Leaf v. International Galleries is an English case dealing with the doctrine of innocent misrepresentation in contract law. Mr Leaf bought an oil painting of Salisbury Cathedral from International Galleries in 1944 for £85 on the representation that it was an authentic picture by the famous English painter John Constable. When he tried to sell it five years later to Christie’s auction house, he was told that it was not in fact a Constable. International Galleries stood by its claim of authenticity. The trial judge found as fact that the painting was not authentic. Lord Denning held at the Court of Appeal that Mr Leaf might well have asked for damages for breach of a warranty that the painting was a real Constable; however, he did not do so, and his request to amend the pleadings to that effect was denied. What Leaf did ask for was equitable relief under the doctrine of innocent misrepresentation by way of rescission (i.e., that he be allowed to return the painting and recover his £85). Leaf’s claim was denied on the grounds that five years was too long after the transaction to rescind it.

Scholars who discuss the case wrestle with the odd fact that £85 seems an extremely low price to pay for an authentic painting by John Constable, and various ways of responding to this have worked their way into the treatment of the case. However, it turns out that £85 might have been a perfectly reasonable price to pay for particular Constables in 1944. This article explores how assumptions like this perfectly ordinary one about the value of a real Constable in the Leaf case can lead us astray. The ‘object lesson in speculation,’ which I use the Leaf case to demonstrate, is the trap that legal teachers and scholars often fall into because we do not engage in actual investigation of what happened in law school casebook cases. At the same time, however, such investigation sits uncomfortably with the role and function of cases in the common law, which uses reported appellate cases in a very specific way. This
This is an archaeological study of the English contracts case *Leaf v. International Galleries*. Like many case-in-context studies, it shows the importance of context to our understanding of leading common law cases. More specifically, it is offered as an object lesson on the way in which the assumptions one might make about law school casebook cases, certain kinds of perfectly reasonable speculation, can lead us astray, as law teachers and as scholars. The exploration or ‘excavation’ illustrates the way in which different levels of investigation will result in different kinds of conclusions, rendering visible the normally invisible multiple layers in cases we use to teach and think about core concepts. It is, in that very modest sense, philosophical. However, it is primarily historical, reporting assumptions that have been made about the case and its legal meaning set against what I have been able to find out about it, very much in the tradition of Brian Simpson’s treatment of famous English cases.

*Leaf* is a 1950 English Court of Appeal decision that includes an opinion by Lord Denning. Given that it deals with fundamental issues of contract law such as innocent misrepresentation and mistake, it has long occupied a place in English, Canadian, and Australian casebooks.


Given the low price paid for the John Constable painting, £85, and the fact that the Constable market was full of forgeries, one might think that all the plaintiff purchaser, Ernest Louis Leaf, was doing in 1944 was buying a chance that the particular painting he purchased from the defendant seller, International Galleries, would turn out to be an authentic Constable. Part II below canvasses these issues of low price and forgeries and concludes that what Leaf purchased was more than this chance. Part III analyses what the judges said about the case, including a correction of what is usually said about the relevance of low price. Part IV turns from the immediate context of Leaf to the way in which the case lived on in a local time and place, specifically how it came to be included and reproduced over various editions of a University of Toronto contracts casebook. Part V concludes by asking what this investigation of Leaf tells us about the way in which we use law school casebook cases.

II What did Leaf buy?

At the heart of the controversy in this case was a painting Leaf bought from International Galleries, who claimed that it was a picture of Salisbury Cathedral painted by the famous English landscape painter John Constable. Leaf bought the painting from International Galleries for £85 in March 1944. He took no further steps to have its authorship authenticated. When he attempted to sell the painting five years later, he was told by the public auction house Christie’s that it was not a Constable. International Galleries continued to insist that it was not a fake. At trial, the county court judge found that the painting was not in fact a Constable; however, the defendant seller’s representation that it was a Constable was innocent (i.e., not fraudulent).

Leaf took the position that he should be able to return the painting and get back the price paid, £85. He was, in other words, asking the court to ‘unwind’ the transaction and grant him the equitable remedy given in cases of innocent misrepresentation, namely, rescission. The issue was whether five years was too long a period to wait before demanding the remedy. Lord Jenkins wrote,

It is perfectly true that the county court judge held that there had been no laches, and, of course, it may be said that the plaintiff had no occasion to obtain any further evidence as to the authorship of the picture until he wanted to sell;

4 See John D. McCamus, The Law of Contracts (Toronto: Irwin Law, 2005) at 337–8 (‘the remedy of rescission involves an unwinding or setting aside of the contractual relationship between the parties . . . in the case of a rescission of a simple contract for the purchase and sale of goods, rescission will be coupled with return of the goods to the seller and a return of the purchase price to the buyer’).
but in my judgment contracts such as this cannot be kept open and subject to the possibility of rescission indefinitely ... it behoves the purchaser either to verify or, as the case may be, to disprove the representation within a reasonable time, or else stand or fall by it. If he is allowed to wait five, ten, or twenty years and then reopen the bargain, there can be no finality at all.\(^5\)

There was no laches because, as Leaf’s lawyer before the Court of Appeal, Mr Weitzman, argued, ‘[t]ime did not begin to run against the plaintiff until he discovered that the picture was not in fact painted by Constable.’\(^6\) However, even though Leaf did not discover any problem with the painting until he tried to sell it, five years was nonetheless too long after the completion of an executed contract to qualify as a reasonable length of time.

In assessing the reasonableness of the buyer’s reliance on the seller’s representation that the picture was a true Constable, it is helpful to have some information that is not in the judgment, namely, that Constable painted many versions of Salisbury Cathedral from different distances and angles. There is a *Salisbury Cathedral from the River* (1820) and a *Salisbury Cathedral from Lower Marsh Close* (1820).\(^7\) There is also the final *Salisbury Cathedral from the Bishop’s Garden* (1826) in the Frick Collection in New York City, with earlier versions of the same scene scattered in museums around the world.\(^8\) For example, the Metropolitan Museum of Fine Art, also in New York City, holds an 1825 study, and the original 1820 sketch is held by the National Gallery of Canada in Ottawa.\(^9\)

\(^{5}\) *Leaf*, supra note 1 at 92.

\(^{6}\) Ibid. at 88.

\(^{7}\) Both paintings and the links provided to others in this article were obtained by linking through *Artcyclopedia: The Guide to Great Art on the Internet*, s.v. ‘John Constable,’ online: Artcyclopedia <http://www.artcyclopedia.com/artists/constable_john.html>. *Salisbury Cathedral from the River* (1820) is found in the National Gallery in London: see ‘John Constable, Salisbury Cathedral from the River, 1820,’ online: National Gallery <http://www.nationalgallery.org.uk/cgi-bin/WebObjects.dll/CollectionPublisher.woa/wa/work?workNumber=NG2651> *Salisbury Cathedral from Lower Marsh Close* (1820) is found in the National Gallery of Art in Washington, DC: see ‘John Constable, Salisbury Cathedral from Lower Marsh Close, 1820,’ online: National Gallery of Art <http://www.nga.gov/cgi-bin/pinfo/Object=118+0+none>.


Constable expert Graham Reynolds reports that the Bishop of Salisbury originally wanted Constable to work up the Ottawa sketch into his painting, but Constable objected on the basis that it was too valuable to him. In a study done on the piece around the time of that purchase, Reynolds notes that Constable viewed his sketches as the most valuable contents of his studio: Constable ‘used to say . . . that he had no objection to part with the corn, but not with the field that grew it.’

The first piece Constable finished for the bishop in 1823 is held at the Victoria and Albert Museum in London. The presence of a dark cloud in the summer sky apparently displeased the bishop, and Constable was set to work on a sunnier version that would be the final 1826 commission.

There is also a smaller 1823 picture of the same scene that Constable made for the bishop’s youngest daughter as a wedding present, which is now located in the Huntington Library and Art Gallery in San Marino, California. When this one was returned for ‘lightening up,’ Reynolds notes, Constable’s studio was so full of variants of the picture that he recorded his daughter’s remark that he was at work on ‘three Cathedrums.’

The National Gallery in London reserves the culminating position in the group for its Salisbury Cathedral from the Meadows (1831), in which Constable added a distinctive arching rainbow across the cathedral’s sky; this version is often referred to as ‘the Rainbow’ for that reason. With so many versions of this picture around – so many different pieces of corn, to use Constable’s metaphor – one can see how it would be possible to think, ‘Hey, I have found a Constable Salisbury Cathedral!’ On the other hand, that might also be a reason to think that


11 Reynolds had been Keeper, Department of Prints, Drawings and Paintings, Victoria & Albert Museum, London, and was the author of numerous books on Constable.

12 See Reynolds, John Constable, supra note 10 at 20–1 for the black cloud version set opposite the Frick Collection’s final version ‘with the offending black cloud removed.’ See at 28–9 for an explanation of the controversy, the bishop’s complaint – ‘if Constable would but leave out his black clouds! Clouds are only black when it is going to rain. In fine weather the sky is blue’ – and Constable’s deferential response to it. See also Selby Whittingham, Constable and Turner at Salisbury (Salisbury: Friends of Salisbury Cathedral, 1972) at 9–10 [Whittingham, Constable & Turner] (recounting the same incident but depicting Constable as less accommodating).

13 See Reynolds, John Constable, supra note 10 at 25, 27.

14 Ibid. at 29.

paintings of Salisbury Cathedral purporting to be Constables would make a good niche market for forgers. Indeed, forgeries seem to have been a particular problem with Constables, from an early date. In their book *The Discovery of Constable*, Ian Fleming-Williams and Leslie Parris explore the fascinating historical dimensions of this problem, which I summarize here.\(^\text{16}\)

Constable produced a huge body of work, not much of which was in circulation at the time of his sudden death in 1837.\(^\text{17}\) Efforts to popularize him were successful, creating a modest demand for the work. However, the pieces were dispersed only gradually by his children and grandchildren, which made it difficult for a proper field of study to emerge.\(^\text{18}\) The first catalogued list, for instance, did not appear until 1902.\(^\text{19}\) This combination of popularity, and particularly access to print reproductions of the most famous pieces, with lack of access to the real work created both incentive and opportunity for forgeries.

The campaign to make Constable popular began shortly after his death, spearheaded by friends who believed he had been underappreciated in his own lifetime. In addition to coordinating the collection of £315 from Constable’s friends and acquaintances, which was used to buy one of his paintings for the National Gallery, Constable’s close friend C.R. Leslie wrote a very popular and influential (if not altogether accurate) biography.\(^\text{20}\) The biography included reproductions of twenty-two mezzotints (prints made from engraved steel plates) created and published by David Lucas under Constable’s supervision,\(^\text{21}\) which


\(^{17}\) Although the exact number of paintings sold during his lifetime is not known, estimates range from forty to less than 100; most were still in the hands of their original owners in 1837. Ibid. at 5, 7.

\(^{18}\) ‘His [Constable’s] children and grandchildren subsequently sold or gave away more than 750 oil paintings and sketches and over 1100 watercolours and drawings.’ Ibid. at 7–8.

\(^{19}\) Charles John Holmes, *Constable and His Influence on Landscape Painting* (Westminster: A. Constable & Co., 1902); Fleming-Williams and Parris, *Discovery*, supra note 16 at 105, 107–8, attribute to Holmes the establishment of modern Constable studies.

\(^{20}\) C.R. Leslie, *Memoirs of the Life of John Constable, Esq. R.A. Composed chiefly of his letters* (1843; rev. ed. 1845). See Fleming-Williams & Parris, *Discovery*, supra note 16 at 27–36, for a fascinating account of the biography, in which Leslie was charged with producing an overly ‘sunny’ Constable, going so far as to edit the letters to remove their negative parts.

\(^{21}\) David Lucas, *Various Subjects of Landscape, Characteristic of English Scenery* (1830; 2d ed. 1833), is usually referred to as *English Landscapes*. Constable closely supervised the work and wrote an introduction. In 1846 *English Landscapes* was reissued in an expanded form by Lucas, under Leslie’s supervision, as *A New Series of Engravings, Illustrative of English Landscape or Mr. David Lucas’s New Series of Engravings* (1846). See Fleming-Williams & Parris, *Discovery*, supra note 16 at 7, 37.
‘proved very handy guides for the forger.’ With some appetite and no food, as it were, these forgers found a ready market, which was developing rapidly as early as the 1840s.

Close friends, such as Leslie, and members of the family took on the role of ‘Constable policing.’ Fleming-Williams and Parris explain that Leslie mentions in the first edition of the biography in 1843 four forgeries he had personally seen. For the second (1845) edition, ‘four’ was revised to ‘multiple.’ Leslie’s son, Robert, ‘recalled that spurious Constables were constantly brought to his father by dealers both before and after the publication of the Life.’ Charles Golding, one of Constable’s older sons, was particularly active in the 1860s and 1870s, writing scathing letters to the Times when he discovered fakes. He remained the primary ‘watchdog’ until his death in 1879, at which time his son Charles said that his father was ‘greatly disliked by certain people for perpetually exposing shams.’

After Golding’s death in 1879, many more pieces were sent into circulation. Constable’s last surviving child, Isabel, made important donations to two English museums (including many of the smaller, less finished items, which spurred interest in Constable’s technique) and held large auctions of her pieces at Christie’s in the early 1890s. Demand increased with supply, and many of these pieces made forgery a tempting proposition, especially the introduction of many small and more informal pieces (small oil sketches, watercolours, and drawings). Later confusion was compounded by the fact that Constable’s two youngest sons, Alfred and Lionel, both spent time painting ‘[au] papare’ (in the manner of their father), and their pieces were left by Isabel to the third generation of the family. Many of these works, especially Lionel’s, mingled with their father’s paintings, creating much confusion when they went into circulation.

The purchase of a Constable, then, seems to have been an exceedingly risky business. Given such an unstable situation, one would think that any person in the market for a work by the great master who had any
knowledge of the situation and thought he had located a genuine article would take additional steps to make sure that it was in fact genuine, steps that should, at the very least, go beyond the seller’s say-so. This was particularly the case with Salisbury scenes, which were well known from an early date and had been the subject of more than one scam.

*Salisbury Cathedral from the Meadows* was included in David Lucas’s publication of the prints made from his mezzotints in *English Landscapes*, which were reissued in 1855 by a subsequent purchaser of the plates. Lucas also had in his possession a plate of a larger version of the same scene (often referred to as ‘the large Salisbury’), which he was unable to publish because Constable was working on the proofs when he died.\(^{31}\) The steel plate with copyright failed to sell at auction shortly after Constable’s death.\(^{32}\) It was reworked and relettered and finally published as ‘the Rainbow’ by Gambert of Berners Street and Goupil & Vibert of Paris in April 1848.\(^{33}\) It was also included in a set reproduced from wood engravings published in the *Art Journal* in 1855.\(^{34}\) In other words, it was a widely reproduced and well-known picture by the middle of the nineteenth century.

The ‘watchdog’ son, Charles Golding, went after a group of three six-foot long forgeries that included something called ‘Salisbury’ in 1869. He wrote under ‘Caution to Picture Collectors’ in the *Times*,

\[T\]here are a greater number of imitations about than usual. For one genuine picture offered for sale there are six sham ones ... They are nearly always made up from the Mezzotint engravings by David Lucas from my father’s pictures.\(^{35}\)

These works, which were destroyed in a warehouse fire in 1874, are thought to have been painted by the professional Constable imitator James Webb, known at the time to have been involved in this line of trade and an interesting figure for students of Constable forgeries.\(^{36}\) A ‘dubious version’ of *Salisbury Cathedral from the Bishop’s Grounds* was attacked by one of Leslie’s sons, G.D. Leslie, when it appeared at the Royal Academy’s winter exhibition in 1893.\(^{37}\)

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\(^{31}\) The plate was dated 20 March 1837, and Constable died on March 31. Ibid. at 37.

\(^{32}\) It was ‘bought in’ at auction for £84 and failed to find a bidder at that price at the Foster Sale of 13 May 1838. Henry Bohn is reported to have bid on it and the *English Landscape* mezzotint prints for £55. It was he who later bought the *English Landscape* plates, which he reissued in 1855. Ibid. at 15.

\(^{33}\) Ibid. at 37.

\(^{34}\) Ibid. at 48.

\(^{35}\) Ibid. at 75.

\(^{36}\) See ibid. at 76, 110.

\(^{37}\) Ibid. at 103.
There is no indication in the reported case as to Leaf’s level of knowledge and sophistication vis-à-vis art generally or Constable in particular. There is, however, some circumstantial evidence that he was not a novice buyer. Christie’s relocated from its hallmark location on King Street to Pall Mall in 1941 following German bombing of the King Street location. Paperwork that would track Christie’s involvement in the case was not kept for the period of the relocation, that is, from 1941 to 1954. However, Christie’s has always used a ‘daybook’ system in which a ‘porter’ or generalist was situated near the front door with a large ledger laid open to write in the consignments on each day. Any item that came in through the door, whether or not it was ultimately sold, was given a reference number (which in the case of a framed picture would be stencilled onto the stretcher), and the details of the object, along with the vendor’s name and address, were entered into the daybook. Oddly enough, there is no record of a visit by Leaf in 1949. This suggests that Leaf bypassed the consignment desk and brought the picture directly to a department specialist; it may even be that he knew someone there to whom he took the picture directly. If Leaf did bypass the consignment desk in this way, this would suggest that, far from being an inexperienced novice, he was an ‘in-the-know’ person, the kind of fellow who knew department specialists in the back rooms of Christie’s auction house.

In addition to Salisbury Cathedral’s attractiveness to forgers, there is the issue of the price paid for the painting in Leaf v. International Galleries: £85 seems an extremely low sum for so popular a scene by such a famous painter. This fact was noted in contemporary accounts that comment on the case. So, for instance, a brief piece written about the case includes the following parenthetical remark about the £85 paid: ‘a bargain, one would have thought, for the genuine article!’ Next to J.M.W. Turner, Constable was probably the most famous English painter of the nineteenth century. The finished ‘sunny’ Salisbury Cathedral from the Bishop’s Grounds (1826) now in the Frick Collection cost £8 190 in 1908. The Metropolitan Museum of Fine Art’s 1825 small study (‘nearly finished’) of the same scene was sold for £1 575 in

38 E-mail from Lynda McLeod, Librarian, Christie’s Archives, to the author (17 May 2006) (explaining the daybook system, including details on the relocation period).
39 Thanks to Ms McLeod for searching this year and the years 1946, 1947, 1948, and 1950. E-mail from Lynda McLeod to the author (18 May 2006).
40 This suggestion was made by Ms. McLeod. Lynda McLeod, e-mail to the author (23 May 2006).
42 It was sold at that price by Stephen Holland to Knoedler on 25 June 1908 and was then sold to Henry Clay Frick. Fleming-Williams & Parris, Discovery, supra note 16 at 114.
1907 and again for £6 510 in 1917. The National Gallery of Canada paid US$575 000 (CAD$566 950) for its 1820 ‘field’ sketch in 1976. What authentic version of a Salisbury Cathedral could possibly be purchased for £85 in 1944?

One might assume from this that the buyer, Leaf, could not possibly have thought that he was really getting an authentic Constable for £85. Such a low price, in other words, should have put him on notice that there was a good chance that the painting was a fake. Indeed, perhaps Leaf made the purchase believing it was probably not a real Constable but that there might be some chance, however remote, that it was. In other words, he was gambling on the chance (a chance that he decided was worth £85) that it would turn out to be a real and much more valuable painting. If that is what Leaf was doing, it is perfectly understandable that a court would turn him away when, upon learning that his gamble had not turned out the way he hoped it would, he attempted to rescind the deal.

This theory makes the case look a lot like another chestnut in this area of contract law, the 1887 Supreme Court of Michigan cow case, Sherwood v. Walker. In this mutual mistake case, the defendant sellers refused to hand over a cow named Rose D. after learning that they had been wrong in their belief that the cow could not breed. Operating under this belief, they had sold it to the plaintiff buyer as a beef cow for a much lower price than it would have fetched as a breeding cow. Once the cow was in calf and they realized their error, they refused to hand it over. The plaintiff was therefore suing in ‘replevin for a cow,’ loosely translated as ‘hand over my cow.’ The majority in the case thought that the fertility of the cow was too important not to form the basis of a mistake that would justify setting the contract aside. The defendant did not have to hand over the cow at the price paid for an infertile cow, and the plaintiff’s action was denied. However, the dissent in the case thought that it should not be found that just ‘because it turned out that the plaintiff [buyer] was more correct in his judgment as to one quality of the cow than the defendants [sellers] … the contract may be annulled by the defendants [sellers] at their pleasure.’ So, too, the court in Leaf v. International Galleries may have thought that the buyer ought not to be able to obtain a free option to cure a deal that simply turned out differently than he had let himself imagine in his wildest dreams (that is, that he had managed to obtain a real Constable for a song).

43 For more details on the prices of earlier sales, see provenance/ownership information in MMFA, ‘Constable Salisbury Cathedral 1825,’ supra note 9.
44 E-mail from Graham Larkin, Curator of European and American Art, National Gallery of Canada, Ottawa, to the author (13 April 2006).
46 Ibid. at 580.
This reasoning presupposes that paintings, like Constable’s, that were valuable shortly after the lifetime of the painter continued to be so, steadily increasing in value over time. However, given the kinds of forces that moved people to sell works of art during wartime, and especially during World War II, these works were sometimes sold at shockingly low prices.\textsuperscript{47} This was especially true of pictures by English painters like Constable and Turner whose popularity went into decline:

Turner, who for a while was a leader of the British art world, is said later to have become an embarrassment to the Tate gallery because of the large collection of his works stored in their cellars; though they are now among the most valued items in the museum’s collection.\textsuperscript{48}

This effect was even more pronounced for Constable, who was never as popular as Turner.\textsuperscript{49}

Using a 300-year time span and publicly available purchase and sale information on art from all over the Western world, the economist who made the above comment about Turner, William Baumol, has concluded that ownership of works of art, while rational for aesthetic reasons would not reliably produce a high rate of return. He goes on to say that none of this implies that people should desist from the ownership of art works. It may well represent a very rational choice for those who derive a high rate of return in the form of aesthetic pleasure. They should not, however, let themselves be lured into the purchase of art by the illusion that they can beat the game financially and select with any degree of reliability the combination of purchase dates and art works that will produce a rate of return exceeding the opportunity cost of their investment.\textsuperscript{50}

This is why Baumol uses the metaphor of art investment as a ‘floating crap game.’

\textsuperscript{47} Thanks to Graham Larkin, Curator of European and American Art, National Gallery of Canada, Ottawa, for making the point that care ought to be taken when dealing with prices of work bought and sold during the war years. E-mail from Graham Larkin to the author (15 April 2006).


\textsuperscript{49} Whittingham, Constable & Turner, supra note 12 at 31, sees Constable’s ‘surliness and independence of mind’ as the reason for his limited public and small number of patrons compared to the more amiable Turner: ‘Whilst Constable stubbornly resisted all pressures to adapt his art to the wishes of his patrons, and consequently received the inevitable lack of acknowledgement, Turner was assiduous in getting commissions and doing what Constable would have considered hack-work. As a result, Turner became rich early on, whilst Constable remained poor, and as success instilled optimism in the one, failure brought pessimism to the other.’ This need to present a more ‘sunny’ Constable for popularization purposes would explain Leslie’s bowdlerized biography.

\textsuperscript{50} Baumol, ‘Unnatural Value,’ supra note 48 at 14.
Others have argued that this rate-of-return outlook is less pessimistic if one excludes the period 1914–1950, during which intense political and economic turmoil caused by events such as World War I, the Soviet revolution, the Great Depression, and World War II affected the market for valuable art. It has also been said that English painters ought to be excluded from the 300-year run, given their 'strong depressing influence on the average rate of return.'\(^{51}\) The scholars just quoted found that ‘the pessimistic conclusion reached by Baumol is mainly due to the behaviour of prices of English paintings . . . and to the years between 1914 and 1950.’\(^{52}\) Generally, ‘English prices behave[d] very erratically during and after World War I, but with a clear downward trend; they recover[ed] during the late fifties.’\(^{53}\)

A painting by Constable sold in 1944 falls squarely within this unpredictable and erratic period in which the market was generally falling. The low price Leaf paid, then, would not necessarily indicate that what he bought was a mere chance that the painting was a Constable, if prices were generally low during this period. In other words, Leaf was not just buying some (fairly remote) chance that the painting was a Constable. In that case, the belief of the seller’s representation that the picture was a Constable and his subsequent failure to have the painting authenticated until he was of a mind to sell five years later was probably more reasonable than it would seem today, looking simply at the price. The object lesson, then, relates to this kind of inference.

The receipt, as quoted in at least some of the reports, states as follows: ‘One original oil painting Salisbury Cathedral by J. Constable, £85.’\(^{54}\) Guenter Treitel infers from the low price that ‘J. Constable’ was written on the receipt, rather than the full name ‘John Constable,’ because the painting was not to be considered a real Constable:

In the usage of art auctioneers ‘John Constable’ would mean that the picture was considered to be the work of the famous painter, but ‘J. Constable’ would not . . . [I]t is hard to imagine that a dealer would have been prepared to give a contractual undertaking that the picture was ‘by John Constable’ when the price was as low as £85.\(^{55}\)

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52 Ibid. at 1363.
53 Ibid. at 1359.
54 This passage is not in the King's Bench Report. However, it is in both the All England Law Reports and the Times Law Reports. See the beginning of Lord Denning’s judgment at Leaf v. International Galleries, [1950] 1 All E.R. 693 at 694 [Leaf, All E.R.]; (1950) 66 T.L.R. (Pt. 1) 1031 at 1032 [Leaf, T.L.R.].
In other words, the low price led Treitel to go so far as to say that the painting must not have been a real Constable, even though, as we will see, at least some of the judges in the case would have been prepared to find such a contractual undertaking had it been pleaded in a timely fashion.

It is worth noting that Treitel gives no authority for his remark about auctioneers’ practice. In any event, the relevant questions would be whether International Galleries was following this practice when it gave the receipt and, further, whether Leaf knew about it. If he did, he could hardly have purported to be taken aback that the painting was not a real Constable when he went to sell it to Christie’s. If he did not, and found out about it only after the fact, then the mistake would be his alone, and not a mutual mistake. According to Lord Denning, ‘[o]n the back of the picture there was a label indicating that it had been exhibited as a Constable and during the negotiations for the purchase the sellers represented that it was a painting by Constable.’

Indeed, International Galleries continued to insist that the painting was authentic when Leaf tried to return it five years later. None of this is consistent with International Galleries’ following a practice of referring to inauthentic Constables as paintings by ‘J. Constable.’

The low price is odd, however, and has caused scholars and teachers of the case to scratch their heads in different ways; Treitel’s claim is probably best understood in this light. The basic instinct is to ask how anyone could have thought they were getting a real work by such a famous painter, John Constable, of such a famous scene, Salisbury Cathedral, for a mere £85 in 1944 (approximately £2,424 in 2004 currency).

However, it turns out that, in fact, of the ten sales of Constable’s work at public auction between 1940 and 1955, seven were for less than £500; two sold for less than £250; and one, Portrait of Lady Croft against a leafy background, dressed in white with a rose, for £100. High prices for Constables were not unheard of in these years. The remaining three paintings auctioned in the period went for prices in the thousands, one for a whopping £41,000 in 1946. However, the prices at the lower

56 Leaf, All E.R., supra note 54 at 693–4; Leaf, T.L.R., supra note 54 at 1032.
57 The 2004 value was calculated using Lawrence H. Officer, ‘What Is Its Relative Value in UK Pounds?’ Economic History Services (30 October 2004), online: <http://www.eh.net/hmit/ukcompare/>. This calculation uses the Retail Price Index.
58 This search under ‘John Constable,’ ‘all media,’ of publicly auctioned sales between 1 January 1940 and 31 December 1955, was performed by Ian Black at Hislop’s Art Sales Index on 27 April 2006.
59 The three sales above £500 were (a) Dedham Mill, Essex, £6600/$26,598, 26 April 1946, Christie’s, London; (b) Hampstead Heath beneath stormy sky with labourers and horses, £3,100/$8,680, 23 March 1955, Sotheby’s, London; (c) Stratford Mill on the Stour, £41,000/$165,230, 12 July 1946, Christie’s, London.
end suggest that Leaf’s £85 in 1944 was not an outrageously low sum to pay for what was genuinely thought by both parties to be a Constable, particularly if it was a not very famous or important view of the cathedral.

It seems likely, then, that what Leaf bought was not a finished or ‘nearly finished’ oil painting with anything like the stature of Salisbury Cathedral from the Bishop’s Garden or Salisbury Cathedral from the Meadows.\(^\text{60}\) Leaf’s picture was probably a small oil sketch that depicted one of the less famous angles – maybe from the river, the lower marsh, or the close. While a large, famous painting like Arundel Mill & Castle sold for £2 200 in 1878, small oils were going for £22, £24, and £43 in the early 1870s.\(^\text{61}\) If the piece was a sketch, with blurry representations of this and that, and no finished piece was actually ever made, it is conceivable that this would be a not very valuable but authentic Constable of Salisbury Cathedral, sold in what was generally a depressed period during which only the most important pieces were still going for high prices.

\section*{What do the judges say?}

None of the three Court of Appeal judges, Lords Denning, Jenkins, or Evershed, gives any indication that there was any reason to believe that Leaf was only buying a chance that the painting was authentic or buying a painting that International Galleries knew was not authentic. Nor is any notice taken of what one might have thought was an excessively low price. The reasonableness of Leaf’s belief that what he was acquiring for £85 was a genuine Constable was presumably well covered in the lower court proceedings.\(^\text{62}\)

At the Court of Appeal, Lord Denning’s reasons focused on the differences between breach of a warranty, breach of a condition, and an innocent misrepresentation. Breach of a warranty that the painting was a Constable would give Leaf access to damages; however, damages were not claimed in the case, either for breach of warranty or breach of

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\(^{60}\) Salisbury Cathedral from the Meadows was the painting that some lobbied for as the picture to be bought for the National Gallery shortly after Constable’s death, given its ‘magnitude, subject, and grandeur of treatment, the best suited to the public collection.’ See Fleming-Williams & Parris, Discovery, supra note 16 at 9–10 (quoted passage at 10).

\(^{61}\) Ibid. at 72.

\(^{62}\) The original trial was before one Judge Drucquer, sitting at the Westminster County Court on 14 December 1949. See Leaf, All E.R., supra note 54 at 693; Leaf, T.L.R., supra note 54 at 1032. The Westminster County Court is now the Central London County Court, and I am told that they retain court records for only six years. For older cases, the National Archives retain court documents only for criminal matters. E-mail from Lesley Dingle, Cambridge University Law Librarian, to Sooin Kim, Faculty Services Librarian, Bora Laskin Law Library (24 January 2008).
condition. Breach of a condition that the painting was a Constable would also have given Leaf the right to return the painting; however, acceptance under the *Sale of Goods Act* is deemed if the chattel is kept for a reasonable time. Five years, Lord Denning said, ‘I need hardly say, is much more than a reasonable time.’ He denied the claim in equity on the basis of an innocent misrepresentation on the grounds that it is ‘much less potent than a breach of condition.” In other words, if the remedy for breach of condition had expired through lapse of time, then any remedy of rescission for innocent misrepresentation must similarly lapse.

In addition to pointing out, as Lord Denning did, that five years was too long, Lord Jenkins added in his opinion that access to the equitable remedy of rescission for an innocent misrepresentation would depend on a plaintiff’s exhausting his remedies at common law. As he put it, ‘in the present case it cannot be said that, apart from rescission, the plaintiff would have been without remedy.”

For some reason Leaf did not claim damages for a breach of warranty. Perhaps his lawyer thought that the claim by International Galleries that the painting was a Constable, while certainly a representation (and an innocent one, thereby triggering access to rescission), did not amount to a warranty. Lord Jenkins explained that the county court judge thought, and he himself agreed, that the representation that the picture was a Constable amounted to a warranty. If it amounted to a warranty, and that was broken, as on the findings of the county court judge it was, then the plaintiff had a right at law in the shape of damages for breach of warranty.

Leaf had been invited by the county court judge at the hearing to amend his claim to that effect, but he declined to do this. Counsel did ask the county court judge “[a]t a very late stage” for leave to amend and add a claim for damages for breach of warranty, but leave was denied. It is not clear whether Lords Evershed and Denning would have agreed with the claim for breach of warranty had Leaf made it.

Presumably the amount claimed in damages for breach of warranty would have been the difference between the value of the painting Leaf received and the value it would have if it had been a genuine Constable. This might well have been £84 if the picture was practically

63 Leaf, supra note 1 at 90.
64 Ibid. at 91.
65 See ibid. at 92.
66 Ibid. at 92–3.
67 Ibid. at 93.
68 Ibid. at 89 (*per* Lord Denning).
69 See ibid. at 95 (*per* Lord Evershed); 89, 91 (*per* Lord Denning).
worthless as a non-Constable (ascribing to it a £1 nominal value) and if £85 was indeed a reasonable price to pay for this picture if a real Constable. If, however, it was quite a nice picture, worth something – say, £35 – then Leaf would receive only £50 in damages. Perhaps this explains why he initially did not want to amend his claim, even when invited to do so – he preferred to receive the full £85 back. When it became clear that he was not going to receive anything at all, however, any sum lower than £85 would have looked more appealing than nothing, and at that point he asked to amend his claim.

Lord Evershed, the Master of the Rolls, gave an opinion that combined Lord Jenkins’s policy point about the need for finality with an emphasis on the uniqueness of the painting as an *object d’art* and the particular difficulties its non-widget-like status raised. He was the only one of the three judges to do this.

Allowing a plaintiff like Leaf to wait, perhaps for long periods, and then to come forward when ‘the fashion in these things, and consequently their value,’ has changed would place courts in the difficult position of having to adjudicate complex issues they are not necessarily well placed to undertake. These matters ‘of great difficulty and complexity’ would lead to ‘uncertainty and considerable litigation,’ in which ‘the alleged rule of equity may work somewhat capriciously.’

As Graham Reynolds has explained,

No one who has worked for any length of time on Constable is likely to profess any undue dogmatism about the exact boundaries which divide his works from those of his imitators . . . He was inexhaustibly inventive in technique, constantly improvising visual equivalents for effects of colour and form which he had been the first to perceive and for which there was no precedent in the work of his predecessors . . . his very unpredictability has presented a special opportunity to pasticheurs and fakers. The cleverest amongst them have been able to pick out for copying those aspects of his multi-faceted style which are most likely to deceive at any given time . . . The most delicate questions of discrimination arise in distinguishing between paintings in which Constable is adopting a new approach and those in which a faker is giving a competent simulation of that process.

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70 Ibid. at 94.
71 Ibid.
72 Ibid.
Divisions of opinions about the line dividing true from false are plentiful and will probably always exist.\textsuperscript{73}

Even famous scenes purchased for large sums have come to be declared dubious. For example, the authenticity of a \textit{Salisbury Cathedral from the Bishop’s Grounds} that was bought for £2 310 on 20 May 1927 and later acquired by the Laing Art Gallery in Newcastle is generally rejected today.\textsuperscript{74}

In other words, it may be that in 1944, the best judgement with respect to the painting purchased by Leaf was that it was a Constable. By 1949, however, the best judgement might well have become that it was not. Courts understandably feel uncomfortable about engaging in this kind of investigation, with its attendant level of uncertainty. They will therefore tend to fall back on \textit{caveat emptor} in the case of art transactions, precisely because, as Lord Evershed put it, ‘the prevailing view at one date may be quite different from that which prevails at a later date.’\textsuperscript{75} If ‘artists and critics of great eminence’\textsuperscript{76} cannot agree on the authenticity of a particular piece and it is subject to subsequent revision in this way, the determination of an ordinary judicial proceeding may or may not establish the truth of the matter in a lasting and meaningful way.

One might sensibly ask whether the mistake as to authorship of the painting was an error fundamental enough to void the contract. Lord Denning characterized the mutual mistake as to who created the picture as a mistake in quality, giving rise to damages for breach of a condition or warranty, not as a mistake in subject matter that would allow the contract to be set aside:

There was a mistake about the quality of the subject-matter, because both parties believed the picture to be a Constable; and that mistake was in one sense essential or fundamental. But such a mistake does not avoid the contract: there was no mistake at all about the subject-matter of the sale. It was a specific picture, ‘Salisbury Cathedral.’ The parties were agreed in the same terms on the same subject-matter, and that is sufficient to make a contract.\textsuperscript{77}

This way of reasoning about mistake is often traced to the famous mistake case \textit{Bell v. Lever Bros. Ltd.}\textsuperscript{78} Here Lord Atkin took a narrow view of a

\textsuperscript{73} Reynolds, \textit{John Constable}, supra note 10 at xi.

\textsuperscript{74} Fleming-Williams & Parris, \textit{Discovery}, supra note 16 at 119.

\textsuperscript{75} \textit{Leaf}, supra note 1 at 94.

\textsuperscript{76} Ibid.

\textsuperscript{77} Ibid. at 89.

\textsuperscript{78} [1932] A.C. 161 (H.C.) at 224 [\textit{Bell}] (‘if parties honestly comply with the essentials of the formation of contracts – i.e., agree in the same terms on the same subject-matter – they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them’).
court’s power to provide relief in situations where there had been a mistake in quality, confining relief to cases where the mistake was as to the ‘identity’ of the subject-matter.\textsuperscript{79} Here there was no mistake as to the identity of the subject matter, namely, a picture of Salisbury Cathedral (rather than a Constable). The authorship of the painting, in other words, was an inessential quality, a mistake about which would not result in the contract’s being set aside.

The subject-matter test is obviously a malleable one, and one might reasonably query Denning’s characterization here – rather than categorizing the authorship of the painting as an inessential mistake in quality, one might think that it was everything that the picture be a real Constable. Indeed, it has been said that the mistake-in-subject-matter analysis is but “a verbal trick.”\textsuperscript{80} Crafting a formulation in which the subject matter is said to be destroyed by the mistake (a contract for the purchase and sale of a Constable) does not decide the issue of whether or not relief should be given for the mistake. This is because it is equally possible to formulate a version in which it is not (a contract for the purchase and sale of a picture of Salisbury Cathedral). The choice of which formulation is the most appropriate is a choice that must turn on something other than the characterization itself.

However, Lord Denning was certainly standing on good precedent in deciding the \textit{Leaf} case as he did. Several judges in \textit{Bell} relied on important and here very relevant passages from a judgment by Blackburn J. in another famous mistake case, \textit{Smith v. Hughes}:

[W]here there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration.\textsuperscript{81}

Blackburn J. also wrote, in a passage quoted by Lord Atkin, that ‘unless there be a warranty making it part of the bargain that it possess some particular quality, the purchaser must take the article he has bought though it does not possess that quality.’\textsuperscript{82} Indeed, Lord Atkin actually gave the example of A purchasing a picture from B where both believe it to be ‘the work of an old master’:\textsuperscript{83} ‘A has no remedy in the absence of

\begin{footnotesize}
\textsuperscript{79} See S.M. Waddams, \textit{The Law of Contracts}, 5th ed. (Toronto: Canada Law Book, 2005) at para. 383. See also \textit{Bell}, supra note 78 at 218 (the mistake must be ‘as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be’).

\textsuperscript{80} Waddams, \textit{Law of Contracts}, supra note 79 at para. 385.

\textsuperscript{81} \textit{Bell}, supra note 78 at 220 (\textit{per} Lord Atkin), 234 (\textit{per} Lord Thankerton).

\textsuperscript{82} Ibid. at 222.

\textsuperscript{83} Ibid. at 224.
\end{footnotesize}
representation or warranty.'84 Nor would a condition exist in his hypothe-
tical, he thought.85

The judges in the case were referred by Leaf’s counsel, Weitzman, to
an article in the Law Quarterly Review written by one H.A. Hammelmann.86
The article discusses a controversial case called Seddon v. North Eastern
Salt Co., Ltd., that purported to preclude rescission for cases of executed
contracts or contracts in which the obligations on both sides had been
performed.87 Hammelmann’s article does at least two things. First, it
criticizes the bar Seddon placed on access to rescission for innocent
misrepresentation: ‘[i]n this paper it is attempted to show that this doc-
trine of rescission is applicable to all cases where restitutio in integrum
is possible, and is not limited to executory contracts, as is stated in
most of the leading text-books’ – at least, as they were in 1939, when
Hammelmann wrote the piece.88 This is the point that Weitzman
wanted the law lords to see. Specifically, even though this was an executed
contract, Weitzman claimed that ‘[h]ere the parties can be restored to
their original position, since the plaintiff can return the picture to the
defendants.’89

However, Hammelmann’s article makes a second point, which is to cry
out for the need to keep mutual mistake separate from innocent
misrepresentation:

[M]utual mistake by the parties will afford a ground for the avoidance of the
agreement [… and] the contract may still be avoided on the ground of
mutual ‘fundamental’ error. The special rules for innocent misrepresentation
only come into play where there is no such mutual and fundamental mistake
… If the view were accepted that rescission can only be granted for innocent
misrepresentation if a ‘fundamental error so as to constitute a complete failure of
consideration’ was caused by it, it seems impossible to discover what practical
value the whole body of case law on innocent misrepresentation could have …
the error in such cases will always be mutual. Thus the remedies and require-
ments would be identical for innocent misrepresentation and for ordinary
mutual mistake and special rules for misrepresentation would be superfluous.90

It is not clear that Hammelmann’s view that the two analyses need to be
kept separate is correct. Innocent misrepresentation is a specialized

84 Ibid.
85 See ibid. at 226.
[Hammelmann, ‘Seddon’].
88 Hammelmann, ‘Seddon,’ supra note 86 at 90 [original emphasis].
89 Leaf, supra note 1 at 88.
90 Hammelmann, ‘Seddon,’ supra note 86 at 101–2 [emphasis added].
subset of the general category of mistake, and cases like Smith v. Hughes did not make the distinction he wanted to see.

In any event, mutual mistake would have been very much on the minds of the judges, as they had only a short time before decided the case of Solle v. Butcher, which Denning cited for his subject-matter test.91 This case recommended the use of ‘voidable’ rather than ‘void’ as a way to construct creative remedies for circumstances in which holding a contract void would create unfairness for third parties. Its ‘soft’ approach to the availability of mistake also came to be thought of as the antithesis to Lord Atkin’s narrow hard-line approach in Bell.92 Solle was also the case in which Lord Denning came out and said point-blank that Seddon was wrong in prohibiting rescission in the case of executed contracts. As he put it, ‘[t]he observations in Seddon v. North Eastern Salt Co. Ltd., have lost all authority.’93

With respect to innocent misrepresentation and the argument for rescission, Lord Evershed pointed to the fact that time itself might change the value of the chattel, so as to make restitutio in integrum by simply giving back the item in exchange for the return of the amount paid impossible:

[I]n the interval there has been a change through wear and tear, or otherwise, in the article which has been sold. A set of chairs attributed to Chippendale might after being used for six years well be said to have suffered damage which, though it does not substantially or greatly alter their value as chairs, may, nevertheless appreciably diminish their market value. Again, the fashion in these things, and consequently their value, varies from time to time.94

In addition to a change in value attributed to wear and tear, as with the Chippendale chairs that get sat on, in the case of paintings like Leaf’s, there is the unpredictable issue of whether or not the authorial attribution is correct and changing views with respect to this.

If rescission were awarded, International Galleries would not be getting back what it thought it had sold – a painting of Salisbury Cathedral by John Constable worth £85 in 1944. It would receive a painting that a court of law had established was inauthentic and that would now be worth considerably less than £85 in 1950, even if the Constable market were generally climbing in the 1950s. Moreover, Leaf had had a painting hanging on his wall for five years that he (and others) thought was a Constable. Whatever value this gave him would also not

91 See ibid. at 89; Solle v. Butcher, [1950] 1 K.B. 671 [Solle].
93 Solle, supra note 91 at 695.
94 Leaf, supra note 1 at 94.
be restored by a simple reverse swap. Hence, even if the prohibition in \textit{Seddon} on rescission for executed contracts was not good law, this was not a case in which it should be awarded, as \textit{restitutio in integrum} would not be possible, at least not by a simple rewinding of the transaction.

There might be a serious problem with \textit{Seddon}. The judges expressed their disapproval in differing degrees. Lord Denning wrote that the observations made there ‘are, in my opinion, not good law.’ \footnote{Ibid. at 90.} Lord Jenkins stated that probably the proposition that ‘no executed contract can after completion be rescinded on the ground of innocent misrepresentation’ is ‘unduly wide.’ \footnote{Ibid. at 91.} However, both judges considered it ‘unnecessary’ to explore this for the purposes of the case at hand. Lord Evershed agreed that it was unnecessary for this case, \footnote{See ibid. at 93.} but he added that he did not think the doctrine was necessarily wrong:

The article that Mr. Weitzman read to us was written eleven years ago. There has been opportunity for Parliament to alter the law if it was thought to be inadequate. I am not saying that that is a ground on which we should conclude that the so-called doctrine of \textit{Seddon v. North Easter Salt Co. Ltd.} is well-stated or is in all respects correct; but the fact that it has stood for such a length of time, even though qualified, is another consideration deserving of some weight, when this matter has further to be debated and to be adjudicated upon. \footnote{Ibid. at 95.}

\textit{Seddon} aside, all three judges agreed that in this case it was better to adopt the bright-line rule that would avoid encouraging litigants to come to court with similar cases, at least to claim equitable relief. The rule would be, as Lord Evershed put it, that ‘[i]f a [person] elects to buy a work of art or any other chattel on the faith of some representation, innocently made, and delivery of the article is accepted ... on acceptance there is an end of that particular transaction.’ \footnote{Leaf, supra note 1 at 94–5.} ‘[I]f it were otherwise, business dealings in these things would become hazardous, difficult and uncertain.’ \footnote{Ibid. at 95.} Lord Denning would add that, as under the \textit{Sale of

\begin{footnotesize}
\footnote{Leaf, supra note 1 at 94–5.}
\end{footnotesize}
Goods Act, acceptance will be deemed to have happened after a reasonable length of time, or, to put it more precisely, after a reasonable time the buyer will be taken to have elected acceptance over rejection:

The buyer has accepted the picture. He had ample opportunity for examination in the first few days after he had bought it . . . Yet he has kept it all this time. Five years have elapsed without any notice of rejection . . . he cannot now claim to rescind.102

As we have seen, it is not clear why the plaintiff did not accept the invitation to amend the claim to ask for damages for breach of warranty when he had the opportunity to do so. John McCamus has written that the damages in this case, measured as per the usual expectancy measure, ‘would yield whatever (presumably impressive) amount [would be] needed to buy an actual Constable painting of Salisbury Cathedral, less eighty-five pounds.’103 This would lead one to think that Leaf did not ask for damages because he thought there was no chance that a court would award him such a large amount of money; there would simply be no appetite for giving such an award. However, here again is the object lesson in speculation.

If £85 was a perfectly reasonable price to pay for this Constable in 1944, then Leaf would rather return the painting and get his £85 back than have the worth of what his painting would cost as a Constable (£85) reduced by the value of what he got (a small oil painting that would probably be worth something greater than £1). This would leave him with some figure less than £85 and, depending on how nice that picture was, perhaps something very close to it – making the entire action, financially speaking, a loss, as well as leaving him with a picture he probably never wanted to see again. Perhaps he had come to believe that Christie’s was right to deny its authenticity, or perhaps he took their word over International Gallery’s. At any rate, Leaf seems to have thought, at least initially, that it was better for him to obtain the full £85 and get rid of the painting.

There is at least one way in which the price of painting would be relevant, however, and it does not relate to the question of whether or not the picture was an authentic Constable. If Leaf had paid more for the painting than he did, it seems less likely that any of the judges would have been willing to categorize its authorship as a mistake as to an inessential quality rather than a fundamental mistake as to subject matter. If Leaf had paid £40 000 for the Constable, for instance, it is hard to see how one could say that he got what he bargained for under the contract – a picture of Salisbury Cathedral, yes, but not a real Constable. Yet

102 Ibid. at 91.
103 McCamus, Law of Contracts, supra note 4 at 696.
when Lord Atkin provided his picture hypothetical in *Bell*, he included the fact that ‘a high price is paid’ for the piece that both parties believed to be painted by an Old Master.\(^{104}\) The usual test for mistake in assumption includes value in the list of situations in which relief for mistake will not be given.\(^{105}\) Nonetheless, the low price Leaf paid likely made it easier for the judges to conclude that this was not a case in which the call for relief was compelling. As it was, they probably thought that Leaf was left with a perfectly nice picture of Salisbury Cathedral for which he had not paid a tremendous amount of money and which he could continue to hang in his living room.

### IV What does Leaf stand for?

University of Toronto professor James Bryce Milner writes in the introduction to his *Cases and Materials on Contracts*, published in 1963, that ‘[e]arly in their legal education, many law students pick up a virus from some unknown source that drives them to ask of each case, what does it stand for?’\(^{106}\) ‘The correct answer,’ he thought, ‘is that the case “stands for” what it is, a little segment of human history, history of an event or of an idea, or of both. The important question is: What is to be done with this case?’\(^{107}\) Is it a reported case or an unreported one? If it is reported, is it known? Is it included in law school casebooks and thereby known? Has it been included as an example of a case that has been wrongly decided or one that has been decided correctly, in the eyes of the casebook compiler and subsequent generations of law teachers? What do treatises and article literature say about it?

Like the reporter who must decide for the profession at large which cases are important for the profession to know, the casebook compiler takes on the task of deciding what cases are worth including in a collection for students, and to what end. American legal historian Willard Hurst has put it this way:

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104 *Bell*, supra note 78 at 224.
105 See, e.g., George E. Palmer, *Mistake and Unjust Enrichment* (Columbus: Ohio State University Press, 1962) at 39 (‘relief will be given for mistake as to existence or identity, but not for mistake as to quality, attributes, or value’) [Palmer, *Mistake*]. See also *Wood v. Boynton*, 64 Wis. 265, 25N.W. 42, 54 Am. Rep. 610 (1885), a case often referred to in American literature on mistake in assumption in which a stone both parties mistakenly thought to be a topaz was sold for $1 when it was in fact a diamond worth $700 and the court refused to award rescission on the grounds that there had been no mistake as to identity or subject matter.
107 Ibid.
The case method demanded of its sponsors the daring responsibility of selecting from this mass a comparative handful of opinions, as those which embodied the essentials of the law; these selected opinions must then be made available for the simultaneous examination of a class, through their publication in ‘casebooks.’

To call it ‘daring’ would seem to build in an admiration for the process. One might simply say, without praise or blame, that the new format made the selection process unavoidable.

Milner seems to have been uncomfortable with something about this process of canonization or codification of cases in law school casebooks. He referred to his own work as ‘admittedly’ a casebook. He also emphasized the idiosyncratic and personal nature of such collections. As he puts it, ‘the objectives of legal education and the consequent arrangement of topics in a course are highly personal.’ However, casebooks live on past the lives of their original compilers. Issues such as the names and arrangement of topics, why certain cases are included but not others, or why the editing was done as it was are not necessarily transparent to subsequent generations, who inherit the casebook but are not privy to how or why those decisions were made. Much of what the original compiler meant for students to understand from his or her presentation of the material can easily be lost in the various translations that take place over time and space. In the hands of subsequent generations of teachers, what that case ‘stands for’ for the purposes of classroom elucidation can come to be something quite different than what the original compiler had in mind.

Case-in-context studies usually focus on finding out little-known facts about a famous case – information about the litigants, the lawyers, the

\[\text{108 J. Willard Hurst, } \textit{The Growth of American Law: The Law Makers} \text{ (Boston: Little, Brown, 1950) at 264.}
\]

\[\text{109 Hurst tended to describe things in terms of a rugged individualism that fit with the} \]

\[\text{‘bastard pragmatism’ he saw in American life, based primarily on the Midwestern} \]

\[\text{society he studied most intensely. His view of the case method, however, cannot be} \]

\[\text{described as all praise, specifically for the way in which it failed to integrate law and} \]

\[\text{society. See, e.g., ibid. at 265–6 (‘The case method isolated the study of law from the} \]

\[\text{living context of the society’).} \]

\[\text{110 Milner, ‘Introduction,’ supra note 106 at vii.}
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\[\text{111 Ibid. at xix.}
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\[\text{112 Milner died from a heart attack on a flight from Ottawa to Toronto in 1969, at the age} \]


\[\text{of His Work, Career, and Writings in Community Planning’ (1982) 14 Environments 35} \]

\[\text{at 52 [Page & Bogart, ‘James B. Milner’]. A park in the city of Toronto, James Bryce} \]

\[\text{Milner Park, was dedicated to Milner in 1984 in recognition of his work on city} \]

\[\text{planning. For a view of the park and dedication plaque, see ‘James Bryce Milner} \]

\[\text{Park,’ online: } \text{Torontohistory.org <http://torontohistory.org/Pages_JKL/} \]

\[\text{James_Bryce_Milner_Park.html>}.} \]
judges, or the formation of the trial record. But another kind of context, important to the process of understanding how a case comes to be known and what we say it ‘stands for,’ lies in how a case is canonized in law school casebooks. Milner’s inclusion of the Leaf case in his contracts casebook provides an opportunity to see up close how this (normally invisible) process works. Various questions are relevant to this examination. First, what kinds of accompanying material were included with the case? Second, what other cases were used with Leaf in its Canadian casebook iteration that would be different from the way Leaf might be included in the casebooks of other countries? And, third, how did the presentation change over subsequent editions, and what was being communicated through those changes? This is all context, important to seeing how a chestnut or leading case in the law school curriculum, such as Leaf, comes to be known in that way that it is in a local time and place.

When Milner included Leaf in his casebook, it was in a chapter on ‘Absolute and Conditional Promises’ in a subsection on ‘Effect of Representations.’ The diagram Milner included in his introduction to this section appears below.

It is difficult to make out what the relationship is between the circles in this diagram (See Figure 1). Is the idea that the express terms of the contract may contain promises or conditions, outside of which there is a realm of representations that can be either innocent or fraudulent? Do promises include warranties (e.g., ‘I warrant that this painting is a genuine Constable’)? Does condition’s ‘performance of a promise’ encompass the Leaf scenario (i.e., if this painting is not a genuine Constable, then there is a breach of condition)? No doubt this diagram made perfect sense to Milner; if one has to guess at its meaning, however, it is easy to see that not every contract law teacher would be eager to use it in his or her classroom.

Milner also followed up excerpts of cases with notes on various points, in the familiar ‘cases, notes, and materials’ format for casebooks. These are ordinarily fairly self-explanatory; Milner, however, seems to have been in the habit of including quite cryptic points in his notes and questions on legal method. So, for instance, Solle v. Butcher, a lease case involving a mistake about whether or not the flat in question was under rent-control legislation, is followed by a ‘Note on Advertising.’ This was probably a point Milner liked to make in class in relation to something in the case that would be clear when he explained it. From what is written there, however, it is difficult to see what that relevance or

113 See, e.g., Maute, ‘Peevyhouse Revisited,’ supra note 2; Threedy, ‘A Fish Story,’ supra note 2; Vogel, ‘Cases in Context,’ supra note 2.
114 Milner, Contract, supra note 3 at 545.
115 Ibid. at 600.
connection was. Again, it would be of limited help to subsequent teachers, who simply would not know why it was included.

Leaf is pared down, in Milner’s presentation, to just two paragraphs of Lord Denning’s decision.\textsuperscript{116} Immediately preceding this excerpt is a much longer reproduction of parts of the majority and dissenting opinions in a Newfoundland case, \textit{O’Flaherty v. McKinlay}.\textsuperscript{117} This is a uniquely Canadian presentation, as casebooks in other Commonwealth countries that might be interested in Leaf are not likely to have any interest in a case from Newfoundland.

The plaintiff in \textit{O’Flaherty v. McKinlay} was new to cars when she bought a second-hand vehicle from the defendant car dealer and garageman. She was told the car was a 1950 Hillman model, when in fact it was an inferior 1949 model. Like Leaf, the plaintiff attempted to rescind the

\textsuperscript{116} Ibid. at 599.
\textsuperscript{117} See ibid. at 594–8.
contract after accidentally learning what model year it really was. The car had been driven about 7,000 miles in the summer of 1950, and it stayed outdoors for a winter unused after the plaintiff learned of the mistake. One of the majority judges in the case wrote that the ‘the representation as to the year-model of a car is very material. A car is not just a car.’\textsuperscript{118} Given that a 1950 Hillman would command a better price on resale than a 1949 model, Dunfield J. wrote that there was ‘an \textit{error in substantialibus}.’\textsuperscript{119} Walsh C.J. wrote, in a part of the judgment that Milner’s casebook does not include, that ‘the 1950 Hillman was different in kind or in substance from the 1949 Hillman … The representation in this case was going to the root of the contract.’\textsuperscript{120} The remedy of rescission was awarded.\textsuperscript{121}

However, the dissenting judge, Winter J. – also excerpted in Milner’s original edition – wrote that the equitable remedy should be denied, as it was in the \textit{Leaf} case. In his eyes, the court should say that the buyer had accepted the goods and that it was too late to repudiate the contract and return them:

\begin{quote}
[I]n both instances the buyer kept the goods for a much longer time than could be considered reasonable before seeking any redress. In actual fact, neither buyer made any examination at all … Both chose to rely entirely upon what the seller had said and both afterwards complained, it seems to me, most illogically, that the seller was unreliable.\textsuperscript{122}
\end{quote}

Winter J. said that he could see no difference at all between the two cases.

Milner wrote in the introduction to his casebook that he made an effort to include Canadian cases in his collection: ‘I do not apologize for any undue number of Canadian cases. Others may think there are too few. But since this book is intended for use in a Canadian law school it is only sensible.’\textsuperscript{123} \textit{Leaf} was being included in English and Australian casebooks, and so, since Canada was a Commonwealth country that often looked to the English Court of Appeal and House of Lords in private law contracts cases, it would make sense for a Canadian casebook to include it also.\textsuperscript{124} This was especially true if a recent Canadian case reported in the \textit{Dominion Law Reports} dealt explicitly with \textit{Leaf}. Indeed,

\textsuperscript{118} \textit{O’Flaherty v. McKinlay}, [1953] 2 D.L.R. 514 at 528 [\textit{O’Flaherty}].
\textsuperscript{119} Ibid.
\textsuperscript{120} Ibid. at 521.
\textsuperscript{121} For criticism of the case and \textit{error in substantialibus} in Canadian law generally, see G.H.L. Fridman, ‘\textit{Error in Substantialibus}: A Canadian Comedy of Errors’ (1978) 56 Can.Bar Rev. 603.
\textsuperscript{122} \textit{O’Flaherty}, supra note 118 at 531.
\textsuperscript{123} Milner, ‘Introduction,’ supra note 106 at x.
\textsuperscript{124} See, \textit{e.g.}, Cheshire & Fifoot, \textit{Cases}, supra note 3 at 179; McGarvie et al., \textit{Cases}, supra note 3 at 446–8.
placing *O'Flaherty* before *Leaf*, as well as including more of it, would seem to suggest that Milner was signalling its priority over *Leaf* itself.

The *Dominion Law Reports* was under the chief editorship of Milner’s dean, Cecil Wright, at this time. Milner’s colleague Bora Laskin was one of the associate editors. The year 1953 was not long after those two teachers, along with John Willis, left the law school operated by the Law Society of Upper Canada at Osgoode Hall to create the new law school at the University of Toronto in 1949. It was quite a dramatic battle, and ‘[m]any members of the Law Society and others believed the controversy had been engineered by [Sidney] Smith [then president of the University of Toronto] and Wright.’ Wright was a former student of Smith’s and an old friend, and Smith was supportive of what Wright wanted to do with legal education in Ontario.

Milner, a native of Nova Scotia, graduated from Dalhousie Law School in 1939, worked for the Foreign Exchange Control Board in Ottawa, and joined the faculty at Dalhousie Law School, where he taught from 1945 to 1949. He attended graduate school at Harvard in 1949 and came to teach at the new law school at the University of Toronto in 1950, the same year as another new teacher in the group, Wolfgang Friedmann. ‘Wright, Laskin, Willis, Milner, and Smith were all Harvard trained. It would certainly be American ideas and teaching methods that would guide the direction of the faculty in the future.’ Teaching the common law using casebooks was one of the hallmark features of this style of legal education. Interestingly, the Socratic method was not thought to be necessarily connected to the case method. Wright, for

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126 Laskin gave a tribute to Milner following his death, when Laskin was Chief Justice of the Supreme Court of Canada. See Bora Laskin, ‘A Tribute to James B. Milner,’ *Canadian Association of University Teachers Bulletin* (October 1969) 26.


128 Smith had been sent from Dalhousie to the Harvard Law School in 1920/1921. He returned to teach at Dalhousie Law School, using, among other texts, Samuel Williston’s *Cases on Contracts*. Smith then followed the mentor who sent him to Harvard, Alexander MacRae, to Osgoode Hall in 1925. MacRae and Smith convinced Wright to attend Harvard in 1926. See Kyer & Bickenbach, *Fiercest Debate*, supra note 125 at 47–55. When Smith was president of the University of Toronto, he took a keen interest in the law school. See Friedland, *University of Toronto*, supra note 127 at 364–7 (on Smith’s appointment) and 411–5 (on Smith’s achievements and departure from the university to federal politics).


130 Ibid. at 236–7.

131 Friedland, *University of Toronto*, supra note 127 at 439.
instance, never questioned students. Milner did use a Socratic approach, but it was said that ‘[i]t was not his style to threaten. He preferred instead to disconcert [by asking many questions without providing answers].’

The first published casebook was prepared by Wright’s predecessor as head of the school at Osgoode Hall, John D. Falconbridge, and appeared in 1927. There were, however, many mimeographed collections of cases in use at Canadian law schools, both at an early and a later date (the use of photocopied collections of materials continues to the present day, given the small size of the Canadian market for published law school teaching materials).

Wright himself created such a collection of contracts cases for the 1928/1929 academic year, which he tried unsuccessfully to publish in the early 1930s. The technology involved in mimeographing was extremely cumbersome. Nonetheless, reproductions were circulating at other Canadian law schools, and Wright was frequently asked to provide copies. Indeed, one of these requests came from Milner himself when he was teaching at Dalhousie in 1947. Letters from this time include many negative responses to this request, since, as Wright wrote, the contracts casebook has ‘not been [available] for several years.’ However, Wright did get involved in distribution of the collection in 1948. It remained, as Wright put it, ‘a straight reprint of my old book.’ With his consent, a supplement to the text was compiled by the University of British Columbia.

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133 Page & Bogart, ‘James B. Milner,’ supra note 112 at 44.
136 In one letter Wright wrote to a colleague, ‘I admire your courage in entering the mimeographing field. There are times when I wish I had never heard of the mimeographing machine … mimeographing, like marriage, should not be undertaken lightly or inadvisedly.’ Cecil A. Wright to Gilbert D. Kennedy (10 June 1947), Toronto, University of Toronto Archives, Thomas Fisher Rare Book Library (Cecil Augustus Wright, Personal Papers, Faculty of Law (1926–1968) A1982-0041, Box 24 (Casebooks-1946-4)).
137 J.B. Milner to Cecil A. Wright (23 May 1947), ibid.
138 See, *e.g.*, Cecil A. Wright to Sydney D. Milne (12 May 1947), ibid.
139 Memo from Cecil A. Wright to Dean Falconbridge (8 June 1948), Toronto, University of Toronto Archives, Thomas Fisher Rare Book Library (Cecil Augustus Wright, Personal Papers, Faculty of Law (1926–1968) A1982-0041, Box 24 (Casebooks-1948-4)).
140 The letters from Gilbert Kennedy setting out the proposal and Wright’s acceptance of it are located in Box 24 (Casebooks-1947-3). Consent here was key. Apparently Wright was furious to discover in 1933 that Jacob Finkelman, teaching in what was then the law
When Milner eventually published his own collection in 1963, he acknowledged Wright’s earlier version: ‘Some faint resemblance to Dean Wright’s original casebook on contracts may still be found, and I should be most ungrateful if I did not acknowledge his contribution to all Canadians teaching on this subject.’ The earliest mimeographed versions of Milner’s collection use the abbreviations ‘C.B.’ and ‘C.B.S.’ to indicate where a case came from Wright’s collection or from the UBC supplement, respectively.

Unfortunately, Wright’s papers do not include a complete dated edition of his collection or of the supplement. They do, however, include one of two volumes of some version of the original casebook, along with an index listing the cases included in both volumes. The latest cases are from 1933, so it probably dates from the time when he attempted to have the work published. Leaf and O’Flaherty, being 1950 and 1953 respectively, were clearly much too recent to be included, nor would they have been included in the UBC supplement in the late 1940s. Neither was listed in the 1951/1952 or 1953/1954 versions of Milner’s casebook.

Wright was involved with a number of casebook projects, and it seems very likely that he withdrew from contracts and any further bother about the casebook when Milner arrived in 1950. Torts became Wright’s primary focus, and this casebook was published in 1954. Wright’s papers include a file of telegrams, invoices, and receipts relating to the contracts casebook, which was being sold for $6 apiece throughout the years 1954, 1955, and 1956 to various Canadian law schools through department at the University of Toronto, was using a mimeographed collection that took material from Wright’s without acknowledgement. This led to a minor incident between the Law Society school and the university. See Kyer & Bickenbach, supra note 125 at 117–8.

141 Milner, Contract.
142 See supra note 136 at Box 23 (Contracts: Syllabus: 1953–54).
145 There is a chapter on misrepresentation, with one subsection on fraud and another on innocent misrepresentation. However, the subsection ends with Bell, supra note 78. See ‘Book II,’ supra note 143 at 458.
146 See note 142 supra.
147 See Cecil A. Wright, Cases on the Law of Torts (Toronto: Butterworths, 1954). See Kyer & Bickenbach, supra note 125 at 90–6 (describing Wright’s interest and work in torts). Wright was in fact partway through the proofs on the fourth edition of his torts casebook at the time of his death in 1967. See Kyer & Bickenbach, supra note 125 at 269.
some kind of publication arrangement with the University of Toronto Press. The work is always referred to on these slips of paper as ‘Wright’s Cases on Contracts’ or ‘Wright’s Cases on Contracts (ed. by J.B. Milner),’ but all the correspondence was being directed to and handled by Milner. It seems likely, then, that Wright had long since removed himself from the field (perhaps as early as the 1930s) and that it was Milner’s decision to include *Leaf* and *O’Flaherty* (sometime after 1954).

Milner’s inclusion of *O’Flaherty*, a recent case from Wright and Laskin’s *Dominion Law Reports*, at a time when all three were teaching in the same program gives a good sense of the multiple ways in which University of Toronto fingerprints were all over this particular story of casebook canonization. Ultimately, however, it is difficult to know what exactly Milner had in mind when he included *Leaf* and *O’Flaherty* in his casebook in the way that he did.

The ‘Note on Legal Method’ following the *Leaf* excerpt reports Lord Evershed’s query as to whether it was proper for the court to overrule *Seddon* when the legislature had had ample time to do so and had not. ‘Do you consider this fact, if it is a fact, to be sufficient reason for the Courts not to “reform” the law?’ Milner was evidently not very keen on emphasizing the point in *Seddon* itself about the availability of rescission in the case of an executed contract. He did not include the parts of Winter J.’s dissent in *O’Flaherty* that deal with issues relevant to the *restitutio in integrum* argument. Winter J. wrote that ‘a few days and a hundred miles or so of driving are very different from [what the plaintiff did here, which was to keep the car for] five months and [drive it for] 7,000 miles.’ Unwinding the transaction would mean giving the car dealer a car significantly less valuable than the one he had sold: it would have an additional 7 000 miles on it and had been left outside for an entire Newfoundland winter.

The pairing of *O’Flaherty* with *Leaf* continued in subsequent editions of Milner’s casebook, four of which were issued under the editorial hand of

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148 The schools included the University of British Columbia, the University of New Brunswick, the University of Saskatchewan, and the Law Society of Upper Canada.
149 See supra note 136 at Box 23 (Casebooks – Contracts).
150 Milner, *Contracts*, supra note 3 at 599.
151 *O’Flaherty*, supra note 118 at 533.
152 But see ibid. at 523 (Walsh C.J. describing the deterioration as slight and, in any event, not sufficient grounds on which to refuse rescission), 526 (Dunfield J. noting that, according to one witness, 7000 miles was not very serious, as the total mileage on this car was still less than 15 000 miles, and also noting that keeping the car outdoors was not very serious, given that no evidence was heard about the battery freezing – ‘it is a known fact that a good many people keep cars in the open during the winter, and most people keep them in unheated garages’).
contracts scholar and professor Stephen Waddams and the last of which appeared in 1985 with a republication of Milner’s original introduction. Waddams omitted Milner’s note on legal method in the second edition, moved both cases to a section on mistake in the third edition, and kept both cases in mistake in the same order in the fourth – O’Flaherty, then Leaf.\textsuperscript{153} Subsequent multi-authored editions of the casebooks continued to include both cases; these collections reversed the order of the cases, however, with Leaf before O’Flaherty, and reproduced much more of the text of Leaf than the two paragraphs from Lord Denning that Milner used.\textsuperscript{154} Once more than one author is involved in the process of creating a casebook, it becomes much more difficult to say who made the decision to edit a case or draft a note in a certain way. At the very least, the choices made would need to make sense to the other casebook editors, taking us even further away from some of the ‘highly personal’ (and even idiosyncratic) choices Milner made.

Yet consider the following small example of the way in which the original text carries on with a life of its own. Milner recorded O’Flaherty \textit{v. McKinlay} as a case coming from the Newfoundland Court of Appeal, when in fact it was decided in the Newfoundland Supreme Court.\textsuperscript{155} This was probably because in Newfoundland before 1975, both trial and appeal superior court functions were discharged by a single court, the Supreme Court of Newfoundland.\textsuperscript{156} The appeal court was the trial court sitting \textit{en banc}.\textsuperscript{157} It is nonetheless worth noting that this particular way of referring to the court was reproduced in a total of six editions.\textsuperscript{158}

What stands out when one looks at the cases in the ‘new’ way – that is to say, with Leaf first and in greater detail – is how very odd it is that a one-year


\textsuperscript{155} Milner, \textit{Contract}, supra note 3 at 594.

\textsuperscript{156} See Law Courts of Newfoundland and Labrador, ‘History of the Court of Appeal,’ online: Courts of NL <http://www.court.nl.ca/supreme/appeal/history.htm>.

\textsuperscript{157} Ibid.

\textsuperscript{158} See Waddams, \textit{Milner’s Cases and Materials on Contracts}, supra note 153 at 806 (2d ed.), 727 (3d ed.), 711 (4th ed.); Waddams et al., supra note 154 at 705 (1st ed.), 749 (2d ed.), 748 (3d ed.). Thanks to Stephen Waddams for pointing out what Milner probably meant in calling the court the ‘Court of Appeal,’ namely, that it was Newfoundland’s appellate court, not that this was necessarily the official name.
difference in the model of a Hillman automobile in the 1950s is enough of a
mistake to vindicate the buyer whereas an error as to authorship of a picture
of Salisbury Cathedral purporting to be painted by John Constable is not.

Hillmans are vintage cars today, given their status as an extinct British
icon; in the 1950s, however, they were the very embodiment of the ordinary
car – as one collector puts it, they were an important part of ‘daily life’
because of their ‘simplicity, reliability, inexpense and practicality.’

In other words, at the time, the car was no Rembrandt. The oddity arising
from such different attitudes toward a mistake about the model year of an
ordinary car and a mistake about the authorship of a Constable would
have been difficult to see in Milner’s presentation, primarily because one
got so little of the Leaf case and, in particular, nothing of Lord Evershed’s
judgment. And, indeed, the editing of O’Flaherty omits some of the best
passages that would lead one to think about the incongruity.

So, for instance, Winter J. wrote in a part of the dissent that Milner did not
reproduce that establishing the truth or falsity of the model year of the car
could be done by a simple reference to records – serial numbers and so on; it was
not a matter of calling in experts and balancing their opinions one against the
other in such abstruse matters, to return to the Leaf case, as brush strokes and
pigments.

The truth of whether the Hillman was a 1949 or a 1950 model ‘lay under
the bonnet.’ It was not the kind of thing that experts would disagree
about or potentially change their opinions on over time. Ordinary used
cars do not appreciate over time, nor does their value fluctuate in
some (potentially complicated) way as a result of world wars or ‘the fick-
leness of taste whose meanderings defy prediction.’

Yet, nonetheless, Dunfield J. can be heard to exclaim in O’Flaherty, ‘A motor car is not
just a unit, such as a pound of tea, indistinguishable from other units.’

Why all this sensitivity toward the differences between the model year
of an ordinary car and none at all to an authentic versus an inauthentic
John Constable painting? The majority judges in O’Flaherty were clearly at
ease with raising the bonnet of the Hillman in order to find ‘truth’ and
provide what they thought was the best remedy – whereas the issue of the
authenticity of Leaf’s painting was not something the judges in that
case – with the exception of Lord Evershed – felt comfortable even
talking about. Constable made the following comment when he prepared

160 O’Flaherty, supra note 118 at 530.
161 Ibid. at 535.
163 O’Flaherty, supra note 118 at 536.
Salisbury Cathedral from the Bishop’s Grounds for the bishop’s daughter’s wedding present, which seems apt here: ‘I do not think Mr. M. [the Bishop’s son-in-law] admires it – but speaking to a lawyer about pictures is something like talking to a butcher about humanity.’ 164

Conclusion: What does it all mean?

It seems clear from the discussion above that the kinds of assumptions we often make in understanding cases like Leaf for teaching and scholarly purposes can be quite wrong. The cases as we encounter them in their appellate court form are necessarily distillations of fact and legal issues, and the edited casebook versions are even more so. As John Noonan puts it in Persons and Masks of the Law, the cases in law school casebooks can become like ‘so many severed heads, detached from the persons who carried them.’ 165 Those cases, like any reported case, cannot include everything, and they will often leave out key information that is important to understanding why they were decided as they were. If £85 was a perfectly reasonable price to pay in 1944 England for what might have been a small oil sketch of an obscure angle of Salisbury Cathedral by Constable that never made it to a finished work, then much of what has been said about the Leaf case has been off point.

This object lesson in speculation would be of only historical interest if we did not live in a precedent-based system, which presupposes that we (lawyers, judges, teachers) will know how to ‘go on’ with cases like Leaf and O’Flaherty – how to formulate what they stand for and how to use them in subsequent cases. As Milner puts it in his introduction, quoting Benjamin Cardozo, the common law never is, it ‘is always about to be.’ 166 That process of interpretation requires accepting or formulating some authoritative account of what the cases were about, even if there are multiple versions of this, as there are multiple views of Salisbury Cathedral. 167 Such interpretations can be more or less factually grounded; they can bracket reality to a greater or lesser extent.

164 Quoted in Whittingham, Constable & Turner, supra note 12 at 9.
166 Milner, ‘Introduction,’ supra note 106 at xvi [emphasis added].
167 See Guido Calabresi & A.D. Melamed, ‘Property Rules, Liability Rules, and Inalienability: One View of the Cathedral’ (1972) 85 Harv.L.Rev. 1089 at 1128 (where the authors claim that looking at cases in an ad hoc way to see what categories emerge ‘affords only one view of the Cathedral’). Thanks to Stephen Waddams for suggesting I allude to the reference to views of the cathedral from this classic work in my title here.
Noonan, for one, lamented what he saw as the tendency to bracket too much reality by providing understandings of cases that exclude the lawyers and how they participated in helping to shape the case, give very little attention to the lives of the litigants, and express a ruthless preference for policy over social interests. He called this exclusive focus on doctrine an ‘abstract indifference.’ More recently, law and economics contracts scholar Victor Goldberg has turned to an exposition of case-in-context studies, ‘exasperated by various features of the reported decisions, including, but not limited to, outcomes. Too often [he finds] the facts as stated to be incomplete, irrelevant, or inaccurately stated.’ Goldberg sees this as a problem related, in many cases, to ‘a lack of understanding about the underlying economics of the transactions in dispute.’

Yet we know that some bracketing of fact and reality is required in order to use cases in the common law and that not all the facts that can be included should be included in a reported case. A completely fact-specific formulation would make for a system in which every situation was its own unique case, essentially adding up to no system at all. As Milner puts it, quoting Alfred Lloyd Tennyson, we would be left with ‘the lawless science of our law, That codeless myriad of precedent, That wilderness of single instances.’ The question is where, when, and how much reality can be bracketed in this way, in the service of generating the kind of legal principle that has any hope of being followed in subsequent cases but will not get something fundamentally important wrong about why a given case was decided the way it was.

So, for instance, is the relevant difference between Leaf and O’Flaherty that Leaf may or may not have been an experienced buyer, whereas we know that the plaintiff in O’Flaherty was new to cars? Or is it the case that Winter J.’s dissent was correct and the difference between ordinary used cars and art is of no import? Or was Winter J. correct for used cars but not for works of art? Or is Leaf ultimately the best way of dealing with art, however one ought to deal with more ordinary objects?

168 Noonan, Persons and Masks, supra note 165 at 7.
170 Milner, ‘Introduction,’ supra note 106 at xv [emphasis added].
171 See O’Flaherty, supra note 118 at 524 (describing the plaintiff as ‘a young lady who had not owned a car before’) (per Dunfield J.), 526 (emphasizing that the plaintiff was ‘a novice driver’) (per Dunfield J.).
The pedagogical point here might simply be to highlight the incongruity raised by the decisions in these two cases. It might also be to think about whose reasoning is more convincing – the reasoning that does not take into consideration what kind of object was in question and the reasoning that does (e.g., Lord Denning’s or Lord Evershed’s). The price of the painting may not have been important *vis-à-vis* the authenticity of the painting and the innocent representation made by International Galleries that it was a Constable; however, the low price paid may well have been key in terms of the judges’ understanding of what kind of mistake was made, one of an inessential quality rather than the subject matter of the contract. In other words, the price paid was probably important, but not in the way that it has usually been thought to be. This question of price is important, and a good example of the kind of context that case-in-context studies can be used to reveal. However, there is also the issue of a case’s extended context and how it comes to be known in a specific time and place.

Perhaps the best way to think about the process of canonization of casebook cases is to imagine that as a case moves on through various editions of a casebook, being edited or moved from one section to another, placed with other cases in different combinations, or followed by different notes and comments, it simply becomes another case. I mean this only in the modest sense that the experience students have with it will depend very much on what they encounter in the edited casebook and how their teacher interprets this material, its arrangement and emphasis. That is one way of understanding the point that has been made about the case method from its earliest days at Harvard Law School – and repeated by Milner at the outset of his remarks – that there are as many case methods as there are teachers.¹⁷²

The curious want to know, however, whether there is a real case that exists underneath all that interpretation. There is a full report, but that will probably not contain the complete picture. There are real facts, but these may well be lost, no matter how hard we search for them. In the ordinary course, one cannot help but think that Clifford Geertz was right to note that ‘whatever the law is after[,] it is not the whole story.’¹⁷³ What, then, is the law after? One is tempted to say that, at least in its leading cases, the common law at least is after just enough fact that the scenario makes sense but not so much that it would unduly complicate a case’s ability to ‘stand for’ a principle. Indeed, an inconvenient fact might well be better omitted for the use value of the case from the

point of view of doctrinal development – or the common law ‘working itself pure’ as Lord Mansfield famously put it.

It might well be a virus, as Milner called it, to always want to know what a case stands for. It seems a rather unavoidable one, however, given a common law system and a system of legal education that puts cases at its core, as the case method does. Milner identifies the correlative virus to the students’ desire to know what each case stands for, the teacher’s drive to ask of each case ‘[i]s it rightly decided?’ That must come, in part, from finding that the cases in the casebooks contradict one another, so that some of them at least must be wrong. As between a majority and a dissent in a given case, one of the two is usually better argued, better grounded, and so on – although different teachers may well disagree about which one that is and why. So, for instance, in Sherwood v. Walker, one might think that a policy of minimal judicial interference is best – let losses stay where they fall – and so the majority decision to set the contract aside and deny the plaintiff-buyer’s request to order delivery of the cow was correct. Or one might take the view that the dissent was more fair – the contract should not be set aside because this would deny the plaintiff-buyer the fruits of his legitimate (and, as it turned out, correct) speculation. The cases in the collection take on a life of their own, and, depending on the teacher, the case that Milner chose as a clear-cut illustration of a leading principle might be, according to another, wrongly decided.

What happens when we discover new information about a leading case or come to think of it in a different way? Does that, or should that, change how we will use it in the future – either in terms of its pedagogical service or in terms of its scholarly standing as a leading precedent for some principle? What if what is dug up – to use the archaeological metaphor often employed in terms of case-in-context studies – radically (or even marginally) changes the way we see a case? Are past decisions that used the older view of the case wrong? Ought future decisions to take the new view into account? What if the new theory is wrong or involves (as it inevitably does) some measure of (controversial) speculation?

176 See also Palmer, Mistake, supra note 105 at 95, for other comments supporting the dissent in Sherwood v. Walker.
177 See Simpson, Leading Cases, supra note 2 at 12; Threedy, ‘Legal Archeology,’ supra note 2.
178 Noonan, Persons and Masks, supra note 165 at 147–9, reports an account of Justice Cardozo’s involvement with the American Law Institute in anticipation of deciding
One thing that it is clear is that we make the leading case a leading case by what we choose to say about it – whether we reproduce it in a casebook or discuss it in a scholarly work. We can change what we say about the case – take it out of the casebook or excise it from the canon. A case can come to stand for something much more general than was ever contemplated when that case was decided. A case will become the shorthand way to refer to a legal rule that has nothing to do with the parties to it and the particular situation they found themselves in. A judge like Cardozo can engage in expert massaging of the facts that influences what the case will stand for. Collectively, this phenomenon, the transformations it entails as the cases come to be expressed in reports and, ultimately, in casebooks and other compilations of teaching materials, is how we make a common law in the law school curriculum. It is not clear that this process is separate from how we make the common law itself, given that the writing of treatises has often grown out of casebook compilation.

Given the high level of agency involved in the process of canonizing leading cases, reality somehow seems less important than it usually is. One wants, however, to resist the conclusion that we could simply have made up the cases. The fact that we did not, that they did involve real people and real facts, is of little significance from the system’s perspective of ‘abstract indifference,’ specifically what the case has generally stood for as a matter of legal doctrine or principle. This is a perfectly reasonable perspective from the point of view of doctrinal development. So, for instance, in Leaf one might say that the case leaves us with the important doctrinal holding that rescission for innocent misrepresentation is available for executed contracts but that this remedy cannot endure longer than the reasonable time allowed for the right to rescind for breach of condition. There is certainly nothing wrong with that as a matter of legal principle.


179 So, for instance, in Palsgraf v. Long Island Railroad, Cardozo left out of the decision Mrs Palsgraf’s injury – a stammer. This was likely because he wanted the case to be a leading case on the foreseeable plaintiff generally and not to be read narrowly as the denial of recovery in a nervous shock case. As Richard Posner put it, including the fact that the injury was a stammer ‘would have made the accident seem not only freakish but silly, a put-on, a fraud. The scale fell on Mrs. Palsgraf and made her stammer. Tell us another. Great cases are not silly.’ Richard Posner, Cardozo: A Study in Reputation (Chicago: University of Chicago Press, 1990) at 42.
However, as a matter of understanding how a case like *Leaf* came to be and how it came to be known by us, it seems woefully incomplete. Part of the problem is that it is a bottom-line conclusion that, when included in a treatise or student’s course summary, does not reflect anything of how it came to be – the messy reality and the real facts and people that had to be involved in order to generate it, as well as the process by which someone needed to see in it its potential to carry some serious doctrinal weight and to be in a position to do something about that.

Most students will go on to assume roles that will require them to do more than provide succinct statements of legal doctrine. They need to be able to appreciate that legal principles do not fall from the sky pristine form; they are made in the frog ditch (where they will mostly be), and that process is not pretty. There are the vicissitudes of a trial process, the distorting effects of which are not always entirely clear. So, for instance, why did *Leaf* not ask for damages for breach of warranty? What would have happened if he had? The case is then met with a series of other corrupting processes, including whether and how it is reported and whether and how it is treated by legal scholars in secondary literature and casebooks. Hiving off inconvenient or bothersome facts such as why such a low price was paid for the painting might make things simpler. And, indeed, avoiding the issue would ensure that one did not commit what I have been calling here the object lesson in speculation. Yet without dealing with what does not make sense in a case, how can we say we truly understand it, such that we will know how to apply it in future cases? How do we know that the inexplicable bit was not what carried the day?

The *Leaf* case is a very ordinary contracts case in the sense that it is not the kind of case that legal scholars have spent a great deal of time and effort puzzling over. It is a ‘good’ casebook case in the sense that it deals with important doctrinal concepts such as innocent misrepresentation and mistake, breach of warranty, breach of condition, and equitable rescission by an important English court. It generates a coherent and intelligible legal principle. Like many casebook cases, however, it also contains a good dose of trial process oddness and mysterious fact, which we may never feel completely confident that we have really understood. This problem is probably best thought of as an inherent feature of a common law system that uses cases, imperfect creatures that they are, to derive its legal principles, or at least to ground them. This is a process filled with just as much human agency as the cases themselves, embodied in the litigants, the lawyers, and the judges. Anyone who helps to staff the system should recognize that this normally invisible fact-specificity and humanity is always present, even in the most seemingly straightforward case – how it comes to be and how we come to know it.