MISTAKE AND RELATED MATTERS: IMPACT OF THE SALES ARTICLE OF THE UNIFORM COMMERCIAL CODE

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The author analyzes various sale-of-goods-situations to illustrate that the sales part of the American Uniform Commercial Code by and large adopts a single unsophisticated approach to mistake and innocent misrepresentation, largely discarding the conceptually legalistic emphasis of the extra-code law. Further, he attempts to show that the code marks a return or a progress to bases of decision more meaningful to people in the market place — with more of a common or alternatively merchant-parlance ring to them.

I. INTRODUCTION

I think it desirable to begin an analysis of mistake in the law of sales with a consideration of the factor of risk assumption through warranties, promises and disclaimers of warranty. The concept of risk is fundamental in the law of mistake. Next, I will consider the impact of the sales article of the Uniform Commercial Code [1] on the extra-code law of mistake, awareness, innocent misrepresentation, disclosure, good faith and fair dealing. This extra-code law supplements the code unless displaced by a particular codal provision. [2]

II. MISTAKE AND ASSUMPTION OF RISK

A. *Disclaimer*

Consider first the partly hypothetical case of a seed merchant entering into a sales contract which describes the subject matter of the sale as 27½ qrs. sainfoin seed. [3] The express warranty [4] created by this description is disclaimed by the seller due to the difficulty of distinguishing this kind of sainfoin from other kinds. Implied warranties are also disclaimed due to the uncertainty about the growth capabilities of seed generally. The buyer,

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[1] Citations are to the 1962 version of the UNIFORM COMMERCIAL CODE and comments [hereinafter cited as UCC].

[2] UCC § 1-103, comment 1 (the text reads simply "displaced", while the comment reads "explicitly displaced").

[3] This approximates the description of the subject matter in Wallis v. Pratt, [1911] A.C. 394, *reversing* [1910] 2 K.B. 1003 (C.A.).

[4] UCC § 2-313. Section 2-313(1)(b) reads as follows: "Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description."

aware of these uncertain factors which give rise to the disclaimers, accepts delivery of the seed and sows it. To his surprise, there grow cucumbers instead of small sainfoin. Assuming the disclaimers were sufficient to relieve the seller from warranty liability for delivering a different kind of seed, the buyer should consider the possibility of either revoking his acceptance of the goods, [5] or seeking rescission of the contract on the ground of mistake of a basic assumption on which the contract was made. As to the latter remedy, it is clear that where the parties to a contract are seen to have consciously considered and allocated certain risks, they cannot be heard to urge mistake about these contemplated factors as a basis for avoiding the contract. [6] In the hypothetical, the seller disclaimed and the buyer accepted the risk of various uncertain factors of which they were aware. Having accepted this risk, the buyer would be precluded from later saying he was mistaken about them. The parties knew that it was difficult to distinguish 27½ qrs. sainfoin from other kinds of sainfoin, *e.g.*, giant sainfoin. However, if the parties assumed the seed was some kind of sainfoin, or, if they did not consider the possibility of cucumber seed or seed of such an entire difference in kind, the buyer might be entitled to relief on the basis of mutual mistake in relation to an assumption upon which the contract was based. [7]

In order to circumscribe the mistake picture, the court has to determine what risks were contemplated and assumed by the parties. In so finding, the court considers not only the express terms of the contract but all the circumstances of the case including the nature of the subject matter and the nature and customs of the trade or business concerned. [8] In other words, the court interprets reasonably the express terms of the contract and the circumstances of the particular sale and trade to ascertain what risks may fairly be regarded as having been within conscious contemplation.

Section 2-615 of the code, although it deals with frustration rather than mistake, should be used as a guide in the task of interpreting what risks were contemplated. The criteria outlined there [9] are — with one exception — basically similar to the extra-code criteria already mentioned. In extra-code law, some courts have been traditionally inclined to base their inter-

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[5] UCC § 2-608 (revocation of acceptance).

[6] Friedman v. Grevin, 360 Mich. 193, 103 N.W.2d 336 (1960); see generally 3 CORBIN, CONTRACTS § 598 (rev. ed. 1960).

[7] *Accord*, Sherwood v. Walker, 66 Mich. 568, 33 N.W. 919 (1887) (basic vital assumption that the cow sold was barren); L. D. Garret Co. v. Halsey, 38 Misc. 438, 77 N.Y. Supp. 989 (Sup. Ct. 1902) (purchase of shares, both parties assuming assets of company of same value, actually worthless); Enequist v. Bemis, 115 Vt. 209, 55 A.2d 617 (1947) (tract of land stated to be 275 acres more or less; in fact only 200 acres; held that vendee only took risk of slight inaccuracy in acreage, not 75 acres); WILLISTON, SALES § 239c, at 630 (rev. ed. 1948); see generally PALMER, MISTAKE AND UNJUST ENRICHMENT 13-17, 36-57 (1962).

[8] *E.g.*, Lumbrazo v. Woodruff, 256 N.Y. 92, 97, 175 N.E. 525, 527 (1931).

[9] UCC § 2-615, comments 1, 8.

pretations solely or in large part on the express contract terms with little regard for circumstances. For instance, in *Dadourian Export Corporation v. United States,* [10] the plaintiff claimed relief on the basis of mistake of identity of the subject matter described as Manila cargo nets. It was held, in effect, that even if there was a mistake of identity, the plaintiff had assumed this risk by reason only of the disclaimer of the warranty of description in the contract — as if *conscious* contemplation of risk was to be inferred only from the *conscious* expressions of the parties. The code, in section 2-615 [11] and elsewhere, [12] rejects this approach and puts as much, if not more, emphasis on a consideration of the circumstances surrounding the transaction including trade usages and risks possibly involved. Moreover, it seems to permit a finding of contemplation to be made on the basis of circumstances alone. [13]

The hypothetical employed here is an example of how the mistake argument can be raised in the face of the disclaimer. In sales of other kinds, of course, the risk in question will often be contemplated by the parties and passed to the buyer by an appropriate disclaimer. Consider the case of a machine or tool bought to perform a particular job. In order to exclude all implied warranties of fitness, the dealer used the disclaimer set out in section 2-316(2) : "There are no warranties which extend beyond the description on the face hereof." The argument might be made that a buyer, on reading this abstract disclaimer (if he reads it at all) could not fairly be regarded as having consciously contemplated the risk of the machine being inadequate to fulfill the particular purpose for which he bought it. This is more likely to be true when the particular purpose is also the ordinary purpose of the machine. If the dealer could fairly be regarded as having contemplated this failure, the buyer might still make out a case of unilateral mistake. [14] On the other hand, the mistake argument becomes rather tenuous if warranty of fitness for a particular purpose was disclaimed. Finally, and apart from all other hurdles, the buyer will still have the task of convincing the court that relief should be given for any substantial or basic mistake, [15] and not only for mistake as to the identity or existence of the subject matter. [16]

There may be a question whether section 2-202, containing the code's parole evidence rule, is offended by proof of mistake. It would not appear

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[10] 291 F.2d 178 (2d Cir. 1961).

[11] UCC § 2-615, comment 8.

[12] UCC § 2-303 (allocation of risks).

[13] UCC § 2-615, comment 8.

[14] See *e.g.*, Winkleman v. Erwin, 333 Ill. 636, 639, 165 N.E. 205, 206-07 (1929) (purchasers of land materially mistaken thinking land included a valuable tract shown to them erroneously by vendor's agent); Kutsche v. Ford, 222 Mich. 442, 192 N.W. 714 (1923); *but see*, Imperial Glass Ltd. v. Consolidated Supplies Ltd., 22 D.L.R.2d 759 (B.C. 1960) (fairly characteristic of the Canadian approach).

[15] *E.g.*, Sherwood v. Walker, note 7 *supra*. Solle v. Butcher, [1950] 1 K.B. 671 (C.A.).

[16] *E.g.*, Wood v. Boynton, 64 Wis. 265, 25 N.W. 42 (1885); Bell v. Lever Brothers Ltd., [1932] A.C. 161.

to be. If the disclaimer is unspecific, it is not at all conclusive about conscious contemplation and assumption of risk. Consequently, proof of a mistaken assumption upon which the contract was made is not necessarily contradictory to the disclaimer. The assumption may be so basic that the parties took it for granted and as not included within the contemplation of the disclaimer — taken for granted in the sense that section 2-202, comment 2, speaks of trade usages being taken for granted. Moreover, the parole evidence rule is not to be applied so as to prevent a showing that the agreement never became operative or is voidable for some reason. [17] Consequently, we should be able to show the failure of a basic assumption intended by the parties as a condition precedent to the operation of the written agreement, without offending the parole rule.

B. *Warranty*

Now let us change the facts of the hypothetical seed case to the extent only of assuming that there was no disclaimer. Assume that under section 2-313, an express warranty was created by the description of the goods — 27½ qrs. sainfoin. Assume also the mistake of both parties as to identity.

In this situation involving both a warranty and a mistake, some cases have allowed rescission on the alternative grounds of breach of warranty or mistake, [18] some on the ground of mistake only, disregarding the warranty factor. [19] However, these cases were not actions on the warranty for damages. Rather, they were actions in which the buyer was merely asking for rescission on the basis of mutual mistake to avoid paying the price or to recover the price already paid. As there was no prayer for damages, the courts perhaps saw it as more appropriate to apply a loose theory of mistake to allow rescission rather than apply warranty rules. [20] If damages for breach of warranty had been claimed, then the assumption of risk, implicit in the concept of warranty, especially the express warranty, would have formed the only basis of relief.

C. *Innocent Misrepresentation*

Having considered cases in extra-code law involving warranty and mutual mistake, we now might inquire about the disposition of cases involving innocent misrepresentation. In similar fashion, the innocent misrepresentation of the seller and the mutual mistake of the parties about the fact represented seem to have been treated as equally good grounds for rescission. [21] However, the innocent misrepresentation would seem to be the appropriate

[17] *E.g.*, Long v. Smith, 23 Ont. L.R. 121 (Ch. 1911).

[18] Alberti v. Jubb, 204 Cal. 325, 267 Pac. 1085 (1928).

[19] Flint v. Lyon, 4 Cal. 17 (1854); Smith v. Zimbalist, 2 Cal. App.2d 324, 38 P.2d 170 (1934).

[20] HONNOLD, SALES AND SALES FINANCING 46 (2d ed. 1962) *but see* Bankendorf v. Sevelovitz, 28 Ga. App. 327, 111 S.E. 77 (1922) (Stones warranted as diamonds, rescission on basis of breach of warranty).

[21] See *e.g.*, Bigham v. Madison, 103 Tenn. 358, 52 S.W. 1074 (1899).

ground for relief because the misrepresentation was the cause of the mistaken assumption inducing the buyer to enter into the contract. It is the obvious ground for relief — the sine qua non of the mistake. [22] Moreover, this ground accents the representor's role as initiator of the mistake — an inducement to the court to award by way of restitution, some relief in the nature of damages. It might not award such or as much if the ground or cause of action is simply mistake. [23] Other differences, for instance, differences in limitation periods may exist as well.

In other cases, [24] the courts have referred obliquely to the misrepresentation factor but have placed emphasis on the mutual mistake as the real basis for relief. The facts of these cases possibly explain this; the opinions do not. In *Winkleman v. Erwin,* [25] involving a contract for the sale of land, the vendor's agent asked a neighbour where the boundary line of the property was, came back and told the vendee he had learned of its location and pointed it out. The boundary line was farther south. This misstatement may not have been one which the vendee would reasonably rely on or believe to be a positive assertion of fact, and therefore, would not constitute a remediable innocent misrepresentation. [26] Although the vendee may not have reasonably relied on the misstatement that the boundary was in that location, it was a material assumption upon which both parties or at least the vendee entered into the contract; consequently, the relief for mistake. In *Enequist v. Bemis,* [27] a tract of land was represented as being 275 acres *more or less* or *approximately* that many. In fact, it contained only 200 acres. It might be argued that this representation amounted to an assertion of opinion and not one of fact. If so, it was not a remediable innocent misrepresentation, which may explain why mistake was used as the ground for relief in this case as well.

The code has had an impact on the law of innocent misrepresentation. Most innocent misrepresentations will now be express warranties as defined in section 2-313. They are affirmations of fact and in the code there is no dichotomy between affirmations within and without the contract. The law of innocent misrepresentation seems to be displaced. However, if extra-code law must be *explicitly* displaced [28] and section 2-313 does not do so, then an innocent misrepresentation is a warranty in the alternative.

An express warranty under the code is apparently an affirmation which in objective judgment is fairly basic, important or material. Not only must

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[22] Emphasis on misrepresentation in Lathrop v. Maddux, 58 Cal. 258, 144 Pac. 870 (1914).

[23] *Contra,* Bigham v. Madison, note 21 *supra.*

[24] Winkleman v. Erwin, note 14 *supra;* Enequist v. Bemis, note 7 *supra.*

[25] Note 14 *supra.*

[26] See short discussion of elements of innocent misrepresentation in L. D. Garret Co. v. Halsey, *supra* note 7, at 445, 77 N.Y. Supp. at 992.

[27] Note 7 *supra.*

[28] Note 2 *supra.*

it be objectively basic, but I submit the buyer must have regarded it as basic. He must have relied upon it.[29] While section 2-313 does not adopt the language of "natural tendency" employed in the Uniform Sales Act definition of express warranty,[30] it does seem to adopt the objective approach of that definition. Generally speaking, as well, it is the material or more important innocent misrepresentation, rather than the misrepresentation which would not naturally induce entry into the contract, which as a matter of practice will be remedied by rescission.[31] Consequently, most remediable innocent misrepresentations, although not all, will amount to warranties under the code. Now, if there be a situation in which there is an operative negation of express warranty, or, there happens to be a writing intended by the parties as an exclusive statement of the terms and warranties of the agreement, innocently misrepresentative words or conduct might provide the basis for reverting to the extra-code law of innocent misrepresentation, or, at least, afford evidence of remediable common mistake.

III. Section 2-613 : Goods Already Destroyed at Time of Contracting; Mistake as to Existence

The use of the language "suffer casualty" in the text of section 2-613 would seem to contemplate the destruction of the goods after the making of the contract and not their destruction beforehand.[32] However, comment 2 interprets the section as also applying to the latter situation. Unfortunately, the text of the section does not bear this out, at least not clearly.

The section apparently applies only to goods *destroyed* and not to goods which were never in existence nor to the case of mistake of identity of the subject matter. Thus, the section is geared to the more normal casualty

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[29] UCC § 2-313, comment 1, 6, 8. "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." UCC § 2-313(1)(a).

[30] "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." Uniform Sales Act § 12.

[31] See Cheshire & Fifoot, Contract 236-37 (6th ed. 1964); see also Law Reform Committee, Tenth Report, Cmd. No. 1782, at 7, 13 (1962) (indicating that there is a right to rescission for less important or minor misrepresentations — not going to the root of the contract, but suggesting that the courts be given the discretion to award damages, instead of rescission, in these cases where damages will adequately compensate). Perhaps this idea of a non-basic representation could be incorporated into the code.

[32] N.Y. Law Revision Commission, *Report on the Uniform Commercial Code*, N.Y. Leg. Doc. No. 65(c), at 34f (1955). Section 2-613 reads as follows:

> Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (Section 2-324) then
> (a) if the loss is total the contract is avoided; and
> (b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

situation and leaves the unusual mistake situations to be dealt with under the general law.

With the preceding discussion of assumption of risk still in mind, we note that this section will not operate if the parties have agreed otherwise; there is always the question whether the seller has undertaken the responsibility for the existence of the goods. Has he, in other words, assumed the risk of their destruction? [33] Some courts require an express promise or undertaking on the face of the record before they will say the risk has been assumed. For instance, in *Estate of Zellmer,* [34] a father had agreed to keep up an insurance policy for the benefit of his child but there was no express promise in the record that the policy was in existence or that it had not been cancelled. In *Kirsch & Co. v. Benyunes,* [35] a case involving a contract for the sale of good quality Spanish chestnuts afloat a ship, the court said that it must be shown that the vendor had actually promised [36] that the chestnuts were of good quality with no deterioration. Other courts have regarded an assumption of the risk of non-existence or an undertaking as to existence as a fact that might reasonably be inferred or implied from the circumstances of the case. [37] The court in the *Kirsch* case, had it taken this approach, probably would have decided against such an implication. The buyer knew the chestnuts were at sea at the time of the making of the contract and would reasonably understand that the seller was not binding himself in respect of the quality of the chestnuts. In any event, a scrutiny of the circumstances to determine what undertakings might reasonably be implied is a proper approach under the code. Had the court in the well known case of *McRae v. Commonwealth Disposals Commission* [38] used this approach, it might have found in the circumstances an implied undertaking that the subject matter of the sale was in existence. The commission had contracted to sell to the plaintiff an oil tanker presumed to be lying at a certain location. As expected, the buyer went to a great deal of expensive trouble to outfit a salvage mission only to discover a barge, something quite different from a tanker. Albeit there was no express representation that the tanker was in existence, the buyer might in the circumstances have reasonably understood the seller as impliedly making such a representation or promise

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[33] UCC § 1-102(3); § 2-613, comment 2; my discussion of assumption of risk is limited to the undertaking of responsibility for the existence or non-destruction of the goods at the time of contracting. This risk assumption is to be distinguished from the undertaking of risk of loss after the time of contracting.

[34] 1 Wis.2d 46, 82 N.W.2d 891 (1957).

[35] 105 Misc. 648, 174 N.Y. Supp. 794 (Sup. Ct. 1919).

[36] 105 Misc. at 655, 174 N.Y. Supp. at 797-98.

[37] *Accord,* the text accompanying notes 11-13 *supra;* UCC § 2-303, comment 2; § 1-201(3) provides: "'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 2-208). Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts (Section 1-103). (Compare 'Contract'.)"

[38] 84 Commw. L.R. 377, 58 Argus L.R. 771 (Austl. 1951).

which would provide the intended business efficacy to the agreement.[39] However, rather than infer a promise in this way the court seemed to fix on the commission a promise as a concomitant of its negligence in not discovering the tanker's non-existence.[40]

Of course, if either party has knowledge of the non-existence or destruction of the goods, he will be held to his obligation.[41] There is no mistake of assumption for the knowing party to set up. An issue here is whether, absent actual knowledge of the destruction, a party will be held to his obligation if he ought to have known of the destruction or was negligent in failing to discover it. In some cases, at least, negligence has had its impact on contractual liability. I have already noted how in the *McRae* case, negligence entered into the determination that a contractual promise had been made. In the *Zellmer* case,[42] the father who agreed to keep in force an insurance policy for his daughter was held simply not to be excused from his contract due to his negligence in failing to discover the policy's expiration. The court felt that a similar approach should have been taken in *McRae* instead of stretching contract doctrine to find a promise of existence. However, the *Zellmer* court, in its own way, is also making liability in contract depend on the fault or negligence of the contractor, the only difference being that an estoppel theory is used rather than the traditional promissory approach. In the former approach we meet a problem different from the illogical impact of fault on contract and concepts of formation of promises. Rather, there is a collision between negligence and the concept of mistake as an equitable reason for rescinding a contract. An abundance of mistakes, perhaps most of them, arise through negligence. Surely, it was never conceived that negligence should have the effect of barring the remedy which mistake provides, namely, rescission of the contract and its liability. In accord with tort and estoppel ideas, reliance losses arising from negligence should, of course, be compensated for. However, it lacks meaning to say that the advantages of the contracts in *McRae* and *Zellmer* were lost in reliance. On the other hand, as envisaged by section 8 of the Uniform Sales Act, where the goods are destroyed through a party's fault after the entry into the contract, it is meaningful to say the contract was lost as a result of fault. In relation to pre-contract non-existence or destruction, the theory is a good one that would give the negligent party the option to avoid for mistake on the condition that he compensate for the other's reliance losses arising from the negligence.[43]

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[39] Wood v. Lucy Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917).

[40] McRae v. Commonwealth Disposals Commission, note 38 *supra* at 409, 58 Argus L.R. at 779-80. See criticism of court's finding in Krasnowiecki, *Sale of Non-Existent Goods: A Problem in the Theory of Contracts*, 34 NOTRE DAME LAW. 358, 372 (1959). The court awarded only compensatory damages for breach of contract — no exemplary damages.

[41] UCC § 2-613, comment 2; see similar language in the UNIFORM SALES ACT § 7.

[42] Note 34 *supra*.

[43] PALMER, *op. cit. supra* note 7, at 63.

IV. Calling Attention to and Separate Authentication of Firm Offer Clause — Section 2-205. Conspicuous Language — Section 2-316.

In essence, section 2-205 provides that a signed written offer on a form supplied by the offeree, a term of which gives assurance that it will be held open, is irrevocable if the term of assurance is separately signed or authenticated by the offeror. This will usually involve calling the term to the offeror's attention.[44] What impact does this section have in the context of the law relative to disclosure and the signing of documents? At common law, in the absence of fraud or misrepresentation or other inequitable conduct, a person who signs a contract voluntarily having had an opportunity to inform himself as to its contents is bound by the contract and is precluded from saying he misunderstood or was ignorant of its terms. He cannot be heard to say that he failed to read the document.[45] A person will be bound by what he signs unless there was some trick, artifice or misleading to throw him off his guard inducing the failure to read.[46] If we examine more closely what is meant by misleading and artifice in this context, we should have some idea of the circumstances in which a party has a duty to inform the other of contractual terms.

In *International Transportation Co. v. Winnipeg Storage Limited*,[47] a Canadian case with American counterparts, the defendant warehouseman had signed a document authorizing the plaintiff to list certain information concerning the defendant's services in a trade journal. The defendant thought it was an offer of a gratuitous listing as had been the habit of the past. In fact, a boxed-in group of words in the upper right-hand corner of the offer indicated that a charge for the listing would be made. The court said that where the signer could not reasonably be expected to be aware of terms there was a duty of calling his attention to them. On the facts, it was held that the defendant could not reasonably have been expected to be aware of the consideration term. The court gave two reasons: the past history of gratuitous listings, and the fact that the arrangement of the printing was apparently designed to deceive and distract the defendant from the term. I do not think the court would have allowed the defence of *non est factum* to succeed on the past historical or non-expectant basis alone in the absence of the misleading element. This case and others[48] illustrate that the artifice or misleading may be found in the very arrangement of the printing in the

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[44] UCC § 2-205, comment 4.

[45] *E.g.*, Breese v. United States Tel. Co., 48 N.Y. 132 (1871); Galloway v. Russ, 175 Ark. 659, 300 S.W. 390 (1927).

[46] *E.g.*, Massachusetts Mutual Life Ins. Co. v. Brun, 187 Ark. 790, 62 S.W.2d 961 (1933); Grimsley v. Singletary, 133 Ga. 56, 65 S.E. 92 (1909); Acme Food Co. v. Older, 64 W. Va. 255, 277, 61 S.E. 235, 244 (1908).

[47] 39 Man. 557 (1931).

[48] *E.g.*, American Travel & Hotel Directory Co. v. Curtis, 236 Ill. App. 236 (1925).

document. Another case [49] adopts the argument that the printing may also be so small as to mislead. In the *International Transportation* case, it is not clear whether the court would have required something over and above the embodiment of the consideration term in the main body of the writing. There was no clear implication that the printing of the unexpected term should be conspicuous although the court's disposition towards fair dealing fairly points in that direction.

In the section 2-205 situation, the offeror might not reasonably expect the firm-offer clause; however, on the basis of what has already been said, you probably have no misleading if the clause is placed in the main body of the form and the printing and arrangement thereof is not designed to mislead. Consequently, where the common law would perhaps not require separate authentication and active calling to attention, in fairly similar circumstances the code does so require. This stricter attitude towards notification must be partly due to increased implementation of the premise that merchants normally cannot be expected to read everything in the often verbose form contracts in use today. [50] The conservative perfectionist, of course, would remind us that the section protects the merchant against his own carelessness. I would rather believe the policy of the code is justifiable for the reason that the commercial time factor rather than simple carelessness is probably the primary cause of the inattentiveness. From another point of view, section 2-205 may be seen as an example of the code's marked insistence on fair dealing. Having prepared the offer, the offeree may assume some extra onus of disclosure. [51]

The code, instead of requiring actual notice and separate authentication might only have required that reasonable means be taken to bring this unexpected material term to the attention of the offeror. For instance, it might have required that the firm-offer clause be in conspicuous language as it does for exclusion of warranties under section 2-316. However, because of the relative isolation of the firm-offer clause situation, it perhaps was felt that here full and meaningful expression could be given to the concept of fair dealing. In this context, conspicuous printing is only a halfway house. In terms of broader application though, conspicuous printing has practical merit. A workable principle of conduct I might suggest is this : If there be some material and unusual or prejudicial term, it ought to be set out in a conspicuous, simple and summary way somewhere in the document notwithstanding it is detailed somewhere else therein. One cannot, of course,

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[49] Breese v. United States Tel. Co., *supra* note 45.

[50] Henningsen v. Bloomfield Motors Inc., 32 N.J. 358, 161 A.2d 69 (1960) (the general principle that one who does not choose to read before signing is bound, cannot be applied on a strict, doctrinal basis in the setting of modern commercial life).

[51] Borden v. Day, 197 Okla. 110, 111-112, 168 P.2d 646, 648 (1946) (presumption of knowledge of contents of signed writing should not be a formidable obstacle to justice where writing drawn by and for benefit of other party); Note, 109 U. PA. L. REV. 409 (1961).

expect merchandisers to colourfully brochure their products' or sales contracts' disadvantages. Brochures employed these days, however, do evidence a business talent for simplicity and clarity. They do make their point. Surely some of this talent could be used to better inform the buyer of the dull legal details of the sale without unduly marring competitive techniques.

V. SECTION 2-207 : ADDITIONAL MATERIAL TERMS IN ACCEPTANCE

Under section 2-207, additional terms in an acceptance that *materially* alter the contract do not become part of the contract "unless expressly agreed to by the other party." [52] The section's comment 4 speaks of such terms not being incorporated without "express awareness" by the other party. When can a party be said to have expressly agreed to a term or said to have been expressly aware of it?

Has the offeror who signs and returns the acceptance form to the offeree expressly agreed to any additional material terms contained in the acceptance; or, does express agreement to or express awareness of these terms mean that he must separately agree to them with specific reference to them? One obstacle in the way of choosing the latter meaning is the effect which the extra-code law gives to the signing of a document, namely, that the signer is taken to have expressly assented to and to have been aware of the terms of the writing. [53] Some of these cases [54] hold the signer bound by his signature although they seem to find as a fact that he was not actually aware of terms in the writing. He was not aware because he failed to read. In that context, it strikes me as absurd to say there was express awareness or assent. Another obstacle to saying the additional material terms must be assented to as a separate matter is the fact that the language of the section does not clearly and unequivocally require it in the way section 2-205 requires separate authentication of the firm-offer clause. On the other hand, I would submit that separate agreement is fairly to be implied.

Yet another obstacle is the case of *Roto-Lith, Ltd. v. F. P. Bartlett & Co.* [55] The seller-offeree had sent an acknowledgement to the buyer-offeror adding terms disclaiming warranties. The buyer never responded

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[52] UCC § 2-207, comment 3. Section 2-207(1), (2) reads :

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless :

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

[53] Polonsky v. Union Federal Savings & Loan Ass'n., 334 Mass. 697, 138 N.E.2d 115 (1956).

[54] *E.g.*, Pepple v. Rogers, 104 Fla. 462, 140 So. 205 (1932).

[55] 297 F.2d 497 (1st Cir. 1962).

to these terms but he accepted the goods. By so accepting, he was held to have assented to the disclaimer. Whether by accepting the goods, he was taken to be aware of the disclaimer, or whether he was in fact aware of it, is not made clear in the report.

VI. More on Good Faith and Fair Dealing : Disclosure of Defects

This part is concerned with the circumstances in which, under the general law and under the code, a seller is obliged to disclose defects in goods and other facts about them to the buyer. As well, the code's standard of good faith for a merchant is given special scrutiny.

In earlier times, to any allegation of a duty of disclosure, *caveat emptor* was the automatic answer. The principles bearing on disclosure are much the same today, only some of the automatism has disappeared. In the early case of *Horsfall v. Thomas,* [56] a purchaser of a cannon which blew up after it had been fired a number of times alleged that the manufacturer who sold it to him had a duty to disclose its defects. The seller's defence was successful on the basis of the principle that a seller need not disclose defects which could have been discovered by the purchaser as capable of judging as the seller, diligently applying the means of knowledge possessed by him. The decision in the case was at most a misapplication of the principle, at least, a very strict application. It placed on the buyer the onus of a very diligent inspection. With time, the law simply became more reasonable. One of the general rules today is that there is a duty to disclose material facts not discoverable by ordinary inspection or by reasonably diligent observation and judgment. [57] The law now holds a man to ordinary inspection and reasonable diligence. [58] Some cases suggest further that the test is not whether the facts would have escaped the ordinary observation of people generally but whether they would have escaped the observations of people familiar with the type of transaction in question. [59] Some materials suggest that if a party is not competent to judge without expert assistance, there is a duty of disclosure. [60] In any event, it is said that honesty requires speech where a defect is latent and failure to speak, knowing that the other acts on the presumption that the facts are otherwise, is fraud [61] or as it is more often

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[56] 1 H. & C. 89, 158 Eng. Rep. 813 (Ex. 1862).

[57] O'Shea v. Morris, 112 Neb. 102, 198 N.W. 866 (1924).

[58] See *e.g.*, Clauser v. Taylor, 44 Cal. App.2d 453, 112 P.2d 661 (1941).

[59] *E.g.*, Salmonson v. Horswill, 39 S.D. 402, 164 N.W. 973 (1917) (would it have escaped the observations of men engaged in buying horses).

[60] *E.g.*, Barder v. McClung, 93 Cal. App.2d 692, 209 P.2d 808 (1949); see generally, Committee on Consumer Protection, *Final Report*, Cmd. No. 1781, at 141 (1962) (discusses the fact that in this era of mass produced articles, many defects will not be apparent even to the manufacturer or retailer and certainly not to the consumer until the article is used; moreover, that the consumer is completely unfit to inspect and assess these goods. Consequently, the report recommends the prohibition of disclaimers by retailers in this area, manufacturer's guarantee being insufficient).

[61] Salmonson v. Horswill, *supra* note 59.

called — constructive fraud. [62] The code seems to adopt the same general rule in that it requires disclosure when defects are "hidden." [63] The word "hidden" may be used merely to get away from the momentarily confusing language of patent and latent. I doubt that it is intended as anything more than that.

Assuming material facts are discoverable by the exercise of ordinary diligence, are there circumstances in which there is a duty to disclose nevertheless? It has been suggested that where the facts are not equally within the means of knowledge of the other party there is a duty of disclosure. However, this suggestion has usually been made in cases wherein the defects were not discoverable by ordinary inspection. [64] A few other cases lend some support to the proposition that where the buyer inquires about some material fact, the seller has a duty of disclosure if he knows the buyer is being induced to buy due to a mistaken impression. [65] The prevailing rule, however, seems to be that a duty of disclosure exists only if there is some right to rely on disclosure arising out of some relation of trust or confidence between the parties. [66] If there is a relation of confidence, facts must be disclosed although they could be discovered using available means of knowledge. [67] The relation usually spoken of is some especial relation of trust or confidence such as trustee and *cestui que trust*, principal and agent, parent and child. Apparently, the required relation of trust and confidence is not created simply by actual reliance or inquiry. There must be some non-arms length relationship between the parties whereby each has the right to rely on good faith and disclosure. However, I would not suppose that the categories of fiduciary relationship are closed. [68] For instance, one might find a fiduciary relationship existing in some continuous vendor and purchaser relationships wherein the parties in time have come to trust and confide in one another.

This brings us to a discussion of good faith as defined in the code. In the case of a merchant, good faith "means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." [69] The requirement of good faith is geared to standards of fair dealing prevailing in the trade. However, the codal definition, grammatically at least, appears to leave a judge discretion to decide whether those standards are reasonable or not. It seems to be left open to him to conclude that the standards are

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[62] Barder v. McClung, *supra* note 60.

[63] UCC § 2-314, comment 3.

[64] See *e.g.*, Boileau v. Records, 165 Iowa 134, 144 N.W. 336 (1913), Grigsby v. Stapleton, 94 Mo. 423, 7 S.W. 421 (1887).

[65] See *e.g.*, Hill v. Gray, 1 Stark. 434, 171 Eng. Rep. 521 (1816); Cherry v. Brissolara, 89 Ark. 309, 315, 116 S.W. 668, 671 (1909).

[66] Boileau v. Records, *supra* note 64, at 139, 144 N.W. at 338.

[67] Venable v. Bradbury, 111 Kan. 495, 207 Pac. 647 (1922).

[68] Hanson Motor Co. v. Young, 223 Ark. 191, 196, 265 S.W.2d 501, 504 (1954) (do not need fiduciary relationship in the strict sense).

[69] UCC § 2-103(1)(b).

unreasonably low, that there is no existing reasonable commercial standard and thus to hold the party to a higher standard.

What criteria can a judge use in deciding upon a reasonable standard of fair dealing? Undoubtedly, he will find almost insurmountable the task of articulating a rationale of fairness in particular cases. Nonetheless, one writer, at least, has made a rather interesting attempt at prescribing and elaborating a reasonable standard of fair conduct. [70] Regarding disclosure, Keeton suggests that if the "man of ordinary moral sensibilities" or the "ordinary ethical person" would have disclosed, there is a duty of disclosure. [71] Failure to disclose would be unfair dealing. He thinks this approach is to be preferred to a standard expressed in terms of what the ordinary man might have thought about disclosure as an abstract question. Implicit in his choice is a desire to hold people to the practices of the ordinary ethical man rather than expect them to conform to his ideals. He would not have people observe a saintly standard. On the other hand, he makes sure to point out that the standard of disclosure in a particular line of business may not measure up to the "normal conduct of men generally," that is, to the standard of the ordinary ethics of men generally. [72] The problem, however, in finding the reasonable standard in the normal conduct of men generally rather than in the normal conduct of used car dealers, for instance, is that you can only surmise how men generally would act in the used car situation. Consequently, a court may not be confident in departing very much one way or another from prevailing trade practice, unless it is plainly unreasonable.

One pervasive problem in the judicial approach to this subject is the undue adherence to legalistic concepts of fraud. The courts ought to consider seriously the idea found in some cases that non-disclosure in certain circumstances, though perhaps not fraudulent, is simply too sharp a practice to be tolerated. [73] It may constitute simple unfairness. In the past, there have been many pronouncements to the effect that one need not disclose where there is no legal or equitable obligation to do so, however morally censurable the conduct may be. [74] Whether or not this reluctance to transcend the traditional boundaries of fraud was justifiable is a matter for further research, but I get the idea from a reading of the cases that it was unwarranted in some instances, at least in those instances where it could have been said with confidence that the conduct without doubt would be commonly regarded as unfair, wrong, outrageous or what have you. Hopefully, the code's renewed

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[70] Keeton, *Concealment and Non-Disclosure*, 15 TEXAS L. REV. 1 (1936).

[71] *Id.* at 32.

[72] *Id.* at 37.

[73] *E.g.*, Ellard v. Lord Llandaff, 1 Ball & Beatty, 241, 250 (Ir. Ch. 1810); see the criticism of certain kinds of sales talk in Foote v. Wilson, 104 Kan. 191, 178 Pac. 430 (1919); see the unconscionable contract in American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964) (buyers obligated to pay $1609 in commission and finance charges over and above the $959 value of the goods and services).

[74] *E.g.*, Windram Mfg. Co. v. Boston Blacking Co., 239 Mass. 123, 126, 131 N.E. 454, 455 (1921).

emphasis on good faith will prompt the judiciary to honestly think beyond the meagre legalisms of the fraud formula.

VII. Innocent Misrepresentation of Solvency and Financial Position : Section 2-702

Section 2-702(2) gives a right to the seller to reclaim the goods on the buyer's fraudulent or innocent misrepresentation of solvency. But the language of the subsection does not give a right of reclamation where a solvent buyer has fraudulently or innocently overstated his assets or understated his liabilities. [75] Absent explicit displacement by the code, the extra-code law which allows reclamation in these lesser circumstances might still apply.

Section 2-702(2) is said to proceed on the basis that "any receipt of goods on credit by an insolvent buyer amounts to a tacit business misrepresentation of solvency and therefore is fraudulent as against the particular seller." [76] Extra-code law does not treat simple non-disclosure of insolvency as fraudulent. Where no inquiry is made about financial condition, non-disclosure is not said to be misleading — active misleading. [77] Here obviously, the code is justified in rejecting the active-passive distinction.

Extra-code law, however, will treat a receipt of goods by an insolvent buyer as fraudulent if he has an intent not to pay for the goods when he receives them. [78] If he hoped to be able to and intended to pay for them, anticipating better times, the non-disclosure is not fraudulent. Somehow the action aspect of the active affirmation misrepresentation makes it fraudulent without the compound of an intent not to pay. [79] The code quite properly treats simple non-disclosure as fraudulent since it is not in fact innocent. Also dispensed with is the intolerable burden on the seller of proving that the buyer intended to cheat.

VIII. Mistake as to the Identity of the Purchaser : Section 2-403

Section 2-403(1) adopts the common law rule that "a person with voidable title has power to transfer a good title to a good faith purchaser for value." [80] At common law, a person who deceived a transferor as to the identity of the transferee was sometimes held to have obtained a voidable title, [81] sometimes a void title. [82] However, the basis on which a contract

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[75] See N.Y. Law Revision Commission, *Report on the Uniform Commercial Code*, N.Y. Leg. Doc. No. 65(c), at 215 (1955).

[76] UCC § 2-702, comment 2.

[77] See *e.g.*, Phinney v. Friedman, 224 Mass. 531, 113 N.E. 285 (1916).

[78] *E.g.*, *ibid;* Nichols v. Pinner, 18 N.Y. 295 (1858).

[79] Nichols v. Michael, 23 N.Y. 264 (1861).

[80] *E.g.*, Phelphs v. McQuade, 220 N.Y. 232, 115 N.E. 441 (1917), Phillips v. Brooks, [1919] 2 K.B. 243.

[81] *Ibid.*

[82] *E.g.*, Wyckoff v. Vicary, 75 Hun. 409 (Gen. T. 5th Dep't. 1894), Ingram v. Little, [1961] 1 Q.B. 31 (C.A.).

in these circumstances was said to be voidable rather than void and vice versa never was made clear. In order to protect the good faith purchaser for value, [83] section 2-403(1)(a) provides that in all cases of deception as to the identity of the transferee, such transferee has power to pass a good title.

IX. CONCLUSION

It is fairly apparent that the code, in adopting for frustration, the language of *basic* assumption, and for express warranties, the language of *basis* of the bargain, means to provide a singular-root formula relating to importance and materiality. Surely then, for the law of mistake as well, the courts will be justified in talking in terms of *basic* mistake or mistake of *basic* assumption and in relegating to their proper sphere, older inflexible notions of mistake of identity and existence.

One other basic objective of the code is to inspirit the law by aligning it with commercial practice and conditions prevailing in the market place. Its attitude to failure to read and understand, its focus on the many circumstances apart from the expressions of the parties that can be said to enter into their agreement, its rejection of rigid unrealistic rules of offer and acceptance — all these attitudes mark this objective. In so far as the objective is attained, the law, perhaps not so incidentally, is made more acceptable and understandable to the persons whose transactions it governs.

It might be argued that the code has neglected to carry this approach over into the law of disclosure generally. It might have been asked what inquiry and inspection is to be expected of people in the light of the extended complexity of merchandise and the incredible hurry of the market place. In these circumstances, how far and fast can their minds go. By the same token, the legislature is still in the process of deciding how far it should or need go in its protective function. Undoubtedly, there are cries of paternalism by men shrewder than people in general. The shrewdest of men, however, desire social protection but will not reach for the ideal for fear of impeding the mobility of the market place. Hopefully, this is the explanation for the absence in the code of a more comprehensive expansive view of disclosure.

[83] UCC § 2-403, comment 1.