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On Contracting

R. A. Samek

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I. *Introduction*

Twelve years ago I drew attention in a paper to the importance of the discovery of *performative utterances* by the well known Oxford linguistic philosopher, John Austin, for a better understanding of the legal concept of contract.[1] In *The Legal Point of View*, I developed this concept into what I called the *performative function of discourse*,[2] and in a recent paper I applied it to rebut an attack on the objective theory of contract.[3] My main aim in the present paper is to compare Austin's classification of *infelicities*, to which performative utterances are subject, with their legal analogues.

Although it is unlikely that Lord Denning was familiar with Austin's concept of performative utterances, the recognition of the performative function of discourse lends strong support to his doctrine of equitable mistake.[4] This example shows well how doctrinal development in the law may be strengthened by keeping abreast of developments in philosophy, and how it may be weakened by failing to do so. The philosophical repertoire of most lawyers is usually antiquated, if not quaint. The same is true of the legal repertoire of philosophers. Yet, philosophers on the whole are more willing to learn from lawyers than the other way round. Thus, Austin explicitly acknowledges that the nearest approach to *performative* is the word *operative* as used by lawyers, the operative part of a legal instrument being that part which actually performs the legal act which it is the purpose of the instrument to perform.[5] He also refers to contributions made by lawyers in his discussion of *infelicities*.[6]

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*R. A. Samek, Professor of Law, Dalhousie University

1. R. A. Samek, *Performative Utterances and the Concept of Contract* (1965), 43 Australasian Journal of Philosophy 196
2. R. A. Samek, *The Legal Point of View* (New York: Philosophical Library, 1974) at 87-88
3. R. A. Samek, *The Objective Theory of Contract and the Rule in L'Estrange* v. *Graucob* (1974), 52 Can. B. Rev. 351
4. *Id.* at 369
5. J. L. Austin, *Philosophical Papers* (Oxford: Clarendon Press, 1961) at 236
6. J. L. Austin, *How To Do Things with Words* (Oxford: Clarendon Press, 1962) at 19. Austin says that it is worthy of note that, "as I am told, in the American law of evidence, a report of what someone else said is an utterance of our performative

A word of warning is necessary in view of the ascendancy of so-called linguistic philosophy in the English speaking countries. Legal concepts cannot be reduced to ordinary language concepts, for the former have a much sharper and more restricted function than the latter. We may say that legal concepts are technical or model concepts used from the *legal point of view*, while ordinary concepts are non-technical concepts which may be used from many different points of view, including the legal point of view. Hence, a legal concept such as *contract* cannot be reduced to an ordinary language concept such as *agreement*, though there may be family resemblances between the two.

According to my model, a *point of view* marks out an exclusive field of interest, and the exclusive field of interest of the *legal point of view* is that mode of institutional social control which is enforced through the effective application of a norm-system by courts or tribunals acting as norm-authorities of the system. The content of the norms of this system is adapted for the purpose of that social control from a range of values drawn from different points of view, and in particular from the moral point of view which provides the foundation of values on which a legal norm-system is built.[7]

I have spoken of ordinary and model *concepts*, but it should not be thought that concepts are single self-contained units with a fixed meaning. This false picture has become embedded in our language largely because of the apparent unity of words. Yet, it is so strong that as long as we think in terms of concepts, we will tend to think of them as units which remain essentially unaffected by their use in language. So what I have proposed to do is to inhibit the false picture of unity engendered by the word *concept* by means of another picture, namely that of a *bent* concept. I have said that a concept is bent by its use in language, and that beside the particular stresses which bend a concept in particular contexts, there are important lines of stress set up by the adoption of points of view and models. An ordinary concept is bent by the point of view from which the concept is used, and a model concept is bent by the model

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kind: because this is regarded as a report not so much of something he *said*, as which it would be hear-say and not admissible as evidence, but rather as something he did, an action of his. This coincides very well with our initial feelings about performatives'' (*Id.* at 13). Under the law of evidence, however, a report of what someone else *said* may be admissible, provided it is not used to show that what he said was true.

7. *Supra*, note 2 at 87-88

to which it belongs, and to the extent that it is uncontrolled by that model, by the particular context in which it is used.[8] Hence, if ordinary and model concepts are used from the legal point of view, they will be bent by it in the direction of its field of interest.

The concept of performatives is a model concept which is normally used from the philosophical point of view in the study of ordinary language. Hence, it cannot be simply applied to the study of legal concepts from the legal point of view. What constitutes a legal agreement or a legal promise cannot be deduced from philosophical conclusions about the performative use of these concepts in ordinary language. *A fortiori*, whether the legal concept of contract is based on the ordinary concept of agreement *or* of promise cannot be decided according to ordinary language usage. On the other hand, we may gain a better insight into legal concepts through a philosophical analysis of the use of ordinary concepts, for difficulties in legal doctrine may have their roots in misapprehensions about their use.

II. *Performative Utterances and Functions of Discourse*[9]

Austin at first thought that he could mark off *performative utterances* from statements or *constative* utterances on two main grounds, namely that in uttering a performative we are doing and not merely saying something, and that performative utterances are *happy* or *unhappy*, while statements are true or false. Suppose that in the course of a marriage ceremony I say "I do (take this woman to be my lawful wedded wife)", or that I tread on your toe and say "I apologize", or that I have a bottle of champagne in my hand and say "I name this ship Queen Elizabeth". In all these cases I am *doing* something and not merely *saying* something which is true or false. A performative utterance is not necessarily effective or operative. For instance, uttering the words "I marry you", or "I divorce you", is not sufficient to perform a marriage or a divorce, but the one thing we must not suppose is that what is needed in addition to the saying of the words in such cases is the performance of some internal spiritual act. For instance, the utterance "I promise to be there tomorrow" is not a true or false report of the performance of some inward spiritual act of promising. The act of

8. *Id.* at 20
9. *Id.* at 27-33. Austin's earlier view was stated in *Philosophical Papers* (*supra*, note 5), and his later view in *How To Do Things with Words* (*supra*, note 6).

promising is performed in making the promise.

Austin himself perceived later that he could not mark off a special class of performative utterances from constative utterances on either of these grounds. The first ground will not do, for in stating something we are also *doing* something and not merely saying something: we are making a statement and not doing something else. Compare, for instance, "I *state* that he did not do it" with "I *bet* that he did not do it".

The second ground on which Austin distinguished performative from constative utterances will not do either, for the notion of unhappiness or infelicity applies not only to the former but also to the latter. For instance, philosophers distinguish between the falsity of a statement and its inappropriateness when it presupposes something which does not in fact obtain. For instance, "The King of France is bald." Similarly, the statement "The cat is on the mat, but I don't believe it" is infelicitous, though not in quite the same way as the performative utterance "I promise that I shall be there, but I don't intend to be there".

Conversely, performative utterances cannot be insulated from truth and falsity. What all this boils down to is that we cannot draw a sharp line between performative and constative utterances on the ground that the former are happy or unhappy, and the latter true or false. Happiness and truth, and unhappiness and falsity, have a way of sliding together.

Austin recognized that the error in his earlier view consisted in assuming that performative utterances could be marked off from constative utterances by means of some *formal* characteristics of these two classes of utterances. He came to appreciate that the same utterance may have both a performative and a constative aspect, and he therefore felt it necessary to start again "from the ground up". He built his new edifice on a theory of *speech* acts, which is really a generalization of performatives applied to the whole field of language. Traditionally, philosophers had considered language anatomically, studying the meaning of words and sentences like an anatomist dissecting the fixed bone structure of a skeleton. The new approach was physiological; language was conceived as a living thing, characterized not by a set structure but by a variety of functions which it fulfilled.[10]

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10. Austin shows that performative utterances cannot be limited to a particular list of verbs, or to a particular grammatical form. Although they are typically in the

In *The Legal Point of View*, I distinguish four *functions of discourse*, namely the *assertive*, the *evaluative*, the *prescriptive*, and the *performative* function. The last consists in the use of verbal formulae for the performance of socially significant acts. For instance, *in* using the formula "I promise", I perform the socially significant act of promising. The performance of socially significant acts has certain social consequences. For instance, promising has the social consequence of being (generally) bound to keep one's promise, and the further social consequence of being liable to social disapproval for breaking it.

All the functions of discourse are *idealized models* of actual functions; they are by definition mutually exclusive, but not cumulatively exhaustive. In actual linguistic practice, the same utterance or sentence may, even on the same occasion, serve one or more of these functions.

III. *Performative Utterances and the Formation of Contracts*

I shall now attempt to show that Austin's concept of performatives leads to a better understanding of the legal concept of contract, or to put it in another way, that the common law's failure to recognize the performative function of discourse has created difficulties in contract doctrine which can be cured by paying attention to it. The view that performative utterances, that is, utterances used for the performative function of discourse, such as *I offer*, *I accept*, *I agree*, *I promise*, are reports of mental states is no doubt at least partly responsible for the so-called *subjective* view of contract, according to which a contract is the outward expression of a union of minds. This view originated on the Continent, and although considerable lip service was and still is being paid to the Latin tag that there must be *consensus ad idem*, the so-called *objective* view has in fact prevailed in the common law countries. It is tempting to correlate the latter with Austin's view that performative utterances are operative in their own right, but in England at least the objective view of contract is usually stated in the form of a rule of estoppel.

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first person singular present indicative active, they need not be in that form. A performative utterance may be made in the second or third person passive. For instance, "You are hereby authorized to pay", "Passengers are warned". Mood will not do either, since I may order you to turn right by saying not "I order you to turn right", but simply "Turn right". Tense will not do, for instead of saying "I call you off-side", I may say simply, "You were off-side". (*Supra*, note 6 at 55 *ff.*)

The parties are deemed to have promised or agreed, if this is the reasonable inference to be drawn from their words and acts, on the supposition that they are reasonable men. In the interest of business certainty, an objective standard is set which *as a general rule* they are estopped from rebutting.

The seeming need to find a technical reason for holding the parties to their utterances is a consequence of the view that the utterances themselves are reports of mental states and therefore inherently corrigible. The objective view of contract, *if it is based on estoppel*, presupposes the truth of the subjective view. If, on the other hand, we appreciate that the parties' utterances are important in their own right, and are not merely reports of their states of mind, both the logical and the moral attraction of the subjective view begins to fade. If parties can logically enter *into an* agreement, and be morally committed by it, without their minds being *in* agreement, the legal edifice of contract can be built on the *terra firma* of their outward acts, instead of on the shifting sands of their subjective intentions. In this way, the legal standard of the reasonable man can be projected directly into the acts of the parties themselves, thus bridging the gulf between the abstract standard of the reasonable man and the special knowledge of the parties in the particular circumstances of the case. The legal standard of the reasonable man is used merely to bring the parties up to a *minimum* standard by interpreting their words and acts as if they were those of reasonable men, and not to replace *their* standards with a different standard altogether.

The most significant implication of Austin's account of performatives for the law of contract is that it eliminates the source of confusion between three very different questions: (i) Have two parties entered *into an* agreement? (ii) Were the two parties *in* agreement? (iii) Did one party *agree* to do something? The statement that there is *an* agreement between two parties entails that they entered into an agreement, but the statement that they are *in* agreement does not entail that they entered into an agreement, and *vice versa*. An agreement is *entered into* by an exchange of performative utterances which commit the parties to a course of action or inaction or by means of conduct which takes the place of such utterances. *Being in agreement* is a fact independent of performative utterances. *I agree* is performative, and does not entail either being in agreement or entering into an agreement. For instance, the speaker may agree with another person out of

politeness without being in agreement with him, and without entering into an agreement with him. In that case one may say that the performative *I agree* is used *infelicitously* because of the speaker's dishonesty in much the same way as the performative *I promise* is used infelicitously when there is no intention to honour the promise; but it is not a case as we shall see where the performance does not come off.

A contract is usually defined in terms of a promise *or* an agreement, yet in practice the two concepts are often telescoped, an agreement being considered as resulting from an exchange of promises. A set of reciprocal promises, however, cannot be *reduced* to the unilateral concept of promise; it rests on the concept of bargain which I have defined as a special kind of agreement used to effect a business-type of exchange.[11] Although the concepts of promise and bargain were intertwined in the development of the common law, it never adopted a general principle of promissory liability.

The concept of consideration (which requires a contract to be supported by some sort of mutual contribution) is implicit in the concept of bargain, but it has no intrinsic link with the concept of promise. Hence, those who regard *promise* as the basic unit of contract have little time for the doctrine of consideration. A promise is essentially unilateral; it implies that the thing promised is desired by the promisee, and for this reason it does not look to an acceptance or rejection in the way an *offer* does. I have defined an offer as the recognized procedure for proposing a bargain, which may be accepted or rejected by the offeree. The performance contemplated is bilateral or multilateral, and the offeror is committed only if his offer is accepted. A promise, on the other hand, contemplates a unilateral performance by the promisor, and the promisor is committed as soon as he makes the promise.[12]

I have suggested that the concept of contract is geared to bargain, and that promise plays only a subsidiary part, particularly in England and in Canada, where reliance on a promise does not generally give rise to an action.[13] But it follows from what I have said about the use of concepts that the legal model concept of contract cannot be reduced to the ordinary concept of bargain.

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11. *Supra*, note 1 at 198
12. *Id.* at 205
13. *Id.* at 206-07

Whether or not a bargain has been made between two parties, and what the terms of the bargain are, are questions of fact; whether or not a contract exists between two parties, and what the terms of the contract are, are questions of law, though the latter questions cannot generally speaking be disposed of without regard to the former.

The fruitfulness of Austin's concept of performatives for a better understanding of the legal concept of contract is not dependent on the acceptance of a bargain theory. Both *bargain* and *promise* are based on a code of morality which sanctions the making of binding commitments and censures their breach; and in both cases the commitments are made by means of performative utterances, or by conduct which takes their place. What I have claimed is simply that an analysis of the ordinary concepts of agreement and promise makes a legal bargain theory of contract more attractive than a promissory theory.

IV. *Austin's Classification of Infelicities and their Legal Analogues*

Austin calls the doctrine of the things that can be and go wrong on the occasion of performative utterances, the doctrine of the *Infelicities*.[14] Stated positively, he says, certain conditions or rules must be satisfied, if a performative is to function happily or felicitously. Austin states six such rules or conditions, without claiming any sort of finality for them:

> (A.1) There must exist an accepted conventional procedure having a certain conventional effect, that procedure to include the uttering of certain words by certain persons in certain circumstances, and further,
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> (A.2) The particular persons and circumstances in a given case must be appropriate for the invocation of the particular procedure invoked.
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> (B.1) The procedure must be executed by all participants both correctly and
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> (B.2) completely.
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> (Γ. 1) Where, as often, the procedure is designed for use by persons having certain thoughts or feelings, or for the inauguration of certain consequential conduct on the part of any participant, then a person participating in and so invoking the procedure must in fact have those thoughts or feelings, and the participants must intend so to conduct themselves, and further

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14. *Supra*, note 6 at 14

(Γ. 2) must actually so conduct themselves subsequently.[15]

Although if we sin against any one (or more) of the six rules the performative utterance will be unhappy, there are according to Austin considerable differences between these ways of being unhappy. The first big difference is between all the four rules A and B taken together, and the two Γ cases. If we offend against any of the A and B rules, then the act in question (*e.g.*, marrying) is not successfully performed at all, does not come off, in short, *misfires*, whereas in the two Γ cases the act *is* achieved (*e.g.*, when I say *I promise*, but have no intention of keeping it) but *abuses* the procedure.

When the utterance is a misfire, the procedure which we purport to invoke is disallowed, and our act (marrying, *etc.*) is void or without effect. We speak of our act as a purported act, or perhaps as an attempt. On the other hand, in the Γ cases we speak of our infelicitous act as *professed* or *hollow* rather than as *purported* or *empty*, though these distinctions are by no means hard and fast. In both the A cases there is a *misinvocation* of the procedure in question (a *misapplication* in A.2), while in the B cases the procedure exists and applies all right, but its execution is muffed. There is a *misexecution*, the purported act is *vitiated* by a *flaw* (B.1) or *hitch* (B.2) in the conduct of the ceremony.

I do not want to be drawn here into the subtleties of Austin's linguistic differentiations between different kinds of *infelicities*, particularly as he himself recognized the impossibility of maintaining any hard and fast lines on grounds of ordinary linguistic usage. The only thing which concerns me is the fruitfulness of Austin's treatment of infelicities for a performative interpretation of contract. It will be apparent that Austin's concept of infelicities is merely the other side of his concept of performatives. Indeed, the six rules stated by him are necessary conditions of the happy functioning of performatives. It may be questioned, however, whether *infelicity* is a good word to describe cases of *misinvocation*, particularly where the procedure followed does not even exist as a conventional procedure. Here, in Austin's own words, we are not just dealing with an infelicity or unhappiness of something which has come off, but with something which has never come off at all. Yet, there is something which has come off, namely the utterance

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15. *Id.* at 14-15

itself, though it has *misfired*, it was used in vain; it has failed to achieve its purpose, since it could not trigger the right procedure without which it remained ineffective.

The terms *nullity* and *voidness* immediately point to fruitful analogies in contract. There too we find a seeming self-contradiction in saying that a *contract* is a nullity or void. Either there is a contract, in which case it cannot be void, or there is not, in which case it does not exist at all. But what is meant by speaking of a *void* contract is that a contract, which *prima facie* appears to be valid, may on closer inspection turn out to be a complete nullity. The case which lawyers have in mind is not so much that where ignorant members of the public may be fooled by something which looks like a contract as that where even a lawyer might be fooled unless his attention is directed to the missing element. Hence, the infelicity is one of *misapplication* of the procedure (A.2) rather than its non-existence (A.1), and it is generally the former which is important to lawyers. For instance, no common lawyer would be fooled into believing that the making of a gratuitous promise (unless under seal) can constitute a valid contract, but he might be fooled into believing that there was *consideration* when on closer investigation it turns out that there was none. We must remember that legal concepts are technical or model concepts, not ordinary language concepts, so that a contract may well not be supported by consideration in law when in ordinary language it would be regarded as so supported, and *vice versa*.

I have treated the case of no consideration as an example of nullity, but it is not one which would immediately come to the mind of a lawyer. What would come to his mind as a paradigm is a very different case, namely *mistake*, which Austin together with *misunderstanding* and things done under *duress*, by *accident* or *unintentionally*, specifically excludes from infelicities proper, on the ground that they belong to the dimensions of unhappiness to which all actions — not just performative utterances — are subject.[16] At common law, a mistake recognized by the law avoids the contract *ab initio*; it makes it a complete nullity, so that not even innocent third parties for value can as a general rule derive any rights under it. The traditional explanation given is that the contract is void because the mistake has prevented *consensus ad idem*, with the silent corollary that there must be a subjective meeting of minds,

16. *Id.* at 21, 42

or concurrence of intentions, for a contract to come into existence. In other words, the common law doctrine of mistake is based on the subjective view of contract. Indeed, it enlarges the subjective view at the expense of the qualifying principle of estoppel, for in operative cases of mistake the party making the mistake is *not* generally estopped by his external conduct from denying that he was *ad idem* with the other party.

It is by no means clear to me why Austin should make a point of distinguishing between wider infelicities and infelicities proper which are restricted to acts of uttering words, since verbal infelicities are merely a species of conventional infelicities. So far as the law is concerned, the use of performative *utterances* is not required for the formation of a contract. Some contracts have to be under seal, and some have to be in writing or evidenced by writing, but the general rule is that the conduct of the parties may take the place of utterances. What is important is the conventional behaviour, not the use of some ritual utterances.

Austin discusses *consensus ad idem* in connection with misunderstanding:

> One of the things that cause particular difficulty is the question whether when two parties are involved *'consensus ad idem'* is necessary. Is it essential for me to secure *correct understanding* as well as everything else? In any case this is clearly a matter falling under the B rules and not under the Γ rules.[17]

Misunderstanding is admittedly a different category from mistake. The former involves a failure in communication, while the latter may but need not be the *result* of such a failure. However, a procedure may be appropriate only in the event of there being no mistake or misunderstanding, or if there is *consensus ad idem*. This is the extreme position of the subjective view of contract so far as the procedure of contract is concerned. Why then should *ultra vires* and *incapacity* be classified under rule A.2,[18] and *consensus ad idem* under the B rules? If *consensus ad idem* is necessary, why is the failure to achieve it just a *flaw* (B.1) resulting in the misexecution of the procedure, and not a circumstance which makes the procedure inappropriate (A.2)?

In all the cases of infelicity discussed so far, the performance is a nullity or void. In the last two types of case mentioned by Austin

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17. *Id.* at 36
18. *Id.* at 34

(Γ.1 and Γ.2) the performance is *not* void, although it is still unhappy. These infelicities Austin calls *insincerities* and *infractions* or *breaches*.[19] Where the procedure is designed for use by persons having certain intentions, a person invoking it must in fact have those intentions, and so conduct himself subsequently.

We have seen that Austin treats *consensus ad idem* in connection with misunderstanding, which he excludes for infelicities proper, but that he also classifies *consensus ad idem* under the B rules and not under the A and Γ rules. Yet, surely, how we should treat *consensus ad idem* will depend on the role we ascribe to it in the contract procedure. If it is conceived as a necessary condition of the appropriateness of the procedure, or of its correct execution, non-compliance will make the contract void. If, on the other hand, it is conceived merely as a defect without nullifying the whole transaction, non-compliance will not have this effect. On the objective view of contract, the latter is the position which the law should take.

Austin's distinction between the A and B groups, on the one hand, and the Γ groups of infelicities on the other — but not so much his distinction within these groups — is extremely helpful in exploring the concept of contract. If we ignore his exclusion of mistake, misunderstanding and things done under duress, by accident or unintentionally, we are left with two main groups of deficiencies. We may then say that the first is so fundamental as to derail the whole contract procedure, and that the second may be invoked by the party prejudiced at his option, without preventing the formation of a contract. On this view, a defect belonging to the first group will not make a contract void on the wide subjective ground of lack of *consensus ad idem*; it will be restricted to the relatively narrow range of cases where the contract procedure totally misfires. This will be so, for instance, where the parties have not agreed on the terms of the agreement with reasonable certainty, where the agreement is lacking in consideration, where there has not been a legally sufficient communication of the acceptance, or where an offer has been revoked or has been followed by a counter-offer instead of by an acceptance.

A *mistake* by one or both parties will not make the contract void, except in the case of a *mutual mistake* where the parties are at cross-purposes, or of a *mistake of identity of party*. The first is really

19. *Id.* at 39

a case of *uncertainty of terms*, and the second of *uncertainty of parties*.[20] A mere mistake will only make the contract voidable; it will be a *hitch* which gives the mistaken party the right to avoid the contract, or to obtain some other relief, if the court thinks that it has an *equity* which should be enforced. This approach is taken by Lord Denning in his doctrine of *equitable mistake*. While the effect of mistake at common law is, as we have seen, to make the contract void *ab initio* on the gound of lack of *consensus ad idem*, an equitable mistake only gives rise to an equity, and this equity must be balanced against possibly conflicting equities and considerations of public policy. Unlike common law mistake, equitable mistake allows for flexibility in the type of relief granted. For instance, parties may be put on terms, in which case the contract is in effect modified rather than avoided. The doctrine of equitable mistake is limited to giving relief against the other parties to the contract, but there is something to be said for allowing equitable relief against negligent third parties, including the sharing of loss by apportionment.

Fraud, consistently with Austin's treatment of it under insincerities, does not make a contract void, only voidable. Incapacity, on the other hand, which is classified under A.2, does not always make a contract void. In some cases it is regarded merely as an equity which may be raised by the party incapacitated. For instance, certain infants' contracts are void and others are voidable.

Physical and moral *duress* makes a contract voidable and not void. Perhaps here the law should draw the line between grosser forms of duress which amount to an abuse of the contract procedure, and undue influence and unconscionability, which merely give rise to an equity to avoid the contract. A party may bind himself to a contract *unintentionally*, if this is a reasonable inference to be drawn on the supposition that he is a reasonable man. On the other hand, if the parties expressly declare that they do not intend to be legally bound by their agreement, they will not be so bound. A failure in *communication* may, but need not, prevent the formation of a contract. For instance, the failure of the offeror to hear a *spoken* acceptance will generally have that effect, while the loss of a letter of acceptance in the mail will not.

It should be noticed that not all defective contracts can be forced

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20. See R. A. Samek, *Some Reflections on the Logical Basis of Mistake of Identity of Party* (1960), 38 Can. B. Rev. 479

into the categories of void or voidable contracts. For instance, *illegal* contracts may be afflicted by different degrees of voidness depending on the degree of their turpitude. *Unenforceable* contracts are valid, but they cannot be enforced by legal action.

V. *The Channelling Function of Contract*

Austin's concept of performatives is useful not only in throwing new light on old problems of contract formation, but in another way as well. As long as we think of contract in terms of the subjective intentions of the parties, we will tend to think only of its remedial function in particular cases, that is, of the static function of protecting certain equities arising from the breach of a party's promise or bargain. Austin's concept of performatives gives us fresh insight into a very different function of contract, which has been called its channelling function.[21] This function may be defined as the dynamic social function of providing a simple, speedy, flexible and effective procedure whereby private individuals and interest groups may by themselves regulate their economic relations. It is the use of this authorized procedure, and not the expressed intentions of the parties, which creates contractual obligations and rights. Hence, failure to follow it will *prima facie* result in the complete nullity or voidness of the transaction. The law, having laid down a certain procedure or channel which must be followed if legal validity is to be given to the transaction, will *prima facie* only recognize transactions if they have been channelled in the proper way. However, in a common law system where law is made by judges, legal norms are very open-textured. There are many cases where it is impossible to predict whether the trial judge will decide that the procedure used has been sufficient to create a valid contract. The mere fact that it has not been conclusively sanctified by a convention which is enshrined in a precedent, does not mean that it will not be so sanctified in the future. Conversely, a procedure which has been sanctified in the past, may become desanctified by a new precedent.

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21. *Supra*, note 1 at 208