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SALE OF NON-EXISTENT GOODS: A PROBLEM IN THE THEORY OF CONTRACTS

Jan Z. Krasnowiecki*

Introduction

The decision of the High Court of Australia in *McRae v. Commonwealth Disposals Comm'n*¹ has greatly encouraged the view that a contract for the sale of non-existent goods, entered into in good faith, is not necessarily void, but that the question in each case turns on the construction of the contract.² The decision has even led to the claim that Section 7(1) of the Uniform Sales Act (Section 6 of the Sale of Goods Act, 1893) does not mean what it says, but that it is merely a "prima facie rule of construction."³ My purpose here is to examine, in the context of the *McRae* case, the validity of a program which aims at the reduction of all contractual problems to problems of construction.

Section 7 of the Uniform Sales Act provides in part: "(1) where the parties purport to sell specific goods, and the goods without the knowledge of the Seller have wholly perished at the time when the agreement is made the agreement is void." The provision was copied, with a slight change in phraseology, not material here, from Section 6 of the English Sale of Goods Act.⁴ Section 6, in turn, is intended to be a codification of the rule in *Couturier v. Hastie*.⁵

It is not surprising that lawyers schooled in the common law of contract, whose attitude to the law merchant is enshrined in *Eastwood v. Kenyon*,⁶ should search for an explanation of section 7 which would shut out the unwelcome echoes of an alien philosophy.⁷ The difficulty, of course, is that section 7 appears to give no weight to the agreement between the parties.⁸ Section 71 (Section 55 of the Sale of Goods Act, 1893), it is true, provides: "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale."

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1 84 Commw. L. R. 377 (Austl. 1951).

2 Atiyah, *Couturier v. Hastie and the Sale of Non-Existent Goods*, 73 L.Q. Rev. 340 (1957); Note, 15 MODERN L. REV. 229 (1952). This view was discussed and rejected in *In re Zellmer's Estate*, 1 Wis. 2d 46, 82 N.W.2d 891 (1957).

3 Atiyah, *supra* note 2, at 348.

4 Sale of Goods Act, 1893, 56 & 57 Vict., c. 71.

5 8 Welsb. H. & G. 40, 155 Eng. Rep. 1250 (Ex. 1852), *rev'd*, 9 Welsb. H. & G. 102, 156 Eng. Rep. 43 (Ex. 1853), *aff'd*, 5 H.L.C. 673, 10 Eng. Rep. 631 (1856).

6 11 Ad. & E. 438, 113 Eng. Rep. 482 (1840).

7 Dig. XVIII 1.8 "Nec emptio nec venditio sine re quae veneat potest intellegi." See DE ZULUETA, ROMAN LAW OF SALE, 12-14 (1949).

8 5 WILLISTON, CONTRACTS § 1561 (rev. ed. 1937).

However, it takes considerable courage to suggest that section 71 reduces the rule of section 7(1) to a prima facie rule of construction.⁹ Apart from the fact that section 71 appears to speak of an existing contract, not of the existence of one, there is the further difficulty that section 71 requires an express agreement to displace the implied rules.¹⁰ In this respect, the wording of section 71 must be compared with the wording of section 19 which begins: "Unless a different intention appears, the following are the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. . . ."¹¹ Thus, sections 7 and 71, even if read together, do not appear to accomplish the same result as might be obtained under section 456 of the Restatement of the Law of Contracts:

Except as stated in § 455 [dealing with subjective impossibility], or where a contrary intention is manifested, a promise imposes no duty if performance of the promise is impossible because of facts existing when the promise is made of which the promisor neither knows nor has reason to know.¹²

It will be noted that this provision, while it pays some attention to the consensual aspect of the contract, relies heavily on fault for its operative principle. The promisor is absolved, absent manifestation of a contrary intention, if he "neither knows nor has reason to know" of the facts making performance impossible. Section 7 not only does not contain any reference to the manifestation of a contrary intention but it states that the contract is void if the goods have perished "without the knowledge of the seller." There is no clear authority under this provision for holding the seller to his obligation where, absent actual knowledge, he *ought* to have known that the goods have perished.¹³

It should be said, at this point, that the above discussion of the Uniform Sales Act and of the Restatement is not intended to be exhaustive of the questions involved but is merely offered as a convenient framework within which the subject of this paper may be developed. Our problem is to discover the meaning of the view that "the true effect of a contract for the sale of perished or non-existent goods is always a question of construction,"¹⁴ and to decide whether there is anything to recommend it.

I. COUTURIER V. HASTIE

It has been mentioned that Section 7(1) of the Uniform Sales Act owes its origin to the case of *Couturier v. Hastie*.¹⁵ In *McRae v. Commonwealth*

⁹ Atiyah, *supra* note 2, at 348.

¹⁰ While § 71 also provided that implied rules shall be displaceable "by the course of dealing between the parties, or by custom," the theory that the question of non-existent goods is one of construction is directed, by those who advance it, to "construction" in the absence of express agreement, course of dealing, or custom.

¹¹ UNIFORM SALES ACT § 19 (emphasis added).

¹² RESTATEMENT, CONTRACTS § 456 (1932) (emphasis added). A similar provision is contained in § 460. *But see* note 59, *infra*.

¹³ See *Smith Engineering Co. v. Rice*, 102 F.2d 492, 498 (9th Cir. 1938), *cert. denied*, 307 U.S. 637 (1938).

¹⁴ Atiyah, *op cit. supra* note 2, at 349.

¹⁵ 8 Welsb. H. & G. 40, 155 Eng. Rep. 1250 (Ex. 1852), *rev'd*, 9 Welsb. H. & G. 102, 156 Eng. Rep. 43 (Ex. 1853), *aff'd*, 5 H.L.C. 673, 10 Eng. Rep. 631 (1856).

Disposals Comm'n,¹⁶ the High Court of Australia had occasion to reconsider that case. It came to the conclusion that the question raised in *Couturier* turned “entirely on the construction of the contract”; and that “it appears really to have been so treated throughout.”¹⁷ A thorough understanding of *Couturier*, therefore, provides a clue to the view made current in the *McRae* case, that the effect of a contract for the sale of perished or non-existent goods is always a matter of construction. The facts of the *Couturier* case were as follows:

On February 22, 1848, plaintiffs, who were merchants at Smyrna shipped 1180 quarters of India Corn “from Salonica to a safe port in the United Kingdom.” A shipper’s order bill of lading was issued to plaintiffs. Plaintiffs then indorsed the bill of lading and sent it on to their London agent with orders to sell the cargo on their account. Previously, they had instructed their agent to insure the cargo “at and from Salonica to a port of discharge in The United Kingdom.” This insurance was effected on February 8, 1848.¹⁸ Note the date.

On May 1, 1848, plaintiffs’ London agent employed defendants, corn factors, to sell the cargo under a del credere agency and sent them the bill of lading indorsed, and the policy of insurance. A del credere agency is one where the factor, for an additional commission called a del credere commission, guarantees the solvency of the purchaser and his performance of the contract.

On May 15, 1848, the defendants sold the cargo to Callender and sent him a bought note which stated that he had bought from them “1180 quarters of Salonica Indian Corn of fair average quality when shipped, at 27s. per quarter F.O.B., and including freight and insurance, to a safe port in the United Kingdom, payment at two months from this date, upon handing over shipping documents.” By virtue of the del credere agency defendants were guarantors of Callender’s performance of this contract.

The vessel containing the above cargo sailed from Salonica on February 23, 1848. Between February 23 and April 24 the vessel ran into very heavy weather. The cargo became heated and fermented. The vessel was obliged to put into Tunis Bay where the captain properly sold the cargo as unfit for further carriage. The cargo was sold on April 24th. There was, therefore, no cargo to be sold on May 15th when defendant sold it to Callender.

On May 23d, Callender repudiated the contract of sale on the ground that the cargo did not exist at the time of the sale to him. In March, 1849, Callender became bankrupt. Plaintiffs thereupon brought this action against defendants to recover the price of the cargo. As guarantors of Callender’s performance, defendants would, of course, be liable if Callender would be.

In the Court of Exchequer plaintiffs argued that on May 15, 1848, Callender had purchased from them the bill of lading and the insurance policy and merely the chance of the cargo being in existence. For a complete

¹⁶ 84 Commw. L. R. 377 (Austl. 1951).

¹⁷ *Id.* at 403.

¹⁸ 8 Welsb. H. & G. 40, 45, 155 Eng. Rep. 1250, 1253 (1852).

understanding of this argument, however, it is necessary to deal briefly with the "C.I.F." sale.

This term "C.I.F." indicates that the price fixed covers the cost of goods, insurance and freight to a named destination. While the risk of loss in the goods after shipment often falls on the buyer in other types of contract, the "C.I.F." contract is peculiar in that it constitutes a sale of the shipping documents plus insurance, rather than a sale of the goods. The goods represented by those documents are of importance only in that they must have been in existence at the time the insurance was effected — otherwise the insurance would be void — and they must have been shipped as indicated in the shipping documents. The latter requirement is not meant to assure the validity of the shipping documents, since a carrier issuing shipping documents against non-existent goods would be liable to the buyer, but is meant to assure that the insurance which generally operates from the moment of shipment (as was the case in *Couturier*) has become operative.¹⁹

Thereafter, the goods become irrelevant to the sale and the seller is entitled to demand payment of the price on presentation of the shipping documents of the policy of insurance despite the loss of the goods.²⁰ The extent to which the C.I.F. sale is a sale of the documents can be seen in cases in which the buyer is held to the payment of the price despite the fact that the loss in transit occurred by a peril excepted by the bill of lading, and by a peril not insured by the policy.²¹ But in such cases it would have to be shown that the bills of lading and the insurance were in the proper commercial form called for by the contract. In other words, it is the shipping seller's duty to make such contracts of carriage and insurance on behalf of the buyer as are called for by the contract of sale, and if the contract is silent on this point, as it usually is, his duty is to make such contracts of carriage and insurance as are reasonable and customary in the trade.

Now, it can be seen that plaintiffs' argument in *Couturier* was essentially that the sale of May 15, 1848, having all the characteristics of a C.I.F. sale, should be treated as such; that the buyer, Callender, was obliged to pay the price against the documents, notwithstanding the cargo had ceased to exist;

¹⁹ SCRUTTON, CHARTERPARTIES & BILLS OF LADING 199-202 (16th ed. 1955).

²⁰ *Mambre Saccharine Co. v. Corn Products Co.*, [1919] 1 K.B. 198, 203. Cf. UNIFORM COMMERCIAL CODE § 2-320 dealing with the C.I.F. term.

²¹ *Groom v. Barber*, [1915] 1 K.B. 316; *Weiss v. Credit Co.*, [1916] 1 K.B. 346, 350. Note, however, that the contract with Callender contained the term "F.O.B." There seems no reason for denying it C.I.F. effects where freight and insurance are included in the price quoted, and payment is "at two months from this date, upon handing over of shipping documents." Cf. *The Calcutta Company v. DeMattos*, [1863] 32 L.J.Q.B. (n.s.) 322, 331 (contract did not contain C.I.F. term but quotation included freight and insurance). On the other hand, the effect of the C.I.F. term is often stated as dependent on an intention that title (and therefore risk — UNIFORM SALES ACT § 22, SALE OF GOODS ACT § 20) pass on delivery to carrier and therefore, that it is within the exception of § 19, Rule 5, UNIFORM SALES ACT (Rule 5 is not in the English Act). See 2 WILLISTON, SALES § 280(d) (rev. ed. 1948). This view causes difficulty in a case such as *Couturier v. Hastie*, since, obviously, title to the goods could not have passed to Callender on May 15, 1848. The proper view of a C.I.F. contract, however, is that the locus of the title is irrelevant from the moment of shipment, because the sale is in effect a sale of the documents plus insurance. Cf. *Dwane v. Weil*, 199 App. Div. 719, 192 N.Y.Supp. 393, 402-403 (1922). Under the Uniform Commercial Code, because the question of risk is divorced from the question of title, there ought to be no obstacle to the view adopted by Parke, B., in *Couturier v. Hastie*. See UNIFORM COMMERCIAL CODE § 2-509, and compare comment 2 of that section with § 2-320(4) and comment 8 thereto.

and that, therefore, defendants were liable for the price as guarantors of Callender's obligation. The Court of Exchequer agreed with plaintiff. Baron Parke, delivering the opinion of the court stated: "We think, therefore, that the true meaning of the contract was, that the purchaser bought the cargo, if it existed at the date of the contract; but if it had been damaged or lost, he bought the benefit of the insurance, but no more."²²

In the course of his opinion Parke also stated:

. . . when there is a sale of a specific chattel, there is an implied undertaking that it exists; and if there were nothing in this case but a bargain and sale of a certain cargo on the 15th of May, there would be an engagement by the vendor, or a condition, that the cargo was in existence at that time. . . .²³

It was the presence of the insurance, *i.e.*, the characteristics of a C.I.F. sale, which persuaded the Court of Exchequer that the existence of the cargo was not part of the agreement of May 15th.

The decision of the Court of Exchequer was reversed by the Court of Exchequer Chamber and the reversal was affirmed by the House of Lords. It is helpful, at this stage, to ask what one might reasonably expect the reversing opinions to contain, if they are to meet Baron Parke's opinion in the Court of Exchequer.

One would surely expect a rejection of the view that the sale of May 15th was essentially a C.I.F. sale in which Callender bought the insurance and shipping documents and merely the chance that the cargo would arrive. This view was in fact rejected by Coleridge, J. who delivered the opinion of the Exchequer Chamber. It is at this point that Coleridge makes the remark, later relied on by the Court in the *McRae* case, that the question "turns entirely upon the meaning of the contract."²⁴ The question Coleridge had in mind, when he made this remark, was whether the contract of sale was or was not essentially a C.I.F.-type contract. Undoubtedly, this could be regarded as a question of construction. But the reason Coleridge rejected Baron Parke's view on this question was because he was under the impression that Callender never obtained the benefit of the insurance.²⁵

²² 8 Welsb. H. & G. 40, 55, 155 Eng. Rep. 1250, 1257 (Ex. 1852).

²³ *Id.* at 1257.

²⁴ 9 Welsb. H. & G. 102, 107, 156 Eng. Rep. 43, 45 (Ex. 1853).

²⁵ Curiously enough, no one has sought to question Coleridge's rejection of that view. P.S. Atiyah treats Parke's view that Callender would have had the benefit of the insurance as "a mistake which was brought to the attention of the Court of Exchequer Chamber when the case went on appeal." Atiyah, *supra* note 2, at 342. Justice Coleridge rejected Baron Parke's view on the ground that Callender, having purchased the cargo after it had ceased to exist, had no insurable interest in it. For this, he cites none other but Parke in *Sutherland v. Pratt*, 11 M. & W. 269, 301-14, 152 Eng. Rep. 815, 817-23 (1843), involving insurance taken out by the purchaser, *after the goods had partially perished*. Of course, if the insurance had been taken out by the purchaser on wholly perished goods there would have been no insurable interest, as counsel admitted in *Sutherland v. Pratt*, *supra* at 817. In *Couturier v. Hastie* the insurance was effected by plaintiffs on February 8, 1848, effective "at and from Salonica. . . ." On the effective date, the date of shipment, February 22, 1848, the cargo was very much in existence. The fact that it thereafter ceased to exist did not void the policy or effect Callender's rights upon the assignment of the policy to him. Plaintiffs would have been obliged to sue the insurance company as trustees for Callender, *Powes v. Innes*, 11 M. & W. 10, 152 Eng. Rep. 695 (1843), *Sparks v. Marshall*, 2 Bing. (N.C.) 761, 774, 132 Eng. Rep. 293, 298 (C.P. 1836). This procedural inconvenience has been removed by the Marine Insurance Act, 1906, 6 Edw. 7, 41, § 50. *But see* note 21 *supra*.

This reason for rejecting Parke's view of the meaning of the contract has more to do with its consequences than with its meaning. In other words, Coleridge held that the contract was not a C.I.F.-type contract because, due to the absence of an insurable interest in Callender, it did not have C.I.F. consequences.

But I do not intend to press this point. I am interested, particularly, in the next step which Coleridge, J.'s reversing opinion might have taken. It will be recalled that for Baron Parke, the view which Coleridge had rejected — that the sale of May 15th was essentially a C.I.F.-type sale — was an exception to the proposition that when there is a sale of a specific chattel, there is an implied undertaking that it exists.

One might have expected, therefore, that Coleridge, J.'s reversing opinion, after denying application to Parke's exception, would have given full effect to his general proposition. That is, Coleridge might have held that since plaintiffs had, through the agency of defendants and of their London correspondents, impliedly undertaken, as part of their contract with Callender of May 15th, that the cargo was then in existence, and since they were clearly in breach of this undertaking, they must fail in an action for the price. It should be noted, however, that it was not necessary for Coleridge to go that far. He might merely have held that since Callender had agreed to pay the price for the cargo and not for the shipping documents plus insurance, and since the cargo had failed, there was a total failure of consideration.

But this brings us to the basic dilemma of the common law's preoccupation with the agreement between the parties. For if the buyer is to be absolved on the ground that the consideration has failed, that which has failed must have been consideration. Consideration, in turn, is what the seller has promised to give. But if the seller has promised to give it, he is bound and the buyer should continue to be bound unless there was an implied condition that the contract should come to an end if the seller cannot give what he has promised. In that event the contract fails because of the condition; not because of the failure of the consideration.²⁶

While it is no longer fashionable to show much concern with this dilemma,²⁷ it helps to explain why Coleridge did not put his decision on the basis that the consideration had failed. Neither did he adopt the theory

²⁶ See *Taylor v. Caldwell*, 3 B. & S. 826, 833-34, 122 Eng. Rep. 309, 312 (K.B. 1863): "There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible. . . . But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied: and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfillment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

²⁷ 6 CORBIN, CONTRACTS §§ 1322, 1331 (1951); *Davis Contractors Ltd. v. Fareham Urban Dist. Council*, [1956] A.C. 696.

suggested by Parke's general proposition. Instead, he said: "If the contract for the sale of the cargo was valid, the shipping documents would pass as accessories to it; but if in consequence of the previous sale of the cargo, the contract failed as to the principal subject matter of it, the shipping documents would not pass."²⁸

In short, Coleridge said enough to indicate that he held against plaintiffs because the contract had in some way²⁹ failed to come into existence, not because plaintiffs had breached an undertaking that the cargo was extant at the time of the contract. While the opinions of the House of Lords do not appear to have clearly adopted Coleridge's theory,³⁰ enough doubt remained to enable the draftsman of Section 6 of the Sale of Goods Act of 1893 to believe that he had codified the *Couturier* rule when he wrote: "Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void."

In one sense what divided Parke and Coleridge could be regarded as a question of construction. At least, both stated a rule which they were willing to see displaced by the contract before them. Parke actually held his rule that "where there is a sale of a specific chattel, there is an implied undertaking that it exists" displaced by the contract before him. Obviously, Coleridge would not have found it necessary to reject Parke's construction of the contract as a C.I.F.-type contract if he had thought of his rule, that the contract fails when the goods fail, as an invariable rule of law.

The only thing which is clear, at this stage, about the view that "the true effect of a contract for the sale of perished or non-existent goods is always a question of construction" is that the proponents of it (a) disapprove of Coleridge's statement that the contract is void, (b) prefer some rule which would make the effect of such contracts turn upon an interpretation of the agreement and (c) are convinced that *Couturier*, on the whole, supports them.

To gain further understanding of their position, we now turn to the one case which is said to have given it its fullest application.

II. MCRAE V. COMMONWEALTH DISPOSALS COMMISSION³¹

On March 29, 1947, the following advertisement appeared in the columns of two Melbourne newspapers, *Age* and *Argus*:

Tenders are invited for the purchase of an OIL TANKER lying on JOURMAUND REEF, which is approximately 100 miles NORTH of SAMARI. THE VESSEL IS SAID TO CONTAIN OIL. OFFERS TO PURCHASE THE VESSEL AND ITS CONTENTS should be

²⁸ *Hastie v. Couturier*, 9 Welsb. H. & G. 102, 109, 156 Eng. Rep. 43, 46 (Ex. 1853).

²⁹ If he meant to adopt the theory that there was an implied condition that the goods were in existence, he certainly did not say anything which might indicate this. Moreover, the theory of implied conditions was first fully developed in *Taylor v. Caldwell*, 3 B. & S. 826, 122 Eng. Rep. 309 (K.B. 1863).

³⁰ *Couturier v. Hastie*, 5 H.L.C. 673, 10 Eng. Rep. 1065 (H.L. 1856).

³¹ 84 Commw. L. R. 377 (Austl. 1951).

submitted to the COMMONWEALTH DISPOSALS COMMISSION,
. . . indorsed "OFFER FOR VESSEL ON JOURMAUND REEF."

In response to this advertisement, plaintiffs submitted a tender dated March 31, 1947. The tender was on a printed form. It stated: "Offer for vessel on Jourmaund Reef by McRae Trading Co., . . . 1 oil tanker as advertised . . . lying on Jourmaund Reef off Samarai. Price £ 285. Cheque enclosed . . ."

The offer was accepted by the Commission in writing on April 11, 1947. Plaintiffs then looked for "Jourmaund Reef" on a map. They found no such reef because none such existed, but they found a "Jomard Island" which they believed to be the location referred to in the Commission's invitation to tender. However, they asked the Commission to give them the precise location of the tanker.

On April 18th, in response to plaintiff's request, the Commission wrote them a letter stating, "Reef, I wish to advise is located as follows: Latitude 11 degrees 16½ minutes South; Longitude 151 degrees 58 minutes East."

Plaintiffs then fitted out a small ship, engaged personnel, and proceeded to the location. They found no oil tanker for the sufficient reason that there was not any oil tanker lying at or near the location specified in the letter of April 18th.

In fact, there was no oil tanker which the Commission might have sold at all. There was an oil *barge* lying at a point about eleven miles east of the location specified in the letter of April 18th. This barge was responsible, through a series of administrative errors,³² characterized by the court as the "grossest negligence,"³³ for the Commission's invitation to tender.

Plaintiffs brought the action against the Commission claiming return of the consideration paid, loss of bargain, and damages in connection with the above expedition. They based their action on breach of contract, fraud, and negligent misrepresentation.

The defendant Commission maintained that plaintiffs must fail in their cause of action for negligent misrepresentation on the basis of *Candler v. Crane, Christmas & Co.*,³⁴ which held that the English common law knows no action for negligent misstatement as such; and that there was no proof of fraud. On the question of the breach of contract the Commission maintained that the contract was void on the basis of *Couturier v. Hastie* or that the barge lying eleven miles east of the specified location answered sufficiently to the description of the subject matter of the sale to qualify as such subject matter. Beyond this, the Commission contended that it was protected by a clause in the contract absolving it from all liability on account of any warranty expressed or implied or "any misdescription or alleged variation of the property delivered."

³² Described at length in the opinion of Webb, J., at first instance, 84 Commw. L.R. 377 at 379-86, and again considered by the High Court at 400-01, 408-09.

³³ *Id.* at 409.

³⁴ [1951] 2 K.B. 164.

Webb, J., at first instance,³⁵ relying on *Couturier*, held that the subject matter of the sale was an oil tanker as distinct from an oil barge and that since there was no oil tanker to sell "there was no contract." However, he found against the defendant on the ground of fraud,³⁶ and entered judgment against it.

The High Court affirmed the judgment modifying the order as to damages. However, it did not approve Webb, J.'s theory.

In an opinion written by Dixon and Fullagar, J.J., the High Court felt that a finding of fraud would not seem justified by the evidence³⁷ and doubted whether plaintiffs could be permitted to recover on the basis of negligent misrepresentation in view of *Candler v. Crane, Christmas & Co.*³⁸ It based its affirmance squarely on plaintiffs' breach of contract theory.

To do so, the High Court had to avoid the thrust of Section 11 of the Victorian Goods Act of 1928 which corresponds to Section 6 of the English Sale of Goods Act. It did so by saying that the case before it did not involve goods which had perished but involved goods which were never in existence.³⁹

Although there is some doubt in my mind whether this step ought not to draw Abraham Tucker's comment that "while we must needs sometimes split the hair we need not quarter it," the point is that by taking this step, the Court reached the question as it existed before the draftsman of Section 6 of the Sale of Goods Act undertook to codify what he thought to be the answer to it. In short, the court felt free to put its own interpretation on *Couturier*.

It held that the question in *Couturier* depended "entirely on the construction of the contract." It pointed out that the view that the contract was void is based solely on the remarks of Coleridge, J. in the Court of Exchequer Chamber, and stated:

The truth is that the question whether the contract was void, or the vendor excused from performance by reason of the non-existence of the supposed subject matter, did not arise in *Couturier v. Hastie*. It would have arisen if the purchaser had suffered loss through non-delivery of the corn and had sued the vendor for damages. If it had so arisen, we think that the real question would have been whether the contract was subject to an implied condition precedent that the goods were in existence. Prima facie, one would think, there would be no such implied condition precedent, the position being simply that the vendor *promised* that the goods *were* in existence.⁴⁰

Without pausing to consider whether, in the usual commercial transaction, such a prima facie rule of construction would be more desirable than the rule of Section 6 of the Sale of Goods Act, nor whether it would be any less intractable, the Court went on to extol the virtues of the common

³⁵ 84 Commw. L.R. 377, at 386.

³⁶ *Id.* at 387.

³⁷ *Id.* at 408.

³⁸ *Id.* at 410.

³⁹ *Ibid.* The court said: "Here the goods never existed, and the seller ought to have known that they did not exist." It is doubtful whether the court meant that § 11 would not protect the seller where he ought to have known that the goods had failed, because this would have furnished a comparatively simple answer to the case. See *In re Zellmer's Estate*, 1 Wis. 2d 46, 82 N.W.2d 891 (1957) and Note, 15 MODERN L. REV. 229, 231 (1952), discussing RESTATEMENT, CONTRACTS § 456 (1932).

⁴⁰ *Id.* at 406-07.

law approach "which has always regarded the fundamental question as being: 'What did the promisor really promise?'"⁴¹

The court came to the conclusion that "the only proper construction of the contract is that it included a promise by the Commission that there was a tanker in the position specified."⁴²

Before discussing the reasons, both those given and possibly those not given, for this conclusion I propose to consider one more "case" or, rather, controversy.

III. STRAWSON V. RUSSELL

In Philosophy there is a problem generally known as that of referring expressions, or logical subjects. The problem involves what appear to be subject-predicate sentences, having for their subject a phrase in the form "the so-and-so." "The oil tanker lying on Jourmand Reef off Samarai contains oil" would be an example. An example made famous by Bertrand Russell, who first advanced a cogent theory of such sentences,⁴³ is: "the King of France is wise." The problem is to give a logical account of such sentences which would allow for the fact that they have meaning regardless of the existence of the thing or person to which the phrase "the so-and-so" refers. For instance, the sentence "the King of France is wise" has meaning when it is uttered today in a context in which it is clear that it is uttered *of* today although there is nobody, today, who corresponds to the description "the King of France."

Philosophers who are concerned with this problem are aware, of course, that the problem does not suggest itself to the layman. Books of fiction are full of such sentences but they do not induce their readers to feel uneasy — at least, not on that account. Philosophers feel uneasy with such sentences because of the traditional theory that a subject-predicate sentence is meaningless unless the statement it makes is either true or false. Now a statement that "the King of France is wise" is not true if there is no King of France, but neither does it appear to be false. So, on the traditional theory, the statement ought to be meaningless but, unfortunately, it is not. This problem caused some of the older philosophers to account for the fact that such statements have meaning by postulating a world of "subsisting" entities which would do duty as subjects of such statements.

Russell maintains that the mistake of the older philosophers, which led them to postulate a world of subsisting entities, lay in supposing that such a sentence as "the King of France is wise" is a simple subject-predicate sentence. Roughly, what Russell said of such sentences was that they all contain an assertion that the referent exists. In other words, he would read the sentence "the King of France is wise" as "there exists an X such that X is the King of France and X is wise." According to Russell, subject-predicate sentences,

⁴¹ *Id.* at 407-09.

⁴² *Id.* at 410.

⁴³ His theory is known as the "Theory of Definite Descriptions," 1 WHITEHEAD & RUSSELL, *PRINCIPIA MATHEMATICA* (2d ed. 1925).

having as their subject a referring phrase in the form "the so-and-so," are not simple subject-predicate but are explicitly existential.

By reading such sentences in this way Russell has saved the traditional theory that a sentence is meaningful only if it is true or false and avoided the necessity of postulating a world in which the subjects of such sentences subsist. Thus, the sentence "the King of France is wise," as read by Russell, is simply false if there is no King of France.

Russell's theory has been challenged by P. F. Strawson.⁴⁴ According to Strawson, what is wrong with Russell's theory is that he accepted the traditional view that a sentence is meaningful only if it is true or false.⁴⁵ Strawson maintains that the meaning of a subject-predicate sentence, which has for its subject a referring phrase of any kind, depends on a knowledge *how*, and (in cases where the phrase or the context does not furnish a clue to this) on a knowledge *that*, the phrase performs an identifying function. His point is that the sentence is meaningful to one who knows *how* the referring phrase is designed to identify (or, *that* it is designed to identify) something or somebody, regardless of the fact that, on the particular occasion of its use, the referring phrase has failed to fasten on anything.

Strawson, therefore, does not accept Russell's view that sentences which have a referring phrase for their subject, *assert* that the referent exists. On Russell's reading of the sentence "the King of France is wise," the answer to the question "is that true?", would be "no it is false." Strawson points out that such an answer would hardly suggest itself as appropriate. One would be inclined to tell the questioner that he must be mistaken as to the country, or if one accepted the question, one would say that the statement is neither true nor false, there being no King of France.

While Russell and Strawson are concerned with the case of sentences which have referring phrases for their *subjects*, most of their reasoning would seem applicable to sentences in which the referring phrase occupies the position of an object. When I say "I petitioned the King of France today" there would seem to be just as much ground for contending that I have *asserted* that the King of France exists as there might be for contending the same thing when I say "the King of France is wise."⁴⁶ This would also be the case when I say "I sell you the oil tanker lying off Jourmand Reef."

Certainly Strawson's reasoning on how the sentence "the King of France is wise" derives its meaning, and his view that the sentence does not *assert*

⁴⁴ Strawson, *On Referring*, 1950 MIND 320, reprinted in *ESSAYS IN CONCEPTUAL ANALYSIS* 21 (Flew ed. 1956).

⁴⁵ "For a sentence of the statement-making type to have meaning, it is not necessary that every use of it, at any time, at any place, should result in a true or false statement. It is enough that it should be possible to describe circumstances in which its use would result in a true or false statement." STRAWSON, INTRODUCTION TO LOGICAL THEORY 185 (1952).

⁴⁶ It should be noted, however, that where the referring phrase occurs as an object, most of the impetus for Russell's view has vanished because the sentence "I petitioned the King of France today" is necessarily true or false even though it does not assert that the King of France exists. The sentence would be false in all cases except where I had actually petitioned the King of France today, even if it did not assert that the King of France exists. Thus it would be false (a) if I had not petitioned anyone today, and (b) if, whomever I had petitioned, it was not the King of France (this would always be the case if there was no such person in existence).

that the King of France exists, would clearly be applicable to the sentence "I sell you the oil tanker lying off Jourmand Reef."

It would, of course, be unfair to say that, when asked whether this sentence asserts that the oil tanker exists, Russell would always say "yes" and Strawson would always say "no," because neither of them would own that their controversy has anything to do with such sentences.⁴⁷ But I have outlined their controversy here because of the interesting turn, from our point of view, which it has lately taken.

Strawson's theory concerning sentences, of the type which have a referring phrase for their subject, has recently been attacked by Russell himself⁴⁸ and, I think more tellingly, by Arthur C. Danto.⁴⁹ Danto points out that Strawson's theory that such sentences do not *assert* that their subject exists and (when their subject does not exist) that such sentences are merely "neither true nor false," is spun round examples in which it could not matter less whether you say, with Russell, that such sentences are false or, with Strawson, that they are "neither true nor false." He then gives an example in which it does matter which way you come out.

His example concerns a real estate agent who sells two houses in New York describing them thus: "The house on the south-west corner of Riverside Drive and 116th Street was designed by Louis Sullivan. The house on the north-east corner is one of Wright's early masterpieces." The house on the north-east corner is not by Wright and there is no house on the south-west corner — only a public park. Mr. Danto points out that a lawyer who would advise the purchaser that he has no case in fraud, with regard to the property on the south-west corner, because what the real estate agent said was neither true nor false would not long survive in his profession.⁵⁰ No one, and certainly no lawyer, would deny that there is obvious force in Mr. Danto's point.

But I believe that one could make a good defense on behalf of Strawson. If I have digressed at some length into the Russell-Strawson controversy, it is because of the lesson, in terms of my subject, which I feel can be learned from the nature of this defense.

To begin with, Strawson clearly recognizes that there would be something wrong with the sentence "the King of France is wise but there is no King of France." On Russell's theory this would be a contradiction, on Strawson's, it would not. But Strawson meets this problem quite well, and, incidentally, furnishes himself with a good defense against Danto. He points out that a sentence whose truth or falsity becomes relevant only if its subject exists, cannot be uttered with the apparent intent of making a true statement without causing its hearers to think that the speaker is certain that the subject does exist. A denial by him of this certainty produces natural surprise in his hearers.

47 See note 46 *supra*.

48 Russell, *Mr. Strawson on Referring*, 66 *MIND* 385 (1957).

49 Danto, *A Note on Expressions of the Referring Sort*, 67 *MIND* 404 (1958).

50 *Id.* at 405.

It is common ground that one can commit a fraud by making a promise without any present intention to carry it out.⁵¹ And I see no reason why one cannot commit a fraud by uttering a sentence which naturally causes the hearers to think that the speaker is certain that its subject exists when he, in fact, knows that it does not. In other words, it is possible for us to so define what we mean by "statement of fact" for purposes of fraud that the realtor will be caught. But, Strawson can say that we do this because we want him to be caught by our law of fraud, not because we are convinced that he *asserted* that there is a house where there is a park.

But, it might be objected, when we choose to say that the realtor has asserted that the house is there, then, so far as we are concerned, he *has* asserted that the house is there, and we do not need any philosophers to tell us that we merely choose to treat the realtor *as if* he has asserted this. Particularly is this irritating, the objection might run, when philosophers like Strawson pretend to reach their conclusion on the basis of the meaning of ordinary language. We are ordinary people, we are the arbiters of what ordinary language really means.

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean — neither more nor less." "The question is" said Alice, "whether you can make words mean so many different things?" Humpty Dumpty is relatively harmless so long as he is *aware* what his point of view is. But suppose that he *acts* like Humpty Dumpty but *thinks* like Alice. Then he is formidable.⁵²

The *McRae* case furnishes a good illustration of this point. A number of special factors were present in the *McRae* case which were not present in *Couturier*. For our purposes, the most important are these:

(1) The acts of the Commission, through its agents, leading up to the invitation to tender and thereafter, were such that they led Webb J., at first instance, to hold that the Commission was guilty of fraud. While the High Court of Australia doubted the existence of fraud, it was clear that the agents of the Commission were guilty of "the grossest negligence."

(2) Although plaintiffs claimed a sum of £300,000 (approximately \$840,000) as representing their estimated profit if there had been an oil tanker to sell, they received only nominal damages on this account because, as the High Court pointed out, the profit was of such highly speculative nature that it "could not be assessed."⁵³

(3) The Commission knew, from the nature of the subject matter of the sale, that plaintiffs would embark on an expedition to salvage the tanker and thus incur considerable expenses, and the plaintiffs in fact did.

Under these circumstances it would be extremely odd if the law were to provide no theory upon which plaintiffs could hold defendants liable. One is

⁵¹ *Edginton v. Fitzmaurice*, 29 Ch. 459 (1885).

⁵² Implicit in Alice's question is the belief we all share that words must have a consistent meaning. In the law, where language is perhaps the most important causal factor in the decision-making process, the belief in the consistency of meaning in language may cause one who is not aware of the extent of its flexibility to reach conclusions which he would not have otherwise reached.

⁵³ 84 Commw. L. R. 377 at 412.

bound to feel sympathy with a court which surmounts various difficulties, including the doctrine in *Candler v. Crane, Christmas & Co.*⁵⁴ to reach a just result. It is difficult, however, to escape the conclusion that the court's approach, based on what the Commission "really promised" as well as its view that prima facie a vendor must be taken as promising that the goods are in existence, has introduced needless complications into a sufficiently troublesome peripheral area of contract law. Webb's decision, after all, could have been accepted. *Candler* might have been distinguished on the ground that it is confined to the situation where there is no contractual *relationship* between the negligent misrepresentor and the party injured. Here, it might have been said, there was a contractual relationship between the Commission and plaintiffs albeit one in which the contract itself might have been unenforceable. Moreover, the *Candler* doctrine need not have been followed. Instead, the decision was based on a holding that defendant really promised that the oil tanker was in existence.

The trouble with this approach is that there is no room for failing to hold the same thing with regard to vendors who are innocent, and purchasers who merely fail to realize a profit. Of course, it is possible in such cases to say that the parties promised to perform their part only subject to mutually contemplated existence of the subject matter. But this is merely to superimpose one fiction upon another. There comes a point when the law of contract must reconcile itself to the fact that it cannot solve a certain problem by resort to the agreement between the parties. To force the agreement to yield a result in such cases, is to act like Humpty Dumpty. The real danger is that later Alice may take over.

In this respect, the recent decision of the Supreme Court of Wisconsin, *In re Zellmer's Estate*,⁵⁵ is to be welcomed. The case involved the question whether Dr. Zellmer's estate should be liable to one of his daughters by his first marriage for the amount of a policy of insurance which Dr. Zellmer promised, as part of a settlement stipulation, to maintain for the benefit of plaintiff. At the time of the stipulation in 1942, the policy was void, having lapsed because of non-payment of a premium due December 28, 1930. There was no evidence that Dr. Zellmer knew the policy had lapsed when he made the promise to keep it up, but it was urged upon the court that his estate should be held liable on the basis that Dr. Zellmer, as part of the stipulation of 1942, promised that the policy was then in force. *McRae v. Commonwealth Disposals Comm'n* was cited in support of this proposition.

The court held in favor of plaintiff, but it did not accept the theory of the *McRae* case. I take the liberty of quoting at length from that opinion:

To interpret the instant contract as containing a promise by Dr. Zellmer that the policy in question was in force and effect at the time of entering into the stipulation is to invoke a legal fiction. This is because there is nothing in the record to indicate that such was his intention. We doubt the policy of invoking such fiction in order to impose liability on a promisor who, due to mistake, has innocently and

⁵⁴ [1951] 2 K.B. 164.

⁵⁵ 1 Wis. 2d 46, 82 N.W.2d 891 (1957).

without fault undertaken to perform the impossible. Therefore, we prefer to ground our decision in the instant case squarely upon the principle enunciated in 2 Restatement, Contracts, sec. 456, supra. A promisor should not be excused from responding in damages for breach of contract on the ground of impossibility of performance due to mistake in a situation, where due to his own negligence, he had failed to discover the nonexistence of the fact or thing which made performance by him impossible. It is on this basis that we determine that Dr. Zellmer's estate must be held liable to the claimant."⁵⁶

It is interesting to note that Justice Currie prefers to hold Dr. Zellmer's estate liable on the basis that Dr. Zellmer was negligent rather than on the basis that he promised that the policy was in force, because he doubts the policy of imposing liability on a promisor who, due to mistake, has innocently and without fault undertaken the impossible. This shows that he believed that construction, when addressed to the question "what did the promisor really promise?," cannot lead to different answers according to whether the promisor was or was not negligent.

In making this point, I do not want to be taken as accepting Justice Currie's belief that the construction of the *McRae* case would yield the same result in a case where the promisor is innocent. It is certainly possible to say that, in the *McRae* case, and in general, "construction" of a contract involves more than straining the agreement till it yields a just result. My point is, and has been throughout this discussion, that when "construction" is held out, as it was in the *McRae* case, to be an inquiry into what the promisor "really" promised, it is at least not unnatural that it will be accepted as such. My point is made when I can indicate at least one serious instance where it was so accepted.

However, there is a more important point to be made in connection with the *Zellmer* case. This involves the question why Justice Currie found himself troubled by the ghost of the *McRae* case at all. After all, we are almost persuaded that the question of construction is closely identified with the demands of ethics, expediency and policy.⁵⁷

It is submitted that the reason for the court's concern both in the *McRae* case and in the *Zellmer* case with the question whether the promisor promised the existence of the tanker in the one case and the validity of the insurance policy in the other, is that in both those cases it was difficult to find any other promise which the promisor might have failed to perform. If I sell you goods in place, it is difficult to see just what promise I have breached if there are no goods there. If I include a paid-up policy of insurance in a settlement stipulation, even if I agree to change the beneficiary, and I change the beneficiary, what promise have I breached if the policy is void?

Frivolous as these observations may seem, they are, I believe, crucial to a thorough understanding of what happened in those cases. Let us assume, (an unlikely assumption), that the Commission had agreed to float the tanker and deliver it to the plaintiffs. No question whether it promised that the tanker

⁵⁶ *Id.* at 893-94.

⁵⁷ Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 901, 954 (1942).

was there would have arisen. The Commission would have breached its contract by failing to float and deliver the tanker, and the question would then have been whether in view of the non-existence of the tanker the Commission should be absolved of the breach. Baron Parke, in *Couturier v. Hastie*, speaks of the implied promise that the cargo was in existence because he is anticipating his decision that plaintiffs did not promise to deliver the cargo but only the documents, and because, so far as delivery goes, under the accepted view of the C.I.F. or F.O.B. (other than destination) contract, the delivery took place when the goods were shipped.

The second reason is probably responsible for Coleridge, J.'s conclusion that the contract was void. In other words, I submit that Coleridge held that the contract was void because he could not find any promise which the plaintiffs had failed to perform except the promise that the goods were then in existence and, for sound commercial reasons, he preferred not to accept Parke's suggestion.

When Justice Currie rejected the *McRae* approach and based his decision on Section 456 of the Restatement, he chose to overlook the fact that this section applies to "a promise" the performance of which "is impossible." But if Dr. Zellmer did not promise that the policy was in force, what other promise did he make which was impossible of performance?

It might be objected that I have merely chosen to use the word promise in a strange way. Surely, the Commission, *Couturier* and Dr. Zellmer all entered into an agreement well known to the law. You do not mean to say, the objection might run, that, if they did not actually promise the existence of the subject matter, those parties bound themselves to nothing? My answer to that is that they did bind themselves to something but the trick is to articulate what that was. And this is a sufficiently difficult trick to have caused Parke to suggest, and the court in the *McRae* case to find, a promise that the subject matter exists; Coleridge, J. to say that the contract is void; and Justice Currie to be troubled by, but to ignore, the problem altogether.

My view is that this is a problem which cannot be solved by contract principles alone. It is a disservice to try.

Conclusion

Justice Currie's opinion in the *Zellmer* case is to be welcomed because he bases his decision squarely on Dr. Zellmer's negligence and does not permit himself to be carried into the largely uncharted area of promises concerning the existence of things. This area is a pitfall in the conceptual structure of contract law. For while that law has learned to cope adequately with the cases where the non-existence of the subject matter, or even some basic assumption, is offered by way of *excuse* for failure to perform an admitted undertaking, it has developed no theory for the case where the non-existence of the subject matter itself constitutes the only possible unperformed undertaking.

Our modern law of contract owes its origin, in large part, to the action of trespass on the case for deceit.⁵⁸ It should not be surprising that there are cases

in which the law of contract ought to acknowledge this ancestry. *McRae v. Commonwealth Disposals Comm'n* and *In re Zellmer's Estate* are such cases. The flexibility of the concept of deceit lies in the fact that it is not necessary to spell out precisely what the deceiver said or promised so long as what he did say was likely to mislead his hearers and did so. Whether this approach should be driven to the point where mere negligence in failing to know of the non-existence of the subject matter of the contract is made actionable, is a matter with which this paper is not directly concerned. But one might doubt the policy of rejecting the clear-cut rule of Section 7 of the Uniform Sales Act in favor of some principle of negligence mixed with deceit.

Section 7 has the merit of reducing litigation in the commercial field where equity is best tempered by the demands of certainty.⁵⁹ On its face, section 7 makes an exception in the case where the seller knows that the goods have perished. The increased protection afforded by a provision which would extend that exception to include the seller's negligent non-knowledge must be weighed against the increased litigation occasioned.

It is doubtful whether the words "have perished" should be taken to exclude the case of non-existent goods from the coverage of section 7. It is true that, in the case of non-existence, there is more likelihood of negligence on the part of the seller but this would not seem to justify such an abrupt change in principle as that suggested in the *McRae* case.

In any event, the *McRae* case presents a special situation — it is a case in which Webb, J.'s view that the grossness of the Commission's negligence amounted to fraud should have been left undisturbed.

⁵⁹ In this respect the provision of § 2-613 of the Uniform Commercial Code, as adopted by Pennsylvania, seems to be less desirable than that of § 7. While § 7 excuses the seller in the case of the destruction of any goods which are identified as the subject matter of the contract, § 2-613 excuses him only where the goods are "irreplaceable or treated by the parties as unique." This latter alternative would seem to court unnecessary litigation. Subsequent to its adoption by Pennsylvania, § 2-613 was amended to read "Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty. . . ." Also, while § 7 absolves the seller only where the goods have perished "without [his] knowledge," § 2-613 replaces this by the words: "and the goods suffer casualty without fault of either party." Although the comment makes clear that negligence, not merely willful wrong, is intended, "knowledge" is not provided for at all. This objection also applies to RESTATEMENT, CONTRACTS § 460, though coverage is implicit in illustration 1.