lord Atkin appears to extend the same result to *falsa causa* by both. To get a test which is out of the danger-land of the reasons of the parties for making the contract, he introduces the objective test—the test of 'difference in kind', the test of 'essential difference'. Lord Thankerton, on the other hand, does not elaborate the 'implied condition theory'. In fact his speech rather repudiates the implied condition theory as applied to "the question of error or mistake as rendering a contract void". He admits that the frustration cases go on an implied condition. But there you have a contract to start with. Lord Thankerton seems to treat error or mistake as to basic, essential or integral quality, which both parties "have accepted in their minds as an essential and integral element of the subject-matter", "as rendering a contract void owing to failure of consideration". Consideration usually does not fail unless there is a contract calling for consideration. What is really meant appears to be not strictly failure of consideration but really the non-existence of the identical subject-matter, and that non-existence occurs, although the husk of the subject-matter continues, if something is lacking "which both must necessarily have accepted in their minds as an essential and integral element of the subject-matter".[51A] In

implication must be no more than is necessary to give business efficacy to the transaction, and a term ought not to be implied unless the new state of facts makes the contract something different in kind from the contract in the assumed original state of facts. *See Roche* v. *Johnson*, 53 S.C.R. at pp. 36–9; see note 40, *supra;* "When a recital [in a deed] is intended to be a statement which all the parties to [the] deed have mutually agreed to admit as true, it is an estoppel upon all." (Patteson J., 14 Q.B. at 787, referred to by Lord Maugham In *Greer* v. *Kettle*, [1938] A.C. at p. 170). An assumed state of facts may be mutually admitted as true and basic. There may then be an estoppel against showing the facts to be otherwise. This rule and its qualifications are discussed by Lord Maugham in *Greer* v. *Kettle*, [1938] A.C. at pp. 168–172.

The condition implied in the frustration cases is, as is pointed out by Lord Sumner in the *Hurji Mulji Case*, *supra*, resolutive. A condition implied as to an assumed state of facts existing at the time the contract is entered into, is precedent. In such cases, too, "It is . . . . essential that the mistake relied on should be of such a nature that it can properly described as a mistake in respect of the underlying assumption of the contract or transaction as being fundamenta lor basic. Whether the mistake does satisfy this description may often be a matter of great difficulty." (Lord Wright in *Norwich Union* v. *Price*, [1934] A.C. at p. 463.) See Lord Atkinson in *Douglas* v. *Baynes*, [1908] A.C. at pp. 481–2.

[51] Lord Atkin at p. 226; Lord Thankerton at p. 235.

[51A] In *Ward* v. *Hobbs*, 4 App. Cas. 13, pigs known to be suffering from typhoid fever were sent to market for sale. They were sold without warranty or representation, just as they were. It was tried to be argued that the animals were not "pigs" in any real sense. Lord Cairns has this to say:" The next of the subsiduary points was this: It was said that that which was sold here (this I think was rather a figurative expression than a serious argument) was not really a lot of pigs but a mass of disease

his view the test of essentiality is the common intent of both parties. His test appears to be subjective.[52]

The effect of a mistake, bilaterally existing, is further considered by Lord Wright in *Norwich Union Fire Insurance Society* v. *W. H. Price Limited.*[53] In that case there was a misconception both on the part of the insurer and the insured that there had been a loss by perils insured against. If there had been no such loss, there was no liability to pay and no payment would have been made. "The facts which were misconceived were those which were essential to liability and were of such a nature that on well-established principles any agreement concluded under such mistake was void in law, so that any payment made under such mistake was recoverable. The mistake, being of the character that it was, prevented there being that intention which the common law regards as essential to the making of an agreement or the transfer of property."[54] The mistake relied upon "should be of such a nature that it can properly be described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic. Whether the mistake does satisfy this description may often be a matter of great difficulty".[55] In another place Lord Wright applies the epithet 'vital' to the mistake.[56] Lord Wright quotes Lord Westbury in *Cooper* v. *Phibbs*[57] where Lord Westbury says: "If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a

—of typhoid fever. To that all I can say is that a pig having typhoid fever appears to me not to lose its *identity* any more than a man having typhoid fever ceases to be a man; and therefore, the thing sold was what it professed to be." But potatoes affected by 'second growth' apparently are not 'potatoes'. (*Rendell* v. *Turnbull* (1908), 27 N.Z.L.R. 1067.) See ANSON, 18th ed. at 148. In *Angel* v. *Jay*, [1911] 1 K.B. at pp. 673–4, Buchnill J., after referring to *Kennedy* v. *Panama Mail Steamship, supra*, (L.R. 2 Q.B. at p. 587) thought the difference between a sanitary and an unsanitary house was not such a complete difference in substance between what was supposed to be and was taken, so as to constitute a failure of consideration. Here Lord Thankerton's view as to 'failure of consideration' is emphasized. In the *Kennedy Case* itself, Blackburn J. speaks of 'failure of consideration'. So also does Lord Atkin in the *Bell Case*, [1932] A.C. at p. 220. See [1923] S.C.R. at p. 15.)

In *Clay* v. *Powell*, [1932] S.C.R. at p. 217, Rinfret J. thought that the difference between treasury shares of a company and shares transferred by an individual shareholder was not a mere difference in quantity to which *Smith* v. *Hughes* applied, but a real difference in identity.

[52] ANSON, 18th ed. 146–9; 52 L.Q.R. at pp. 91 *et seq.* (Lawson).

[53] [1934] A.C. 455; *cf. City of Woodstock* v. *Oxford*, 44 S.C.R. 603.

[54] [1934] A.C. at pp. 461–2.

[55] [1934] A.C. at p. 463.

[56] [1934] A.C. at p. 462.

[57] L.R. 2 H.L. at p. 170; *See Re Cameron*, [1939] 4 D.L.R. at p. 588; *Richardson* v. *Tiffin*, [1940] 3 D.L.R. at p. 490 (Duff C.J. diss.).

common mistake." Lord Wright makes the comment that "at common law such a contract (or simulacrum of a contract) is more correctly described as void, there being in truth no intention to contract".[58] He then points out that there is nothing inconsistent with this in *Bell* v. *Lever Bros.*[59] Lord Wright seems to base the failure of the transaction upon the absence of intention. The mind does not go with the transaction. There is the failure of the coincidence of intention and act which is necessary to transfer property or to make a contract. The failure of the 'underlying assumption' precludes intent either to contract or transfer property. The result is that mutual mistake as to a basic, underlying assumption, prevents a contrcat coming into being. The apparent contract is a nullity *ab initio*.[60]

In *Bell* v. *Lever Brothers*, B pays A a large sum to be relieved from an existing onerous contract. That contract existed. It was not void although it was defeasible because of certain things A had done. B certainly did not know of these things. A knew, though it may be that his mind was not directed to them or their legal effect when he made the new agreement and received the money under it. Two members of the House of Lords (probably three) thought there was no fundamental, basic error which entitled B to recover back the money so paid. Six other learned Judges at various stages of the case thought otherwise. In the opinion of the majority in

[58] [1934] A.C. at p. 463. This quotation from Lord Westbury was also considered by Lord Atkin in the *Bell Case*, [1932] A.C. at p. 218, where the same criticism is made of Lord Westbury's statement.

[59] [1934] A.C. at p. 463.

[60] Lord Wright ([1934] A.C. at p. 462) quotes from the speech of Lord Shaw in *Jones* v. *Waring & Gillow*, [1926] A.C. 670. Lord Shaw uses language which seems to be derived from the *non est factum* cases (*e.g. Foster* v. *MacKinnon*, L.R. 4 C.P. 711,): "The mind of the grantor does not go with the transaction at all; his mind goes with another transaction and he is meaning to give effect to that transaction, depending on facts different from those which were the true facts." In the *non est factum* cases the mistake may be merely unilateral. Some language of Lord Wright ([1934] A.C. at p. 463) might suggest that unilateral mistake as to a basic, underlying assumption, might preclude consent which would, in turn, prevent a contract arising. But at p. 467 he speaks of mutual mistake with respect to the offer and acceptance of the notice of abandonment. Lord Wright's judgment covers the question of the validity of the agreement to abandon as well as the mere matter of the recovery of money paid under mistake of vital fact. So the *Bell Case* may be treated as dealing both with the validity of the agreement to determine the employment as well as with the question of recovering the money paid under a mistake of fact. In *Richardson* v. *Tiffin*, [1940] S.C.R. at pp. 647–8, Duff C.J.C. deals with a case in which a contract is made upon a common mistake as to private right, the mistake arising out of the application of general principles of law to the facts. The learned Chief Justice (diss.) thought the contract, so founded on basic common error, was void. However, money paid under it could not be recovered. Recovery of money paid under mistake must have been paid under mistake of pure fact only (at p. 648).

the House of Lords, B got exactly what he had bargained for —*viz.* the release from an existing contract. It was not material, in this view, that B already had the right to attain the same result inexpensively if he had known the true facts.[60A] To some, the case might seem to be closely analogous to the purchase of *res suae*.[61] B paid a large sum for a release to which he was already entitled. That there was something to be released was a basic assumption, probably of both parties. In the *Norwich Case* it is clear that there was a common assumption of a basic kind and, on that assumption, notice of abandonment was given and accepted and the money paid. Both the abandonment and the payment ensuing were held to be nullities.

A makes an agreement with B whereby B agrees to pay certain sums of money to A and A agrees to do certain things in return. This agreement is void because it is contrary to public policy or otherwise. Later, A and B arrange that B is to give notes for certain of these sums. The notes are given, both A and B thinking the original agreement was valid. "This belief, ... is a mistaken belief, and the promissory notes are void. The mistake was a mistake in respect of particular private rights involving the application of general principles of law to the facts; a mistake due to ignorance in respect of a right which both parties, having no doubt, supposed to exist. On the principle of *Cooper* v. *Phibbs*, and cases which have followed it, such a mistake vitiates the contract or the instrument under

[60A] *Cf. Soper* v. *Arnold*, 14 App. Cas. 429; 37 Ch. D. at p. 103.

[61] *Suae rei emptio non valet, sive sciens sive ignorans emi: sed si ignorans emi, quod solvero repetere potero, quia nulla obligatio fuit.* D. 18, 1, 16. See D. 45, 1, 31; D. 13, 7, 40, pr.; D. 50, 17, 45. A contract to buy a *res sua*, unknown to be such, may be treated as *inutilis* because of impossibility, *Quippe quod alicujus est, id ei dari non potest.* (G. 3, 99.) So also *Cum tibi nummos meos quasi tuos do, non facio tuos.* D. 12, 4, 3, 7. The passage from Lord Westbury (*Cooper* v. *Phibbs*, L.R. 2 H.L. at p. 170) referred to by Lord Atkin ([1932] A.C. at p. 218) and by Lord Wright ([1934] A.C. at pp. 462–3) is an illustration of this principle. *See* 52 L.Q.R. at p. 85; *Munro* v. *Meyer*, [1930] 2 K.B. at p. 334; *Cole* v. *Pope*, 29 S.C.R. at 295–6; note 33, *supra*. If A and B are negotiating for the purchase by A of specific property which both A and B believe, having no doubt on the matter, belongs to B, and it turns out that, unknown to each, the property already belongs to A, the case is analogous to the case of the antecedent destruction of a *certa res*, both buyer and seller being ignorant of the destruction. The subject-matter of the sale, as understood by both, is B's right of ownership. This does not exist. The bottom falls out of the contract, as in the case of the nonexistence of a physical thing, the subject-matter of a sale involving a *certum corpus*. A agrees that title in certain specific property shall vest in B. In so agreeing A forgets that his rights in the property are probably much more than are present to his mind when he makes the agreement. This unilateral error cannot be taken advantage of by A in answer to a claim for specific performance by B. *United States* v. *Motor Trucks*, 39 T.L.R. at p. 728.

See, as to cases somewhat analogous to the *Bell Case*, D. 12, 4, 3, 7; D. 19, 1, 5, 1.

which it is given."[61A] This sort of mistake is not the basis of a right to recover back money as paid under a mistake of fact for there the mistake must be one of pure fact and not mixed fact and law.[61B] In *Bell* v. *Lever Bros.*, there was ignorance on B's part of certain important facts. In *Richardson* v. *Tiffin*, both A and B knew the complete facts. In the second case, the agreement founded upon the basis of the existence of a private right, is void. There is mutual mistake as to a basic fact. But inasmuch as the mutual mistake as to private right was not founded on mistake as to pure fact, there can be no recovery by B of moneys already paid.[61C]

Class Three

The parties, A and B, are dealing with respect to a particular parcel of oats. A, the seller, knows the oats are new oats. B, the buyer, thinks the oats are old oats and he would not buy them if they were not thought to be old oats. Nothing has been said about 'old' oats. A knows B so thinks. In addition B thinks the contract contains a term that the oats dealt in are 'old' oats. A knows nothing of B's belief as to the contractual term as to the oats being old. B is bound by the contract. "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 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."[62] The security of transactions requires that the appearance of consent should be taken for the reality. ". . . . Your having it in your mind is nothing, for it is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is . . . ."[63] ". . . . . A state of mind not notified cannot be regarded in dealings between man and man."[64] And there is

[61A] POLLOCK, *op. cit.*, p. 445; 23 HALSBURY, 2nd ed., p. 131.

[61B] *Richardson* v. *Tiffin*, [1940] S.C.R. at p. 648, per Duff C.J. dissenting. While this is from a dissenting judgment, the other judgments are not in conflict with this principle. See also *Re Cameron*, [1940] O.R. at pp. 57, 63; POLLOCK, *op. cit.* at p. 460; 23 HALSBURY, 2nd ed., p. 166.

[61C] [1940] S.C.R. at p. 646.

[62] Blackburn J. in *Smith* v. *Hughes*, L.R. 6 Q.B. at p. 607. Blackburn J. relies on *Freeman* v. *Cooke*, 2 Ex. at p. 663, an estoppel case. BENJAMIN ON SALE, s. 54. One can treat this as a species of estoppel whereby one is precluded from denying that a certain state of mind existed at the time. A present state of mind is a question of fact. *See Citizen's Bank of Louisiana* v. *First National Bank*, L.R. 6 H.L. at pp. 360–1.

[63] Brian C.J. 17 Ed. IV, referred to with approval by Lord Blackburn in *Brogden* v. *Metropolitan Ry.*, 2 App. Cas. at p. 692.

[64] Lindley J. in *Byrne* v. *Van Tienhoven*, 5 C.P.D. at p. 347.

a multitude of cases in which the same thing has been laid down.[65] In such cases there is a divergence between a party's intent and its expression. This divergence, if not known or suspected by the other party, cannot, normally, be shown. Something in the nature of an estoppel operates to preclude the mistaken person from showing the true situation existing in the innermost recesses of his mind.[66] Yet, in such cases, unila-

[65] "The rule is, that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists and acts upon that inference he shall afterwards be estopped from denying it." (Bramwell B. in *Cornish* v. *Abington*, 4 H. & N. at p. 556.)

"Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motive, design, or interpretation of words." (Holmes J. in *O'Donnell* v. *Clinton*, 145 Mass. 461.)

"If, without the plaintiff's knowledge, [defendant] did understand the transaction to be different from that which his words plainly expressed, it is immaterial as his obligation must be measured by his overt acts." (Holmes J. in *Mansfield* v. *Hodgdon*, 147 Mass. 304.) See the speech of Lord Watson in *Stewart* v. *Kennedy*, 15 App. Cas. at p. 123.

"The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct." (HOLMES, COMMON LAW, at p. 309.)

"A contract has, strictly speaking, nothing to do with the personal or individual intent of the parties. A contract is an obligation attached by mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he uses the words, intended something else than the usual meaning which the law imposes upon them, he would still be held unless there was some mutual mistake or something else of the sort." (L. Hand J. in *Hotchkiss* v. *National City Bank*, 200 Fed. at p. 293; 41 Col. L. R. at 399; AMERICAN LAW INSTITUTE, RESTATEMENT, CONTRACTS, vol. 1, s. 71; vol. 2, p. 966; *Baines* v. *Woodfall*, 6 C.B.N.S. at p. 677.)

"Intention is immaterial till it manifests itself in an act. If a man intends to buy and says so to the intended seller, and he intends to sell, and says so to the intended buyer, there is a contract of sale; and so there would be if neither had the intention." (Bramwell B, in *Brown* v. *Hare*, 3 H. & N. at p. 495.)

"A contract involves what is called a meeting of the minds of the parties. But this does not mean that they must have arrived at a common mental state touching the matters in hand. The standard by which their conduct is judged and their rights limited is not internal, but external. In the absence of fraud or incapacity, the question is: What did the party say or do? 'The making of a contract does not depend on the state of the parties' minds: it depends on their overt acts'." (*Woburn National Bank* v. *Woods*, 77 N.H. at p. 175.)

"It is, I think, a well-established principle in English law that civil obligations are not created by, or founded upon undisclosed intention. That is a very old principle." (Lord Macnaghten, in *Keighly, Maxsted* v. *Durant*, [1901] A.C. at p. 247, where the famous dictum of Brian C.J. is quoted.)

Cf. ". . . . the root principle which lies at the foundation of all the law of contract, namely, that there must always be the consent *ad idem* of the two contracting minds to make a valid contract." (Lord Atkinson in *Boston Fruit* v. *British & Foreign Marine*, [1906] A.C. at p. 343.)

[66] Blackburn J. in his classical statement of the rule relies upon *Freeman* v. *Cooke*, 2 Ex. at p. 663, an estoppel case. Williston argues that this is not a case of true estoppel, as it may well be the fact that there is no detrimental reliance upon the outward appearance of consent. (*Selected Readings on the Law of Contract*, at p. 122; 1 WILLISTON, CONTRACTS, 1st ed. 18, 175.) However this may be, there are many English and

teral mistake, self-created, may not be entirely devoid of significance. It may lead to the other party's being confined to his remedy for damages. "It cannot be disputed that the Court of Chancery has refused specific performance in cases of mistake when the mistake has been on one side only; and even when the mistake on the part of the defendant resisting specific performance has not been induced or contributed to by any act or omission on the part of the plaintiff. . . . . The Court has thought, rightly or wrongly, that the circumstances of the particular case under consideration were such that . . . . it would be 'highly unreasonable' to enforce the agreement specifically. The Court will not be active in assisting one party to an agreement who has always his remedy in damages to take advantage of the mistake of the other so as to involve him in serious and unforeseen consequences."[66A]

Inasmuch as a party is normally precluded from showing a divergence between his real intention and the apparent, outward expression of it, because his overt acts create the semblance of agreement, it is obvious that knowledge or strong suspicion by the other party of such divergence excludes the operation of the "estoppel". There is then no real misleading. The other knows that 'things are not what they seem.' *Cessante ratione cessat lex ipsa.* This is brought out in cases in which a person has 'snapped' at an offer which is known or strongly suspected

Canadian authorities which treat the situation as falling at least under the genus of estoppel. See Ritchie C.J. in *Moffat* v. *Merchants Bank*, 11 S.C.R. at pp. 57–8; Beck J.A. in *Colonial Investment* v. *Borland*, 5 Alberta L.R. at p. 89, and the same learned Judge in *Gray-Campbell* v. *Flynn*, [1922] 3 W.W.R. at pp. 1040–1; *Sovereign Bank* v. *MacIntyre*, 44 S.C.R. at pp. 177–8; HALSBURY (Hailsham ed.) vol. 7, p. 89; *Sullivan* v. *Constable*, 48 T.L.R. 267, 369; *Williams Machine Co.* v. *Moore*, [1926] 4 D.L.R. at p. 581. *Cf. Murray* v. *Jenkins*, 28 S.C.R. at p. 577.

A intends to sell and B intends to buy a specific parcel of tea from a named ship. By mistake A exhibits a sample to B of a different parcel. B agrees to buy the specific parcel by the sample. Here there is no error as to the *identity* of the thing. The mistake of A, a merely unilateral one, is merely as to the quality which he, A, is contracting that the subject-matter has. If B does not know of this mistake, B can hold A to a contract that bulk shall equal the sample actually exhibited. (BENJAMIN ON SALE, s. 57; *Scott* v. *Littledale*, 27 L.J.Q.B. 201.) A is precluded from showing his mistake by something in the nature of an estoppel. (See 39 T.L.R. at p. 728.) In *Megaw* v. *Molloy*, 2 L.R. Ir. 530, an auctioneer, in selling maize out of a specific ship, by mistake exhibited a sample of maize from another ship. The seller sued for damages for non-acceptance of the maize. The buyer was allowed to show that there was no real agreement. In *Scott* v. *Littledale* the seller was precluded from setting up *his own* unilateral mistake. In the *Megaw Case* the buyer was not precluded from showing the se,ler's mistake as a step towards showing absence of *consensus ad idem* as to the quality. See KENNY'S CASES ON CONTRACTS, p. 237 (note).

[66A] *Stewart* v. *Kennedy*, 15 App. Cas. at p. 105, per Lord Macnaghten.

to have been made under a mistake as to its terms.[67] The knowledge must be as to a mistake as to the terms of the offer itself and not merely as to the quality of the subject-matter.[68] And generally knowledge by one that the other party is using words mistakenly or is entering into a contract under a misapprehension as to the terms of the engagement, precludes the person with such knowledge from enforcing the contract on the basis of the apparent terms.[69] Whether, in such a case, there is a contract on terms supposed by the other is discussed *infra*. If a party makes an offer and decides to revoke it, it has been held that knowledge of this intention acquired indirectly by the offeree without any direct communication from the offeror precludes the clinching of the bargain, thereafter, by an acceptance. The pseudo-acceptor, at the time of his acceptance, knows that the offeror is no longer in a contracting mood.[70]

The character of the transaction itself may preclude any intention, even apparent, to enter into a legal relation although the parties may have gone through the outward motions of offer and acceptance and there may be a legal object and consideration.[71] But a mere intention of one, not expressed,

[67] *Webster* v. *Cecil*, 30 Beav. 62; *Garrard* v. *Frankel*, 30 Beav. 445; *Tamplin* v. *James*, 15 Ch. D. 215; *Bennett* v. *Adams*, 15 W.L.R. 383; *Shelton* v. *Ellis*, 70 Georgia 297; *Hartog* v. *Colin*, [1939] 3 All E.R. 566. In some of these cases, the person 'snapping' at the offer which he knew to have been given under mistake was given the option of rectification or rescission.

[68] This is involved in *Smith* v. *Hughes* itself. *Pope & Pearson* v. *Buenos Ayres etc.*, 8 T.L.R. 758.

[69] Hannen J. in *Smith* v. *Hughes*, L.R. 6 Q.B. at pp. 609–10; *London Holeproof* v. *Padmore*, 44 T.L.R. 499; Beck J.A. in *Colonial etc.* v. *Borland*, 5 Alberta L.R. at pp. 81, 89, and in *Gray-Campbell* v. *Flynn*, [1922] 3 W.W.R. at pp. 1040–1; *Sullivan* v. *Constable*, 48 T.L.R. 267, 369; Lord Atkin in *Bell* v. *Lever Bros.*, [1932] A.C. at 222; *Gill* v. *McDowell*, [1903] 2 I.R. 463; *Thwaites* v. *Morrison*, 14 Alberta L.R. at p. 21; *Riley* v. *Spotswood*, 23 U.C.C.P. 318; *Blay* v. *Pollard*, [1930] 1 K.B. at p. 636; AMERICAN LAW INSTITUTE, RESTATEMENT OF CONTRACTS, ss. 71, 501, 503.

[70] *Dickinson* v. *Dodds*, 2 Ch. D. 463; *Cartwright* v. *Hoogstael*, 105 L.T. 628.

[71] *Verborum quoque obligatio constat, si inter contrahentes id agatur: nec enim si per jocum puta vel demonstrandi intellectus causa ego tibi dixero 'spondes'? et tu responderis 'spondeo', Nascetur Obligatio.* D. 44, 7, 3, 2. See D. 44, 7, 54. HUME, TREATISE OF HUMAN NATURE, Bk. 3. Pt. 2, s. 5; *Stewart* v. *Robertson*, L.R. 2 Sc. App. 494; *McClurg* v. *Terry*, 21 N.J. Eq. 225. And the relationship of the parties itself may indicate that the parties did not intend to enter into the sphere of legal obligation. *Balfour* v. *Balfour*, [1919] 2 K.B. 571; *Crocker* v. *Crocker*, [1921] P. at p. 37; *Carroll* v. *Carroll*, [1937] 2 D.L.R. at p. 319; *Francis* v. *Allen*, 57 S.C.R. at p. 374; *Lens* v. *Devonshire*, Times, Dec. 4, 1914 (referred to [1923] 2 K.B. at p. 288); *Regent Taxi* v. *Congregation etc.* [1929] S.C.R. at p. 713; *Rogers* v. *Booth*, [1937] 2 All E.R. 751; *Young* v. *C.N.R.*, [1931] A.C. at p. 89; *Kreglinger* v. *Wyatt*, [1933] 1 K.B. 793; *Murdoch* v. *West*, 34 S.C.R. 305; POTHIER, OBLIGATIONS, Pt. 1, c. 1, s. 1; *Smith* v. *Brown*, [1896] A.C. at p. 623. The parties may expressly provide that there is to no legal obligation ensuing from their agreement and effect is given to this

not to enter into a legal obligation, may be ineffective to prevent a contract arising if the other reasonably treats the matter as serious.[72]

The inability of a party to show a discrepancy between the expression of his intention and that intention itself[72A] entails that the criterion of the meaning of the expression is to be an objective one. Spoken words, written words, acts apart from words from which the terms of a contract are implied, all alike are subjected to an external test of their meaning. And in the case in which the terms of the contract have been reduced to writing there is the additional feature of the parole evidence rule.[73] The

provision. The matter is then not merely an inference from circumstances. *See Rose* v. *Crompton*, [1925] A.C. 445; *Jones* v. *Vernon's Pools*, [1938] 2 All E.R. 626; *Appleson* v. *Littlewood*, [1939] 1 All E.R. 464; *Rogers* v. *Booth*, *supra*.

[72] *Nyulasy* v. *Rowan*, 17 Victorian L.R. 663; *The Dysart Peerage Case*, 6 App. Cas. at pp. 514–5. *Cf. Bell* v. *Graham*, 13 Moore at pp. 259–60; *Ogden's Ltd.* v. *Nelson*, [1905] A.C. at pp. 112–3; HUME, TREATISE OF HUMAN NATURE, 523–4 (Oxford). Although a person may be precluded from showing that his mind did not go with his outward acts, it does not follow that the opposite party cannot show the discreapncy between his opponent's act and state of mind. *See Megaw* v. *Molloy*, *supra*; *Queen* v. *Buckmaster*, 20 Q.B.D. at p. 185.

[72A] But a court of equity may refuse specific performance in some cases. "It is not the habit of a Court of Equity to decree specific performance of an agreement more favourable to the plaintiff than to the defendant, involving hardship upon the defendant and damage to his property, if he entered into it without advice or assistance and there be reasonable ground for doubting whether he entered into it with a knowledge and understanding of its nature and its consequences." *Vivers* v. *Tuck*, 1 Moore N.S. at 526–7.

[73] Williston, *Mutual Assent in the Formation of Contracts*, SELECTED READINGS, at p. 122, following Thayer and Wigmore, states that the parol evidence rule is a rule of substantive law and not merely a rule of evidence. The rule "fixes by an external standard the scope of the contract . . . . the objection to proving intent or agreement at variance with the writing does not relate to the character of proof: the fact itself of which proof is attempted is immaterial. No evidence or admission will alter the application of the rule that the writing, not the intent of the parties, even though otherwise expressed, defines the terms of the contract." Cf. Beck J.A. (diss.) in *Gray-Campbell* v. *Flynn*, [1922] 3 W.W.R. at p. 1038: "It is, of course, of first importance to keep constantly in mind the distinction between the true agreement—the *aggregatio mentium*—and the instrument which was executed for the purpose of expressing the agreement and to be careful in discussion not to use the word agreement as referring indifferently to both. Once a party to a written agreement alleges mistake, of course the rule of evidence excluding evidence to vary a written instrument has no application whatever. If the mistake alleged is proved with reasonable clearness, good sense and justice imperatively demand that the mistake should be corrected, unless there is some good reason to the contrary in the particular case, but it is a logical absurdity to say that he is bound merely because he signed the written instrument which contained the mistake." In *L'Estrange* v. *Graucob*, [1934] 2 K.B. at p. 403, Maugham L.J. says: "In the case of a formal contract between seller and buyer, such as a deed, there is a presumption which puts it beyond doubt that the parties, intended that the document should contain the terms of their contract." A verbal acceptance of a written offer comes within this rule and extraneous evidence is excluded for the purpose of altering it. The learned Lord Justice recognizes that a writing signed by a party

words in which a promise is embodied are to be construed in the sense in which the promisee, in the circumstances, would reasonably understand them. This rule is objective from the side of the promisee as well as from the side of the promisor. It is not the sense in which the promisor understands the words, or the sense which the promisor conceives the promisee to attribute to the words, which governs. ". . . . The language used by one party is to be construed in the sense in which it would be reasonably understood by the other".[74] The application of an objective test may mean that the court gives to the words a meaning which neither party attributed to them. When the words are not clear on their face, or when their application to external circumstances gives rise to difficulty, "the general rule seems to be, that all facts are admissible which tend to show the sense words bear with reference to surrounding circumstances of and concerning which the words were used, but that such facts as only tend to show that the writer only intended to use words bearing a particular sense are to be rejected".[75] The objective 'reasonable meaning' test has been discussed by the moralists and has been frequently applied by the courts.[76]

"may not be the contract, but merely a memorandum in writing, of a preceding verbal contract between the parties" (at p. 406). If the party signs a written contract it is wholly immaterial whether he has read it or not. But *non est factum* may be raised or there may misrepresentation by the other as to the contents. *Cashin* v. *Cashin*, [1938] 1 All E.R. at p. 545; RESTATEMENT OF CONTRACTS, vol. 2, s. 503.

[74] Blackburn J. in *Fowkes* v. *Life Ass. Co.*, 3 B. & S. at p. 929.

[75] BLACKBURN ON SALE, p. 49, judicially adopted by Blackburn J. in *Grant* v. *Grant*, L.R. 5 C.P. 727 and by Lord Davey in *Bank of N.Z.* v. *Simpson*, [1900] A.C. 182, and by Lord Atkinson in *Charrington* v. *Charrington*, [1914] A.C. at p. 93; *Hanley* v. *Packing Co.*, 21 Ont. A.R. at pp. 122, 125; *Reddy* v. *Stropple*, 44 S.C.R. at p. 257; *Canada Law Book Co.*, v. *Boston Book Co.*, 64 S.C.R. at p. 185; *Kelantan* v. *Duff Development*, 39 T.L.R. at p. 340; *Royal Bank* v. *Salvatori*, [1928] 3 W.W.R. at p. 508; SALMOND & WINFIELD, CONTRACTS, 179. When the meaning is clear on its face, and external circumstances do not create doubt or difficulty the instrument is "to be construed according to the strict, plain, common meaning of the words themselves: and . . . . in such a case evidence *dehors* the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly in admissible." (Tindal C.J. in *Shore* v. *Wilson*, 9 Cl. & F. at pp. 565–6, approved in *Tsang Chuen* v. *Li Po Kwai*, [1932] A.C., at pp. 727–8.) *Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio.* D. 32, 25, 1.

[76] "[Lord Shand] expresses the opinion that the mere existence of such erroneous belief in the mind of the appellant affords a sufficient ground for annulling the contract. So far as I can judge, his opinion rests upon the inference or assumption that in such a case there cannot be that *duorum in idem placitum consensus atque conventio* which is necessary to the constitution of a mutual contract. To give any countenance to that doctrine would, in my opinion, be to destroy the security of written engagements. . . . By delivering his missive to Mr. Glendinning, the appellant represented to the respondent that he was willing to be bound by all its conditions and stipulations, construed according to their legal meaning, whatever that might be. He contracted as every person does who becomes a party to a written contract, to be bound, in case of dispute, by the

Circumstances may oust the application of the ordinary rule that a reasonable meaning is to be attributed to a promisor's words or actions. He may have been led into a mistaken apprehension by conduct of the promisee, which conduct falls short of a fraud. The result of this misapprehension is that the promisor's apparent meaning is different from his real meaning. The special circumstances of his having been led into a misconception by the innocent actions of the other party allow the

---

interpretation which a court of law may put upon the language of tht instrument. The result of admitting any other principle would be, that no contract in writing could be obligatory if the parties honestly attached. in their own minds, different meanings to any material stipulation. As soon as one of them obtained a final judgment of a competent Court in favour of his construction, the other would be at liberty to annul the contract. It is a significant fact that, although Courts are constantly resorted to for their decision on the conflicting views of parties as to the meaning of their written contracts, and not infrequently interpret them in a sense contemplated by neither of the litigants, not a single case has been cited in which it was attempted to void a contract on that ground." (Lord Watson in *Stewart* v. *Kennedy*, 15 App. Cas. at p. 123.)

"Notice, however, of the contents of a contract is not necessary, when the contract is proved, apart from fraud and mistake and things of that kind. If a party has contracted, he is bound, whether or not he has read or understood his contract or has pursued any references to their ultimate hiding place. If the respondents . . . . take a contract, whose terms they do not or cannot make out, they must abide by them as truly construed by a Court." Lord Sumner in *Phoenix Insurance* v. *De Monchy*, 45 T.L.R. at 549. See also *Moffatt* v. *Merchants Bank*, 11 S.C.R. 46.

"Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were. But the normal speaker of English is merely a special variety, a literary form so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law." Holmes, *Theory of Legal Interpretation*, COLLECTED LEGAL PAPERS at p. 204. The same view is expressed by Greer L.J. in *Hall* v. *Brooklands Auto-Racing Club*, 48 T.L.R. at p. 552. "I do not think that it can be said that the content of the contract made with every person who takes a ticket (*i.e.* a ticket to a motor race) is different. I think it must be the same, and it must be judged by what any reasonable member of the public must have intended should be the terms of the contract. The person concerned is sometimes described as 'the man in the street', or 'the man in the Clapham omnibus', or, as I recently read in an American author, 'the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves'." Z. Chafee, Jr., *The Disorderly Conduct of Words*, 41 Col. L.R. 381 at p. 399.

PALEY, MORAL AND POLITICAL PHILOSOPHY, Bk. 111, c. 5; referred to by Hannen J. in *Smith* v. *Hughes* and Whateley's Note; AUSTIN, Lecture XXI; MARKBY, ELEMENTS OF LAW, s. 620 *et seq.*; SALMOND & WINFIELD, CONTRACTS, 178; POLLOCK, CONTRACTS, 10th ed. 242; ANSON CONTRACTS, 18th ed. 155; Blackburn J. in *Fowkes* v. *Manchester etc.*, 3 B. & S. at p. 929; *Smith* v. *Hughes*, L.R. 6 Q.B. at p. 607; *Hobbs* v. *Esquimault*, 29 S.C.R. 450; *Kidston* v. *Stirling*, 55 D.L.R. at p. 372; *Williams* v. *Moore*, [1926] 4 D.L.R. at p. 577. *Cf. Murray* v. *Jenkins*, 28 S.C.R. at pp. 577–9; *Colonial etc.* v. *Borland*, 5 Alberta L.R. at p. 80; *Lindsey* v. *Heron*, 64 D.L.R. at pp. 100, 104.

promisor to show his real intention.[77] If there is fraud by the promisee as to the ambit of the promisor's promise, the promisor is, of course, not bound.[78] It must be remembered, too, that *error in negotio*, particularly that class of it which is raised by the defence of *non est factum*, stands in a class apart. If A signs an agreement to buy land which contains onerous terms, appropriate to that type of contract, of which A was not aware, A may be bound.[79] If A thinks he is signing a guarantee and he signs a contract generically different, *e.g.* a lease, he is not necessarily bound although he may have gone through the outward actions which would indicate that he was assenting to the agreement which he actually signed.[80]

[77] *Scriven* v. *Hindley*, [1913] 3 K.B. 564; *see* note 30 for various interpretations of this case. In *Colonial* v. *Borland, supra*, at p. 90, Beck J. found that there was no *consensus* when the writing was so involved and complicated as not to be readily understood by the ordinary man. *See Foster* v. *Mutual Reserve*, 19 T.L.R. at p. 345; 20 T.L.R. 715 (a case of ingenuity in concealing the real meaning of the writing), and see Lord Sumner in *Phoenix* v. *De Monchy*, 45 T.L.R. at p. 549; *Angers* v. *Mutual Reserve*, 35 S.C.R. at p. 353.

[78] See, *e.g.*, *Letourneau* v. *Carbonneau*, 35 S.C.R. 110; *Sagar* v. *Man. Windmill*, 7 W.W.R. 1213; *International etc.* v. *Wpg. Storage*, [1931] 2 W.W.R. 664; D. 12, 1, 18, 1. But the fraud must be the promisee's, not that of someone for whom the promisee is not responsible. *Moffatt* v. *Merchant's Bank*, 11 S.C.R. 46. *Cf. Zwicker* v. *Feindel*, 29 S.C.R. 516; *B.C. Electric* v. *Turner*, 49 S.C.R. at p. 493.

If A, a party to a written contract, misrepresents, fraudulently or innocently, the purport of the writing, to B, who signs in reliance on the misrepresentation, certain consequences may follow. If the misrepresentation was fraudulent, A could hardly hold B to the objective meaning of the writing which he had fraudulently misrepresented. If the misrepresentation was innocent there was mutual mistake, such as would afford a ground for reformation. "Moreover, for a party who had made such a misrepresentation or for those claiming under him to insist upon holding the other party to the terms of a contract his execution of which was so induced, however innocently, would be *ex post facts* fraud dealt with by Jessel M.R. in *Redgrave* v. *Hurd*, 20 Ch. D. 12." Anglin J. in *McKean & Co.* v. *Black*, 62 S.C.R. at pp. 307–8. *See* note 102, *infra*.

[79] *Howatson* v. *Webb*, [1908] 1 Ch. 1; *Blay* v. *Pollard*, [1930] 1 K.B. 628; *Bradley* v. *Imperial Bank*, 58 O.L.R. 650; *Cashin* v. *Cashin*, [1938] 1 All E.R. at p. 545. *Cf. Watkins* v. *Jansen*, [1938] 3 D.L.R. 557.

[80] There are many cases. See, *e.g. Morgan* v. *Dominion Permanent*, 50 S.C.R. 485; *National Union* v. *Martin*, [1924] S.C.R. 348; *Rawleigh* v. *Dumoulin*, [1926] 4 D.L.R. 1417; *Carlisle etc.* v. *Bragg*, [1911] 1 K.B. 489; 28 L.Q.R. 190; 8 C.B.R. 661. In these cases there is usually fraud by a third person. But cases occur in which there is no fraud by any one. *Imperial Bank* v. *McLellan*, [1934] 1 W.W.R. 65. *Si falsum instrumentum emptionis comscriptum tibi, velut locationis quam fieri mandaveras, subscribere, te non relecto, sed fidem habente, suasit, neutrum contractum in utroque alterutrius consensu deficiente constitisse procul dubio est.* (C. 4, 22, 5.) D applies to Guardians for relief. The Guardians are under certain statutory duties to afford relief but they may make advances by way of loan. The Guardians made an advance to D. Later the Guardians sue to recover as on a contract of loan. To recover they must show the conditions of a contract. "There must be a lending mind on the part of the lender and there must be a borrowing mind on the part of the borrower; one must know that he is lending and the other must know that he is borrowing. If these conditions are complied with there is nothing to prevent relief being granted by way of loan. . . . It seems to me to be a

The parties may use words which are ambiguous, having more than one meaning which may properly be attributed to them. *Raffles* v. *Wichelhaus*[81] is an instance of a proper name applying to two ships, each party having a different one of the two ships in mind. There was no contract as offer and acceptance did not coincide. The same situation may result where words are used which have not a precise meaning, objectively, and each party attaches a different meaning. There is no *consensus ad idem* and no contract in such a case.[82]

The question has been raised, and vigorously and copiously discussed, whether real *consensus ad idem*, a true *aggregatio mentium*, is essential to contract. Does it suffice if a party by his external actions manifests the semblance of consent merely?

---

pure question of fact and [the County Court Judge] has found that although the Guardians were of a lending mind the borrower was not of a borrowing mind, because he did not know that this relief was being offered to him by way of loan and he thought that he was applying for it in the ordinary circumstances . . . . which would negative the idea of his having to repay." *Pontypridd Guardians* v. *Drew*, 42 T.L.R. at p. 681, per Lord Atkin. There is no contract. In the ordinary case no property would pass in the money. In the *Pontypridd Case* the existence of the statutory duty of the Guardians altered this. *Si ego pecuniam tibi quasi donaturus dedero, tu quasi mutuam accipias, Julianus scribit donationem non esse; sed an mutua sit, videndum. Et puto nec mutuam esse magisque nummos accipientis non fieri, cum alia opinione acceperit. Quare si eos consumpserit licet conditione teneatur, tamen doli exceptione uti poterit, quia secundum voluntatem dantis nummi sunt consumpti. Si ego quasi deponens tibi dedero, tu quasi mutuam accipias, nec depositum nec mutuum est: idem est si tu quasi mutuam pecuniam dederis, ego quasi commodatam ostendendi gratia accepi: sed in utroque casu consumptis nummis condicitoni sine doli exceptione locus erit.* D. 12, 1, 18.

[81] L.R. 6 Q.B. 597, already discussed.

[82] *See* Lord Atkinson in *Douglas* v. *Baynes*, [1908] A.C. at p. 485, where the ambiguity lurked in the word "develop"; *Hazard* v. *New England Marine*, 1 Sumner 21 (Story J.), "coppered ship." In *Lever* v. *Jackson*, 30 Sol. J. 6, a word had a different meaning at offeror's residence and at offeree's residence. (*See* 21 Ont. A.R. at p. 123.) *Kidston* v. *Stirling*, 55 D.L.R. at p. 372 (Anglin J.). *Cf. Charrington* v. *W.*, [1914] A.C. 71; *Bloom* v. *Averbach*, [1927] S.C.R. at p. 621; *Falck* v. *Williams*, [1900] A.C. 176. In this last case, a party apparently in attempting to economize in a cable message in code apparently caused an ambiguity. A party who is responsible for creating an ambiguity in using terms which are open to two reasonable meanings cannot complain if the other party takes the meaning which was not intended by the deviser of the ambiguity. See *City of London Fire* v. *Smith*, 15 S.C.R. 69. *Cf. Rupley* v. *Daggett*, 74 Ill. 351; *Westminister Vank* v. *Hilton*, 43 T.L.R. at p. 126; *Baker* v. *Guaranty*, [1931] S.C.R. at p. 204; *Barthel* v. *Scotten*, 24 S.C.R. at p. 374; *Ireland* v. *Livingstone*, L.R. 5 H.L. at p. 416; *Sovereign Ins.* v. *Peters*, 12 S.C.R. Ill. at p. 37; *Miles* v. *Haslehurst*, 23 T.L.R. 142; *Lynch* v. *Seymour*, 15 S.C.R. at p. 352; *Metropolitan* v. *Montreal*, 35 S.C.R. at p. 270; *London etc.* v. *Bolands*, 40 T.L.R. at p. 606; Blackburn J. in *Fowkes* v. *Manchester*, 3 B. & S. at p. 929; *Hanley* v. *Canadian etc.*, 21 Ont. A.R. 119; SELECTED READINGS IN THE LAW OF CONTRACTS, at p. 118. *Veteribus placet pactionem obscuram vel ambiguam venditori et qui locavit nocere, in quorum fuit potestate legem apertius conscribere.* D. 2, 14, 39; D. 45, 1, 99. *Verba cartarum fortius accipiuntur contra proferentem.* In *British Whig etc.* v. *Eddy*, 62 S.C.R. at pp. 588–0, art. 1019 of the Quebec Civil Code is referred to.

The only acceptable evidence of a man's intent is his outward actions. Reliance has necessarily to be placed on those actions by others as the true expression of a corresponding inward intention on the part of the actor.[83] English law resorts to something in the nature of an estoppel and precludes the actor from showing the divergence between his expression and his intention.[84] But this precluding depends upon the other party not knowing or strongly suspecting the divergence. If the other knows of the mistake or strongly suspects it, he cannot hold the mistaken party to his ostensible promise. This is stated in the judgment of Hannen J. in *Smith* v. *Hughes* and has already been discussed.

The question whether objective or subjective tests are to govern in determining whether there is a contract will be found discussed in the authorities referred to below.[84A] Some go so

[83] *See* Lord Selborne in *Stewart* v. *Roberts*, L.R. 2 Sc. App. at p. 534. This was a marriage case.

[84] As has been mentioned above, Williston does not treat this as a case of true estoppel because the other party need not necessarily have acted to his detriment in reliance on the external semblance of consent or agreement. *See Greenwood* v. *Martins Bank*, [1933] A.C. at p. 57; *Nuffum* v. *Dawson*, 51 Ll.L. 147, at p. 150, referred to in 51 T.L.R. at p. 545.) But the other has made a promise in reliance upon the appearance of assent. The making of a promise, paradoxical as this may be, may be consideration for a counterpromise. If a promise may be consideration for a counterpromise, why may such making not also be a detriment for the purpose of estoppel? Of course, when there is actual performance in reliance upon the purported consent there is no difficulty in raising an estoppel of the ordinary variety. Although a party cannot show a discrepancy between *his* act and *his* state of mind, it does not follow that his opponent is precluded from showing that discrepancy. See *Megaw* v. *Malloy*, *supra*; *Queen* v. *Buckmaster*, 20 Q.B.D. at p. 185; *Sovereign Bank* v. *McIntyre*, 44 S.C.R. at pp. 177–8. WHARTON, CONTRACTS, vol. 2, c. xxxiv, discusses *culpa in contrahendo*. In this discussion the views of Ihering and others are discussed. English law shows a reluctance to attach liability to the careless use of words. Fraud, defamation and estoppel apart, negligence in the using of words, in the absence of some special duty, does not normally entail liability. Estoppel must be as to an existing fact. It cannot cover promissory matter. But, of course, the present or past state of a man's mind is a matter of fact. (*Yorkshire Insurance Co.* v. *Craine*, 39 T.L.R. at p. 846.)

[84A] BUCKLAND, TEXT-BOOK OF ROMAN LAW, at p. 414, BUCKLAND, THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW, 254. There are lots of texts which suggest the subjective view; *e.g. Sed cum, ut jam dictum est, ex consensu contrahentium stipulationes valent.* 1, 3, 19, 13; *Nulla enim voluntas errantis est.* D. 39, 3, 20; *Est pactio duorum plurium in idem placitum et consensus.* D. 214, 1; *Nam stipulatio ex utriusque consensu valet.* D. 45, 1, 83, 1; *Non videntur qui errant consentire.* D. 50, 17, 116. WHARTON ON CONTRACTS, vol. 1, 237 *et seq.*; HOLLAND, JURISPRUDENCE, 11th ed. 117; 258; SALMOND & WINFIELD, CONTRACTS, 178; ANSON, CONTRACTS, 12th ed. 9; POLLOCK, CONTRACTS, 7th ed. 5; LANGDELL, SUMMARY, s. 180; 53 L.Q.R. 525; (Jackson); 55 L.Q.R. at p. 501 (Winfield); LORD WRIGHT, ESSAYS, 377; 8 C.B.R. 299; AMERICAN LAW INSTITUTE, RESTATEMENT, CONTRACTS, s. 71; MORAWETZ, THE ELEMENTS OF CONTRACT, s. 2; 52 L.Q.R. at pp. 80, 81; WILLISTON, CONTRACTS, 1st ed. 18. 176; Duguit, in The volume, The Progress of the Law in the 19th Century, 102; HUME, HUMAN NATURE, bk. 3, pt. 2, s. v. The Common Law by Holmes has had a tremendous influence. The theme song which runs

through it is the 'objective' standard. The author applies it to the negligence, even to intended crime, and to contracts. "The law has nothing to do with the actual state of the parties' minds. In contracts as elsewhere, it must go by externals and judge parties by their conduct." (at p. 309); and see Holmes, *The Path of the Law*, COLLECTED PAPERS, at 177–8. With this compare KORKUNOV, THEORY OF LAW at 59; Williston, *Mutual Assent in the Formation of Contracts*, SELECTED READINGS, 119; *The Formation of Simple Contracts*, (M.L. Ferson), SELECTED READINGS, 128; Ashley, *Mutual Assent in Contract*, READINGS, 114; *Implied-in Fact Contracts and Mutual Assent*, Costigan, READINGS, 144; *Cornish* v. *Abington*, 4 H. & N. 549; *Norwich Union* v. *Price*, [1934] A.C. 463; 55 L.Q.R. at p. 194; *Smith* v. *Hughes*, L.R. 6 Q.B. 549. *Cf. Murray* v. *Jenkins*, 28 S.C.R. at pp. 577–9; *O'Donnell* v. *Clinton*, 145 Mass. 461; *Mansfield* v. *Hodgson*, 147 Mass. 304; *Preston* v. *Luck*, 27 Ch. D. 497; *Hotchkiss* v. *National*, 200 Fed. at p. 293. "But it is not necessary to attempt to fathom the mind of Simpson; he is bound by the interpretation reasonably ascribed to his words and conduct by Eakins and acted upon by him." (Duff C.J. in *Richmond etc.* v. *Simpson*, [1940] S.C.R. at p. 14.) One of the arguments used by the proponents of the objective theory is the difficulty which would otherwise be encountered in forming contracts by correspondence. See *Byrne* v. *Van Tienhoven*, L.R. 5 C.P.D. at p. 347; Ferson, *op. cit.* 124; Williston, READINGS, at p. 120. Here, the parties being at a distance, a continuing offer had to be recognized. But, of course, the offeror may have changed his mind before acceptance. If the change of mind is not communicated, it has no effect. This problem is not a new one. It had arisen in the Roman Law. See BUCKLAND, TEXT-BOOK, 413; D. 45, 1, 137, pr; D. 45, 1, 1. Contracts by correspondence require the cutting of knots—not the untying of them. Whatever view, objective or subjective, is taken, there are bound to be logical anomalies. "The life of the law has not been logic: it has been experience." The common law does not always push principles to their ultimate logical conclusions. A definite rule had to be found and it did not make much difference what the rule was. But it had to be certain like the rule of the road.

After all, is it clear that we really do apply the "objective" test consistently throughout the whole process of making a contract by correspondence? A makes an offer to B by letter. A changes his mind while the offer is in course of transmission to B and he makes ineffectual efforts to inform B of this change. B receives the offer and he purports to accept by posting a letter in due time, he, B, not then knowing of A's change of mind. It is clear that A is bound, though, at the time of B's posting his letter, A had ceased to be in a contracting mood. (*Byrne* v. *Van Tienhoven, supra.*) This would suggest the objective theory. B's acceptance must be an overt or external act, such as the posting of a letter. The world is not peopled by telepathists and, consequently, a merely mental determination cannot be an acceptance. (*Felthouse* v. *Bindley*, 11 C.B.N.S. 869.) But, is the posting by B, an external act it is true, 'objective' as to A, in any sense relevant to the law of contracts until it comes within A's ken? Does not the objective view merely insist upon ignoring any discrepancy between the appearance, which governs, and the reality of assent? To have appearance in this context means, surely, appearance to someone, to A. Therefore, until actual communication to A of the letter of acceptance, there ought not to be acceptance if the objective test were strictly applied. However, to avoid a logical chamber of mirrors, and to get a working rule having definiteness and certainty, the law introduces a purely artificial rule as to when acceptance is complete. The heavens would not fall if acceptance were not deemed complete until the letter of acceptance actually reached A, and some learned persons have thought that ought to be the law. B dictated a letter to his stenographer, addressed to A, wherein B purported to reject an offer made to him, B, by letter. The stenographer, for some reason or other, types "accepted" for "rejected" and B signs the letter without noticing the error. Later B found out the mistake and he actually notifies A before A receives B's letter which meanwhile had been duly posted. Is A bound? If B made no mistake and wrote and posted a letter of acceptance and then changed his mind and actually so notified A before A receives the acceptance, B is probably held.

far as to banish completely *consensus ad idem* from the realm of contract. All that is required, according to persons taking this view, is that a party should by his outward actions successfully imitate inward consent. A party's outward acts are symbols of his inward will and the symbols, only, count.[85] This point of view seems to carry the law of contracts into the innermost recesses of Plato's cave. Consent is deferred to, but only as something which the parties' actions must simulate. The reality is not relevant. All that is required is the outward appearance of consent, consent itself not being material. Mistakes arising out of divergence between intention and its outward expression are relatively infrequent. Instances of divergence between expression and true intention can hardly exceed, say, one in a thousand of all contracts made. Because in such cases a party is precluded from showing this divergence, it is proposed to banish consent completely from the whole field of contract and to rest contract upon certain outward forms or symbols without any regard to the inward intention of at least one of the parties. This seems to be throwing the bathtub out with the baby. It is an instance of letting the tail wag the dog. The use of estoppel or quasi-estoppel does not involve the resort to such drastic treatment. A man may be estopped from showing that a signature purporting to be his is a forgery,[86] yet no one has suggested that forgery has lost its import. A party may be estopped from showing the absence of consideration by his conduct even as against the other party to the contract who knew all the facts if public policy so requires.[87] Nevertheless, consideration is still discussed in the text-books.

To apply the objective test exclusively to all contracts tends to obliterate, in many cases, an important distinction between a true contract which ordinarily has been regarded hitherto as actually consensual, and constructive or quasi-contracts which are admittedly not consensual but which are merely devices whereby the procedural machinery of contract is made use of to restore the *status quo* in cases in which, without such restoration, there would be, for the most part, an unjust

[85] "The law does not look beyond their symbolic acts indicative of consent." Ferson, SELECTED READINGS, at p. 129.

[86] *Ewing* v. *Dominion Bank*, 35 S.C.R. 133.

[87] *See Allen* v. *Day*, 64 S.C.R. 76. Whether this is a case of estoppel which is usually treated as a mere matter of evidence (51 Ll.L. at p. 150; 54 T.L.R. at p. 211; [1918] A.C. at p. 817; [1937] 1 All E.R. 753) or a case involving foreign substantive law, is not clear. If it is merely a matter of estoppel (a matter of evidence only) it is difficult to see why a Canadian court would apply the foreign law and not the *lex fori*.

enrichment.[88] *Nemo debet locupletari jactura aliena.*[89] In quasi-contract, recovery is limited to an amount necessary to restore a former situation. In true contracts recovery is such as to put the parties in the position they would have been in had a promise been performed. In this type of case the *Hadley* v. *Baxendale* rule applies.[89A] Accepting the objective theory of contract, both types would have the common feature hereafter that neither in any case rests upon true *consensus*. In each case, merely external acts would generate liability. This seems a somewhat heroic remedy to meet the relatively few cases in which justice and the security of transactions require that a party should be precluded from showing a divergence between his intention and its expression. In such case, something in the nature of an estoppel meets the situation without the necessity of destroying the whole underlying fabric of contract in the generality of cases.

It is only in a very limited sphere that absence of true consent by one of the parties is entirely irrelevant. He must, at least, intend to enter into a contract of the particular type.[90]

[88] "The inadequate terminology of our law supplies no apt technical description for distinguishing between a real contract founded on a real assent, but established by inference, and an obligation fastened by law upon the party in default, independently of this assent and often against his will, but treated, to meet the exigencies of pleading, as having a contractual origin. Both classes of obligation are denoted by the term 'implied contract'; but the distinction is of course fundamental." (Duff J. in *Lequime* v. *Brown*, 3 W.L.R. at p. 482.) *See* Lord Wrenbury in *Eastern Shipping* v. *Kee*, 40 T.L.R. at p. 110; Lord Haldane in *Sinclair* v. *Brougham*, [1914] A.C. at pp. 416–7; Lord Sumner at p. 452; Lord Wright in *Brooks Wharf* v. *Goodman*, [1936] 3 All E.R. at p. 707; *Morgan* v. *Ashcroft*, [1937] 3 All E.R. at pp. 96, 103 *et seq.*; *Craen-Ellis* v. *Connors*, [1936] 2 All E.R. 1066; 54 L.Q.R. 29; LORD WRIGHT, ESSAYS, 1, 34; 54 L.Q.R. 201; 53 L.Q.R. 302; 53 L.Q.R. 447; 54 L.Q.R. 24, AMES LECTURES ON LEGAL HISTORY, lect. xiv; [1937] 3 All E.R. at p. 104; 14 C.B.R. 758; WINFIELD, PROVINCE OF THE LAW OF TORT, c. vii; JACKSON, HISTORY OF QUASI-CONTRACT; 5 Camb. L.J. 204; *In re Cleadon Trust*, [1939] Ch. at p. 314; *Standard etc.* v. *Whalen*, 64 S.C.R. at p. 93; *Bayliss* v. *London etc.*, [1913] 1 Ch. at p. 140; *Holt* v. *Markham*, [1923] 1 K.B. at p. 513; *United Australia etc.* v. *Barclay's Bank*, [1940] 4 All E.R. at p. 35 *et seq.*, 47, 53. *Clarke* v. *White*, 3 S.C.R. at pp. 323, 329; *Kelly* v. *Watson*, 61 S.C.R. at p. 486; *Bowling* v. *Cox*, [1926] A.C. at pp. 754–5; *Hain Steamship* v. *Tate*, 52 T.L.R. at p. 624; *In re Simms*, [1934] Ch. at pp. 20, 24, 31; *Berg* v. *Sadler*, [1937] 1 All E.R. at p. 641.

[89] Lord Dunedin in *Sinclair* v. *Brougham*, [1914] A.C. at p. 434.

[89A] G. P. Costigan, Jr., in 33 H.L.R. 374.

[90] *See* note 80, *supra*. "The true facts may not have been known to the grantor . . . . with such a result that the mind of the grantor does not go with the transaction at all; his mind goes with another transaction, and he is meaning to give effect to that other transaction, depending on facts different from those which are the true facts." *Jones* v. *Waring & Gillow*, [1926] A.C. 670, Lord Shaw, cited with approval in *Norwich Union* v. *Price*, [1934] A.C. at p. 462; Duff J. in *B.C. Electric* v. *Turner*, 49 S.C.R. at p. 492. The treatment of the contracts of persons who were insane or drunk but not known to be such to the other party lends support to the objective view. Insanity or drunkenness may preclude the mind

"It is true that in general the test of intention in the formation of contracts and the transfer of property is objective; that is, intention is to be ascertained from what the parties said or did. But proof of mistake affimatively excludes intention. It is, however, essential that the mistake relied on should be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or being fundamental or basic. Whether the mistake does satisfy this description may often be a matter of great difficulty."[91] When there is a mistake as to identity of the person with whom one deals, where personal qualities are material, "there [is] not the agreement of the [buyer's] mind with that of the seller that was required to establish any contractual right at all".[92] There is no contract because there is really only one party.[93]

Passengers on trains, bailors of goods, etc., make contracts without any document being signed. Here the parties know a contract of a particular type is being made. Special terms may be inserted in the contract which are relevant to the transaction. The passenger or bailor may be taken to have assented to these terms if reasonable and intelligible methods have been used to bring them to his attention. His intention may be inferred from his conduct.[94] Regard is to be had to "the general course

from going with the outward act. In theory the result should be similar to the result reached in a case of true *non est factum*. See Duff J. (diss.) in *Bawlf Grain Co.* v. *Ross*, 55 S.C.R. at p. 240; *Molyneux* v. *Natal etc.*, [1905] A.C. 555. In this latter case the Roman and Roman-Dutch Law are discussed. English law early adopted an attitude which was hostile to the drunkard or lunatic. A man was not to be allowed to stultify himself.

[91] Lord Wright in the *Norwich Case* at p. 463. See BUCKLAND, TEXT-BOOK, at p. 417; MOYLE, INSTITUTES, 5th ed. 421. In the *Norwich Case* the mistake was not merely unilateral. As to the necessity of "intention" in transferring property, see speech of Lord Dunedin in *Sinclair* v. *Brougham*, [1914] A.C. at p. 431, and see Lord Sumner in *Jones* v. *Waring & Gillow*, [1926] A.C. at p. 696. See also Greene M.R. in *Morgan* v. *Ashcroft*, [1937] 3 All E.R. at p. 97, and Scott L.J. at p. 105. Lord Wright in the *Norwich Case* aequiparates the "intention" necessary to the making of a contract with the "intention" necessary to pass property so as to preclude recovery based on mistake of fact. See 84 L.J. (Newspaper) 434; *Ayres* v. *Moore*, [1939] 4 All E.R. at p. 355. See the remarks of Lord Westbury in *Chinnock* v. *Marchioness of Ely*, 4 D.J. & S. at p. 643: "An agreement is the result of the mutual assent of two parties to certain terms and if it be clear that there is no consensus, what may be written or said becomes immaterial." See remarks of Kay J. (diss.) in *Preston* v. *Luck*, 27 Ch. D. at p. 502. *In totum omnia quae animi destinatione agenda sunt, non nisi vera et cetera scientia perfici possunt.* (D. 50, 17, 76.) As to illiterate signers, see *Hitchman* v. *Avery*, 8 T.L.R. 698; *Macandrew* v. *Gilhooley*, 4 B.W.C.C. 370.

[92] Lord Haldane in *Lake* v. *Simmons*, 43 T.L.R. at p. 419.

[93] Lord Haldane in *Lake Case* at p. 420, referring to HOLMES, COMMON LAW, lect. ix.

[94] See Lord Haldane in *G.T.R.* v. *Robinson*, 22 D.L.R. at p. 5; *C.P.R.* v. *Parent*, 33 D.L.R. at p. 16; *Whitehouse* v. *Pickett*, [1908] A.C. at p. 361.

of business and to the exigencies of time and place"[95] and to "the general principles of necessity recognized in . . . . business transactions"[96] in determining whether the particular steps taken to bring the special terms to the party's attention were adequate. But all these cases can be explained on the basis of something in the nature of an estoppel. Parties negotiating with each other before the making of a contract may be under a duty to pay some attention to the relevant words and actions of the other party. If they fail to do so, there may be an estoppel by negligence to deny that an apparent consent was a real one.[97]

Class Four

A and B are dealing with respect to a particular parcel of oats. A, the seller, knows the oats are new oats. B, the buyer, thinks they are old oats. A knows B so thinks. B, further, thinks the oats are being sold as old oats. A knows that B thinks that the contract contains a term that the oats are to be old. There has been nothing in what passed between the parties to justify B in the belief as to this contractual term. Nevertheless, A knows that B believes there is a contractual term on the subject of the oats being old. Here B labors under a mistake which relates, not to the qualities of the oats merely, but to the scope of the terms of the contract itself. A cannot compel B to take the new oats. And it matters not how A acquired his knowledge of B's idea of the terms of the contract.[98]

The further question arises whether, in such a case, there is actually a contract that the oats are to be old oats. B cannot be required to accept delivery of the oats which are in fact new. That is clear. Has B, in such a case, an action for damages for breach of a term in the contract that the oats are to be old?

[95] Lord Haldane in the *Parent Case* at p. 17; *Hearn* v. *Southern Ry*, 41 T.L.R. at p. 307.

[96] Lord Haldane in the *Robinson Case* at p. 6.

[97] Estoppel by negligence involves antecedent duty to take care. Lord Wright in *Mercantile Bank of India* v. *Central Bank*, 54 T.L.R. at p. 211. "There is, of course, the widest possible distinction between a void contract or a nominal contract which, for want of assent on one side, is no contract, but the validity of which one of the parties is estopped from disputing, and a contract which is voidable in the sense of being rescindable but valid until rescinded. Such transactions as these last mentioned may cease to be impeachable by change of circumstances alone. Change of circumstances alone not involving a true consent could not produce a contract out of that which never was a contract because of want of consent by one of the nominal parties." Duff J. (diss.) in *Sovereign Bank* v. *McIntyre*, 44 S.C.R. at p. 177.

[98] Hannen J. in *Smith* v. *Hughes*, L.R. 6 Q.B. at pp. 609–11; Lord Atkin in *Bell* v. *Lever Bros.*, [1932] A.C. at p. 222; *Blay* v. *Pollard*, [1930] 1 K.B. at p. 636; *London Holeproof Hosiery* v. *Padmore*, 44 T.L.R. 499; 8 C.B.R. 299; 11 C.B.R. 210.

The words of Lord Atkin in *Bell* v. *Lever Brothers* would seem to suggest that the answer is to be in the affirmative: "In these cases I am inclined to think that the true analysis is that there is a contract, but that the one party is not able to supply the very thing whether goods or services that the other party contracted to take; and therefore the contract is unenforceable by the one if executory, while if executed the other can recover back money paid on the ground of failure of consideration."[99] This, of course, was merely an *obiter dictum*. In *London Hole-proof Hosiery Co.* v. *Padmore*[100] A knew that B attached a certain meaning to the terms of the contract in which A did not acquiesce. All the learned judges in the Court of Appeal thought that there was no contract as the parties were not *ad idem*. A could not enforce the alleged agreement against B, and B could recover a deposit which he had paid in reliance on the contract being on the terms as he understood them. The action was brought by B to recover this deposit and it was sufficient for the decision of the case to decide that the contract was not effective on A's terms. Whether B would have had an action for damages for breach of the contract on the terms in which he, to A's knowledge, understood it, was not involved in the case.[101] In *Garrard* v. *Frankel*[102] B made an offer of a lease of premises to A at a rental of £230. The lease erroneously stated the rent to be £130. Both parties signed the lease. B meant the rent to be £230. A must have known this. Sir John Romilly gave A the option of rescission or rectification. He did not feel he could rectify outright without giving this option. However, Lord Atkin's dictum may now lead to a different result.[103]

J. A. WEIR.

University of Alberta.

[99] [1932] A.C. at p. 222.
[100] 44 T.L.R. 499.
[101] *See* 8 C.B.R. 299, and 11 C.B.R. 210.
[102] 30 Beav. 445; *cf. The Liverpool etc.* v. *Wyld*, 1 S.C.R. 604, with *Provident* v. *Mowatt*, 32 S.C.R. 147. *Garrard* v. *Frankel* is applied by Gwynne J. in *The Aetna Life* v. *Brodie*, 5 S.C.R. at 32, where the mistake seems to have been unilateral and not known to the other party. *See McKean & Co.* v. *Black*, 62 S.C.R. at pp. 307–8.
[103] See note 101; Restatement, s. 505; HOLMES, COMMON LAW, 310; POLLOCK, CONTRACTS, 10th ed. at 500–1. *Cf. The Dominion Bank* v. *Marshall*, 63 S.C.R. 352, and *Sullivan* v. *Constable*, 48 T.L.R. 267, 369. Of course when A and B have both agreed on the same terms and a writing is drawn up which omits part of the subject-matter, equity can rectify and specifically enforce the rectified agreement, notwithstanding the Statute of Frauds: *United States* v. *Motor Trucks*, 39 T.L.R. 723. In such case there was a real agreement to start with. The mistake is merely in reducing it to writing.