Objectivity in Contract

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I Introduction

It is generally agreed amongst contract theorists that the common law applies an objective theory of contract to determine agreement between contracting parties.[1] Regard is had to the manifestation of agreement rather than, as subjective theory would require, to the actual agreement of the parties. But while it is generally accepted that the common law applies an objective theory there is less certainty about the meaning of objectivity.

This question arises in the areas of contract formation and interpretation. Any discussion of contract doctrine in these areas posits explicitly or otherwise a theory as to the meaning and importance of the intentions of the parties. How the objective theory is to be justified and how it fits within general contract theories is a further question, and one that has been given much less attention, although it is generally recognised that the characterisation of objectivity is central.

In his casebook on contracts, Corbin observes:[2]

> Words and other symbols do not have any absolute or "objective" meaning; there is no single meaning that is the "true" or "correct" one. They have very different meanings when used or heard by different persons.

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1 See *Anson on Contracts* (25th ed 1979) 24; *Chitty on Contracts* (24th ed 1968) para 330; Cheshire, Fifoot & Furmston, *Law of Contract* (7th NZ ed 1988) 34; Greig and Davis, *The Law of Contract* (1987) 187; Pollock, *Principles of Contract* (13th ed 1950); Treitel, *The Law of Contract* (7th ed 1987) 231; Waddams, *The Law of Contracts* (2nd ed 1977) 109; *Williston on Contracts* Vol 1 (3rd ed 1957) sec 22. In the literature on this subject little distinction is made between the objective theory and the objective test of contract.

2 Corbin, *Cases on the Law of Contracts* (3rd ed 1947) 449.

If one accepts that agreement or meaning is determined from a particular viewpoint[3] or amalgamation of viewpoints then the question arises as to which viewpoint is to be taken. The first choice is between an actual (subjective) and a constructed (objective) viewpoint. Within each of these the position of either party to the agreement may be taken. A further objective viewpoint is possible when a position taken outside the parties is added. Five viewpoints are thus obtained, although only one of the subjective viewpoints has been seriously maintained.

In this article the leading theories of objectivity will be examined. It will be argued that only one accords with authority, and the similarities of this theory to an earlier formulation of the subjective theory will be discussed. The starting point will be a descriptive statement of the theories and a brief outline of how in a situation of contract formation they can lead to different results. The theories will be tested against authority, and, finally, the basis of an objective theory will be discussed.

II Objective Theories

In the most recent contributions to the debate the terms promisor objectivity and promisee objectivity have been used to indicate the viewpoints of the parties themselves with respect to a promise or expression of agreement, and the term detached objectivity has denoted the position of an outside observer.[4] Vorster has stressed that the terms *promisor* and *promisee* must be viewed in relation to the promise in dispute. In some circumstances this promise is different to the promise of which a plaintiff seeks performance. He states:[5]

> [A] plaintiff is obviously a promisee (in the conventional sense of that term) in respect of the performance which he is claiming, but he is not necessarily a promisee in respect of the object about which there is disagreement. A plaintiff may be a seller claiming the purchase price about which there is no disagreement. The disagreement may relate solely to the identity of the thing bought and sold. With regard to the thing allegedly bought and sold the seller/plaintiff is the *promisor* – it is the content of *his* promise which is in dispute.

Useful discussion of the viewpoints taken does require a reference point, and it is accepted here that the promise in dispute provides that reference point.

3 In *Corbin on Contracts* (2nd ed 1960) para 106 Corbin notes that an extreme theory would hold that there is a single correct meaning that can be determined apart from any viewpoint, and allies this approach with the detached theory of objectivity. However, even if it is accepted that there is only one correct meaning which exists apart from any viewpoint, there can be no assent to it except that arising from a particular viewpoint. Behind questions of which theory applies lie further and difficult questions of epistemology.

4 Howarth, "The Meaning of Objectivity in Contract" (1984) 100 LQR 265; Vorster, "A Comment on the Meaning of Objectivity in Contract" (1987) 103 LQR 274; Howarth, "A Note on the Objective of Objectivity in Contract" (1987) 103 LQR 527.

5 Ibid, 277.

As a further preliminary it may be noted that as a matter of terminology, the parties to the disputed promise may be seen equally as representor and representee, offeror and offeree,[6] or promisor and promisee.

Promisor Objectivity

A simple formulation of the theory of promisor objectivity is that the promise, representation or expression of agreement is to be viewed from the position of the maker thereof. An element of objectivity is added by requiring that the promisor's interpretation reasonably held is considered, not her actual interpretation. Wherever adopted,[7] however, the position is further mitigated by requiring regard to the promisee's reception of the promise. Otherwise the test is excessively weighted in favour of the promisor. A typical formulation is given by the American *Restatement of Contracts*:[8]

> Where there is no integration [formal agreement], words or other manifestations of intention forming an agreement . . . are given the meaning which the party making the manifestations should reasonably expect that the other party would give to them.

Framed in this way the theory stops short of completely objectifying the view of the promisor. The interpretation need only be within the range of reasonable interpretations.[9] The theory could be objectified further by substituting the reasonable person for the promisor.

Promisee Objectivity

Here the viewpoint of the promisee or representee is taken. A degree of objectivity is imported by requiring that the view taken be reasonable. But again objectivity could be hardened by requiring that the reasonable person take the place of the promisee. The classical view is expressed by Spencer:[10]

> Words are to be interpreted as they were reasonably understood by the *man to whom they were spoken*.

As under promisor objectivity, if the requirement of objectivity is simply to provide reasonable bounds then the actual understanding or agreement of the party remains important.

6 The classic exposition of this terminology is found in Hughes, "Consensus and Estoppel" (1938) 54 LQR 370. See also Spencer, infra at note 10.

7 This view was proposed by Archbishop Whately in his notes to Paley's *Moral Philosophy*. Both Pollock, supra at note 1, at 198, and Williston, supra at note 1, at n. 13, para 605, adopt this view. It would appear that Pollock, mistakenly, understood this to be the equivalent of promisee objectivity.

8 Para 227. See also Corbin, supra at note 3, at para 599 et seq; Howarth, supra at note 4, at 266ff.

9 This point is discussed by Samek, "The Objective Theory of Contract" (1974) 52 Can Bar Rev 351, 355.

10 "Signature, Consent, and the Rule in *L'Estrange v Graucob*" [1973] CLJ 104, 106.

In contrast, Pollock, for example, suggests a more fully objective position:[11]

> We must look to the state of things as known to and affecting the parties at the time of the promise, including their information and competence with regard to the matter in hand, and then see what expectation the promisor's words, as uttered in that state of things, would have created in the mind of a reasonable man in the promisee's place and with the same means of judgment. The reasonable expectation thus determined gives us the legal effect of the promise.

On this formulation the place for the actual intentions and understandings of the parties is extremely limited. First, the data from which the viewpoint is to be constructed is taken from that available to both parties. Second, the reasonable person is fixed with this information and placed in the shoes of the promisee.

Detached Objectivity

Only under this theory is a completely objective approach taken. Here the viewpoint is that of a third party: the judge or the reasonable person. Within the English jurisdiction,[12] this position has been associated with Lord Denning.[13] The locus classicus is *Solle v Butcher*:[14]

> once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good.

This has been termed the "fly on the wall" theory.[15] No place is given for the intentions and understandings of the parties themselves in the construction of the promise or agreement between them.

Exceptions Allowed

Each of the theories or tests of agreement has arisen in order to deal with situations of dispute and each is formulated with accompanying exceptions to ameliorate the harsh results rigid application. To take a typical example within the framework of promisee objectivity, while it might appear fair that where the promisor's actual and manifested intentions differ she should be

11 Supra at note 1, at 198.

12 In the United States this position is much more influential. The root formulation in the United States provides a useful contrast to Lord Denning's formulation. Learned Hand J in *Hotchkiss v National City Bank* 200 F 287, 293 states: "A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held [to the usual meaning]." In this statement the underlying theory of contractual obligations attaching to the words of the parties ab extra is fully revealed.

13 Spencer, supra at note 10, at 109; Howarth, supra at note 4, at 476.

14 [1950] 1 KB 671, 691.

15 Spencer, supra at note 10, at 108. Following this contribution to contract theory, the characteristics of the fly have been hotly debated by contract theorists.

held to her manifested intention, what should be the position where the promisee has knowledge of the promisor's actual intention? Fairness would seem to require that the promisee should not be allowed to insist on a reasonably held interpretation of the promisor's intention. An exception is created in which the promisor is allowed to assert her actual understanding when the promisee has knowledge of it.

The exceptions articulated for the theory of promisee objectivity have been fully considered by Spencer and may be discussed first. Spencer proposes that there are two situations in which the courts have recognised that it would be unfair to insist on true promisee or representee objectivity. He argues that in a situation where A (promisee) manifests his agreement to B's (promisor) terms, but does not in fact agree to them:[16]

1. A is not bound by his apparent consent where B knew that A's mind did not go with his apparent consent,
2. nor is A bound by his apparent consent where B originally misled A, so that it is partly B's fault that A's mind did not go with A's apparent consent.

Examples of the general rule and its exceptions will be discussed below as developed in the cases.

Howarth argues that similar exceptions could be formulated for the promisor theory to accommodate situations where the promisor was at fault. If this is so, promisor objectivity would in theory provide an equally adequate explanation for the decisions in the cases.[17] The exceptions obtained would be as follows. In a situation where A (promisor) proposes terms that he reasonably expects to be understood in a particular way by B (promisee), B will be bound by A's interpretation unless:

1. A knows that B does not in fact interpret the terms as A reasonably expects her to do, or
2. A misleads B so that he cannot rely on his reasonable expectation of B's interpretation.

On either theory, the effect of an operative exception is to negate consent. According to classical contract theory the contract is void ab initio. However, whether this is so depends on whether the effect of an exception is to allow the actual state of consent of the mistaken party to be asserted, thus negating consent, or whether the exception merely provides a basis for equitable relief. In the latter case, the effect of an exception will be to render the contract voidable.

In principle, if these theories are concerned with establishing the assent of the parties to the agreement the former result follows. If, on the other hand,

16 Supra at note 10, at 114.
17 Supra at note 4, at 273.

the concern is to determine the sense of the agreement then the way is open to consider equitable relief. Different results will thus he obtained depending on whether the actual intentions of the parties are considered, and on whether coincidence is required between a reasonable view and the actual view of the promisee or promisor.

As noted, detached objectivity differs fundamentally in that it approaches the problem without regard to either the actual or reasonable intentions of the parties. If agreement is to be tested purely objectively then whenever agreement is manifested the agreement will be valid. It can never be void ab initio although it may be avoided on other grounds.[18] Lord Denning states the necessary conclusion:[19]

> [T]he contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake.

Detached objectivity can thus produce results similar to promisor or promisee objectivity but this will depend on the exercise of the court's discretion. On the other formulations, the objective theory may itself be determinative of the result.

III Subjective Theories

Pure Subjectivity

Perhaps the only serious formulation of this position was that of Archbishop Paley:[20]

> Where the terms of promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended, at the time that the promisee received it.

While, as will be seen, this theory has never directly been adopted in the cases, it accords well with the will theory of contract and the requirement that the parties actually be ad idem. The problems associated with this approach will be examined in more detail below but it may at least be noted that unacceptable problems of evidence and fraud arise from an unrestricted application of this approach.

18 This crucial distinction was discussed by the majority of the High Court of Australia in *Taylor v Johnson* (1983) 151 CLR 422, 428. The Court considered that the void/voidable issue arose from a distinction between the subjective and the objective approach, without discussing whether a more limited objective theory might also allow for the possibility of a contract being void ab initio for mistake.

19 Supra at note 14.

20 *Principles of Moral and Political Philosophy* (1827) Vol 1, Ch V, 79.

Consensus and Estoppel [21]

A purely subjective approach is thus traditionally allied with estoppel safeguards. Under this theory the actual intentions of the parties are still held to be paramount. The subjective element is central and actual agreement between the parties is required. But a party may be estopped in some circumstances from asserting his actual intention.

For those who would seek to uphold the centrality of the actual agreement or consensus of the parties to a contract, this approach offers a significant advantage over a less than fully objective approach in that actual agreement is necessarily built directly into the theory. As has been seen promisee objectivity of itself does not make clear the status of the actual agreement of the parties. The classic statement of the consensus and estoppel position is that of Blackburn J in *Smith v Hughes*:[22]

> I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other.

While Blackburn J did not describe the effect of the rule in terms of estoppel, his reference to the earlier case of *Freeman v Cooke*[23] shows that he did indeed see this as an instance of it. In *Freeman v Cooke*, action in reliance and to the detriment of the representor was clearly required. In *Smith v Hughes*, however, Blackburn J required only that the representee enter into the contract in reliance on the representation.[24] This, as Trietal has noted, distinguishes the rule in *Smith v Hughes* from a true estoppel.[25]

In a purely executory contract the parties do not necessarily act to their detriment simply by entering into agreement. Thus, while not coinciding in all respects with a true estoppel, the situation is seen as an instance of estoppel by reference to the effect of the application of the principle. The party is estopped from asserting her true intention.

In principle this theory can operate identically to promisee objectivity,[26]

21 See supra at note 6. Bronaugh suggests what I take to be a similar theory in proposing a test of subjective reasonableness in "Agreement, Mistake, and Objectivity in the Bargain Theory of Contract" (1976) 18 Wm and Mary LR 213, 243ff.

22 (1871) LR 6 QB 597, 607.

23 (1848) 2 Ex 654; 154 ER 652.

24 Supra at note 22.

25 Supra at note 1, at 228. Trietel appears to be following the earlier argument of Williston, supra at note 1, at sec 98. Cato argues in "Mistake and Restitution: A defence of *Conlon v Ozolins*" [1985] NZLJ 172, that Blackburn J's dicta is not to be accepted as stated, but is to be restricted to situations where there has been detrimental action. However, this argument unnecessarily imports limitations of true estoppel into the area of contract. Estoppel in this area functions simply to best determine when there is objective agreement between the parties. It does not subvert the traditional contractual requirement of consideration.

26 Hughes, supra at note 6, demonstrates that the consensus and estoppel analysis may be coherently applied to all the cases usually cited to support the objective theory.

and many discussions of the objective theory include discussions of this form of estoppel. Nevertheless, a distinction is drawn in this discussion for the purposes of highlighting the position of the actual agreement of the parties. If the party is not estopped from asserting his actual understanding and this understanding is accepted then the effect is to negate consent and the contract will be void ab initio. But if the exceptions stated above apply equally to this formulation of the theory, the question arises whether this is simply the same theory as promisee objectivity but cast in different terms, since in practice they may lead to the same results. It is suggested the difference is that the promisee objectivity theory conceals a central ambiguity. It may or may not require determination of the actual intention of the parties.

In summary, the difference between the theories is well illustrated by whether the result of an exception to the theory is to render the contract void ab initio or merely voidable. Cases of unilateral mistake in which one of the parties has made a mistake as to identity or terms of the promise illustrate this difference clearly.[27] Under a true subjective theory such a mistake simpliciter would justify release from an obligation. Under a fully objective theory such a mistake would not operate to avoid the contract even if known to the other party, although equity might intervene to provide relief. Only those mistakes which would be apparent to the "fly on the wall" could be operative to affect agreement between the parties. Application of promisor or promisee objectivity could reach either of these end points. This paradigm can also illustrate differences between the forms of objective theory. If a mistake may only be operative where it could reasonably manifest itself to the promisee then this may well lead to different results than if it must be such as the promisor reasonably expects the promisee to have made.

IV Case Support

In this section case support for each of the theories will be examined. In general, it will be argued that apart from a period in which some cases seemed to suggest a subjective approach, the cases support only a consensus and estoppel or promisee objectivity approach. Again, the area of most fruitful investigation is contract formation, where the different approaches can produce real differences.[28]

27 Much of the discussion of objective theories has been confused by failing to ask whether the rules applicable to informal contracts differ from those applicable to formal contracts. In the American literature it is recognised that the rules may well be different in these cases, see *Restatement of Contracts*, para 233. But see Spencer, supra at note 10, at 117 for a contrary view. When discussing informal contracts it is natural to proceed in terms of agreement, but when discussing formal contracts the same issues are often seen as problems of interpretation.

28 Farnsworth, "Meaning in the Law of Contracts" (1967) 76 Yale LJ 939, 945 notes that ideas of subjectivity were never consistently applied in the area of contract interpretation.

Examples of Nineteenth Century Subjectivity

While the origins of the requirement of the meeting of minds in contract formation are in some dispute,[29] there can be no doubt that from at least the late eighteenth century the influence of this concept has been of real importance in the cases. This approach was soon modified to deal with difficulties that arose from it. In terms of the categories discussed so far, the requirement that there be an agreement in fact is naturally allied with a purely subjective theory. It should be noted, however, that this requirement may also fit with both the consensus and estoppel approach and that of promisee objectivity if it is accepted that one of the functions of these theories is to fairly test whether the parties were in fact in agreement.

A comparison of *Cooke v Oxley*[30] in 1790, *Adams v Lindsell*[31] in 1818, *Byrne & Co v Leon Van Tienhoven & Co*[32] in 1880, and *Dickinson v Dodds*[33] in 1876 illustrates the difficulties with a purely subjective approach.

In *Cooke v Oxley* the problem that faced the Court was whether an offer to sell goods made at one point of the day could be left open for acceptance later in the day. On the facts, when the purchaser purported to accept an offer of sale made much earlier in the day, the vendor had already sold the goods. It was held that a later acceptance of the offer could not be effective for there had been no moment at which both had agreed.

In *Adams v Lindsell* a different approach was taken. In that case the goods which the seller had offered to sell in a letter had been sold by the time the plaintiff's acceptance letter was received but after the letter was posted. It was argued on the basis of *Cooke v Oxley* that the seller could unilaterally revoke the offer again on the underlying theory that a moment of mutual and actual assent was required. The Court of King's Bench considered that this result would create difficulties for the completion of business by post and held that an offer was accepted at the time when the letter was posted. This was reconciled with the requirement of meeting of the minds as follows:[34]

> The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the letter.

This travelling offer theory was an attempt to reconcile commercial realities

29 Farnsworth, ibid, argues that it is incorrect to suppose that the origins of the consensus ad idem doctrine started only at that time. He cites *Reniger v Fogossa* (1551) 1 Plowder 2; 75 ER 1 in support. Against this Simpson, "Innovation in Nineteenth Century Contract Law" (1975) 91 LQR 247, 258ff argues that the development was in the requirement that promises generally had to be made at the same time to be viewed as dependent. There was seen to be required an "instant of mutual assent" (at 261).

30 3 TR 653; 100 ER 785.

31 1 B & Ald 681; 3 TR 148; 106 ER 250.

32 (1880) 5 CPD 344.

33 (1876) 2 ChD 463.

34 Supra at note 31, at 251.

with the purely subjective theory illustrated in *Cooke v Oxley*.

In *Byrne & Co v Leon Van Tienhoven & Co* the issue was whether a withdrawal of an offer may be effective at the time of posting or whether communication of the withdrawal to the offeree was required. The travelling offer approach which complied with a literal and subjective view of the meeting of the minds theory was clearly rejected in obiter dicta. Also rejected was a literal application of the rule which provided that a unilateral and uncommunicated withdrawal of the offer could be effective to deny the actual and instantaneous moment of subjective meeting of the minds. Instead Lindley J (as he then was) accepted the view:[35]

> that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all.

Acceptance by post was explained to be effective at the time of posting because there was an implied term in the offer that such would be effective.

A case that has been cited as an example of the subjective theory is *Dickinson v Dodds*.[36] In that case an offer was to be held open for acceptance until several days later. Prior to its acceptance, the subject-matter of the offer was sold to another party. It was found as a fact that the offeree had sufficient notice of the withdrawal. The judgments delivered in the Court of Appeal make it clear that notification of the sale was required for the withdrawal to be effective.[37] However the decision is still expressed in terms of the theory of consensus ad idem:[38]

> It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed.

The withdrawal is effective because it frustrates the occurrence of consensus ad idem. But while the dicta of the case are broadly expressed in terms of a purely subjective approach, nevertheless manifestation of the withdrawal to the other party is required. A position of pure subjectivity is implicitly rejected.

Dickinson v Dodds and *Byrne & Co v Leon Van Tienhoven & Co* are thus incompatible with a purely subjective approach. Agreement or lack thereof is not always established by an instantaneous and subjective moment of mutual assent but also by looking at the manifestation of acceptance and of revocation. The language of these cases clearly does not embrace a developed objective theory,[39] but reasonable bounds are put on the actual intentions of

35 Supra at note 32, at 347.
36 Gilmore, *The Death of Contract* (1975) 29.
37 Supra at note 33, at 472 per James LJ; at 475 per Mellish LJ.
38 Ibid, per James LJ; see also at 474 per Mellish LJ.
39 See Atiyah, *Introduction to the Law of Contract* (2nd ed 1971) 47.

the parties as required both by business convenience[40] and for evidential reasons. Expressed in terms of a theory of contract, while even decisions such as these seem to contradict a pure will theory, which requires true consensus ad idem, they do not, for example, embarrass a bargain theorist who would maintain that the subjective intentions of the parties provide the legitimating basis of testing agreement or interpretation of a promise, but would nevertheless test that intention by looking at the objective manifestation of it.[41]

A correlative to the requirement of mutual assent, even if not subjective meeting of the minds, is a doctrine of mistake. In this area as well the influence of the continental will theory and consensus ad idem are to be seen. *Cundy v Lindsay*,[42] the case of the rogue Blenkarn posing as the firm Blenkiron & Co, has been described as an example of a "full blown consensus theory".[43] The basis of the decision was that since the vendor never intended to deal with Blenkarn, but only with Blenkiron & Co, there could be no contract concluded when Blenkarn purported to accept the offer of sale. Lord Cairns LC stated:[44]

> With him they never intended to deal. Their minds never, even for an instant of time rested upon him, and as between him and them there was no *consensus* of mind which could lead to any agreement or any contract whatever.

The stated ground of the decision is one of pure subjectivity, but also the rule that an offer can only be accepted by the person to whom it is addressed.[45] The result is compatible with either the consensus and estoppel approach, or with promisee objectivity, for it is an example of the exception that arises when one party knows of the other party's mistake.[46] That party can then no longer insist on the manifestation of assent by the other party. And, unlike the withdrawal of offer cases above, the result is not incompatible with a purely subjective approach.[47]

A final case, and one that can be seen as an example of either a subjective[48] or an objective theory,[49] is *Raffles v Wichelhaus*.[50] The difficulty with analysis

40 Treitel, supra at note 1, at 34.
41 See Bronaugh, supra at note 21, at 248ff.
42 (1878) 3 App Cas 459.
43 Simpson, supra at note 29, at 267.
44 Supra at note 42, at 465.
45 Greig and Davis, for example, accept that the offer analysis is the correct one, supra at note 1, at 901.
46 Treitel analyses the case on the basis of an exception to the objective principle, supra at note 1, at 228-230.
47 It is interesting to note the approach to this problem by Lord Denning MR in *Lewis v Averay* [1972] 1 QB 198, 207. He rejects the approach in which a mistake as to identity nullifies consent, avoiding the contract. A contract complete to outward appearances can only be avoided.
48 See, for example, Gilmore, supra at note 36, at 35ff.
49 See, for example, Howarth supra at note 4, at 275. For a discussion of the two views in this context see Greig and Davis, supra at note 1, at 188ff.
50 (1864) 2 H & C 906; 159 ER 375.

of this case is that the judgment of the Court as delivered gave no indication of the grounds for decision. It consisted of a single sentence: "There must be judgment for the defendants". The facts were that the defendants did not accept goods delivered on board the ship *Peerless* ex Bombay in December, pleading that they intended to accept goods from a different shipment: the *Peerless* ex Bombay in October.

The interjections of the Judges during counsel's argument indicate two possible bases of decision. It was suggested by counsel for the defendant that since there was an ambiguity in the name of the ship, parol evidence could be admitted to determine which ship was intended. An objective approach to this case would hold that because the sense of the promise could not be objectively determined, that is, because it was objectively ambiguous, parol evidence would be admitted. But in this case such evidence would not have resolved the ambiguity. Thus the contract would be void for uncertainty. No objective sense of the promise could be determined. However, just prior to being stopped in argument, counsel for the defendant suggested that if parol evidence were admitted then it would be shown that the defendant did not intend the same ship as the plaintiff, and hence the contract would be void due to lack of consensus. This is clearly a subjective approach. Again the interjections of the Judges do not indicate the ground of decision.

These nineteenth century cases provide a basis for arguing that a purely subjective theory, while providing a theoretical basis for the language of judgments, was not unqualified. There is in these cases an apparent desire to reconcile requirements of perceived fairness (*Cundy v Lindsay*, *Dickinson v Dodds*) or business convenience (*Adams v Lindsell*, *Byrne & Co v Leon Van Tienhoven & Co*) with consideration of actual intentions. Even at the height of the will theory of contract a subjective approach could be therefore modified with objective requirements.

The Case for Promisor Objectivity

As noted above, the major supporter of this theory of objectivity is Howarth. In his article,[51] Howarth cites *Smith v Hughes*, *Denny v Hancock*,[52] *Tamplin v James*,[53] and *Scriven v Hindley*[54] in support. Vorster's observation that one must determine whether the viewpoint of the promisor is taken in any given case by reference to the promise in dispute has already been discussed.[55] It remains to examine the cases in more detail in light of this observation.

51 Supra at note 4.
52 (1870) LR 6 Ch App 1.
53 (1880) 15 ChD 215.
54 [1913] 3 KB 564.
55 See text, supra at page 318. Howarth in reply merely notes this criticism. He does not dispute it. Supra at note 4, at 528.

It could well be argued that *Smith v Hughes* is the most important case for any treatment of objective theories in English law. Certainly it is one of the most disputed. It is adopted, as here, by proponents of promisor objectivity, by others as an example of promisee objectivity,[56] and by others still as an example of the consensus and estoppel[57] or reasonable subjectivity approaches. And Lord Denning MR implicitly rejected it in *Solle v Butcher* on the basis that detached objectivity would base the decision on other grounds.[58]

The facts of the case are well known. One of the issues discussed on appeal was the second question left to the jury at first instance:[59]

> If, however, they thought that the word "old" had not been used, the second question would be, whether they were of opinion, on the state of the evidence, that the plaintiff believed the defendant to believe, or to be under the impression, that he was contracting for the purchase of old oats.

The question was framed in terms of the Paley position of promisor subjectivity, and so the Court of Appeal had an opportunity to consider the theory directly.

The difficulty with the case for present purposes is that Blackburn and Hannen JJ appeared to formulate the test in opposite terms. It will be useful to cite Blackburn J's test again:[60]

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

On this formulation the test is clearly one of promisee objectivity. As to the degree of objectivity, in terms of the discussion above as to whether it is the reasonable person in the position of the promisee or the views of the promisee as bounded by the view of the reasonable person that should be taken, Blackburn J sets a two-part test. First, one should determine how the reasonable person in the position of the promisee would view the conduct or representation. Second, to rely on this, the promisee must take this view in fact. The corollary to this is that if the promisee does not take a reasonable view, then she will be unable to rely on it (unless the other party is precluded from setting up the estoppel by virtue of knowledge or negligent conduct).[61] It also follows from this that a party will be unable to insist on a reasonable interpretation from the promisee's point of view unless he in fact relies on it

56 See, for example, Samek, supra at note 9, at 355.
57 See, for example, Hughes, supra at note 6, at 372.
58 Supra at note 14, at 693.
59 Supra at note 22, at 599.
60 Ibid, 607.
61 This was the situation in *Sullivan v Constable* (1932) 48 TLR 267, affirmed on appeal (1932) 48 TLR 369. Hughes, supra at note 6, discusses this as a different rule, distinguishing the rule in *Smith v Hughes* from the rule in *Sullivan v Constable*.

in entering (or abandoning) the contract.[62] This passage could hardly be cited in support of promisor objectivity.

Hannen J's formulation must be cited at some length:[63]

> [O]ne of the parties to an apparent contract may, by his own fault, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party. . . . But if in the last-mentioned case the purchaser, in the course of the negotiations preliminary to the contract, had discovered that the vendor was under a misapprehension as to the sample he was offering, the vendor would have been entitled to shew that he had not intended to enter into the contract by which the purchaser sought to bind him. The rule of law applicable to such a case is a corollary from the rule of morality which Mr Pollock cited from Paley . . . that a promise is to be performed "in that sense in which the promiser apprehended at the time the promisee received it," and may be thus expressed: "The promiser is not bound to fulfil a promise in a sense in which the promisee knew at the time the promiser did not intend it."

When viewed in context, the corollary of the position of promisor subjectivity is seen to be applicable only as an exception to the rule binding a party to his assent as interpreted by the other party. Reliance by Howarth on the formulation as a general rule is misconceived.[64] Hannen J's formulation as set out above is the first exception to promisee objectivity. Upon full examination, *Smith v Hughes* provides no support at all for promisor objectivity.

It should be noted that the effect of the primary rule is that the party is precluded from denying her consent. If an exception to the rule applies, the contract is seen to be apparent only and thus is void because the parties are not ad idem.[65] The principle is founded on the theory that mutual assent of the parties is essential to the formation of a contract.

The other cases cited by Howarth are seen to be illusory once Vorster's method of analysis, set out above, is applied. All three are cases in which, as Vorster states, "there was . . . a dispute about the content of the seller's promise".[66] So, for example, in *Denny v Hancock* the buyer refused to complete his purchase of a property when he discovered that the boundaries of the company did not, as he had thought, encompass several trees. The seller sought a decree of specific performance. The seller did not know of the buyer's mistake, but James LJ found that the plan relied on by the buyer was:[67]

> calculated to induce anybody to believe that the whole of the belt, or shrubbery, or whatever you may call it, was included in the property sold.

It may be said that a reasonable person in the position of the buyer would have made the same mistake, or, alternatively formulated, that the mistake

62 *The Hannah Blumenthal* [1983] 1 AC 854 discussed infra.

63 Supra at note 22, at 609-610.

64 Howarth is not alone in supposing that the formulation is applicable as a general rule. See, for example, Samek, supra at note 9, at 355- 356.

65 Supra at note 22, at 607 per Blackburn J.

66 See text, supra at page 318.

67 Supra at note 52, at 11-12.

made by the buyer was a reasonable one. The Court did not give the decree of specific performance.

Howarth argues that the buyer was the promisor, promising to purchase the land. Vorster argues that while the seller was attempting to enforce the buyer's promise, the case was resolved by considering the correct interpretation of the seller's promise, and the boundaries of the land he promised to sell. In doing so, the position of the reasonable buyer was taken. This is clearly correct, and the case is as an example of the second exception to the test of promisee objectivity, as described above.

Both *Tamplin v James* and *Scriven v Hindley* can be analysed in the same way. In the former, the Chancery Court refused to give a decree of specific performance. The question of the effect of an exception to the rule did not arise. In *Scriven v Hindley*, an action brought in the Court of King's Bench, the effect of the mistake was to render the contract a nullity. In that case, it was established that the seller intended to sell Russian tow, while the buyer intended to buy Russian hemp. The buyer refused to complete the purchase after he discovered that the lot bid for at auction was not Russian hemp, but Russian tow. The seller brought an action for the price. It was found that while that the auctioneer did not know of this mistake, the seller had been negligent in not correctly identifying the goods.

The decision of AT Lawrence J proceeded on the basis that unless the plaintiffs could "insist upon a contract by estoppel",[68] there would be no contract. The parties were never ad idem, although objectively viewed there was an agreement. But a contract by estoppel:[69]

> cannot arise when the person seeking to enforce it has by his own negligence or by that of those for whom he is responsible caused, or contributed to cause, the mistake.

This is a clear example of the second exception to promisee objectivity, expressed in terms of consensus and estoppel.

This analysis shows that none of the cases cited by Howarth support the theory of promisor objectivity. Instead they are examples of promisee objectivity.

The Case for Promisee Objectivity

Howarth in his discussion of promisee objectivity finds the source for the formulation of the theory in Blackburn J's judgment in *Smith v Hughes*. As has been noted, this theory owes much to earlier estoppel doctrine.[70] Indeed the application of the estoppel or *Smith v Hughes* approach can be seen in a

68 Supra at note 54, at 569.
69 Ibid.
70 Supra at note 4, at 272.

number of cases.[71]

But while these cases clearly had regard first to the actual understanding of the parties and then to whether that understanding was reasonable, cases about the test of understanding indicate a possible change of approach. In *McCutcheon v David MacBrayne Ltd* Lord Reid adopts this statement from a contract text:[72]

> The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other.

The second part of Blackburn J's formulation, that the party must in fact hold the reasonable view, appears to be left out. However, Lord Reid continues:[73]

> In this case I do not think that either party was reasonably bound or entitled to conclude from the attitude of the other, as known to him, that these conditions were intended by the other party to be part of this contract.

The words "as known to him" suggest that not only must the intention be reasonable, but it must also be actually held.

Two sale of goods cases contain dicta of some relevance, although they do not concern contract formation but rather interpretation of written terms in contracts. In *Hardwick Game Farm v SAPPA* Lord Pearce says:[74]

> The court's task is to decide what each party to an alleged contract would reasonably conclude from the utterances, writings or conduct of the other.

Lord Diplock echoes this statement in *Ashington Piggeries v Christopher Hill*:[75]

> What [the seller] promised is determined by ascertaining what his words or conduct would have led the buyer reasonably to believe that he was promising. That is what is meant in the English law of contract by the common intention of the parties. The test is impersonal. It does not depend ... upon the actual belief of the buyer himself as to what the seller's promise was, unless that belief would have been shared by a reasonable man in the position of the buyer. The result of the application of this test to the words themselves used in the contract is 'the construction of the contract'.

Lord Diplock did not appear to consider the actual intentions of the parties in the case.[76]

Of greater use is the discussion by Lords Diplock and Brightman in the recent House of Lords decision *The Hannah Blumenthal*.[77] At issue was

71 In addition to the cases already cited above: *Sullivan v Constable*, supra at note 61; *London Holeproof Hosiery Co Ltd v Padmore* (1928) 44 TLR 499; *Blay v Pollard and Morris* [1930] 1 KB 628; *Ewing and Lawson v Hanbury* (1900) 16 TLR 140; *Falck v Williams* [1900] AC 176; *Hitchman v Avery* (1892) 8 TLR 698; *Harris v Great Western Ry* (1876) 1 QBD 515; *Fowkes v Manchester and London Assurance* (1863) 3 B & S 917; 122 ER 343.

72 [1964] 1 WLR 125, 128.

73 Ibid.

74 [1969] 2 AC 31, 113.

75 [1972] AC 441, 502.

76 Ibid, 503.

77 Supra at note 62.

whether an arbitration agreement had been discharged. Lord Diplock stated:[78]

> To the formation of the contract of abandonment, the ordinary principles of English law of contract apply. To create a contract by exchange of promises between two parties where the promise of each party constitutes the consideration for the promise of the other, what is necessary is that the intention of each *as it has been communicated to and understood by the other* (even though that which has been communicated does not represent the actual state of mind of the communicator) should coincide. That is what English lawyers mean when they resort to the Latin phrase consensus ad idem and the words that I have italicised are essential to the concept of consensus ad idem, the lack of which prevents the formation of a binding contract in English law.
>
> Thus if A (the offeror) makes a communication to B (the offeree) whether in writing, orally or by conduct, which, in the circumstances at the time the communication was received, (1) B, if he were a reasonable man, would understand as stating A's intention to act or refrain from acting in some specified manner if B will promise on his part to act or refrain from acting in some manner also specified in the offer, and (2) B does in fact understand A's communication to mean this, and in his turn makes to A a communication conveying his willingness so to act or to refrain from acting which mutatis mutandis satisfies the same two conditions as respects A, the consensus ad idem essential to the formation of a contract in English law is complete.

This formulation is in effect identical to the estoppel test as presented by Blackburn J in *Smith v Hughes*. The communication is interpreted from the standpoint of the reasonable person in the position of the offeree, and to enforce it the offeree must in fact hold that interpretation.

Vorster objects to this formulation, as did the Court of Appeal in *The Leonidas D*,[79] as seeming to require correspondence of the actual intentions of the parties. For if B reasonably understands the offer which A intended to mean Y as meaning X, then there will be consensus only if what she communicates back to A in acceptance is reasonably understood in the same terms. Thus, unless A and B reasonably and in fact interpret the offer and acceptance in the same terms, consensus is lacking.

This criticism appears to be unsound. Applying the formulation to the facts of *Raffles v Wichelhaus* would give an identical result to that in fact reached, for one party reasonably thinks the other party is offering to ship the goods ex October *Peerless*, and the other reasonably thinks the first party is agreeing to accept goods ex December *Peerless*. There is no objective sense of the promise: both understandings are reasonable. Neither is there consensus between the two reasonably held views of the promise; the contract does not stand on that ground. The formulation also fits the facts of *Scriven v Hindley*. One party reasonably thinks the other is offering hemp, while the other party unreasonably thinks the other is agreeing to accept tow. The unreasonable party's understanding is rejected, and the reasonable party's understanding stands. Lord Diplock's formulation explicitly requires that a party in fact hold a reasonable view, and it is clearly in accord with the decided cases as

78 Ibid, 915-916.
79 [1985] 2 All ER 796, 804-805.

discussed so far.

Vorster and the Court of Appeal in *The Leonidas D* expressed preference for Lord Brightman's formulation:[80]

> To entitle the sellers to rely on abandonment, they must show that the buyers so conducted themselves as to entitle the sellers to assume, *and that the sellers did assume*, that the contract was agreed to be abandoned sub silentio. . . . The state of mind of the buyers is irrelevant to a consideration of what the sellers were entitled to assume. The state of mind of the sellers is vital to a consideration of what the sellers in fact assumed.

This formulation is also in accord with the promisee theory discussed so far and confirms that, at least in terms of the requirement that a reasonable view is in fact held, the objective theory is unchanged from the *Smith v Hughes* test.

There is a shift, however, in the way in which the problem is approached. Instead of looking first at whether there is actual consensus and asking whether a party is estopped from denying it, the court will look at how the reasonable party would view the other party's conduct (or lack of it), and then ask whether the party held that view in fact. If the party did not hold that reasonable view, then he will be unable to enforce it. It is suggested that this defines the difference between what has been presented as the consensus and estoppel theory and promisee objectivity.

Of more difficulty in *The Hannah Blumenthal* is the assertion of Lord Diplock that the theory is an instance of a general principle of injurious reliance as the source of rights in English law. This, as Vorster notes,[81] seems to confuse the particular type of estoppel that gives rise to contractual rights with true estoppels. The former, in English law, does not require an act of reliance beyond entry into the contract. If this alone is intended by Lord Diplock then so far it is in line with orthodox contract theory. If not, then it heralds the introduction of a new requirement for contract formation.[82]

As noted, the Court of Appeal in *The Leonidas D* later accepted Lord Brightman's formulation, finding some difficulty with Lord Diplock's approach not because of his characterisation of it as an instance of the princi-

80 Supra at note 62, at 924.

81 Supra at note 4, at 285.

82 Atiyah heralds Lord Diplock's remark as a harbinger of a new era of contract theory in "The Hannah Blumenthal and Classical Contract Law" (1986) 102 LQR 363, 369. He states at 368: "Hitherto, the orthodox view has been that a misleading statement, if it is a contractual offer, and is "accepted" creates a contract even if the offer is not otherwise acted upon by the offeree." The orthodox view certainly provides an explanation of the result in this case, for the facts show that the party seeking to have the arbitration agreement discharged did not in fact hold the view that the other party had abandoned it, and therefore, even if such a belief could reasonably have been held, he would have been unable to assert it. The case is thus entirely consistent with *Centrovincial Estates PLC v Merchant Investors Assurance Co Ltd* [1983] Com LR 158 (as noted by Atiyah at 365), which asserted the orthodox view that a party can accept an offer in the sense he reasonably understood it to have, even though that understanding did not correspond with the offeror's actual intention. Neither case supports Atiyah's general thesis that the contract and tort tests "are coming closer together" (at 368).

ple of injurious reliance, but because it would appear to require actual mutual consent. Certainly Lord Brightman's formulation is a more straightforward statement of promisee objectivity, and to this extent the decision of the Court of Appeal is within the mainstream support of the theory.[83]

The Case for Detached Objectivity

This brief discussion of promisee and promisor objectivity adduces clear and consistent support for promisee objectivity. The theory of detached objectivity remains to be considered. As noted previously the main proponent of this view is Lord Denning. However, as has been noted by Spencer,[84] the line of authority in support consist of cases in which Lord Denning has promoted the same view.[85] Spencer argues that all of these, apart from *Rose v Pim*, would have been decided the same way had a different test been applied.[86]

In *Rose v Pim*, the buyer sought to supply his customer with "feveroles", and agreed to buy horsebeans on recommendation from the seller that horsebeans were "feveroles". When it was discovered that they were not the buyer sought rectification on the basis that the written agreement did not correspond with the common intentions of the parties.

While the case is criticised as an example of the imposition of an objective view of the promise against the actual intentions of the parties,[87] such a criticism is best levelled at dicta of Denning LJ (as he then was), rather than at the result of the case. It was found as a fact that the oral contract and the written contract were in the same terms and in these cases the remedy of rectification is not available.[88] Based on this ground, the decision is sound. Lord Denning, however, took the opportunity to once again assert that a common fundamental mistake as to the subject-matter of a contract renders the contract merely voidable and not void, an assertion for which he finds support in his own judgment in *Solle v Butcher*. His Honour argues that this is so on principle for:[89]

> when the parties to a contract are to all outward appearances in full and certain agreement, neither of them can set up his own mistake, or the mistake of both of them, so as to make the contract a nullity from the beginning.

83 See also *Thake v Maurice* [1986] 1 All ER 497, 504; *Harvela Ltd v Royal Trust Co* [1986] AC 207, 225D.

84 Supra at note 10.

85 *Leaf v International Galleries* [1950] 2 KB 86 (CA); *Rose v Pim* [1953] 2 QB 450 (CA); *Gallie v Lee* [1969] 2 Ch 17 (CA); *Lewis v Averay*, supra at note 47; *Storer v Manchester City Council* [1974] 1 WLR 1403 (CA); *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507 (CA).

86 Supra at note 10, at 111, at n. 42, and at 113, at n. 56.

87 Ibid, 113.

88 Supra at note 85, at 458 per Singleton LJ; at 461 per Denning LJ; at 463 per Morris LJ.

89 Ibid, 460.

The test of agreement here is clearly inconsistent with *Smith v Hughes* and the cases applying its principles, and with *Bell v Lever Bros*.[90] The approach is incompatible with the orthodox view of testing agreement, in which a place is found, and indeed required, for the actual intentions of the parties. Of course the mistake in a case such as *Rose v Pim* is of a different type than in the cases of unilateral mistake discussed so far. In those cases, the effect of mistake is to negative consent, while in cases of common mistake it is to show that the actual agreement of the parties is different than that manifested (as in this case), or that there was never an agreement in the first place (*Raffles v Wichelhaus*).[91] In both instances, however, the actual intentions of the parties are not discarded, but rather are limited by an objective theory. Unlike cases of unilateral mistake, the mistake, once accepted, does not reveal that there was never an intention to contract. Acceptance that a common mistake can never render a contract void is not, of itself, inconsistent with a limited objective approach.[92]

Thus while it is incorrect to claim that *Rose v Pim* resulted in the imposition of an agreement upon the parties, the breadth of Lord Denning's statements could lead to that result. Certainly, the High Court of Australia in *Taylor v Johnson*[93] has proceeded some way towards adopting detached objectivity, at least for some types of case. In New Zealand, any movements[94] have been superseded by the Contractual Mistakes Act 1977. In the United Kingdom, Lord Denning's formulation has not been adopted, and the most recent decisions adopt a form of objectivity that is clearly limited.

90 [1932] AC 161.

91 See Stoljar, "A New Approach to Mistake in Contract" (1965) MLR 265, 275.

92 Certainly since *Bell v Lever Bros* the view has been that a mistake as to quality of subject matter does not render a contract void. Indeed, in New Zealand, Chilwell J in *Waring v Brentnall Ltd* [1975] 2 NZLR 401, 404, stated that "[S]o far as common mistake is concerned, in my judgment it does not operate in this case to avoid the contract at common law", and that (at 409) Lord Denning's approach should be followed in New Zealand. The definition and effect of a mistake in New Zealand is now governed by the Contractual Mistakes Act 1977.

93 Supra at note 18. The majority (Mason ACJ, Murphy and Deane JJ) appeared to recognise only two theories: pure subjectivity and detached objectivity. Of interest is the statement (at 428) that "allied with any assertion of the 'subjective theory' is acceptance of one manifestation of the doctrine of estoppel". Implicit in the division is the recognition that the orthodox objective theory is in fact a subjective theory allied with estoppel. They pointed to the speech of Lord Atkin in *Bell v Lever Bros* as marking the turning point to a (fully) objective theory, and to Lord Denning's approach (at 429) as following upon that "in due course". However, their acceptance of the approach is clearly limited (at 430-431): "whether that proposition should properly be accepted as applying in the case of an informal contract or in the case where there is a mistake as to the identity of the other party are questions which can be left to another day. It would seem that it does not apply in a case where the mistake is as to the nature of the contract. . . . we are prepared to accept it as applicable to a case, such as the present, where the mistake is as to the existence or content of an actual term in a formal written contract."

94 Supra at note 92.

V The Basis of the Theory

This examination of judicial support for the various theories shows that only promisee objectivity is widely upheld. What has not been examined is the basis of the rule. There are two related issues. First, why does the common law adopt an objective approach? Second, why is any restriction placed on a fully objective approach? In other words, is there an underlying basis for the theory that will explain the rule and its exceptions? In general, while the solution to the former question can be found quite simply, a clear solution to the latter is much more difficult and controversial.

The simplest explanation for restrictions on a subjective theory is that some sort of objective test is required just to determine what another's intention or understanding is. In the oft-quoted words of Brian CJ, "the intent of a man cannot be tried, for the Devil himself knows not the intent of man." At its simplest an objective test is required for epistemological reasons.[95]

Closely allied to this is the fact that an objective test circumvents the possibility of unacceptable results that a subjective test would allow. This is well expressed by Bagallay LJ in *Tamplin v James*:[96]

> [W]here there has been no misrepresentation and where there is no ambiguity in the terms of the contract, the Defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake. Were such to be the law the performance of a contract could rarely be enforced upon an unwilling party who was also unscrupulous.

These two practical considerations justify at least some form of objective test but they do not of themselves require exclusion of subjective intentions where such can be proved, or where it would be unfair to do so. Indeed, the consensus and estoppel approach above, and orthodox promisee objectivity do not extend much further past these two requirements. The orthodox theory does accord a place for subjective intentions, and so ascribes prescriptive value only to any explanation that does not maintain that place. If this is accepted then it becomes clear that the theory is not substantive, but is evidential, although the substantive positions of the parties may thereby be affected.[97]

Nor do these two requirements explain why the viewpoint of the promisee is preferred to that of the detached observer. If the theory is to simply adjust the intentions of the parties fairly, this could well be accomplished by a

95 See Dalton, "Deconstructing Contract Doctrine" (1985) 94 Yale LJ 997, 1039ff.

96 Supra at note 53, at 217.

97 The doctrinal element underlying this assertion is that, essentially, tests of objectivity are evidential rather than substantive. Against this the view of Williston, supra at note 1, vol. 13, sec 1536: "Doubtless the law is generally expressed in terms of subjective assent, rather than of objective expressions, the latter being said to be 'evidence' of the former ... but when it is established that this is not rule of evidence but rather a rule of substantive law, the whole subjective theory which is sometimes rather ludicrously epitomised by the quaintly archaic expression 'meeting of the minds, falls to the ground."

detached observer.[98] The objection has been noted that to take such a position involves imposition upon the parties, but this begs the question: is the basis of the rule to do justice between the parties, or to provide workable rules to enable the parties to undertake their promises and obligations, or some other?[99] The answer to this will clearly depend on a wider theory of contract, and the nature of contractual obligation. Here it will be sufficient to suggest where the wider theories of contract go further than the common law.

An explanation for the theory which would accord with the position of the promisee is that the theory protects the reasonable expectations of the parties.[100] Nevertheless, this explanation does not account for the requirement that the promisee must in fact hold that reasonable expectation. It does not explain why the theory is not fully objective.

Other explanations are defective for the same reason. A fully objective theory is allied with the theory that contractual obligations are accorded ab extra. Thus Lord Denning can adjust the contractual relations of the parties by equitable principles once the path has been cleared of the actual intentions of the parties to the contract. Howarth's support for detached objectivity is revealed, once authority is found to be lacking, to rest on this basis.[101] The orthodox theory is incompatible with this approach.

Similarly defective is Atiyah's explanation for the requirement of the promisee to actually hold the reasonable view. He argues that because the danger of injurious reliance is the basis of the requirement, where there is no reliance there should be (as in tort) no requirement. While this might explain the retention of the promisee's actual intention, it does not account for those decisions that allow for a completed contract between the parties without injurious reliance. And indeed, Atiyah would argue that this should be a necessary requirement in every case.

The orthodox objective theory is best seen as in accordance with traditional promise and bargain theories of contract.[102] Both theories assert that the intentions of the parties provide, as Dalton states, "the legitimating basis of contractual obligation",[103] and hence both, in principle, are incompatible with an approach that could result in the imposition of contractual obligations on the parties. The concern is with the promise made or the bargain offered, and for the reasons outlined above, these are best determined from the viewpoint of the promisee. In theory, developments toward greater objectivity are possible by insisting that the bargain between the parties be such as is fairly deter-

98 Atiyah, *Essays on Contract* (1986) 110.

99 See supra at note 97. See also, Coote, "The Essence of Contract" (1988) 1 Journal of Contract Law 91 (Part I) 183 (Part II) 43.

100 See, for example, Waddams, supra at note 1, at 110.

101 See Coote, supra at note 99.

102 Or with a theory of contract as assumption of legal obligations as suggested by Coote, supra at note 99.

103 Supra at note 95, at 1040.

mined apart from the intentions of the actual parties themselves, although the bargain theory is much more susceptible to this development than the promise theory. However, the objective theory as it is now revealed through the cases would be left far behind.

VII The Limits of Objectivity

The discussion to this point has sought to demonstrate that only the promisee theory of objectivity is supported by authority and principle. A discussion of the operation of this theory in comparison to a subjective consensus and estoppel theory suggests that the orthodox objective theory is closely allied to the earlier subjective theory, and in most respects is simply its obverse. Further, the discussion of the basis of the theory suggests that many of the purposes suggested by theorists serve underlying prescriptive ends and are incompatible with the orthodox theory as set out in the cases. Objectivity is limited to tempering the subjective intentions of the parties and requiring that, apart from settled exceptions, they be reasonable. Common law objectivity does not extend so far as to discard those intentions altogether.