had "the status of a treaty for our purposes, in the sense that it is a contract between States".

Even had the treaty been valid municipally, the learned judge was prepared to hold that its own provisions were sufficient to save the jurisdiction of the Canada Labour Relations Board in this matter. Article 6 of the treaty provided:

> Nothing in this Agreement shall derogate from the application of Canadian law in Canada, provided that, if in unusual circumstances its application may lead to unreasonable delay or difficulty in construction or operation, the United States authorities concerned may request the assistance of Canadian authorities in seeking appropriate alleviation. In order to facilitate the rapid and efficient construction of the DEW System, Canadian authorities will give sympathetic consideration to any such request submitted by United States Government authorities.

In the first place, there was no evidence that the proviso, *i.e.*, all of the cited extract except the first fourteen words, had ever been invoked. Thus, in view of those opening words, the Court felt that there could not have been any intention that the treaty should abrogate rights or obligations created for employees and employers by the federal statute mentioned *supra.*

This case, then, provides us with an interesting illustration of how an international agreement might have to be considered in connection with domestic legal arrangements, and of the ways in which principles relating to international law find their practical applications in our municipal courts.[10]

S. J. LANGER*

CONTRACTS

Let us start at the beginning, with Offer and Acceptance. Two recent decisions illustrate the application both of well known, and of less familiar, principles governing the formation of a contract. It is generally assumed that acceptance of an offer is ineffective unless communicated to the offeror,[1] but authority for this assumption is scanty, and scarcely modern.[2] In *Parkette Apartments Ltd.* v. *Masternak*,[3] the High Court of Ontario was able to apply the rule on the following facts. Plaintiff was attempting to make a deal with the defendant for the purchase of the defendant's property. An offer of $64,000 was "accepted" by the defendant, but as she introduced certain material alterations into the terms of the offer, the "acceptance" was in law a counter-offer. One of the changes was to set a deadline of January 31st. The plaintiff initialled the defendant's alterations, but made an alteration of his

10. Cf. Vanek, *Is International Law Part of the Law of Canada,* (1949-50), 8 University of Toronto L.J. 251.
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1. Subject to exceptions in the case of mailed acceptance, and the so-called unilateral contracts.
2. Principally *Powell* v. *Lee,* 99 L.T. 284 (K.B. Divisional Ct.), Cf. *Felthouse* v. *Bindley* (1862), 11 C.B.-N.S., 869, 142 E.R. 1037; affd. (1863) 7 L.T. 835.
3. (1965) 50 D.L.R. 2d 577 (Ont.).

own. The document in this form eventually reached the defendant on February 6th or 7th; she had in the meantime received a better offer elsewhere, and claimed that there was no concluded contract with the plaintiff. The plaintiff sued for specific performance.

The action failed, on two grounds: the document, when delivered to the defendant was not an acceptance, but a counter-offer; even if it had been an acceptance, there was no contract for want of communication of the acceptance. There was, of course, communication eventually, but the court held, disapproving *Cowie* v. *Richards and Brien*[4] that if the offer sets a deadline, there is no "period of grace" after the deadline has passed within which the acceptance may be effectively made. On both grounds it is submitted that the decision in *Parkette Apartments Ltd.* v. *Masternak* is perfectly correct.

In *Hawrysh* v. *St. John's Sportsmen's Club*,[5] the plaintiff claimed damages for the defendant's breach of contract in excluding him from the final "roll-off" of a bowling competition. The terms of the contract were contained in a poster advertising the competition, which set out the "Rules and Conditions" of the event. Competitors were to be given a handicap, calculated by reference to the player's highest league average as of a certain date. The entry fee was $10.00, and the top eight bowlers at the end of the qualifying rounds were to compete in the roll-off.

The poster did not specify any minimum number of league games that a bowler must have played to determine his highest average, though the defendant apparently had 12 games in mind as the minimum.[6] The plaintiff's average was based on only three games. After he had obtained a score which qualified him for the roll-off, the defendant declared him disqualified, relying on two principal grounds for this action.

The first was alleged non-disclosure of the number of league games played by the plaintiff. Bastin, J. held on the facts that the plaintiff *had* disclosed this, and, in any event, it would seem to be immaterial whether disclosure was made or not. Even if, as the defendant asserted, the plaintiff must have known that a total of three games was well below any acceptable minimum, the contract was silent on the point, and could hardly be said to be a contract *uberrimae fidei*. Only active concealment of the number of games would have given the defendant grounds for disqualifying the plaintiff.

The second ground relied on was the usual condition that the committee's decision "should be final". Such conditions are valid,[7] but there still remains the question of construction: *on what matters* is

4. (1960) 50 M.P.R. 107 (N.B., App. Div.).
5. (1964) 49 W.W.R. 243 (Man. Q.B.).
6. 21 games is the minimum fixed by the rules of the American Bowling Congress, which the defendant normally incorporated into its competition conditions.
7. Cf. *Chapinyc* v. *Western Grocers Ltd.* (1958) 13 DLR 2d 342 (Man. Q.B.).

the committee's decision to be final? In this case it was held that the provision related only to the conduct of the competition, but did not authorize the committee to change the published conditions. As the decision of the committee was, in effect, to add a new condition of entry to those contained in the contract, the defendant could not rely on the finality clause.

The plaintiff had, therefore, succeeded in establishing a breach of contract by the defendant, but on what principles were the damages to be assessed? Bastin, J., followed *Chaplin* v. *Hicks*:[8] where actual loss is shown to result from a breach of contract, the Court must do its best to estimate the amount, even though it cannot arrive at an absolute measure of damages in every case. Accordingly, the plaintiff was awarded $400 for the loss of the $75 prize given to those competing unsuccessfully in the roll-off, for the loss of his chance of winning the first prize of $1,155, and for his loss of "the enjoyment of the competition and the distinction of becoming a prize winner".

By contrast with the *Hawrysh* case, the facts of *Western Processing & Cold Storage Ltd.* v. *Hamilton Construction Co. Ltd. and Dow Chemical of Canada Ltd.*[9] are complicated enough, but for our present purposes the relevant issues can be stated fairly simply. Western was building a cold storage plant at Portage la Prairie, and Hamilton was the general contractor for this work. Hamilton obtained its insulating material from a distributor, Alsip, who in turn purchased the material from Dow. The insulating material was later discovered to be seriously defective, and Western recovered damages from Hamilton and from Dow.

The point of present interest is Dow's claim to shift its liability on to the distributor, Alsip. In third-party proceedings Dow claimed an indemnity from Alsip, on the basis of certain conditions which were contained in the form of acknowledgement of the order for the material, which had been sent to Alsip. These conditions were that the seller gave no warranty with respect to the goods except that they should meet the seller's current sales specifications; "any recommendations made by the seller concerning uses or applications of said goods, are believed reliable, but the seller makes no warranty of results to be obtained; *buyer assumes all responsibility and liability for loss or damage resulting from the handling or use of said goods*".[10] and there were also conditions imposing a thirty-day time limit for any claims by the buyer, and a restriction of liability in any event to the price of the goods.

It is extremely common for a seller, when acknowledging receipt of an order, to incorporate his "usual terms" as part of the acceptance, and this practice raises some fundamental issues in the law of contract.

8. [1911] 2 K.B. 786 (C.A.).
9. (1964) 47 WWR 150 (Q.B.), (1965) 51 WWR 354 (C.A.) (Man).
10. *Italics supplied.*

Technically, the seller is either making a counter-offer, instead of accepting the order, or else he is attempting to vary an already concluded contract by the unilateral imposition of fresh terms, and on either view the buyer is not bound by the new terms, at least not until he has accepted them, either expressly or by his conduct in taking delivery of the goods.

It is interesting to observe the different approaches to this problem of Bastin, J., at first instance, and of Monnin, J.A., who delivered the judgment of the Court of Appeal. Bastin, J., accepted that the terms were part of the contract, but applied the *contra proferentem* rule of construction to hold that these provisions:

> . . . were to govern their rights and obligations in relation to the particular contract for the sale of goods and were not intended to go beyond that. I consider that a claim for damages for negligence against Dow by a stranger to this contract of sale, even though it relates to the goods sold, would be outside the scope of the agreement.[11]

Accordingly, Dow's claim of indemnity from Alsip failed.

Monnin, J.A., reached the same conclusion by an entirely different route. "The agreement between Paulsen, on behalf of Alsip, and Dow's representative, was oral. It would be grossly unjust to saddle Alsip with a responsibility *which it never entered into or agreed to accept* . . ."[12] His Lordship went on to say if there had been a "course of well-established prior business conduct" showing that Alsip knew that Dow's acknowledgment of the order would contain such terms, the matter would have been different.[13] It follows, on this view, that even acceptance of the goods will not make the subsequently added conditions part of the contract. With respect, it is submitted that this is the better approach to the problem.

As a further reason for rejecting Dow's claim, Monnin, J.A., concluded that there had been a fundamental breach, which precluded Dow from relying on the exemption clauses. This finding was not, of course, necessary for the decision, but it is an encouraging indication of the realistic approach of Canadian judges to this question. On a narrow, technical view the material supplied *was* insulating material within the meaning of the contract, but it was so seriously defective in quality as to be more of a liability than an asset to Western, and the case is analogous to that of a piece of machinery which cannot be made to function properly.[14]

Mutual mistake has always been a difficult subject, to say the least. It is not made any easier by the decision in *Diamond* v. *B.C. Thorough-*

11. 47 WWR 150, at p. 170.

12. 51 WWR 354, at p. 358 (italics supplied).

13. Monnin, J.A., cites the recent decision of the House of Lords, *McCutcheon* v. *David MacBrayne Ltd.*, [1964] 1 WLR 125 in support of this point. With respect, the issue in the *McCutcheon* case was somewhat different, *viz.*, whether a term could be *implied* on the basis of previous dealings between the parties, and not whether an *express* term was binding.

14 Cf. e.g., *Knowles* v. *Anchorage Holdings Ltd.* (1964) 43 DLR 2d 300 (B.C.). This point is discussed further in the section on Commercial law—Sale of Goods.

bred Breeders' Society.[15] At an auction sale of race horses held by the defendant, the plaintiff bought a yearling colt *Palloffair.* It was not his intention to buy *Palloffair*; the horse he wanted was the yearling *Pennate*, which was considerably more valuable, and when he bid for *Palloffair* he thought he was bidding for *Pennate.* His mistake arose from the fact that the horses were given a "hip number" and were identified by this number in the sale catalogue, and in the ring at the time of sale. Unfortunately, *Pennate* and *Palloffair* were given the wrong hip numbers at the sale. Instead of the horse described in the catalogue under "Hip No. 16" (*Pennate*), the horse *Palloffair* bore "Hip No. 16" at the sale.

The plaintiff contended that the contract was void *ab initio* on the ground of mutual mistake; both parties were under the misapprehension that they were dealing with *Pennate*, when in fact they were dealing with *Palloffair*, and this was, the plaintiff argued, either a mistake as to the *identity* of the subject matter of the sale, or a mistake as to a *quality* of the subject matter which was fundamental to the contract. Aikins, J., rejected both arguments.[16] The parties were not mistaken as to the identity of the subject matter, which was the horse actually put up for sale under hip number 16. The mistake was as to the lineage of the horse, a matter of quality; both horses were untried, and the quality of lineage was not fundamental to the contract. The subject matter of the contract was "a race horse", and that is what the plaintiff received.

With respect, this is a surprising conclusion. Aikins, J., naturally relied heavily on *Leaf* v. *International Galleries*,[17] but there is one important difference between the two cases which was not given sufficient consideration. Before a mutual mistake as to the identity of the subject matter can be established, one must first enquire what it was that the purchaser agreed to buy, or, in other words, what was the *description* under which the goods were sold. In the *Leaf* case the authorship of the painting was not part of the description, although it was "warranted" by the seller.[18] The lineage of an untried race horse *may* be less important to a purchaser than the authorship of a painting, but can it seriously be argued that the lineage of the horses in the present case was not part of the description under which they were sold? The sole purpose of the hip number was to refer the buyer to the particulars stated in the catalogue, the most important of which was the lineage, but if this decision is correct the purchaser might just as well throw his catalogue away without looking at it, so far as the doctrine of mistake is concerned.[19]

15. (1965) 52 WWR 385, (B.C.).
16. *Ibid.*, especially at pp. 398-403.
17. [1950] 2 K.B. 86 (C.A.)
18. [1950] 2 K.B. 86, at pp. 89 (Denning, L.J.), and 93-94 (Evershed, M.R.).
19. In the result the plaintiff recovered damages for breach of condition. He could not reject the horse, as he has "accepted" it within the meaning of the Sale of Goods Act R.S.B.C. 1960, c. 344, s. 40 (s. 37, SGA (Man.)). It is a difficult, and still open, question whether a party can "affirm" a contract which is void for mistake. Presumably he can.

In the field of privity of contract, *Midland Silicones Ltd.* v. *Scruttons Ltd.*[20] has been endorsed by the Ontario Court of Appeal in *Bill Boivin Plumbing & Heating Ltd.* v. *Flatt*[21] where an agreement between sub-contractors and the general contractors, under which the former waived any lien under the Mechanics' Lien Act,[22] was held not to enure for the benefit of other lien claimants. In *J. A. Johnston Co. Ltd.* v. *E. R. Taylor Construction Ltd.*,[23] on the other hand, the court was able to apply the trust concept to avoid the doctrine of privity. The plaintiff, J. Ltd., had contracted with the defendant, T. Ltd., for the construction of a shoe factory. The factory was operated by S. Ltd., a wholly owned subsidiary of J. Ltd. T. Ltd. delivered a manufacturer's guarantee bond for 25 years in respect of the roof of the factory. By an oversight, S. Ltd. was named as owner of the building in the guarantee bond. The roof was not watertight, and J. Ltd. brought action on the bond against the surety.[24]

The surety contended that J. Ltd., not being the party in whose favor the bond was given, could not sue on it. The court rejected the contention. The essence of the bond was a guarantee of the roof for the benefit of the owner of the building, who at all material times was J. Ltd. J. Ltd. had never concealed its interest or deceived the bonding company. S. Ltd. was, therefore, trustee of its rights under the bond for J. Ltd.[25] Alternatively, the mention of S. Ltd. as owner of the building was simply an error of description, and the identity of the owner being of no relevance in the formation of the contract, the misdescription did not avoid the contract.

* * * *

As one learned writer has pointed out,[26] the decision in *Hedley Byrne* v. *Heller*[27] can be expected to have repercussions in the law of contract. The case of *Dick Bentley Productions Ltd.* v. *Harold Smith (Manufacturers) Ltd.*[28] seems to justify this prediction. The plaintiff was looking for a quality car. The defendant, with whom the plaintiff had been dealing for a couple of years, offered a car, the previous history of which he said he could find out, and which he said had done only 20,000 miles since having a new engine and gearbox fitted. The plaintiff bought the car, but it did not come up to his expectations, and he claimed damages for breach of warranty.

20. [1962] A.C. 446 (H.L.).
21. (1965) 51 DLR 2d 574.
22. R.S.O., 1960, c. 233.
23. (1965) 52 DLR 2d 20 (Ont.).
24. The principal bonding company had gone out of business.
25. For other authorities, see 18 Hals., 3rd ed., p. 462, notes (c) and (d).
26. Stevens, (1964) 27 Mod. L.R. 121, at 155-166.
27. [1964] A.C. 465 (H.L.).
28. [1965] 1 WLR 623 (C.A.).

The central issue in the case was whether the statement as to the mileage of the car was a contractual warranty, or a mere innocent misrepresentation.[29] After referring to the classic words of Hold, C.J.,[30] "An affirmation at the time of sale is a warranty, provided it appears on evidence to be so intended", and emphasising that intention is to be judged by the words and actions of the parties, not by their innermost thoughts,[31] Lord Denning, M.R., propounded a new test:

> . . . it seems to me that if a representation is made in the course of dealing for a contract for the very purpose of inducing the other party to act upon it, and actually inducing him to act upon it, by entering into the contract, that is prima facie ground for inferring that it was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that it was intended to be acted upon and was in fact acted on. But the maker of the representation can rebut this inference if he can show that it really was an innocent misrepresentation, *in that he was in fact innocent of fault in making it*, and that it would not be reasonable in the circumstances for him to be bound by it.[32]

In the present case Smith had stated as facts, matters which he, as a dealer, was in a position to discover, without any attempt to check the accuracy of his statements. Accordingly, he was at fault, and the inference of warranty was not rebutted.

Although the result of the case is hardly surprising, its great interest lies in the fact that we now have, for the first time, a workable test to distinguish contractual warranties from other "affirmations at the time of sale". Intention, by itself, is a poor test, for it leaves the matter too much at large. Fault, on the other hand, is more easily determined; and by adopting the test of fault Lord Denning, M.R., has at the same time brought the contractual remedies for misrepresentation into line with the latest developments in the law of tort.

A. D. HUGHES*

DOMESTIC RELATIONS

A review of the cases decided in the last few years concerning domestic relations indicates a definite liberalizing trend, perhaps a more realistic approach to this branch of the law.[1] A recent case illustrating the trend is that of *Baert* v. *Baert and Sintag*,[2] a decision of the Manitoba Court of Appeal. (It is interesting to note that this case was considered of sufficient importance to be reported in the English "Current Law".)

The case was concerned with two points, which might be termed for convenience, as a point of practice and a point of law. The point of

29. The statement was incorrect, but there was no fraud.
30. Cited by Buller, J., in *Pasley* v. *Freeman* (1789), 3 T.R. 51, at p. 57, 100 E.R. 450, at p. 453.
31. Cf. *Oscar Chess* v. *Williams* [1957], 1. WLR 370, at p. 375.
32. [1965] 1 WLR 623, at pp. 627-628 (italics supplied).

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1. Several examples of this appears in the section dealing with Private International Law.
2. (1965) 52 W.W.R. 314.