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# Convergence and Divergence Between the English, French, and German Conceptions of Contract

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# CONVERGENCE AND DIVERGENCE BETWEEN THE ENGLISH, FRENCH, AND GERMAN CONCEPTIONS OF CONTRACT

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## INTRODUCTION

In the current context of the debate over the desirability of harmonizing European private law,<sup>1</sup> identifying the points of convergence and divergence in the law of the member states is an essential first step. One issue that has been much discussed in this regard is that of the objective/subjective<sup>2</sup> conception of contract: while this issue has

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<sup>1</sup> See generally: A.S. HARTKAMP *et al*, (eds.), *Towards a European Civil Code*, 3<sup>rd</sup> ed., Kluwer Law International, The Hague 2004; P. GRAZIANO & M. VINK, (eds.), *Europeanization: New Research Agendas*, Palgrave Macmillan, New York 2006; J. SMITS, (ed.), *The Need for a European Contract Law: Empirical and Legal Perspectives*, Europa Law Publishing, Groningen, 2005.

<sup>2</sup> “Objective” and “subjective” here are used in the usual sense given to them in the contractual context, viz., as references to the role, if any, played by the parties’ inner thoughts in the determination of the existence and content of the contract. See, e.g., S.M. WADDAMS, *The Law of Contracts*, 4<sup>th</sup> ed., Canada Law Book, Toronto 1999, pp 105-09; D. IBBETSON, *A Historical Introduction to the Law of Obligations*, Oxford University Press, Oxford 1999, ch. 12; M. J. SCHERMAIER, ‘Mistake, Misrepresentation and Precontractual Duties to Inform: the Civil Law Tradition’, in R. Sefton-Green (ed.), *Mistake, Fraud and*

traditionally been earmarked a significant point of divergence between English, French, and German private law, many comparatists have more recently contested the divergence thesis, arguing that legal systems have in fact been converging on all fronts.<sup>3</sup> To be sure, all observers seem to agree that, insofar as some points of divergence might still persist between these three legal systems, the objective/subjective conception of contract would be one of them. It is this issue that I wish to revisit here, hopefully in a new comparative light, with a view to pinpointing the exact locus of the difference between English, French, and German law on this point.

Whether contract is viewed objectively or subjectively in any given legal system is revealed most clearly through this system's treatment of contractual mistake,<sup>4</sup> in particular, its treatment of those contractual mistakes that involve an individual "willing

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*Duties to Inform in European Contract Law*, Cambridge University Press, Cambridge 2005, p 39, at 40, 52-53. An "objective" theory of contract under this definition is a theory according to which contracts are formed on the basis of the parties' mutual "declarations of intention," whether implicit or explicit, whereas a "subjective" theory of contract holds in contrast that contracts are formed on the basis of what the parties actually intended. See, e.g., *Dickinson v Dodds* (1876) 2 Ch. D. 463 (C.A.), *per* James L.J. at 472. These terms therefore are *not* used in the evidentiary sense that is sometimes ascribed to them, viz., as respective references to that which is, and that which is not, externally observable. In the following discussion, the evidentiary issue is set aside by assuming that the parties' actual intentions, just like their declarations, can be proven to a court's satisfaction

<sup>3</sup> See generally: K. ZWIEGERT AND H. KÖTZ, *Introduction to Comparative Law*, vol. II, 3<sup>rd</sup> ed., Oxford University Press, Oxford 1998, pp 83-94; D. HARRIS AND D. TALLON, (eds.) *Contract Law Today—Anglo-French Comparisons*, Clarendon Press, Oxford 1991, pp 1-5; B. NICHOLAS, *The French Law of Contract*, Oxford University Press, Oxford 1992, pp 83-4; J. CARTWRIGHT 'Defects of Consent and Security of Contract: French and English Law Compared' in P. Birks and A. Pretto (eds.), *Themes in Comparative Law in Honour of Bernard Rudden*, Oxford University Press, Oxford 2002, pp 156-57; O. LANDO & H. BEALE, *Principles of European Contract Law*, Kluwer Law International, The Hague 2000-03, p 178-9; M.-A. FRISON-ROCHE 'Remarques sur la distinction de la volonté et du consentement en droit des contrats', *R.T.D. civ. (Revue trimestrielle de droit civil)* 1995, p 573; A. RIEG, *Le rôle de la volonté dans l'acte juridique en droit civil français et allemand*, L.G.D.J., Paris 1961; J.H. MERRYMAN, 'On the Convergence (and Divergence) of the Civil Law and Common Law', in M. Cappelletti, ed., *New Perspectives for a Common Law of Europe*, Sijthoff, Boston 1978, p 195; P. LEGRAND, 'European Legal Systems Are Not Converging', 45 *ICLQ (International and Comparative Law Quarterly)* 1996, p 52.

<sup>4</sup> J. GORDLEY, *The Philosophical Origins of Modern Contract Doctrine*, Oxford University Press, New York 1991, pp 186-7; R. SEFTON-GREEN, 'General Introduction', in Sefton-Green (ed.), *supra* note 2, at 6-7.

one thing but declaring something else,”<sup>5</sup> for only in such cases is one forced to determine which of the will or the declaration ought to be made to prevail over the other. At a purely conceptual level, one would expect a legal system that endorses a subjective conception of contract to make the subjective will prevail over the objective declaration and relieve the mistaken party from her contractual obligations in such cases. Conversely, one would expect a legal system that endorses an objective conception of contract to favour the declaration over the will and hold the mistaken party to her contractual obligations. To that extent, the comparative study of the English, French, and German law of mistake undertaken below is intended as just a means to discovering the relative objectivity or subjectivity of the English, French, and German conceptions of contract.

In practice, of course, relief can be granted or denied based on considerations that have nothing or little to do with substantive contract law. At English law, for example, the outcome of cases, mistake cases included,<sup>6</sup> clearly has been strongly conditioned by the traditionally rigid structure of the remedies available and the omnipresence of the jury, among other procedural particularities.<sup>7</sup> In addition, much of our understanding of legal rules and concepts unquestionably is shaped by the form of the materials from which these rules and concepts are extracted. One might suspect, for example, that the syllogistic formulation that has long characterized French judicial decisions conceals

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<sup>5</sup> F.C. VON SAVIGNY, *System des heutigen Römischen Rechts*, vol. III, Berlin 1840, p 265. (My translation.) Such mistakes are also at play in the law of adverse possession wherever a clash between possessory acts and intentions is at issue. A fuller study of the objective/subjective theory in private law could include these cases as well.

<sup>6</sup> See generally: E. SABBATH, ‘Effects of Mistake in Contracts’, 13 *ICLQ* 1964, p 798.

<sup>7</sup> Hence Maine’s famous observation that, at English law, substantive legal rules were “secreted in the interstices of procedure.” H.S. MAINE, *Dissertations on Early Law and Custom*, Arno Press, New York 1975, at 389.

greater judicial ambivalence than meets the eye.<sup>8</sup> For these reasons, great caution will be exerted, when moving from the legal materials on contractual mistake to their conceptual underpinnings, not to lose sight of the particular and different contexts that attended the production of these materials in each system.

Like any self-respecting comparative study, this one begins with the preliminary identification of an objective criterion with which to carry out the comparison--a *tertium comparationis*.<sup>9</sup> As legal rules, institutions, and categories vary across legal systems and thus provide poor *tertium comparationis*, comparatists generally use particular fact situations as launching-pads for their analyses.<sup>10</sup> The different responses which a given situation elicits in different legal systems are then methodically studied. As just explained, the fact situation that interests me here is that which stages at least one party to a contract "willing one thing but declaring something else." Part I accordingly is devoted to sifting through the various categories of mistake at English, French, and German law with a view to identifying those that involve the requisite will/declaration split.

The treatments of these mistakes at English, French, and German law are described and compared in Part II. I there show that, from the outside, contemporary English, French, and German treatments of these mistakes in fact differ very little. In all

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<sup>8</sup> M. DE S.-O.-L'É. LASSER, 'Judicial (Self-) Portraits: Judicial Discourse in the French Legal System', 104 *YLJ (Yale Law Journal)* 1995, p 1325.

<sup>9</sup> Since Radbruch (*Über die Methode der Rechtsvergleichung*, MKSR II, 423, 1905/06), the notion of *tertium comparationis* is a staple of comparative law literature. See in particular: H. KÖTZ, 'Comparative Law in Germany Today', 4 *R.I.D.C. (Revue internationale de droit comparé)* 1999, p 753, at 758ff.

<sup>10</sup> See, e.g., the various volumes of M. BUSSANI & U. MATTEI, *The Common Core of European Private Law*, for which reporters from different legal systems were asked to comment on a common set of fact hypotheticals. This way of proceeding is known in the comparative law literature as "functionalism." Although functionalism as a theory of comparative law has been much criticized (L.-J. CONSTANTINESCO, *TRAITÉ DE DROIT COMPARÉ*, vol. III, L.G.D.J., Paris 1983, pp 63-71; P. LEGRAND, *Le droit comparé*, P.U.F., Paris 1999), its value as one of several methodological tools available to the comparatist is widely acknowledged. (J. REITZ, 'How to Do Comparative Law', 46 *AJCL (American Journal of Comparative Law)* 1998, p 617, at 620-23; G. SAMUEL, *Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences*, in M. van Hoecke, (ed.), *Epistemology and Methodology of Comparative Law*, Hart Publishing, Oxford 2004, p 35 at 38ff; SEFTON-GREEN, *supra* note 4, at 12-17, 30-31.)

three legal systems, the understanding of contract that emerges from the outcomes of the relevant judicial decisions--which can be immediately apprehended from an outside perspective--is a dialectic objective/subjective understanding, viz., an understanding of contract as made up of one part of objectivity and one part of subjectivity interacting with one another. From the perspective of what courts *actually do*, therefore, English, French, and German law appear to converge upon the same dialectic objective/subjective understanding of contract. However, things look very different on the inside, from the perspective of what the jurists in each system *perceive* their courts as doing--which can be apprehended only mediately, viz., through an interpretation exercise that presupposes a perspective shift, from the outside to inside the mind of the jurists.<sup>11</sup> Keeping in mind that the English, French, and German definitions of “jurist” differ, it is possible to say that German jurists are the only ones whose perception of contract has accorded with the understanding of it actually emerging from (English, French, and German) judicial practice. German jurists have, in accordance with judicial practice, tended to perceive contract as a dialectic combination of objective and subjective. English and French jurists in contrast have, in departure from judicial practice, tended to perceive contract in a more linear manner—as being in principle objective and only exceptionally subjective, in the case of the English, and as being in principle subjective and exceptionally objective, in the case of the French. Thus, while the understanding of contract that actually emerges from English, French, and German judicial practice on mistake (the external standpoint) is roughly the same, the perceptions of contract which English,

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<sup>11</sup> For an argument that the primary aim of comparative law is to understand legal systems from the inside, see: W. EWALD, ‘Comparative Jurisprudence (I): What Was It Like to Try a Rat?’, 143 *UPLR (University of Pennsylvania Law Review)* 1995, p 1889. I endorse this view, with qualifications, in my ‘Comparative Law as Comparative Jurisprudence: The Comparability of Legal Systems’, 52 *AJCL* 2004, p 713.

French, and German jurists have derived from their respective interpretations of this judicial practice (the internal standpoints) vary greatly.

I conclude that it is possible for convergence and divergence theorists to both be right: it may well be that legal systems are converging from an external standpoint, while remaining essentially divergent from an internal standpoint.

## I. THE *TERTIUM COMPARATIONIS*

In only two of the traditional English categories of mistake does the mistake involve a split between the parties' objective declaration and their subjective intentions. The first is that of "mistakes in assumption;"<sup>12</sup> the second is the category of cases known as "*non est factum*." Mistakes in assumption, the principal instance of which is the classic error *in substantia* of Roman law,<sup>13</sup> roughly correspond to the *erreur vice de consentement* ("consent-vitiating errors") of French law and the *Fehler bei der Willensbildung* ("mistake going to the formation of the will") of German law. Cases of *non est factum* encompass some of the errors *in corpore*, *in negotio*, and *in persona* of Roman law,<sup>14</sup> and loosely correspond to the *Inhaltsirrtum* ("error as to the content of the

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<sup>12</sup> G.E. PALMER, *Mistake and Unjust Enrichment*, Ohio State University Press, Columbus, 1962, at 9-32; S.A. SMITH, *Contract Theory*, Oxford University Press, Oxford 2004, at 368; WADDAMS, *supra* note 2. Among the many other labels with which these mistakes have been saddled over the years, the most prominent are "unilateral mistakes," "mistake in expectation," "error in motive," "error as to quality," and the very "error *in substantia*" of Roman law."

<sup>13</sup> "[V]inegar is sold as wine, bronze as gold, lead or some other metal resembling silver as silver." R. ZIMMERMANN, *The Law of Obligations—Roman Foundations of the Civil Law Tradition*, Kluwer, Deventer, Netherlands, 1992, at 592.

<sup>14</sup> Respectively, mistakes as to the identity of the object of the contract ("The purchaser assumes that he is buying fundus Cornelianus, the vendor that he is selling fundus Sempronianus." ZIMMERMANN, *op.cit.*, at 589), as to the nature of the transaction ("[M]oney has been handed over, but [...] the parties [are not] *ad idem* as to the purpose of this act. One of them thinks that it is a deposit, the other takes it to be a loan for consumption;" *id.* at 591), and as to the identity of the other contracting party (*id.* at 592). .

declaration”) of German law and the *erreur sur la nature du contrat* (“error as to the nature of the contract”) of French law.<sup>15</sup>

*Smith v. Hughes*<sup>16</sup> is the classic case on mistake in assumption at English law. It involves a horse breeder who, on the basis of a sample, purchased oats which he claims he had taken to be old, while they were in fact new.<sup>17</sup> The French counterpart of *Smith v. Hughes* features a fake Louis XV chair purchased in the belief that it was real.<sup>18</sup> In both cases, the plaintiff can be taken to concede that the parties’ declaration was clear: the object of the sale was oats of the kind shown in the sample; the chair which was exposed in the shop’s window. In both cases, the plaintiff can be taken to be requesting that the parties’ declaration be set aside on the ground that it conflicted with his subjective intention: he had intended to buy old oats, an authentic Louis XV. Cases of *non est factum* similarly can be viewed as involving a plaintiff claiming that his/her subjective intention diverged from the parties’ unambiguous declaration: a document was signed, but the signor thought that s/he was signing a different document.<sup>19</sup> In mistake in assumption and *non est factum* cases alike, therefore, upholding the contract can be taken

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<sup>15</sup> *Non est factum* cases could arguably be considered a category altogether different from mistake, one containing cases concerning the capacity to contract rather than mistake as such. The line between these categories is unclear at best however, as is shown by the fact that, as just suggested, many of the cases classified as *non est factum* at English law are treated as mistake cases pure and simple at French and German law. *Non est factum* cases thus deserve to be studied here only to the extent that they, as argued in the text below, can be seen as involving the declaration/intention split that we are looking for.

<sup>16</sup> (1871), L.R. 6 Q.B. 597.

<sup>17</sup> What the parties actually knew or did not know in that case is not entirely certain, but the court insists on the distinction between the buyer thinking the oats are old and his thinking that the oats are warranted old (Blackburn J. at 607), which distinction is central to the present analysis.

<sup>18</sup> *R.T.D. civ.* 751 (1970).

<sup>19</sup> See, e.g., *Carlisle & Cumberland Banking Co. v Bragg* [1911] 1 KB 489.



to signal an endorsement of the objective theory and invalidating the contract conversely can be read as signaling an endorsement of the subjective theory.<sup>20</sup>

Aside from mistake in assumption and *non est factum* cases, the traditional categories of mistake of English law include “misunderstandings,”<sup>21</sup> “mistakes as to terms” (sometimes less aptly termed “mutual mistakes,”) “mistakes in integration,”<sup>22</sup> and “common mistakes,” none of which arguably involve fact situations that present the requisite objective/subjective split. Cases of misunderstanding-- *erreur-obstacle* (“obstacle error”) in French law, *Dissens* (“absence of assent”) in German law—can be read as involving a claim that no objective declaration ever came about.<sup>23</sup> Cases of mistake as to terms--*Inhaltsirrtum* (“mistake as to the content of the declaration” in German law)--and cases of mistake in integration (the typical rectification case of English law) can be taken to stage two competing versions of the parties’ common declaration rather than one common declaration competing with the parties’ subjective intentions,<sup>24</sup>

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<sup>20</sup> With respect to *Smith v. Hughes*, this conclusion is based more on the court’s reasoning than on the actual outcome of the case, which has more to do with the presence of the jury than with any substantive rule of contract law.

<sup>21</sup> PALMER, *supra* note 12.

<sup>22</sup> *Ibid.*

<sup>23</sup> See, e.g., *Henkel v. Pape*, (1870) L.R. 6 Ex. 7 (one party purported to purchase three rifles, whereas the other purported to sell fifty); Cass. Civ. Com., Jan. 14 1969, D.S.Jur 1070, 458 (car bought for 2,000 Belgian francs, but sold for 2,000 French francs). In these cases, communications for, respectively, three rifles and 2,000 Belgian francs crossed divergent communications for fifty rifles and 2,000 French francs, and the court’s conclusion that no contract was formed can accordingly be interpreted as being based upon a finding that no common declaration ever formed. I discuss below a different possible interpretation of the case, an interpretation of it as being based in a mistake as to terms.

<sup>24</sup> *Smith v. Hughes* (*supra* note 16) is such a case if the buyer is taken to have agreed to take the oats not “under the belief that they were old, [but rather] under the belief that the [parties] contracted that they were old.” Blackburn J. at 607. Perhaps the same can be said of *Henkel v. Pape* (*supra* note 23 ), insofar as it can be read as involving a contract for “rifles,” which one party interpreted as “three rifles’ and the other as “fifty rifles.” Similarly in Cass. Civ. Com., Jan. 14 1969, D.S.Jur 1070 (*supra* note ), it could be argued that the parties had agreed to buy and sell a car for “2,000 francs,” but one party had read this as “2,000 Belgian francs’ and the other as “2,000 French francs.” For an argument that the same cases can be cast as misunderstandings or mistakes as to terms depending on how important the mistake in question is taken to be in relation to the whole agreement, see G.C. CHESHIRE, ‘Mistake as Affecting Contractual Consent’, 60 *LQR (Law Quarterly Review)* 1944, p 175 at 179-80. See also Stoljar’s merging of misunderstandings and mistakes as to terms under “correspondence mistakes.” (S.J. STOLJAR, *Mistake and Misrepresentation: A*

and accordingly are classified under contractual interpretation, not contract formation, at French law.<sup>25</sup> Cases of common mistake, finally, have more to do with a lack of adequate contractual object, than with a defect in consent proper.<sup>26</sup> In none of these four kinds of cases does the court need to engage with the issue of the objective/subjective formation of contracts in order to come to a decision. In none of them, therefore, does a conclusion in favour of the defendant can be read as signaling an endorsement of the subjective theory. For this reason, the only mistake cases that are useful for present purposes are those falling under the traditional English categories of mistake in assumption and *non est factum*.<sup>27</sup>

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*Study in Contractual Principles*, Sweet & Maxwell, London 1968.) With respect to mistake in integration cases, see: *Crane v Hegeman-Harris Co. Inc.* [1939] 1 All E.R. 664, at 667, per Simonds J.

<sup>25</sup> Blackburn J., *supra* note 16 at 607.

<sup>26</sup> See generally: F.H. LAWSON, 'Error in Substantia', 52 *LQR* 1936, p 79 at 96; CHESHIRE, *supra* note 24, at 177; "Case 12" in SEFTON-GREEN (ed.), *supra* note 2, at 355-367. Traditionally confined to cases of *res sua* and *res extincta*, they essentially entail a split between the declaration and the outside world. In cases of *res sua*, the declaration purports to transfer the property in a thing to a party who already owns it; in cases of *res extincta*, the thing has ceased to exist at the time that the declaration is formed. See, e.g., *Scott v. Coulson*, [1903] 2 Ch. 249; *Couturier v Hastie* (1856), 5 H. L. Cas. 673 (sale of cargo of corn that has already been disposed of); *Strickland v Turner*, (1852), 7 Ex. 208 (sale of annuity after death of annuitant); *Associated Japanese Bank v Crédit du nord SA* (1989) 1 WLR 255, at 267 (guarantee on sale of non-existing machines); *Galloway v Galloway* 30 T.L.R. 531 (K.B. 1914) (separation agreement between non-married man and woman). In the Australian case *McRae v Commonwealth Disposals Commission* (1951) 84 C.L.R. 377, the court found that no such discrepancy existed as the risk that the object (a sunk tanker) did not exist had been implicitly allocated in the contract. Cases of *res sua* thus involve a discrepancy between the thing's legal status as it appears in the declaration and as it is in reality, whereas it is the thing's physical status that is at issue in cases of *res extincta*. Neither case involves a split between the declaration and the parties' subjective intentions. Lawson, *id.*, at 85-86.

<sup>27</sup> Not even all cases of mistake in assumption are useful for our purposes. Cases where the mistake results from a misrepresentation by the other party are here excluded because they typically say more about the misrepresenter's relation to the court (estoppel issues) than about the misrepresentation's relation to consent. (See, e.g., *Redgrave v Hurd* (1881) 20 Ch. D. 1 (C.A.), per Jessel M.R.: "A man is not to be allowed to get a benefit from a statement which he now admits to be false.") Also mostly excluded from our purview are mistake of identity cases, despite their conceivably qualifying as mistakes in assumption. (Mistakes in assumption about the person are treated just like mistakes in assumption about the thing at French and German law. §1110 C.C.; §119(2) B.G.B.) Like misrepresentation cases, English mistake of identity cases rarely are "pure" mistake cases, for they typically stage an innocent third party relying to his detriment on a contract which one party was induced to enter through the fraudulent behaviour of another. The issue of the validity of the mistake-tainted contract thus is dealt with indirectly, as an accessory to the larger issue of who should be made to bear the loss that resulted from the fraudulent party's BEHAVIOUR. J. CARTWRIGHT, 'The Rise and Fall of Mistake in the English Law of Contract', in Sefton-Green (ed.), *supra* note 2, at 85, note 78. (See, e.g., *King's Norton Metal Co. Ltd. v Edridge, Merrett, & Co. Ltd.* (1897) 14

Of course, courts have at times shoe-horned into the categories of *non est factum* or mistake in assumption, cases that arguably better fit other categories of mistake,<sup>28</sup> and vice versa,<sup>29</sup> under the above analysis. While such “misclassification cases” are not the best cases with which to test the legal system’s proclivity towards objective or subjective contract, they are nonetheless useful for that purpose. As just explained, the best cases are those in which the objective/subjective split is inescapable—clear cases of mistake in assumption or *non est factum*. Nonetheless, the very fact that a court might feel the need to tinker with the classification of the mistake at issue so as to avoid (or plunge into) engaging with subjective intentions is itself revealing of this court’s attitude towards such intentions. For this reason, such misclassification cases are also included in the present study.

## II. THE COMPARISON

### A. English Law

While the English law of contractual mistake has evinced a general commitment to the objective theory of contract, it appears that it has suffered occasional lapses into subjectivity. I will consider its objective and subjective dimensions in turn.

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T.L.R. 98 (C.A.); *Lewis v Averay* ([1972] 1 Q.B. 198, *per* Lord Denning M.R.). Only passing reference will be made to misrepresentation and mistake of identity cases, therefore.

<sup>28</sup> See, e.g., *Raffles v. Wichelhaus*, (1864), 2 H. & C. 906, in which the court found that “there was no *consensus ad idem*” despite the parties having agreed to sell a cargo “to arrive ex ‘Peerless’” on the ground that one party “meant” the September Peerless and the other “meant” the December Peerless. As such, the case is framed in terms of a split between the parties’ declaration and their subjective intentions. But an analysis in terms of mistake as to terms would arguably have been more appropriate: a contract was formed concerning a cargo “to arrive ex ‘Peerless’” but one party insisted that this be interpreted as “ex (September) Peerless” whereas the other asked that it be interpreted as “ex (December) Peerless.” The same can be said of the court’s reasoning in *Scriven Bros. Hindley & Co.* [1913] 3 KB 564.

<sup>29</sup> See, e.g., *Bell v. Lever Bros.*, [1932] A.C. 161, the issue of which could be framed in terms of an objective/subjective split as “whether to void an agreement terminating an employment contract, which both parties erroneously assumed could not be terminated in any other way,” but which ends up being treated by the court as a case of common mistake (presumably on the ground that the mistake in assumption was shared by the two parties).

## i. Objectivity

It is a well-known feature of English law that it has long endorsed an objective theory of contract.<sup>30</sup> Since Justice Blackburn's famous dictum in *Smith v. Hughes*,<sup>31</sup> indeed, it is well-settled that English contract law generally looks to words and deeds, not actual intentions. Judicial statements<sup>32</sup> and academic commentaries<sup>33</sup> to that effect abound. The notion of bargain, which lies at the heart of the common law of contracts, is but the embodiment of this principle.<sup>34</sup>

Not surprisingly, therefore, claims for relief from contractual obligations on the ground that one's mind did not follow one's deed have traditionally met with scepticism

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<sup>30</sup> But see Williston's claim that the objective theory of contracts came relatively late to English law, which would have endorsed a subjective standard in its early years: WILLISTON, 'Mutual Assent in the Formation of Contract', 14 *ILR (Illinois Law Review)* 1919, p 85. See also Stoljar's reply that the early case law on point is too sparse to draw any conclusion on the issue, *supra* note 24, at 8.

<sup>31</sup> "If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." Blackburn J. in *Smith v Hughes*, *supra* note 16, at 607. Although *Smith v Hughes* is the case most commonly cited in support of this proposition, the general idea predates it. See: *Scott v Littledale* (1858) 8 E & B 815 (sale by sample); *Cornish Abington* (1859) 4 H. & N. 549, at 556 ("If any person, by a course of conduct, or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement ... whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct.")

<sup>32</sup> *Norwich Union Fire Insurance v Price* [1934] A.C. 455, at 463, *per* Lord Wright ("The test of intention in the formation of contracts...is objective; that is, intention is to be ascertained from what the parties said or did."); *Storer v Manchester City Council* [1974] 3 All.E.R. 825 (C.A.), *per* Lord Denning at 829 ("In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: 'I did not intend to contract,' if by his words he has done so.")

<sup>33</sup> J. CHITTY, *Chitty on Contracts*, 28<sup>th</sup> ed., Sweet & Maxwell, London 1999, at 2-148; CARTWRIGHT, *supra* note 27, at 66 ("Judicial instinct seems to rise against the claim [that a contract can be undermined by a mistake]"); C. J. SLADE, 'The Myth of Mistake in the English Law of Contract', 70 *LQR* 1954, p 385 at 386 ("The court will take the objective attitude and judge the parties' intentions from what they said and did"); CHESHIRE, *supra* note 24, at 180 ("In all the relevant decisions the concern of the Court has been to implement, not the actual expectations of each party, for that indeed would be impossible, but the sense of the promise objectively considered.")

<sup>34</sup> G.H. TREITEL, *An Outline of the Law of Contract*, 4<sup>th</sup> ed., Butterworths, London 1989.

from English courts.<sup>35</sup> From an objective perspective, once a contractual intention can reasonably be inferred from words or actions, it matters little whether these words or actions reflect an actual intention: “[w]here there has been no misrepresentation and where there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake.”<sup>36</sup> Hence have mistakes in assumption been largely dismissed as irrelevant at common law.

Relief was granted in cases where the mistake was induced by the defendant’s fraudulent, negligent, or even innocent misrepresentations.<sup>37</sup> But it is the defendant’s reprehensible behaviour, not the plaintiff’s lack of consent, which is then targeted by the sanction.<sup>38</sup> Courts have moreover taken a strict view of the kind of behaviour that qualifies as reprehensible for that purpose. For example, they have excluded cases where the defendant, being aware of the plaintiff’s mistake, does nothing to correct it.<sup>39</sup> Only in a handful of cases have pure mistakes in assumption—mistakes in assumption unadulterated by the presence of a misrepresentation from the defendant—proven a sufficient ground for relief from contractual obligations.<sup>40</sup>

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<sup>35</sup> SHATWELL, ‘The Supposed Doctrine of Mistake in Contract: A Comedy of Errors’, 53 *CBR* (*Canadian Bar Review*) 1955, p 166; ATIYAH & BENNION, ‘Mistake in the Construction of Contracts’, 24 *MLR* (*Modern Law Review*) 1961, p 421 at 421-23; CARTWRIGHT, *supra* note 3, at 155.

<sup>36</sup> *Tamplin v James* (1880) 15 Ch. D. 215, at 217 (buyer refuses property when realizes garden not included in the sale).

<sup>37</sup> *Derry v Peek* (1889) 14 App.Cas. 337, 359 (HL); *Esso Petroleum Co. Ltd. v Mardon* [1976] Q.B. 801 (C.A.); *Redgrave v Hurd* (1881) 20 Ch.D 1(C.A.).

<sup>38</sup> Sabbath, *supra* note 7, at 812; SMITH, *supra* note 12, at 367. For this reason, “few English contract law books make the association between mistake and misrepresentation.” SEFTON-GREEN, *supra* note 4, at note 90. See however: R. GOFF & G. JONES, *The Law of Restitution*, 6<sup>th</sup> ed., Sweet & Maxwell, London 2002, at chap. 9; J. CARTWRIGHT, *Misrepresentation*, Sweet & Maxwell, London 2002; WADDAMS, *supra* note 2, at 339ff.

<sup>39</sup> *Pope & Pearson v The Buenos Ayres New Gas Co.* (1892) 8 T.L.R. 758: “In order to render a contract invalid on the ground of mistake it is not sufficient for one of the parties to say I thought so and so and if I had not so thought I should not have entered into the contract. ... Even if the other contracting party knew such to have been the case the contract will still be binding unless he induced the mistake or said or did something to confirm it or unless the facts show that he warranted the truth of what he knew was believed...”

<sup>40</sup> See generally: TREITEL, *supra* note 34, ch 8; SMITH, *supra* note 12, at 302, 365.

The door to such relief arguably was open and shut in *Bell v. Lever Brothers Ltd.*<sup>41</sup> The House of Lords was there asked to set aside an agreement terminating an employment contract on the ground that the employer had, upon concluding this agreement, wrongly assumed that the employment contract was not terminable otherwise. It was later discovered that the employees had engaged in behaviour that would have warranted their dismissal without compensation. Although the court allowed the employees' appeal and restored the termination agreement which the trial judge and the Court of Appeal had set aside, it stopped short of suggesting that mistake in assumption could never be a valid ground for voiding contracts.<sup>42</sup> Having reviewed cases of *res sua* and *res extincta*, Lord Atkin indicated that relief might be extended to cases of error *in substantia* where the error is shared by both parties and is such that "the state of the new facts destroy[s] the identity of the subject matter as it was in the original state of facts."<sup>43</sup>

If this can be construed as an overture to a general theory of mistake in assumption, it is a very slight one indeed. As many have noted, the degree of seriousness that is required of the mistake in order for it to be operative is such as to be rarely met in real life.<sup>44</sup> For one, the House of Lords found in *Bell* that the difference between "an agreement to terminate a broken contract" and "an agreement to terminate an unbroken contract" was not serious enough to warrant relief.<sup>45</sup> What is more, Lord Atkin gave the

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<sup>41</sup> [1932] A.C. 161 (H.L.)

<sup>42</sup> The finding of the jury dismissing fraud on the part of the employees clearly was an important factor in the court's decision here.

<sup>43</sup> At 218. See also *supra* note 26.

<sup>44</sup> *Great Peace Shipping Ltd. v Tsavliris* [2002] E.W.J. No. 4397, at 5 (*per* Lord Phillips M.R.); *Associated Japanese Bank per Steyn J.*, *supra* note 26, at 267 ("[T]he principle enunciated in *Bell v Lever Bros Ltd* is markedly narrower than the civilian doctrine.") See also: Cartwright, *supra* note 3 at 155; TREITEL, *supra* note 34; SMITH, *supra* note 12, at 365.

<sup>45</sup> *Supra* note 29, at 236. In coming to this conclusion, the court relied upon the pre-Judicature Act case of *Kennedy v Panama, New Zealand and Australian Royal Mail Co. Ltd.* ((1867), L.R. 2 Q.B. 580), in which shares in a company with an important mail carriage contract were found to be insufficiently different from

following examples of mistakes that would similarly be insufficiently serious to be operative: an unsound horse bought in the belief that it sound; an inhabitable house bought in the belief that it is habitable; a garage bought without knowledge of the fact that the nearby thoroughfare is about to be redirected and the incoming traffic consequently diverted.<sup>46</sup> In none of these cases would the contract be void, regardless of whether the mistake is the buyer's only or that of both parties.

But, for purpose of understanding English law from the perspective of the participants in the English legal system, the waves which *Bell* stirred on the academic scene are as interesting as the case itself.<sup>47</sup> Although scholars have yet to agree on the exact implications of the case, their differing opinions belie a deep-seated consensus in favour of the objective theory. Some have attempted to minimize the case's impact, denying that it may have opened the way towards a general theory of mistake;<sup>48</sup> others have conceded the opening, only to condemn it in no uncertain terms.<sup>49</sup> Beyond these different takes on the case, however, almost all<sup>50</sup> agree that a general theory of mistake in assumption has no place in English law.

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shares in a company without such a contract to void their sale. See also: *Gompertz v Bartlett* (1853), 2 E. & B. 848 (inland bill believed by both parties to be foreign).

<sup>46</sup> *Ibid.*, at 224.

<sup>47</sup> The fact that the realm of "legal participants" largely is co-extensive with that of "judges" in the English legal system makes it more difficult to distinguish between the external ("what the judges actually do") and the internal ("what the jurists see the judges as doing") perspectives than at French and German law, where the realm of "legal participants" is much broader than that of "judges."

<sup>48</sup> G.H. CHESHIRE & C. FIFOOT, *Law of Contract*, 3rd ed., [publisher, city] 1952, pp 179-80. ("Despite the wide language of the speeches [in *Bell*], the decision it is submitted is no authority for a general doctrine of mistake.") See also: TREITEL, *supra* note 34; CARTWRIGHT, *supra* note 3; LAWSON *supra* note 26; ATIYAH & BENNION, *supra* note 35, at 423, 438-39, 441; CHESHIRE, *supra* note 24, at 177; S.J. STOLJAR, 'A New Approach to Mistake in Contract', 28 *MLR* 1965, p 265 at 278-79; TYLOR, 'General Theory of Mistake in the Formation of Contract', 11 *MLR* 1948, p 257 at 263-64.

<sup>49</sup> SLADE, *supra* note 33, at 398ff; SHATWELL, *supra* note 33 at 177, 183-84.

<sup>50</sup> See, however: GOODHART, 'Mistake as to Identity in the Law of Contract', 57 *LQR* 1941, p 228.

And indeed, it is clear in retrospect that *Bell* has had a chilling effect on subsequent courts confronted with mistake issues. In *Leaf v. International Galleries*,<sup>51</sup> the Court of Appeal denied relief to the buyer of a picture of the Salisbury Cathedral, which he and the seller wrongly believed to be by Constable, partly on the ground that “[t]here was no mistake about the subject-matter of the sale” as the picture indeed was a “picture of the ‘Salisbury Cathedral’”!<sup>52</sup> In *Frederick E. Rose (London), Ltd. V. Wm. H. Pim, Jr., & Co.*,<sup>53</sup> the same court refused to set aside a contract for the sale of “horse beans,” which both parties had taken to be just another name for the “feveroles” requested by the buyer’s customer. Even though “horse beans” and “feveroles” proved to be different kinds of beans, the court commented that the mistake was not sufficiently serious to render the contract void at law.<sup>54</sup> Mistake of identity cases, finally, have followed a like, if parallel, course. Although the involvement of innocent third parties in these cases has caused them to break free from the *Bell* line, their tenor similarly is unmistakably objective. In a 1972 Court of Appeal decision, Lord Denning summed up as follows the state of English law on mistake of identity:

When a dealing is had between a seller ... and a person who is actually there present before him, then the presumption in law is that there is a contract, even though there is a fraudulent impersonation by the buyer representing himself as a different man than he is. There is a contract made with the very person there, who is present in person.<sup>55</sup>

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<sup>51</sup> [1950] 2 K.B. 86; 1 All E.R. 693 (C.A.).

<sup>52</sup> Among the other reasons for the decision was the fact that the plaintiff was seeking, not common law damages, but the equitable remedy of rescission, the availability of which is governed by very strict rules. In addition, Lord Denning clearly was concerned to prevent the plaintiff from using Equity as a means to bypass the rigours of the Sale of Goods Act.

<sup>53</sup> [1953] 2 Q.B. 450, 2 All E.R. 739 (C.A.).

<sup>54</sup> The court did suggest that the contract might be voidable at equity, however, but declined to rescind it on the ground that it had been fully executed. *Ibid.* The plaintiff had originally requested that the contract be rectified, which the court refused to do because the terms of the contract had been agreed upon under mistake.

<sup>55</sup> Lord Denning in *Lewis v Averay* ([1972] 1 Q.B. 198 (C.A.)), citing *King’s Norton Metal Co. Ltd. v Edridge Merrett & Co. Ltd.* ((1897) 14 T.L.R. 98), *Phillips v Brooks* ([1919] 2 K.B. 243), and *Ingram v Little* ([1961] 1 K.B. 31). See also the dissenting judgement of Ford Nicholls and Lord Millett in the recent case of *Shogun Finance Ltd. V. Hudson*, [2003] U.K.H.L. 62.



In the fifty years since *Bell*, then, it may well be true that “hardly a decision”<sup>56</sup> has voided a contract on the ground of mistake at common law.<sup>57</sup>

This is not to say that English courts have over that period systematically denied relief in all cases involving mistakes in assumption. Relief has been granted in some such cases, but it typically was on grounds other than mistake. In particular, courts have seized on the other strand running through the Lords’ speeches in *Bell*, namely, the argument of construction according to which the parties had implicitly allocated to the employer the risk of the assumption not materializing.<sup>58</sup> In a 1951 decision of the Australian High Court, this argument was even applied to a case of *res extincta* where a salvage operator obtained compensation for the loss that he had suffered in attempting to salvage a non-existent sunken ship on the ground that the defendant had implicitly assumed the risk of the ship’s non-existence.<sup>59</sup> In reaching this conclusion, the court contended that *Couturier v. Hastie*,<sup>60</sup> the English authority on cases of *res extincta*, had itself been decided on grounds of construction rather than mistake. In support of this contention, the court quoted Pollock’s comment that “a large proportion of the cases which swell the rubric of relief against mistake in the textbooks ... are really cases of

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<sup>56</sup> FULLER, ‘Mistake and Error in the Law of Contracts’, 33 *ELJ* (*Emory Law Journal*) 1984, p 41 at 68.

<sup>57</sup> See however: *Sowler v Palmer*, [1940] 1 K.B. 271, in which the court applied the looser test of French law to void a lease on the ground that the lessor was mistaken as to the lessee’s identity. According to Nicholas (*supra* note 3 at 96), this case has by now been largely discredited. A subjectivist approach would also have been adopted in some recent South African cases: D.B. HUTCHISON & B.J. VAN HEERDEN, ‘Mistake in Contract: A Comedy of (Justus) Errors,’ 104 *SALJ* (*South African Law Journal*) 1987 p 523.

<sup>58</sup> “[I]f 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.” Lord Atkin, *supra* note 29 at 225. And at 227: “In these [mistake as to quality] 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 ... 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 the consideration.” See also Lord Thankerton at 236.

<sup>59</sup> *McRae*, *supra* note 26.

<sup>60</sup> (1856) HL Cas 673.

construction.”<sup>61</sup> Indeed, the mistake and construction arguments run so closely together in the case law as to be at times indistinguishable.<sup>62</sup>

That the construction argument would generally be preferred over the mistake argument by English courts and scholars alike is significant. Both these arguments lead to the undoing of the contract. But the construction argument, unlike the mistake argument, spares the courts the need to inquire into the parties’ subjective intentions. As such, it allows them to reach the desired outcome through objective means, with which they clearly feel more comfortable.

On the whole, then, it seems quite clear that English judges do more than just pay lip service to the objective theory of contract: their allegiance to this theory is very much confirmed by their common law decisions in cases involving mistakes in assumption.

## ii. Subjectivity

This allegiance has not been perfectly unflinching, however. English judges have suffered occasional lapses into subjectivism. *Raffles v. Wichelhaus*<sup>63</sup> is perhaps the most famous example of such a lapse in the realm of contractual mistake.<sup>64</sup> The case was decided on subjective grounds (parties not *ad idem* on a fundamental term of the contract), despite the fact that the same result could have been reached on objective

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<sup>61</sup> Preface to Vol. 101 of the *Revised Reports*, at vi, quoted in *McRae*, *supra* note 26, at 379. See also: LAWSON, *supra* note 26 at 96-97; SMITH, *supra* note 12, at 282, 302-04, 316, 371; C.J. SLADE *supra* note 33 at 398, 401-02; P. BENSON, ‘The Idea of a Public Basis of Justification for Contract’, 33 *OHLJ* (*Osgoode Hall Law Journal*) 1995 p 273. But see Lord Phillips’s categorical rejection of the implied term theory in *Great Peace*, *supra* note 44, at 13.

<sup>62</sup> See e.g.: *Sullivan v Constable* (1932), 48 *TLR* 369; *Pope & Pearson*, *supra* note 39 (“The defendants might have succeeded if they could have proved that it was an implied condition of the contract that it was not to be binding unless their information as to the value of the coal was correct...but the evidence proved nothing of the sort.”) This is also true of academic writing. See, e.g.: TYLOR, *supra* note 48; J.W. SALMOND AND P.H. WINFIELD, *PRINCIPLES OF THE LAW OF CONTRACTS*, Sweet & Maxwell, London 1927, p 195.

<sup>63</sup> *Supra* note 28.

<sup>64</sup> *Dickinson v Dodds*, *supra* note 2, is another example, albeit one outside the mistake context.

grounds (breach of condition). Subjective grounds were similarly invoked by English judges in some mistake of identity cases to support their conclusion that no contract was ever formed between the parties.<sup>65</sup> The endorsement of the subjective theory suggested by these last cases is even more decisive in light of the fact that they involved innocent third parties whose interests might have been fully protected had the judges instead used the construction argument to set the contract aside. It seems that the pull of the general, objective framework of the law, even when combined with the sympathy which the judges must have felt towards the innocent third parties, was not sufficient to offset the subjectivist forces that overpowered them in these cases.

But the most significant inroads into the objective treatment of contractual mistake came from the law of equity. The plea of *non est factum* has long been available to relieve document signers whose “mind ... did not accompany the signature.”<sup>66</sup> Subjective intentions here are front and center: “[T]he doctrine of *non est factum* inevitably involves applying the subjective rather than the objective test to ascertain the intention. It takes the intention which a man has in his own mind rather than the intention which he manifests to others...”<sup>67</sup> Admittedly, courts have always insisted that the scope of this plea “be kept within narrow limits.”<sup>68</sup> This plea is unavailable in cases involving

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<sup>65</sup> See, e.g., Lord Cairns in *Cundy v Lindsay*, (1878) 3 App. Cas. 459 (H.L.), at 462: “With him they never intended to deal. Their minds never, even for an instant of time, rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever”; Sellers L.J. in *Ingram v Little*, *supra* note 55 at 33: “Hutchinson” the offeree, knew precisely what was in the minds of the two ladies for he had put it there and he knew that their offer was intended for P.G.M. Hutchinson of Caterham and that they were making no offer to and had no intention to contract with him, as he was. There was no offer which he ‘Hutchinson’ could accept and, therefore, there was no contract.”

<sup>66</sup> Byles J. in *Foster v Mackinnon* (1869) L.R. 4 C.P. 704, at 711 (elderly man indorsed a bill of exchange which had been misrepresented to him as a guarantee).

<sup>67</sup> *Saunders v Anglia Building Society (Gallie v Lee)* [1971] A.C. 1004 (H.L.), *per* Lord Pearson, at 1013.

<sup>68</sup> “Much confusion and uncertainty would result in the field of contract and elsewhere if a man were permitted to try to disown his signature simply by asserting that he did not understand that which he signed.” Donovan L.J. in *Muskham Finance Ltd. v Howard* [1963] 1 Q.B. 904, 912. See also: *Gallie v Lee*, *supra* note 67 at 1011.

unsigned contracts. Moreover, the opportunity to extend its availability beyond cases of blind and illiterate signers was questioned in early cases.<sup>69</sup> And it has been recently confirmed that the plea would be barred where the signer has been “negligent” or where the document signed was not “fundamentally different” from the document believed to be signed.<sup>70</sup> Nonetheless, the sheer fact that this plea is to some extent available is instructive here, for it demonstrates that a certain measure of subjectivity remains at play in the English conception of contract.<sup>71</sup> While one may be mistaken about the exact content of a contract and still be bound by it, no contract is binding unless the general “object of the [contractual] exercise”<sup>72</sup> has, at some level, been subjectively intended.<sup>73</sup>

Also significant in this respect is the doctrine of equitable mistake—should such a doctrine exist. There is evidence to suggest that early nineteenth-century equity indeed considered it “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.”<sup>74</sup> However, courts of equity thereafter grew increasingly resistant to claims of mistake in contract formation.<sup>75</sup> While these courts did, and still do, take mistake into account in the

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<sup>69</sup> *Hunter v Walters* (1871), L.R. 7 Ch. App. 75, *per Mellish L.J.*, at 87, quoted in *Howatson v Webb*, [1908] 1 Ch. 1, *per Farwell L.J.*, at 3-4.

<sup>70</sup> *Gallie v Lee*, *supra* note 67, at 1012.

<sup>71</sup> PALMER, *supra* note 12, at 80.

<sup>72</sup> *Gallie v. Lee*, *supra* note 67, at 1010.

<sup>73</sup> “Suppose that the very busy managing director ... has a pile of documents to be signed ... and he ‘signs them blind,’ as the saying is, not reading them or even looking at them. He may be exercising a wise economy of his time and energy. ... Such conduct is not negligent in any ordinary sense of the word. But the person who signs documents in this way ought to be held bound by them ... I think the right view of such a case is that the person who signs intends to sign the documents placed before him, whatever they may be, and so there is no basis on which he could successfully plead non est factum.” *Id.*, at 1013.

<sup>74</sup> *Manser v Back* (1848) 6 Hare 443 at 448. See also: *Malins v Freeman* (1837) 2 Keen at 25; *Calverley v Williams* (1790) 1 Ves. 210 at 211; *Townshend v Stangroom* (1801) 6 Ves. 328; *Stewart v Alliston* (1815) 1 Mer. 26. See generally: R. GOFF AND G. JONES, *The Law of Restitution*, 5<sup>th</sup> ed., Sweet & Maxwell, London 1998, pp 288-89.

<sup>75</sup> See, e.g., *Tamplin v James* (1880) 15 Ch. D. 215, at 217 (refusal to complete sale of land upon discovery garden is not included), where the court refused to support the defendant on “the simple statement that he has made a mistake.”

determination of the appropriate remedy,<sup>76</sup> they have on the whole done little more to soften the plight of mistaken parties,<sup>77</sup> at least until relatively recently.

In the famous 1950 case of *Solle v. Butcher*,<sup>78</sup> the court granted relief to a lessor who had failed to realize that rent control legislation applied to the property in question, on the ground that the mistake was “fundamental” and shared by both parties. This ruling implied a much looser test of “fundamentalness” than had been formulated and applied in *Bell*, but Lord Denning stated that this departure was justified on the ground that the case before him was founded in equity whereas *Bell* had been decided at law.<sup>79</sup> Lord Denning then restated what he took to be the doctrine of equitable mistake as follows: “[T]he court of equity ... had the power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained.”<sup>80</sup> Aside from situations of common fundamental misapprehensions as to facts as was before the court, such an “unconscientious” advantage would in his view also be present where one party is aware that the other is mistaken and “lets him remain under his delusion”<sup>81</sup>—despite the court’s clear *dictum* to the contrary in *Smith v. Hughes*.<sup>82</sup> Taking advantage of the greater flexibility of remedies at equity, finally, Lord Denning concluded his judgement with an order that the lessee elect between rescission

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<sup>76</sup> Mistake has long been considered a possible bar against claims for specific performance (*Smith v Wheatcroft*, (1878) 9 Ch. D. 223; *Malins v Freeman*, (1837) 2 Keen 25; *Morley v Clavering* (1860) 29 Beav. 84, 30 Beav. 108), or rescission for misrepresentation (SLADE, *supra* note 33, at 390.)

<sup>77</sup> See generally: KERLY, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery*, Cambridge University Press, Cambridge 1890, at 243ff; WILSON, *Principles of the Law of Contract*, Sweet & Maxwell, London 1957 at 117; CHESHIRE & FIFOOT, *supra* note 48, at 178, 202, 204; STOLJAR, *supra* note 24, at 25-27.

<sup>78</sup> [1950] 1 K.B. 671.

<sup>79</sup> At 678.

<sup>80</sup> At 678.

<sup>81</sup> At 679.

<sup>82</sup> *Supra* note 16.

and the lease as it had been agreed upon with the lessor.<sup>83</sup> Lord Denning's judgement thus broke new grounds in three ways. It put forward a test for fundamentalness considerably looser than that established in *Bell*; it extended the definition of "misrepresentation" to include a party's passive inaction in the face of the other's delusion; and it liberated the courts from the rigidity of the common law remedies.<sup>84</sup>

Although this judgment generated much criticism,<sup>85</sup> it did find following in some mistake cases.<sup>86</sup> In most of these, however, the judges favoured a reading of *Solle* consistent with *Bell*, a reading according to which "the equitable remedy of rescission the [Lord Denning] identified is one that operates in a situation where the mistake is not of such a nature as to avoid the contract."<sup>87</sup> At any rate, the binding force of *Solle* was seriously called into question in the recent case of *Great Peace Shipping Ltd. v. Tsavliris*.<sup>88</sup> In denying relief to a shipping company who had agreed to salvage a ship believed to be much closer than it really was, the Court of Appeal there questioned the

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<sup>83</sup> At 682.

<sup>84</sup> Many commentators have suggested that the limited relief offered by English law to mistaken contract parties is in part due to the all-or-nothing character of common law remedies. As nothing short of complete nullity is available at common law, courts would have been resistant to intervene at all in mistake cases. See: Sabbath, *supra* note 6, at 798, 808; Fuller, *supra* note 56, at 54. It appears that a misinterpretation of Pothier's writings may have played a role in bringing about this state of affairs. When Pothier suggested that mistake in assumption "annuls" the contract at the French law, he meant to refer to "*nullité relative*" ("voidability") not "*nullité absolue*" ("voidness"), whereas Pothier's English interpreters ironically took him to be referring to "*nullité absolue*." *Id.*, at 49. On the influence of the civil law upon the English law of mistake generally, see: A.W.B. SIMPSON, 'Innovation in Nineteenth Century Contract Law', 91 *LQR* 1975, p 247; IBBETSON, *supra* note 2, chap. 12.

<sup>85</sup> CHESHIRE & FIFOOT, *supra* note 48 at 175; WILSON, *supra* note 77 at 117; CHITTY, *supra* note 33, at 194; STOLJAR, *supra* note 24, at 25-8, 45-6; C.J. SLADE, *supra* note 33, at 396, 405-07; ATIYAH & BENNION, *supra* note 35 at 442; W. ANSON, *Anson's Law of Contracts* 327-29 (25th ed., 1979); GOODHART, 'Rescission of Lease on the Ground of Mistake', 66 *LQR* 1950, p 169 at 173; Steyn J. in *Associated Japanese Bank*, *supra* note 26, at 267.

<sup>86</sup> See, e.g., *Grist v Bailey*, [1967] Ch. 532 (rescission of sale of freehold land mistakenly thought to be encumbered by statutory tenancy); *Magee v Pennine Insurance Co.* [1969] 2 Q.B. 507 (compromise agreement to end insurance contract determinable on other grounds), also a decision by Lord Denning; *Laurence v Endcourt Hodings* [1978] 1 W.L.R. 1128 (rescission of lease where parties unaware of applicable restrictive planning permission); *Associated Japanese Bank*, *supra* note 26; *West Sussex Properties Ltd. v Chichester District Council*, unreported decision of the Court of Appeal (28th June 2000), cited in *Great Peace*, *supra* note 44, at 26-27.

<sup>87</sup> *Great Peace*, *ibid.*, at 17. See, e.g., Steyn J. in *Associated Japanese Bank*, *ibid.*, at 270.

<sup>88</sup> *Ibid.*

authority and pertinence of the cases cited in support of the equitable jurisdiction invoked in *Solle*, endorsed the trial judge's description of this jurisdiction as "chimera," and firmly reiterated that "there is no jurisdiction to grant rescission of a contract on the ground of common mistake where that contract is valid and enforceable on ordinary principles of contract law."<sup>89</sup> The precedential legacy of *Solle* remains uncertain therefore. But even if *Solle* were to remain good law, it would constitute no more than a qualified endorsement of the subjective theory, as the case also confirms that relief would never even be considered in cases involving mistakes that are strictly unilateral.<sup>90</sup>

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This brief overview of the English law of contractual mistake has shown that, while English judges and scholars have repeatedly affirmed their commitment to an objective theory of contract, English judicial practice is more qualified. The *non est factum* cases clearly demonstrate that, in order for a contract to be binding at English law, some element of subjectivity must have been present at the time of contract formation. While the content of the contract need not have been subjectively endorsed, the parties must have minimally intended to enter the kind of contract at issue.<sup>91</sup> Moreover, the occasional flirting of English judges with an equitable doctrine of mistake shows that these judges cannot but feel somewhat disturbed by mistakes in assumption, even those relating merely to the content of contracts. English judicial practice thus seems to suggest that, while contractual intention cannot have legal effect unless it is declared, the declaration of intention must at some level remain just that: a declaration *of* intention.

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<sup>89</sup> *Ibid.*, at 24.

<sup>90</sup> See e.g. *Riverlake Properties, Ltd. v Paul*, [1975] 1 Ch. 113 (C.A. 1974) (reimbursement clause in favor of lessee in 99-yr lease omitted by mistake). See generally: FULLER, *supra* note 56, at 85.

<sup>91</sup> For a similar conclusion, see: SMITH, *supra* note 12, at 62, 174.

In sum, while English judicial practice suggests a view of contract as partly objective and partly subjective, English jurists tend to self-represent contract as purely objective. That is to say, internal and external standpoints on the English conception of contract diverge.

## **B. French Law**

French law is commonly described as significantly more subjective than English law,<sup>92</sup> and a cursory look at the explicit statements of French codifiers and scholars in matters of contractual mistake indeed suggest as much. But here again we will see that the overall picture changes when judicial practice, the third of what the French consider to be the sources of their law,<sup>93</sup> is taken into account.

### **i. Subjectivity in Theory**

The handful of Civil Code articles relating to contractual error are contained in the chapter titled *Des conditions essentielles pour la validité des conventions* (“Of the conditions that are essential for the validity of agreements”). This chapter opens with article 1108, which states that a legally enforceable agreement contains the following four elements: “the consent of the party ...; the party’s capacity to contract; a clear object forming the substance of the agreement; a licit cause to the obligation.”<sup>94</sup> Articles 1109 and 1110 are the first two articles of the first section, which deals with consent. They read as follows:

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<sup>92</sup> ZWEIGERT & KÖTZ, *supra* note 3, at 423: “the doctrine of intention, traces of which still lurk in Continental rules relating to mistake...”; Cartwright, *supra* note 3, at 153; T. HOFF, ‘Error in the Formation of Contracts in Louisiana: A Comparative Analysis’, 53 *TLR (Tulane Law Review)* 1979, p 329 at 337; HOLSTEIN, ‘Vices of Consent in the Law of Contracts’, 13 *TLR* 1965, p 635 at 670-73.

<sup>93</sup> Y. LOUSSOUARN, ‘The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law’, 18 *LLR (Louisiana Law Review)* 1958, p 235 at 250-54.

<sup>94</sup> My translation.



Art. 1109            There is no valid consent, where consent is given through error, or where it has been extorted through violence or elicited by deception.

Art. 1110            Error is a cause of nullity of the agreement only if it relates to the very substance of the thing which constitutes its object.

                          It is not a cause of nullity if it relates to the person with whom one intends to contract, unless the consideration of this person is the principal cause of the agreement.

Further down, in the fourth section, which deals with cause, article 1131 provides that “[t]he obligation devoid of cause, endowed with a false cause, or an illicit cause, can have no effect.”

Consent-vitiating errors (the rough equivalent of mistakes in assumption) are governed by articles 1109 and 1110. Cases of *res sua* and *res extincta* are considered errors relating, not to consent, but to cause, and accordingly fall under article 1131. As for errors going to the nature of the contract (the kind involved in *non est factum* cases), they are governed by article 1108. It is generally accepted that these errors are absent from the list of article 1110 because they are “obstacle errors,” viz., errors so serious as to prevent consent from even forming, unlike the consent-vitiating errors listed at article 1110, which are serious enough to lessen the quality of consent but not to threaten its very existence.<sup>95</sup> As such, errors as to the nature of the contract fall, like other obstacle errors, under the general consent requirement of article 1108 and are sanctioned with *nullité absolue* (roughly “void at law”) or even *inexistence*, in the opinion of those who insist on that distinction,<sup>96</sup> whereas the consent-vitiating errors of article 1110, which include the *erreurs sur la qualité substantielle*, are sanctioned with the less stringent *nullité relative* (roughly “voidable at equity.”)<sup>97</sup>

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<sup>95</sup> A. BÉNABENT, *Droit civil: les obligations*, 5<sup>th</sup> ed., Montchrestien, Paris 1995 at §76, 49; J. CARBONNIER, *Droit civil, vol. IV, “Les obligations,”* 12<sup>th</sup> ed., L.G.D.J., Paris 1985 at §19, 90. But see: J. FLOUR & J.-L. AUBERT, *Les obligations*, 5<sup>th</sup> ed., Armand Colin, Paris 1991, at §192, 146-47.

<sup>96</sup> See generally: FLOUR & AUBERT, *ibid.* at §323, 260, note 1.

<sup>97</sup> See M. PLANIOL, G. RIPERT & P. ESMEIN, *Traité pratique de droit civil français*, vol. VI, 2nd ed., L.G.D.J., Paris 1952 at §176, 207, notes 4 and 5.

While the cause mentioned at articles 1108 and 1131, being the counterpart of the object of the obligation, clearly is understood objectively,<sup>98</sup> the notion of consent at play in articles 1108 to 1110—which notion lies at the root of the whole law of obligations—is by all accounts subjective.

French authors are surprisingly consistent on this point. All the treatises on the law of obligations consulted open with an abstract theoretical discussion of the principle of the *autonomie de la volonté* (the “autonomy of the will”), a product of nineteenth-century economic and philosophical individualism which they take to be the cornerstone of the French law of obligations.<sup>99</sup> According to this principle, which French authors have long mistakenly attributed to Kant,<sup>100</sup>

... any obligation must be founded on the individual will and is legitimate only insofar as it is so founded: that which would not have been consented to would be tyrannical towards the individual subjected to it. To say that the will is autonomous is not to say, merely, that it is free to create such rights and obligations as it pleases. It is also to say that where it did not create any, none exists.<sup>101</sup>

The notion of consent derived from this principle clearly is subjective in the extreme: the will that binds is the individual’s very own.<sup>102</sup> Not the will as interpreted by others, or reconstructed by law, but the internal, subjective will of the individual—the

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<sup>98</sup> See generally, the excellent P. LOUIS-LUCAS, *Volonté et cause: étude sur le rôle respectif des éléments générateurs du lien obligatoire en droit privé*, Sirey, Paris 1918.

<sup>99</sup> See generally: E. GOUNOT, *Le principe de l'autonomie de la volonté en droit privé, étude critique de l'individualisme juridique*, A. Rousseau, Paris 1912; V. RANOUIL, *L'autonomie de la volonté, naissance et évolution d'un concept*, Presses Universitaires de France, Paris 1980; G. ROUHETTE, ‘The Obligatory Force of Contract in French Law’, in Harris & Tallon (eds.), *supra* note 3, at 38-40.

<sup>100</sup> RANOUIL, *ibid.*, at 56-57; GOUNOT, *ibid.*, at 54. Not surprisingly, French jurists have generally tended to emphasize Kant’s idealism and downplay his pragmatism. RANOUIL, *ibid.*

<sup>101</sup> FLOUR & AUBERT, *supra* note 95. (My translation, emphasis in original.). See also: NICHOLAS, *supra* note 3, at 32 (“In other words, contracts are binding because they are an expression of the free will of the parties, who are law-givers for themselves.”) French authors have long attributed this subjectivist conception of human will to Immanuel Kant. It is only recently that one of them denounced this attribution as unfounded. See RANOUIL, *ibid.*

<sup>102</sup> “French law consecrates the omnipotence of the actual will of the author of a declaration of will. This is just the logical consequence of the principle of the autonomy of the will.” J. CHABAS, *De la déclaration de volonté en droit civil français*, Sirey, Paris 1931, at 81-2. (My translation.) Anecdotal evidence from personal experience confirms this. Of all French law students I encountered throughout my studies and beyond, not one could even conceive of consent differently than as subjective consent.

*volonté psychologique* (“psychological will”).<sup>103</sup> And the code provisions on error indeed were long interpreted by *la doctrine* in this arch-subjective light. Despite the negative, clearly restrictive formulation of article 1110 (“Error is a cause of nullity ... *only if* ... It is *not* a cause of nullity if ...”), classical French authors were of the view that this article should be read very broadly, so as to permit nullifying a contract whenever it was demonstrated that one of the two parties had, even unbeknownst to the other, made a mistake about an aspect of the contract that had determined her consent.<sup>104</sup> From a subjective perspective, indeed, any kind of substantial mistake—unilateral or mutual, of law or of fact, negligent or not, known or unknown to the other party, about the object of the contract or its underlying motive—vitiates consent and thus constitutes a legitimate ground for nullifying the contract.<sup>105</sup> Under its classical interpretation, therefore, article 1110 captured all the scenarios of mistake, even unilateral mistake, as to a quality of the object which Lord Atkin suggested in *Bell* would not justify nullifying the contract at common law—the unsound horse, the inhabitable house, the garage without the expected traffic flow.<sup>106</sup> As for the other party, who might in the process be deprived of reasonably expected gains, he could attempt to recover these gains through delictual

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<sup>103</sup> French doctrinal writings on consent indeed are replete with qualifiers such as “psychological” and “internal”. See, e.g., FLOUR & AUBERT, *supra* note 95, at 146; F. TERRÉ, P. SIMLER, & Y. LEQUETTE, *Droit civil—Les obligations*, Dalloz, Paris 1993, at 182; B. STARCK, H. ROLAND, & L. BOYER, *Droit civil: les obligations*, 6th ed., Litec, Paris 1999 at 192; H. MAZEAUD, J. MAZEAUD, & F. CHABAS, *Leçons de droit civil*, 8th ed., Montchrestien, Paris 1986 at 161.

<sup>104</sup> C. AUBRY & C. RAU, *Droit civil français*, 7th ed., Librairies techniques, Paris 1961 at §343bis, text and note 8; G. RIPERT, *La règle morale dans les obligations civiles*, L.G.D.J., Paris 1949 at §42; BUFNOIR, *Propriété et contrat*, 2<sup>nd</sup> ed., A. Rousseau, Paris 1924 at 598ff; G. BAUDRY-LACANTINERIE & L. BARDE, *Traité théorique et pratique de droit civil*, t. XII, Des Obligations, vol. I, 3rd ed., Sirey, Paris 1908 at §60, 92ff; A. COLIN & H. CAPITANT, *Traité de droit civil*, Dalloz, Paris 1957, §39, at 36-37. This interpretation was arguably endorsed in article 1400 of the Civil Code of Québec, which, more explicitly than the French article 1110, states: “Error vitiates consent of the parties *or of one of them* where it relates to the nature of the contract, the object of the prestation or anything that was essential in determining that consent. ...” (My emphasis.)

<sup>105</sup> F. LAURENT, *Principes de droit civil français*, vol. XV, Bruylant-Christophe, Paris 1869 at §487.

<sup>106</sup> *Supra* note 29 at 49.

proceedings against the mistaken party, at least where the mistake was attributable to this party's fault or negligence.<sup>107</sup> And while all authors recognized that such recovery could be arduous in practice, a majority of them were satisfied that no more could be done for the non-mistaken party in light of the law's implacable subjectivist logic.

## ii. Objectivity in Practice

The subjective understanding of consent advanced by the classical authors did find confirmation in judicial practice as far as errors as to the nature of the contract are concerned. Although these errors have long been considered “merely academic” (*hypothèses d'école*),<sup>108</sup> they have generated an (admittedly sparse) *jurisprudence*. And in these few decisions, the court clearly reasons that the claimant's subjective intentions must prevail over the divergent objective manifestation of these intentions.<sup>109</sup>

With respect to consent-vitiating errors, however, the classic theory did not withstand the test of legal practice.<sup>110</sup> From very early on, courts resisted claims of such errors, granting relief only where some additional conditions, not mentioned in the code, were met. For one, the significance of the missing quality to the mistaken party would have to be established on objective as well as subjective grounds.<sup>111</sup> Moreover, a judicial

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<sup>107</sup> See, e.g., PLANIOL, RIPERT, & ESMEIN, *supra* note 97, at §189; G. BAUDRY-LACANTINERIE & L. BARDE, *supra* note 104, at 92ff; BUFNOIR, *supra* note 104, at 598ff; F. CHABAS, *supra* note 102, at 99; COLIN & CAPITANT, *supra* note 104, at §39 B, 37. Unlike at English law pre-*Donoghue v Stevenson*, the French law of delicts has, from its inception, been very flexible. Article 1382 broadly states: “Any act of man, which causes damage to another, obliges he by whose fault it happened, to repair it.”

<sup>108</sup> R. DAVID, ‘La doctrine de l’erreur dans Pothier et son interprétation par la common law d’Angleterre’, in P. Matter (ed.), *Études de droit civil à la mémoire de Henri Capitant*, Dalloz, Paris 1939, p 145.

<sup>109</sup> Civ. 1<sup>re</sup>, 25 May 1964, d. 1964, 626 (illiterate man signs guarantee thinking it a reference); Cass. Req., 5 May 1878, d. 1880.I.125 (mutual insurance policy believed to be regular insurance policy).

<sup>110</sup> NICHOLAS, *supra* note 3 at 92; Lawson, *supra* note 26, at 81.

<sup>111</sup> A. WEILL & F. TERRÉ, *Droit civil: les obligations*, 3rd ed., Dalloz, Paris 1980, §176, at 195; J.-M. TRIGEAUD, ‘L’erreur de l’acheteur—L’authenticité du bien d’art (étude critique)’, 80 *R.T.D. civ.* 1982, p 55 at 61-62; G. VIVIEN, ‘De l’erreur déterminante et substantielle’, 91 *R.T.D. civ.* 1992, p 305 at 325; FLOUR & AUBERT, *supra* note 95, at §196, 151-152; L. JOSSERAND, *Les mobiles dans les actes juridiques du droit privé*, Dalloz, Paris 1928 at §64, 82.

consensus soon emerged to the effect that relief would be granted only where the error was not *inexcusable*<sup>112</sup>—the “excusability condition”—and related to an aspect of the contract which the other party knew or should have known to be determinant for the mistaken party<sup>113</sup>—the “awareness condition.” In time, this last condition was transformed into an even stricter one, namely, relief would be granted only where the contract explicitly or implicitly allocated the risk of the error to the non-mistaken party—the “implicit term condition.”<sup>114</sup>

As already mentioned, neither the excusability nor the awareness condition can be accounted for under a subjective theory of consent. From the perspective of a party’s subjective consent, only the existence of the error matters; its source and circumstances are irrelevant. It should therefore make no difference whether the error resulted from the mistaken party’s negligence or whether the missing quality’s significance to the mistaken party was known to the other party. When the awareness condition is transformed into the implicit term condition, moreover, the whole doctrine of error is effectively discarded, as our discussion of *Bell* suggests. The issue of contract formation, that of the effect of a split between the declaration and the parties’ subjective intentions, is then

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<sup>112</sup> PLANIOL, RIPERT, & ESMEIN, *supra* note 97, at §180, 214; MARTY & RAYNAUD, *Droit civil--Les obligations*, vol. II, 2nd ed., Sirey, Paris 1988-89, at §148, 151; J. GHESTIN, *La notion d’erreur dans le droit positif actuel*, L.G.D.J., Paris 1963, at §523, 484; FLOUR & AUBERT, *supra* note 95, at §204, 158; STARCK, ROLAND, & BOYER, *supra* note 103, at §418, 175; BÉNABENT, *supra* note 95, at §72, 41; MAZEAUD, MAZEAUD, & CHABAS, *supra* note 103, at §171, 161; A. SÉRIAUX, *Droit des obligations*, 2<sup>nd</sup> ed., P.U.F., Paris 1998, at §16, 58.

<sup>113</sup> G. MARTY AND P. RAYNAUD, *ibid.*, at §121; L. JOSSERAND, *Cours de droit civil français*, vol. II, 3rd ed., Sirey, Paris 1939, at §65, 83ff; J. GHESTIN, *Traité de droit civil*, L.G.D.J., Paris 1993, at §137ff, 166ff; H. CAPITANT, *De la cause des obligations* (3rd ed., 1927), at §4; PLANIOL, RIPERT, & ESMEIN, *supra* note 97, vol. X at §177, 233; CARBONNIER, *supra* note 95, at 70, §19; TERRÉ, SIMLER, & LEQUETTE, *supra* note 103, at 167, §§208-09; VIVIEN, *supra* note 111, at 328; Y. LOUSSOUARN, ‘Vice du consentement. Extension de l’erreur sur la substance’, *R.T.D. civ.* 1969, p 556 at 558; B. GRELON, ‘L’erreur dans les libéralités’, *R.T.D. civ.* 1981, p 261 at 277, 291; J. GHESTIN, ‘note’, *J.C.P. II*, 1,1971, pp. 6916ff.

<sup>114</sup> GHESTIN, *supra* note 112, §526, at 489; P. MALINVAUD, *Les mécanismes juridiques des relations économiques : droit des obligations*, 2<sup>nd</sup> ed., Librairies techniques, Paris 1975, at §8, 216.

replaced with an argument of construction, which involves no inquiry into subjective intentions whatsoever:

[f]rom the moment that error is taken into account only where it has entered the parties' agreement, ... *error in mente retenta* is inoperative ; the question is placed on more solid grounds ... thanks to the contractual criterion which judges have fortunately substituted for the individual criterion.<sup>115</sup>

In order to establish the subjectivity of French law with respect to consent-vitiating errors, therefore, French judicial decisions would have to be identified which grant relief for excusable such errors despite the other party not knowing of the quality's significance and/or having agreed to bear the risk of this quality missing. Although it has been claimed that some such decisions can be found in the early *jurisprudence* on articles 1108-1110,<sup>116</sup> closer scrutiny of the decisions cited reveals that this is not the case.

Wherever relief is granted, the court makes direct or indirect reference to the fact that the non-mistaken party agreed to bear responsibility for the missing quality, or at least was aware of its significance to the mistaken party.<sup>117</sup> In most of these cases, in fact, the court struggles to distinguish the error argument from that of breach of warranty, which is invoked concurrently.<sup>118</sup> Wherever relief is denied, moreover, the court similarly refers

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<sup>115</sup> M. JOSSERAND, *Cours de Droit civil positif français*, vol. II, 2nd ed., Sirey, Paris 1933 at §72. (My translation.)

<sup>116</sup> A. RIEG, *supra* note 3, at 102, note 55.

<sup>117</sup> V. Versailles, 7 January 1987, *Gaz. Pal.*, 21-22 January 1987 (seller unaware that sold painting is a "Poussin"; Req. 30 July 1894, D.P. 95-1-340 (guarantor mistakenly believed debt secured with valid mortgage—condition to that effect contained in guarantee agreement); Req. 17 June 1946, *Gaz. Pal.* 46-2-204 (availability of goods bought and sold considered essential by both parties to the sale); Civ. 28 January 1913, S. 1913-1-493 (insurance compromise known by both parties to be premised on insured being seriously injured); Cass. com., 28 October 1980 (sale of fishing equipment inadequate for buyer's purpose, of which seller was aware); Cour de Paris, 18 March 1896, *Gaz. Pal.*, 1896.I.586, and Cour de Paris, 28 July 1927, D.H. 1927.5.529, D.H. 1929.539 (sale of pearls and diamonds of lesser quality than contracted for given high price agreed upon) ; Cass. civ. 23 November 1931, D. 1932.1.129 (sale of land inadequate for buyer's purpose, which was known to vendor). In the same vein, the French reporter on Case 1 (SEFTON-GREEN (ed.), *supra* note 2, at 99), which replicates the *Poussin* case (*ibid.*), notes that "the court's interpretation of the catalogue description will ... determine the acceptance of the risk."

<sup>118</sup> Many have attempted to establish a principled distinction between these two arguments. See: R. DEMOGUE, *Traité des obligations*, vol. I, A. Rousseau, Paris 1923, at 438, note 1; RIPERT & BOULANGER, *Traité de droit civil, d'après le traité de Planiol*, vol. III, L.G.D.J., Paris 1956, at §1527, 509; G. BAUDRY-

to the fact that the non-mistaken party was unaware of the quality's significance and/or had not agreed to take on the risk of it missing.<sup>119</sup> One author concludes—rightly it seems—that not a single decision exists which is based exclusively on the doctrine of error embodied in article 1110, that is, on error as a problem of contract formation.<sup>120</sup>

In sum, the account of error that implicitly emerges from French judicial decisions is remarkably similar to that implicit in English judicial decisions. Like English judges in *non est factum* cases, French judges favor subjective intentions over their divergent objective manifestations in cases involving errors as to the nature of the contract, with perhaps the one difference that the circumstances giving rise to such errors may be slightly broader at French law than at English law.<sup>121</sup> With respect to consent-vitiating errors, French judges, like English judges, readily seize upon the argument of construction so as to avoid delving into the parties' subjective intentions. Admittedly, the French test for what constitutes an error serious enough to warrant setting the contract aside is looser than the common law test applied in *Bell*. It is in fact closer to the equitable test put forward in *Solle*, the authority of which has recently been called into question. As a result, it may well be the case that mistaken parties currently stand a better chance of having the contract set aside in France than in England.<sup>122</sup> But this

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LACANTINERIE & F. SAIGNAT, *Traité théorique et pratique de droit civil*, vol. XIX, Sirey, Paris 1895-96, at §425, 442; HAMEL, cited in PLANIOL, RIPERT, & ESMEIN, *supra* note 97, vol. X, at §126, 139; COTTIN, *La définition du vice caché dans la vente, étude de droit comparé*, L.G.D.J, Paris 1939, p 130; DE BERNON, *Les vices rédhibitoires ou cachés dans les différents contrats en droit romain et en droit français*, Paris 1895, at 140ff; *Brèthe de la Gressaye*, cited in C. BEUDANT & P. LEREBOURS-PIGEONNIÈRE, *Cours de droit civil français* vol. XI, 2<sup>nd</sup> ed., A. Rousseau, Paris 1951 at 198, note 1; O. TOURNAFOND, 'Les prétendus concours d'actions et le contrat de vente (erreur sur la substance, défaut de conformité, vice caché)', *D. Chron. P.* 1989, at 243, §50. For an argument that all have failed, see: GHESTIN, *supra* note 112, §545, at 510-513.

<sup>119</sup> See in particular: Cass. civ. 3<sup>ème</sup>, 29 May 1970, Bull. civ. III, № 347 (sale of land inadequate for buyer's purpose, which was unknown to vendor).

<sup>120</sup> BAUDRY-LACANTINERIE & BARDE, *supra* note 104, at §61, 95.

<sup>121</sup> It is nowhere suggested that these errors arise only in contexts involving written documents.

<sup>122</sup> NICHOLAS, *supra* note 3, at 83-4; French reporter on Case 1, in SEFTON-GREEN (ed.), *supra* note 2. Particularly striking in this respect is the judgment of *Rotil v Balas*, D.P. 1933.2.25, which set aside a

difference has no bearing on the relative objectivity or subjectivity of the French and English conceptions of contract, insofar as French judgments undoing contracts, and English cases upholding them, proceed on the basis of the very same, objective reasoning. All that can be inferred from the different treatments of mistaken parties in these two legal systems, therefore, is that these systems have adopted different default rules concerning contractual interpretation: whereas English judges more readily apply the doctrine of *caveat emptor* where the parties have not expressly stipulated otherwise, French judges will in similar circumstances generally prefer to allocate the risk to the non-mistaken party.<sup>123</sup>

Based on these similarities between the English case law and French *jurisprudence* on error, the English observer may well be satisfied to conclude that it is the whole of French *law* on error that resembles English law in this respect, since law is nothing *but* cases to her. But he who seeks to understand law from the inside, from the perspective of the legal actors, could not be so satisfied. To him, what counts as “law” is what is considered “law” in each legal system. French law hence can be reduced to French *jurisprudence* only insofar as the French consider their law to be so-reducible. And as suggested above,<sup>124</sup> they do not. The French have traditionally considered *la*

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contract for the sale of an antique table, which both parties mistakenly believed to be a “Louis XV,” despite the fact that the buyer, himself an antique dealer, had fully inspected the table beforehand.

<sup>123</sup> C. MALECKI, ‘L’erreur sur la personne en droit anglais et en droit français des contrats: De l’influence déterminante de Pothier sur la Common Law?’, 72 *R.I.D.C.* 1995 p 347 at 377; LAWSON, *supra* note 26, at 98. This allocation of the risk is consistent with French law having retained the implied warranties of quality of Roman law (arts. 1641-49 C.C.), and with the *obligation de renseignement* (“obligation of information”), which the vendor must discharge at the cost of being found guilty of *réticence dolosive* (“passive deception”): Cass. civ. 3<sup>e</sup> 15 January 1971; Cass. Civ. 7 May 1974, Bull. Civ. III, no 186 (purchase of property for purpose of building hotel voided because seller knew and failed to disclose that water supply insufficient for that purpose); Cass. Com. 21 May 1977, JCP 1977.IV.35 (sale of a business voided because seller knew and did not reveal fact that municipality planned elimination of level crossing, which likely would decrease goodwill); Cass. Civ. 13 February 1967, Bull. civ. I.58 (seller failed to disclose planned widening of a road).

<sup>124</sup> *Supra* note 93.



*jurisprudence* to be just one of four sources of their law, and only the third in importance.

Written law and doctrinal commentaries have been said to come first.<sup>125</sup> We have reviewed the written law relating to error, its classic doctrinal interpretation, and the judicial response to this interpretation. But we have yet to account for the reception which contemporary authors have given to this judicial response. Since what French authors say of French *jurisprudence* may well be, in the eyes of the French, of greater legal significance than this very *jurisprudence*, our exploration of contemporary French law on mistake remains incomplete until we review the contemporary *doctrine* on the issue.<sup>126</sup>

### iii. Subjectivity and Objectivity in Contemporary *Doctrine*

Contemporary authors acknowledge that *la jurisprudence* on consent-vitiating error does not vindicate the classic, arch-subjective theory of consent.<sup>127</sup> But they refuse to acknowledge the full significance of this for said theory.<sup>128</sup> In their view, the divergence between the classic theory of consent and *la jurisprudence* on error reflects nothing more than the inescapable discrepancy between any theory and its practical application:

[I]ndividual intentions are not always easy to discover ... furthermore, intention being an element amenable to different appreciations, certain clauses will be interpreted differently by different tribunals... These objections relate more to the practical difficulties entailed by the application of our theory than to the theory itself.<sup>129</sup>

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<sup>125</sup> Admittedly, the issue of the hierarchy of the sources of law has been the object of extensive debate in contemporary French legal literature. See, e.g., P. JESTAZ, 'Source délicateuse (Remarques en cascade sur les sources du droit)', *R.T.D. civ.* 1993, p 73.

<sup>126</sup> "Participants have a view about what they are doing and why and, although these views may not be in themselves dispositive, they are never entirely irrelevant." G. POSTEMA, 'Classical Common Law Jurisprudence (Part I)', 2 *OUCLJ (Oxford University Commonwealth Law Journal)* 2002, p 155.

<sup>127</sup> VIVIEN, *supra* note 111, at 306.

<sup>128</sup> For a critique of this position, see my: 'Objectivisme et consensualisme dans le droit français de l'erreur dans les conventions', 2 *R.R.J. (Revue de la Recherche Juridique)* 2005, p 661.

<sup>129</sup> CHABAS, *supra* note 102, at 81-2.

The judicially-established conditions of excusability and awareness thus are, according to contemporary authors, mere “exceptions,” “temperaments,” “qualifications” to the subjectivist logic of the theory, all of which are necessary to soften the hard edges of this theory in light of evidentiary and policy considerations.<sup>130</sup> “Intentions are too difficult to discover,” they reluctantly admit. Moreover, “nullifying contracts too easily risks undermining contractual stability and security.” And so is the juridical universe neatly dichotomized as between, on the one hand, the pure, unadulterated theory of *autonomie de la volonté*, which warrants nullifying contracts wherever consent of even one party has been vitiated by error, and on the other hand, the messy world of legal practice, where the hard facts of evidence and policy command that contract nullification be resisted wherever the error is inexcusable and/or the mistaken party’s intentions have not been sufficiently externalized to be detectable by the other. Through this dichotomizing act, contemporary French authors hope to isolate and preserve the arch-subjectivist ideals that they hold dear from the objectivist pull of legal facts.<sup>131</sup>

Of course, this act may not be as successful as they would hope. For while it may be conceptually possible to separate juridical theory from practical considerations of evidence and policy, considerations relating to the rights of the non-mistaken party clearly fall on the theoretical side of this divide, yet these considerations also militate in favour of a more objective approach to contractual mistake. There could hence be good *theoretical* reasons for tempering with the classic conception of *l’autonomie de la volonté*. Indeed, can a theory really claim to be about *contracts* and fail to account for

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<sup>130</sup> CHABAS, *ibid.*, at 75, 91-92; A. RIEG, *supra* note 3, at 146, §141; E. GAUDEMET, *Théorie générale des obligations*, Sirey, Paris 1937, p 57; FLOUR & AUBERT, *supra* note 95, at 144, §190ff and 149, §195; TERRÉ, SIMLER, & LEQUETTE, *supra* note 103, at 161, §199; MAZEAUD, MAZEAUD, & CHABAS, *supra* note 103, §161 at 151, §163 at 152-53, §166, at 156, §171 at 161.

<sup>131</sup> J. HAUSER, *Objectivisme et subjectivisme dans l’acte juridique*, L.G.D.J., Paris 1971, p 28.

the autonomous will of *both* parties? Insofar as such a theory would account only for the autonomous will of the mistaken party, should it not be substantially revised?<sup>132</sup>

While a few contemporary French authors have crossed this leap and revised their subjectivist conception of *l'autonomie de la volonté* so as to accommodate the more objective light shed by judicial practice,<sup>133</sup> most have not. The large majority of modern accounts of error indeed proceed by way of a two-part presentation, whereby the *autonomie de la volonté* principle first is described in all its subjectivist splendour, only to be immediately qualified in light of the judicial practice recounted in the second part.<sup>134</sup> Very rarely is the judicial practice explicitly accounted for at the level of principle.

As a result, it can be said of the French law of consent-vitiating error that it is marked by a deep split between the subjective conception favoured by *la doctrine* and the more balanced, partly objective conception that emerges from *la jurisprudence*.

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The similarities in the understanding of contract that emanates from English and French judicial practice hence belie juristic perceptions of contract that are mirror opposites from one another. Whereas English jurists cling to the belief that their law of contract is objective, and only reluctantly acknowledge that subjective considerations rear their ugly heads in mistake cases, French jurists want to believe that their law of contract

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<sup>132</sup> For an argument to this effect, see my *Consensualisme et objectivisme ...*, *supra* note 128.

<sup>133</sup> GHESTIN, *supra* note 112, at §386, 345; STARCK, ROLAND, & BOYER, *supra* note 103, at §403, 168.

<sup>134</sup> See, e.g., TERRÉ, SIMLER, & LEQUETTE, *supra* note 103, at §208, 167; FLOUR & AUBERT, *supra* note 95, at §§194-208, 148-162; A. SÉRIAUX, *supra* note 112, at 57; A. RIEG, *supra* note 3, at §139. Particularly striking, some authors do not even mention the judicial developments that run counter to the classic theory, e.g.: E. GAUDEMET, *supra* note 130, at 60ff.

is primarily subjective, and only reluctantly acknowledge the objectivist temperaments forced upon them by their judges.

### C. German Law

Although the English and French internal perceptions of contract are, as just explained, mirror opposites of one another, these perceptions share a common structure. Both involve a linear progression through two consecutive steps: first, either pure objectivity or pure subjectivity is, out of principle, adopted as the starting position; second, this position is then qualified in light of judicial practice.<sup>135</sup> The Germans' perception of contract exhibits an altogether different structure, namely, a dialectic structure. German jurists perceive contract very much as combining equal and interacting parts of objectivity and subjectivity. In this sense, it can be said of the German understanding of contract that it is self-consciously dialectic, unlike the English and French understandings, which are dialectic in practice, but linear in perception. Indeed, the following account of the German perception of contract will show that this perception is remarkably consistent with judicial practice.

The provisions of the German Civil Code (BGB) governing mistake are located in Section III ("Of Juristic Acts") of the famous "General Part" (Book I). Within Section III, these provisions are found in Title 2 on "Declarations of Will," which precedes Title 3 on "Contracts." The law of obligations fills a separate book of the BGB (Book II). This positioning of the provisions on mistake within the BGB is, like this code's entire

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<sup>135</sup> The progression is here logical, not necessarily chronological. So the fact that *non est factum* cases might have historically preceded the landmark common law cases on objectivity in contract formation is not an objection to the former cases being "qualifications" of the principle articulated through the latter.

structure, logically justifiable. Contracts are just one kind of “juristic acts,” which the *Motives* to the BGB define as “one or several private declarations of will, aimed at producing legal effects, which materialize in accordance with the juridical order because they have been willed.”<sup>136</sup> Insofar as mistake affects consent, it applies to all juristic acts, not just those that generate obligations, contractual or otherwise.<sup>137</sup> The provisions on mistake thus appear in the introductory part of the BGB, which lays down the general notions applicable throughout the other parts, including those specifically devoted to contracts and obligations.

To understand the German law of mistake, therefore, one must reach beyond contract and obligation to the more general notion of juristic act. The definition just given suggests that this notion is highly abstract and complex, and it indeed has fuelled decades of intense academic debate both pre- and post-BGB.<sup>138</sup> For present purposes, however, I need do no more than outline that all the ingredients of the objective/subjective dialectic that permeates the German law of mistake are present at the more abstract level of the juristic act.

### **i. Subjectivity and Objectivity in the Notion of Juristic Act**

Like French scholars, German scholars have long viewed the juristic act as an expression of individual liberty—*Privatautonomie*.<sup>139</sup> It represents, in their view, the capacity of the individual to modify their legal environment by sheer act of will. The will

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<sup>136</sup> MOTIVES I, at 126.

<sup>137</sup> For example, it would apply to testaments, which, unlike contracts, are unilateral juristic acts that create legal effects, but not obligations properly so-called.

<sup>138</sup> C. WITZ, *Droit privé allemand*, Litec, Paris 1992, p 87.

<sup>139</sup> See generally: *id.*, at 107, citing W. FLUME, *Allgemeiner Teil des bürgerlichen Rechts*, vol. 2: Das Rechtsgeschäft, 3rd ed., Springer, Berlin 1979, at §1 I, 1ff; D. MEDICUS, *Allgemeiner Teil des bürgerlichen Rechts*, 9th ed., C.F. Müller, Heidelberg 2006 at §§174ff; and LARENZ & WOLF, *Allgemeiner Teil des bürgerlichen Rechts*, 7th ed., C.H. Beck, Munich 1989, at §2 II, 41ff.

at play here clearly is the psychological, internal will. It is the individual will *to act* (*Handlungswille*), to act *so as to bring about legal effects* (*Erklärungswille*), and to bring about *specific* legal effects (*Geschäftswille*).<sup>140</sup> If only to that extent, therefore, the notion of juristic act is suffused with subjectivity.

At the same time, German scholars fully realize—and here they diverge from their French and English brethren—that the will that *remains* purely internal is ineffective to bring about the legal effects wished for. Unlike the French, who have tended to view the declaration as mere evidence of the internal will (and have mistakenly enlisted Grotius in support of this view<sup>141</sup>), German academics see the declaration as significant in itself.<sup>142</sup> German academics indeed have long considered the declaration to be necessary for purpose of triggering the legal involvement required to objectify the internal will. As Windscheid famously explained: “the declaration is more than just a communication of the will; ... it is the will embodied.”<sup>143</sup> Hence the subjective/objective dialectic within the notion of juristic act: legally speaking, the internal will is nothing without the declaration, but the declaration in turn can never be severed from the internal will—it is significant only insofar as it remains a declaration *of* will.

I suggested above that this dialectic understanding of the relation between the will and the declaration is also present in the understanding of contract that emanates from the English and French judicial practice on contractual mistake. But it is only at the hand of German scholars that it comes to be explicitly articulated as such. This dialectic

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<sup>140</sup> WITZ, *supra* note 138, at 87-88.

<sup>141</sup> H. GROTIUS, *De jure belli ac pacis libri tres*, Bk 2, Humphrey Milford, London 1927 1701, Chap 11, §VI, 3.

<sup>142</sup> BENSON, *supra* note 61.

<sup>143</sup> B. WINDSCHEID, 'Wille und Willenserklärung', 63 *AcP* (Archiv für die civilistische Praxis) 1880 p 77, cited in WITZ, *supra* note 138. (My translation.)

understanding of juristic acts is explicitly formulated in the drafters' *Motives*. It is also the understanding of juristic acts that is codified at Section III of the General Part of the BGB, and that informs the whole of German private law. The *Motives* definition of juristic act quoted above<sup>144</sup> mentions, on the one hand, "private declarations of will" and, on the other hand, the "materialization" of these declarations "in accordance with the juridical order." The BGB similarly embodies a combination of subjective and objective considerations. On the one hand, the principle of *Privatautonomie*, while nowhere explicitly consecrated, is implicitly endorsed throughout.<sup>145</sup> On the other hand, the codifiers were concerned not to leave "freedom so unabated as to become destructive of itself,"<sup>146</sup> as von Gierke had warned following the publication of the first draft of the BGB. Partly to that end, they inserted in the code the famous "general clauses" of §138 and §242. The *gute Sitten* clause of §138 prohibits juristic acts that contravene public policy generally, and more specifically those

... by which a person exploiting the need, inexperience, lack of sound judgment or substantial lack of will power of another, causes to be promised or granted to himself or to a third party in exchange for a performance, pecuniary advantages which are in obvious disproportion to the performance.

The *Treu und Glauben* clause of §242 requires that obligations be performed in good faith, "giving consideration to common usage." These two clauses were seen as key to balancing the principle of *Privatautonomie* as against that of mutual trust, and to

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<sup>144</sup> *Supra* note 135.

<sup>145</sup> See in particular, (1937) §§305, on freedom of contract and testament, respectively.

<sup>146</sup> O. VON GIERKE, *Die soziale Aufgabe des Privatrechts* 28ff (1889), cited in Ewald, *supra* note 11, at 2075.

anchoring the BGB into a “higher social morality.”<sup>147</sup> And post-BGB judicial history suggests that they surpassed all expectations in this respect.<sup>148</sup>

## ii. Subjectivity and Objectivity in the Law of Mistake

The objective/subjective dialectic underlying the notion of juristic act naturally percolates into the law of mistake. Over the course of the decades that preceded the enactment of the BGB, German scholars hotly debated the significance of the declaration splitting from the will in particular situations.<sup>149</sup> Partisans of the *Willenstheorie*, among whom Savigny, Puchta, and Windscheid, were of the view that the subjective will should prevail in such cases. Bekker, Kohler, Leonhard, and other proponents of the *Erklärungstheorie* argued in contrast that it is the declaration that should then be made to prevail. Yet other scholars favoured some or other of the many variations on these two theories.

It is widely recognized that the BGB “resisted boxing itself into doctrinal antagonism,”<sup>150</sup> and adopted neither of the *Willenstheorie* or the *Erklärungstheorie* to the exclusion of the other.<sup>151</sup> Perhaps in light of the failure of the French subjectivist theory of error to materialize in judicial practice, the Germans did not even attempt to endorse the *Willenstheorie* exclusively.<sup>152</sup> At the same time, they could hardly remain insensitive

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<sup>147</sup> F. WIEACKER, *A History of Private Law in Europe*, Oxford University Press, Oxford 2003, p 377. See also: LARENZ, *supra* note 139, at 43. The term Larenz uses is “*Sozial-ethische Komponente*”. Similar clauses can be found in the French Civil Code, but none that are as broad in scope and as flexible in tone.

<sup>148</sup> “Those clauses have come to constitute the intellectual core of substantive modern German private law.” W. EWALD, *supra* note 11, at 2086. The *Treu und Glauben* clause, in particular is now regarded, not just as a maxim for interpreting existing obligations, but in fact as a source of obligation proper: “the basic norm *par excellence* in the law of obligations” (F. WIEACKER, *id.*, at 418).

<sup>149</sup> See generally: WITZ, *supra* note 138, at 89ff; GORDLEY, *supra* note 4, at 190ff; RIEG, *supra* note 3, at 7ff.

<sup>150</sup> RIEG, *ibid.*, at 9. (My translation.)

<sup>151</sup> WITZ, *supra* note 138, at 89\*\*.

<sup>152</sup> LAWSON, *supra* note 26, at 81.



to the sophisticated arguments which Savigny and his disciples had marshalled against the *Erklärungstheorie*. The drafters of the second and final version of the BGB hence took the view that:

... neither of these theories can be implemented in its pure state, ... rules that conform to equity must be created by adjusting, to the extent possible, the contradictory interests of the victim of the mistake with those of the other contracting party and of third parties.<sup>153</sup>

And so did the BGB provisions on mistake end up containing elements of both theories. These provisions divide into two categories.<sup>154</sup> Sections 119(1) and 120 govern mistakes “in the expression of the will” (*Willensäußerung*), whereas §119(2) deals with mistakes “in the formation of the will” (*Willensbildung*).<sup>155</sup> We will consider each category in turn.

### **Mistakes in the expression of the will—§§119(1), 120 BGB**

Mistakes in the expression of the will, also known as mistakes “in the transaction,”<sup>156</sup> relate to the content of the declaration (*Inhaltsirrtum*), its emission (*Erklärungsirrtum*), or its transmission (*Übermittlungsirrtum*). Mistakes as to the content of the declaration include misunderstandings about the interpretation to be given to the declaration,<sup>157</sup> the identity of the object,<sup>158</sup> the identity of the other contracting party,<sup>159</sup>

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<sup>153</sup> PROTOKOLLE I, at 222-23.

<sup>154</sup> See generally: F. FERRAND, *Droit privé allemand*, Dalloz, Paris 1997, pp 259-67; RIEG, *supra* note 3, at 92-145; WITZ, *supra* note 138, at 265-290.

<sup>155</sup> As in French law, cases of *res sua* and *res extincta* are not treated as cases of mistake but as cases of impossibility (§242 BGB) at German law.

<sup>156</sup> ZWEIGERT & KÖTZ, vol. II, *supra* note 3, at 96.

<sup>157</sup> LG Hanau (30 June 1978, NJW 1979, 721) (“25 Gros Rollen WC-Papier” ordered by a school director, thinking “Gros” meant *groß* (large) whereas it meant “a dozen,” with the result that the school ended up with 3,600 rolls of toilet paper.); BGH 7 June 1984 (NJW 1984, 2279 = BGHZ 91, 324, Case 34) (Bank makes a declaration intending to confirm an existing guarantee, but which is reasonably interpreted as a new offer of guarantee. Rescission barred only because not timely.)

<sup>158</sup> Witz gives the example of someone offering to purchase “the Mercedes in the window,” not realizing that the floor model he saw has since been replaced by an older one. *Supra* note 138, at 267.

and the nature of the contract.<sup>160</sup> The typical *non est factum* case of English law would fall in this last category. Mistakes as to the emission of the declaration result from slips in the expression, such as give rise to rectification at English law.<sup>161</sup> Mistakes as to the transmission of the declaration, finally, involve communication problems of the sort at issue in *Henkel*.<sup>162</sup>

Mistakes in the expression of the will hence form a very broad category, one that covers almost all of the situations which English and French law would deem offer and acceptance problems—misunderstandings and *erreurs-obstacles* respectively.<sup>163</sup> The gathering of these highly diverse situations under the common heading of “mistake in the expression of the will” nonetheless is appropriate in light of the fact that all involve declarations unsupported by the intentions of their authors. For this reason, rescission in all these cases is in principle obtainable without regard to the content of the declaration, beyond what is necessary to ascertain their being unsupported by intention, of course.

With respect to the first two kinds of mistakes in the expression of the will (mistakes in content or emission), rescission can be had under §119(1):

§119. (1) A person who, when making a declaration of intention, is in error as to its content, or did not intend to make a declaration of such content at all, may rescind the declaration if it may be assumed that [the person who made the declaration] would not have made it with knowledge of the facts and with reasonable appreciation of the situation.

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<sup>159</sup> Köhler gives example of someone placing an order with a company while unaware that the company has changed hands. *BGB—Allgemeiner Teil*, 31st ed., C.H. Beck, Munich 1989, at §14 IV 2b, cited in WITZ, *supra* note 138, at 267.

<sup>160</sup> Köhler gives the example offer of donation intended as offer of sale by offeror. *Ibid.*

<sup>161</sup> OLG Hamm (8 January 1993, NJW 1993, 2321, Case 35) (Amount of lump sum payment in life insurance contract mistakenly entered in the annuity column.)

<sup>162</sup> *Supra* note 23. See: WITZ, *supra* note 138, at 269.

<sup>163</sup> Cases of outright *Dissens* indeed are at German law confined to situations where the mutual declarations diverge in their explicit terms. See: SABBATH, *supra* note 6, at 807, note 45, discussing SAVIGNY, *supra* note 5, at 265-266. A case such as *Raffles v Wichelhaus*, however, would likely be considered one of “hidden dissent,” which does not give rise to rescission of the contract (§155 BGB). B.S. MARKESINIS, *The German Law of Obligations*, Clarendon Press, Oxford 1997, p 202.

In practice, however, German judges have manifested the same circumspection as English judges towards declarations contained in signed documents.<sup>164</sup> In such cases, they commonly invoke the *Treu und Glauben* clause of §242 to limit the scope of §119(1) so as to afford greater protection to the interests of those who relied in good faith upon the declaration.

As for declarations tainted with the third kind of mistakes in the expression of the will—mistakes in transmission—they are rescindable under §120:

§120. A declaration of intention which has been incorrectly transmitted by the person or institution employed for its transmission may be rescinded under the same condition as a declaration of intention made in error as provided for by §119.

### **Mistakes in the formation of the will—§119(2) BGB**

Whereas mistakes in the expression of the will involve situations where one “intends consequence A but mistakenly states consequence B in his declaration,”<sup>165</sup> mistakes in the formation of the will arise where one “says A, knows what it means and intends it as such, but is mistaken about the reasons for agreeing to A.”<sup>166</sup> Also known as “mistakes of motive,”<sup>167</sup> these are the mistakes in assumption of English law and consent-vitiating errors of French law, which most importantly comprise cases of *error in substantia*.

The doctrinal consensus, both pre- and post-BGB, has been to the effect that mistakes in the formation of the will in principle are not a ground for rescinding an

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<sup>164</sup> WITZ, *supra* note 138, at 276-77; FERRAND, *supra* note 154, at 264-65.

<sup>165</sup> MARKESINIS, *supra* note 163, at 198.

<sup>166</sup> MARKESINIS, *ibid.*, at 200. While conceptually defensible, the line between mistakes in the transaction and mistakes of motive is at times difficult to draw in practice. The *Reichsgericht* indeed determined that a guarantor who mistakenly believes that the debt he is guaranteeing is a secured one is mistaken as to the transaction (RGZ 75, 271), reported in ZWEIGERT & KÖTZ, vol. II, *supra* note 3, at 96. Staudinger and Coing similarly suggest that one buying a forest in the belief that it contained 100,000 trees instead of the 85,000 trees it did contain would be mistaken in the transaction. COING & STAUDINGER, *Bürgerliches Gesetzbuch*, 11th ed., Berlin 1957, at §119, note 14.

<sup>167</sup> *Ibid.*

otherwise valid declaration. The motives that lead someone to form a particular intention are by definition external to this intention and should for this reason be considered legally irrelevant.<sup>168</sup> In certain cases, however, the intention is formed based on an aspect of the transaction that, albeit external to the material thing to which it relates, nonetheless is objectively significant and thus to be considered as falling within its realm.<sup>169</sup>

Consequently, §119(2) allows rescission for mistakes as to the formation of the will where the mistake relates to “characteristics of the person or the thing that are normally regarded as essential in business relations.”<sup>170</sup> The *Bundesgerichtshof* interpreted these terms very broadly, moreover, as including “all relations of fact or law that, in light of their nature and duration, affect the utility and value of the object.”<sup>171</sup> Nonetheless, rescission under §119(2) is available only where the court is satisfied that the risk of the mistake has not been implicitly or explicitly allocated in the parties’ mutual declaration,<sup>172</sup> which rules out relief in cases involving mistakes as to the value of the thing.<sup>173</sup> Examples of characteristics that German courts have found “essential” under §119(2) include the authenticity of a painting<sup>174</sup> or antique object,<sup>175</sup> the creditworthiness

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<sup>168</sup> ZWEIGERT & KÖTZ, vol. II, *supra* note 3, at 104-06; MARKESINIS, *supra* note 163, at 200.

<sup>169</sup> This is the explanation for §119(2) propounded by a minority of German authors. WITZ, *supra* note 138, at 270. Witz also reports that the dominant view is to the effect that §119(2) just is an exception to the general prohibition rescission on ground of mistake in motive implicit in §119(1). *Ibid.*

<sup>170</sup> The equivalent formula in the Swiss civil code is: “one which businessmen would normally regard as a *sine qua non* of contracting.” SWISS CIVIL CODE, 53 II 153; 56 II 426.

<sup>171</sup> BGH 18.12.1954, BGHZ 16, 54, 57, quoted in Witz, *supra* note 138 at 273.

<sup>172</sup> Cases of mistake in calculation are instructive in this respect. The mistake leads to rescission only where responsibility for it has not been clearly allocated to the mistaken party: RG 30 November 1922 (RGZ 105, 406) (loan in Roubles to be paid back in Reichsmarks rescinded because both parties wrongly believed the Rouble to be worth 25 instead of 1 Pfennig at the time of contracting.) See generally: WITZ, *supra* note 138, at 278-79.

<sup>173</sup> MARKESINIS, *supra* note 163, at 204.

<sup>174</sup> RG 11 March 1932, RGZ 135, 339, Case 36 (rescission was however denied because of lateness of request); BGH 15.1.1975, BGHZ 63, 369, 376; BGH 8.6.1984, NJW 1984, 2597, 2599.

<sup>175</sup> RGZ 124, 115.

of a debtor,<sup>176</sup> the development potential of land,<sup>177</sup> and the year of manufacture of an automobile.<sup>178</sup>

### Compensation of the reliance interest—§122BGB

Perhaps most surprising to English and French jurists alike is the fact that §§119-120 apply to all cases of mistake, regardless of whether the mistake was excusable or not, known or knowable to the non-mistaken party, or induced by a misrepresentation.<sup>179</sup> This can be explained by the fact that in all these cases rescission is conditional upon compensation of the reliance interest (*Vertrauensschaden*) of those who might legitimately have relied upon the declaration.<sup>180</sup> Section 122(1) indeed provides:

§122. (1) If a declaration of intention is ... rescinded under §§119, 120, the declarant shall, if the declaration was required to be made to another party, compensate that party or otherwise any third party, for the damage which the other party has sustained by relying upon the validity of the declaration ...”

Section 122 thus establishes a form of liability without fault on the part of the mistaken party, one that is triggered solely through his claiming rescission, with the one caveat that the obligation to compensate does not arise “if the injured party knew the ground of the ... rescission or did not know it due to negligence (should have known it).”<sup>181</sup>

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<sup>176</sup> RGZ 66, 385.

<sup>177</sup> RGZ 61, 86.

<sup>178</sup> BGH 26.10.1978, NJW 1979, 160, 161.

<sup>179</sup> MARKESINIS, *supra* note 163, at 198; Lawson, *supra* note 26, at 83. Fraudulent misrepresentations are governed by §123 BGB.

<sup>180</sup> See generally: SABBATH, *supra* note 6, at 815. The comparison with Austrian law is interesting in this regard. The Austrian civil code imposes no obligation of compensation upon the mistaken party who claims rescission. But rescission is available only where it is proven that the non-mistaken party caused the mistake, should have known about it, or was notified of its existence in good time. ZWEIGERT & KÖTZ, vol. II, *supra* note 3, at 98.

<sup>181</sup> §122(2) BGB.

It thus seems that, from the perspective of judicial practice, the German law of contractual mistake very much resembles English and French law. While rescission of mistake-tainted declarations *a priori* is available in a very wide variety of cases, it has not been granted in cases involving mistakes of motive unless the significance of the missing quality is established on objective grounds. Moreover, German judges have proven as reluctant as English judges to grant rescission of declarations that are written and signed. Finally, while declarations are, at German law unlike at English and French law, rescindable despite the mistake being inexcusable and/or unilateral, compensation of those who legitimately relied upon these declarations to their detriment is ordered in all these cases. The same objective/subjective dialectic conception of contract that emanates from the English and French judicial practice on contractual mistake thus also emerges from German judicial practice.

Unlike at English and French law, however, this dialectic conception of contract is self-consciously endorsed at German law. While English jurists have tended to view contract linearly, as in principle objective and only exceptionally subjective, and French jurists have conversely tended to view it also linearly, but as in principle subjective and exceptionally objective, German jurists—whether codifiers, judges, or scholars—have tended to view contract just as it is treated in judicial practice, that is, as dialectically objective and subjective. In the BGB generally and the provisions on mistake more particularly, as well as in various pronouncements on the matter by German judges and scholars, contract is represented as made up of mutually interacting objective and subjective elements. In this sense, the German conception of contract can be described as self-consciously dialectic, in contrast with the English and French conceptions, which are

dialectic in judicial practice, but linear in juristic perception. In sum, unlike at English and French law, at German law the internal and external standpoints seem to converge.

## CONCLUSION

The issue of the objective/subjective conception of contract was here chosen because it has traditionally been presented in the comparative law literature as a terrain of significant divergence between English, French, and German law. While many comparatists have contested this portrayal of English, French, and German law, and maintained that European legal systems have been converging on all fronts, our brief survey of the relevant English, French, and German legal materials suggests that divergence and convergence theorists are both right. Convergence theorists are right in that the understandings of contract that implicitly emerge from English judicial practice on mistake in assumption and *non est factum* and their French and German counterparts in fact are very similar: in all three legal systems, judicial practice reflects a dialectically objective and subjective understanding of contract. But divergence theorists are also right in that English, French, and German jurists have interpreted this judicial practice very differently. While English jurists have generally tended to downplay the subjectivist signals emerging from this practice, French jurists have conversely tended to minimize its objectivist signals, and German jurists have generally proven equally receptive to both. That is to say, convergence theorists are right from the standpoint of the outcome of judicial decisions, whereas divergence theorists are right from the standpoint of what appears to go on in the jurists' minds.