USAGE AND STATUTE LAW

BY

HJALMAR KARLGREN

Justice of the Swedish Supreme Court

I

SEC. 1 OF the Swedish Sales of Goods Act, 1905, contains the following provision: "The rules of this statute on the rights and duties of sellers and buyers shall be applied only in so far as no provision to the contrary has been agreed upon by the parties—explicitly or otherwise—or follows from mercantile usage or other customs." The same clause is part of the uniform Sales Acts of the other Scandinavian countries. Thus, in the actual words of the statute, the legal rules on sales of goods are to be set aside not only by such explicit or implicit conditions as the contracting parties may have agreed upon—including clauses in adhesion contracts (standard printed forms)—but also by customs, and principally the customs of merchants, or mercantile usage.

This enactment may seem perfectly innocuous. It might well be asked what could be more natural than to attach decisive importance to mercantile usage in litigations between merchants. And why should not the same importance be allowed to other customs if they can be proved? In fact, virtually identical provisions have been embodied in later products of Swedish legislation in the field of private law, *inter alia* in the Mercantile Agents Act, 1914, and above all in the Contracts Act, 1915. It is particularly noteworthy that in these provisions the principle of the supremacy of customs over statutory rules has not been confined to the field of mercantile law.

However, the principle embodied in sec. 1 of the Sales of Goods Act is far from being a matter of course. Even if one accepts as natural the fact that rules on the sale of goods can generally be set aside by contract, it is nevertheless by no means self-evident that statutory provisions may be disregarded merely because a different usage has been adopted by merchants or a different custom is otherwise found to exist. Can it be true indeed that statutory provisions, carefully framed by the drafters and founded upon a delicate balancing of different considerations, should be set aside as soon as it is found that people act contrary to these rules with such regularity that a custom may be held to exist? This would apply in the most central fields of private law: sales of goods, agency, and contracts in general. Can this statement really be correct?

In fact, these questions face us with some formidable legal problems. It appears from the *travaux préparatoires* of the above-mentioned section of the Sales of Goods Act—which, however, will not be discussed in the present study—that, in this respect, the implications of the enactment were problematic from the very beginning.

The doubts now raised are reinforced by the fact that some representative foreign legal systems hardly recognize such a radical rule. Thus, the prevailing opinion both in Anglo-American and French law seems to be (it is difficult to obtain an unambiguous answer) that mercantile usage *may* constitute a binding customary law which sets aside statutory provisions, but that, in the main, its effects are not so far-reaching as that, the legal validity depending upon the question whether it is adopted, in one way or another, in the contract of the parties.[1] However, it is likely that the principle is modified to *some* extent by the existence of fictions concerning implied terms of the contract.

The attitude revealed in German statutes and judicial precedents and the opinions of German legal writers deserve particular attention since they seem to have exercised a considerable influence upon the view prevailing in the Scandinavian countries. At an early stage, some famous German scholars—basic enquiries were made by Goldschmidt and Laband—developed the view that it is necessary to distinguish between customs of two kinds: such as constitute customary law in the classical sense (characterized by *opinio necessitatis*) and such as are merely of a "factual" character.[2] The latter were held to be relevant in so far only as they were implicitly adopted as an element of the contract between the parties—i.e. in such a manner that, when properly *constructed,* the contract could be held to contain a reference to such customs—but otherwise they were not decisive. This distinction is still essential in German law. But it is very vaguely upheld. For in this connection, as in others, the term "construction" is taken in its broadest sense. To some extent, the "hypothetical wishes" of the parties are introduced, and thus it is not only the intention of the parties as

[1] See further the discussion and the works referred to in Luithlen, *Einheitliches Kaufrecht und autonomes Handelsrecht,* Freib. i. d. S. 1956, pp. 38 ff. As for English law, reference may also be made to Wortley, "Mercantile Usage and Custom", *Zeitschrift für ausländisches und internationales Privatrecht* 1959, at p. 259.

[2] Goldschmidt, *Handbuch des Handelsrechts,* Vol. I, 2nd ed. 1847, pp. 316 ff., particularly pp. 329 ff.; Laband, "Die Handelsusancen", *Zeitschrift für Handelsrecht* 1872, pp. 466 ff.

actually expressed in their promises which serves as the basis of the construction. The obvious result is that customs of a "factual" character are also held to be decisive in a number of cases where the reference to "construction" has no support in the actual facts.

However, this scarcely means that customs are given such general validity in preference to statutory provisions, as would seem to follow from the enactments in sec. 1 of the Swedish Sales of Goods Act and similar statutory provisions. For when German courts give some scope to "factual" customs by means of construction in this broad sense they do not go as far as to give *carte blanche* for the custom to be considered part of the contract when it is stated that the custom exists (and is, or ought to be, known to the parties concerned). They seem, rather, to mean that although attention should be paid to customs in the process of construction, it does not follow that the customs should unconditionally be treated as binding contract conditions. It appears, indeed, that customs are not the only elements to be considered during the process of construction; cf. sec. 346 of the German Code of Commerce (where it is stated that customs are among the facts to which the court has to pay regard, "*Rücksicht zu nehmen*") and sec. 157 of the Civil Code (cf. also secs. 133 and 242). However, the present writer is not in a position to make any definite statement as to what regard the courts pay to this limitation when deciding the legal effects of "factual" customs.

In the 1956 draft for legislation on international sales of movables (*Projet d'une loi uniforme sur la vente internationale des objets mobiliers corporels*), this matter is the subject of peculiar provisions. Under sec. 14, the parties to a contract are bound (a) by usages to which they have made express or implied reference; (b) by usages which persons in the conditions of the parties commonly consider to form one of the terms of their contract. It is further laid down in the same section that usages of the above-mentioned kinds shall override the rules of the proposed international Sales of Goods Act, and that commercial terms and expressions used by the parties shall be construed in conformity with commercial practice. Finally, it appears from sec. 12 that the draft does not deal with, *inter alia,* the validity of the contract or of any of its provisions or of any usage to which it refers; this provision presumably hints at such rules on particular grounds of nullity as may be adopted in the legislation or practice of the countries concerned.

How is this to be understood? It is natural that customs to which

the parties have expressly or implicitly referred and to which consequently they have submitted should be valid in preference to such non-mandatory statutory provisions on sales of goods as are discussed in this paper. It seems, however, that beyond this customs are intended to be given some sort of objective validity under subsec. (b) of sec. 14. The meaning of that clause is not entirely lucid, however.[3] The idea is obviously that, even though the parties actually concerned have not agreed—expressly or implicitly—to be bound by a custom, that custom shall nevertheless apply, in preference to non-mandatory legal rules on sales of goods, if parties in a similar position *normally* agree to follow the custom. It is obviously not enough, however, that contracting parties normally make the custom their starting point and take it for granted that a rule to that effect is in force in the field concerned (and even less that contracting parties are normally acquainted with the custom). What is required is that contracting parties normally consider the custom as an element (a clause) of their contract. The contracts usually concluded by parties in the branch of trade concerned shall embody such clauses—the customs become applicable by virtue of the habit of including them in the contract. This conceivably implies such a narrow limitation that, after all, the scope for an application of customs under the *projet* is extremely reduced. To what extent will it be permissible to assume that the parties normally consider the custom to be an element of their contract in the way now described? Hardly in many cases. Anyway, the demarcation—a matter to which I revert below in another connection—will be extremely difficult. In fact, it can hardly be accomplished without the aid of fictions.

The limitation set out above will lead to curious consequences. A custom with the dignity of customary law in the classical sense

[3] It was laid down in an earlier draft (*projet* 1951) that under the corresponding provision—sec. 13 (b)—those customs should be valid that persons in the position of the parties to the contract "*considèrent généralement comme applicables*". Literally, this would seem to mean that when adjudicating a case in accordance with a custom, courts would have to consult, as to its applicability, the general opinion of persons concerned! The *travaux préparatoires* (p. 60) provide no clear answer. The reader is only told that "*c'est la méthode de l'interprétation typique*" which has been used, here as elsewhere in the draft. In this case, the expression seems to imply a very far-reaching recognition of the binding force of customs. See for an even earlier proposal *Zeitschrift für ausländisches und internationales Privatrecht* 1935, p. 11, with an *exposé des motifs* by Rabel, at pp. 53 f.

In the *travaux préparatoires* of the 1956 *projet*, p. 50 (cf. pp. 30 f.), it is stated that under sec. 13 in the 1951 *projet*, subsec. (b) dealt—in the opinion of the editing Committee—with those cases where the parties had not paid attention to the customs.

—i. e. which is supported by a general opinion that it is legally valid and must thus be followed—would not seem to be respected by the draft if it is inconsistent with an enactment embodied therein. For through this *opinio necessitatis* the custom would assume validity *sua virtute,* and not because parties to a contract normally consider it to have the character of a clause in their contract. Customs are consequently deprived of their validity, *inter alia* in such cases where the prevailing opinion endows them with a particularly strong claim for consideration. But there is little doubt that the framers of the draft intended this rejection of customs as a source of law.[4]

This discussion seems to lead to the result that the latest proposal for an act on international sales of movables—in which, however, concessions in favour of the Scandinavian law of sales of goods have been made in other important respects—does *not* attribute the same far-reaching legal importance to mercantile usage or other customs as would seem to follow from sec. 1 of the Swedish Sales of Goods Act and similar Swedish enactments.

II

What considerations should be applicable, then, to this central problem—essential both to the law of sales and to contract law in general—namely, whether such customs as prevail in the commu-

[4] Finally, we are confronted by the question whether, in those situations where under sec. 14, subsec. (b), parties to a contract are held to consider the application of a custom as a consequence of the contract in normal cases, the custom is not already valid in virtue of subsec. (a), since it must be said that, in these cases, the contract contains a reference to the custom concerned. Can it be, then, that subsec. (b) has such a limited scope that it adds nothing to the provision in subsec. (a)? Perhaps the drafters have meant that a reference according to the last-mentioned subsection cannot be assumed to exist unless the parties concerned or either of them knew of the custom (in spite of the fact that parties normally consider it as an element of the contract). This, however, is too hasty a conclusion, at least if the Scandinavian law of contracts is chosen as a starting point. If the custom is unknown to one of the parties, A, but not to B, and if we also assume that parties in general consider the custom as an implicit clause of the contract, it may well be held that B is justified in reading the applicability of the custom into the contract in this case too. Thus, a reference to the custom is embodied in the contract as objectively interpreted, and it follows that subsec. (a) is indeed applicable. And it is not impossible, under the same hypothetical assumption, that the objective meaning of the contract would remain unchanged even if both the parties are ignorant of the custom.

nity are binding upon the judge even when inconsistent with legal rules of the kind embodied in the Sales of Goods Act, the Contracts Act, and other statutes within the realm of private law?

It should be emphasized, incidentally, that we are not exactly going to discuss the importance of customs in those cases where no applicable statute can be found or where fixed rules have not been established by precedents. It is a matter of course that, in these situations, customs are important as a guide to the courts when they are confronted with the task of "filling gaps in statutory law". Even in these cases, however, it may be a matter for discussion whether customs generally should be held decisive. Or—to put the problem in other words—must other rules give way to customs, rules which the courts might prefer to apply and might even feel bound to apply under established principles of justice? For in strict logic, the difference between the "law-correcting" and the "gap-filling" function of customs may be only apparent: even in the absence of statutory provisions or guiding precedents, the courts *must* arrive at a decision, and in such cases their primary resource is to proceed along the lines generally acknowledged, making use of conclusions *ex analogia* or *e contrario* from statutory provisions or rules emerging from precedents. Should the rules resulting from these conclusions *ex analogia* or *e contrario* be set aside in favour of customs, if such can be found?

A natural approach to this subject would be to raise the question whether the applicability of customs as decisive for the meaning of contracts does not simply follow from proper principles of *construction*. This is indeed an oft-recurring manner of stating the problem in legal literature. Moreover, when stated in this form, the problem has venerable traditions—it has been raised at all times when discussing the validity of mercantile usage or other customs. Is it not an element of the very contract of the parties—albeit implicitly—that the customs prevailing in the community within the trade concerned shall be applicable? Does not the applicability of customs follow directly from the non-mandatory character of the relevant enactments, from the fact that this system of non-mandatory statute rules can be set aside by such provisions as may be read into the contract of the parties by means of construction?

Such a view cannot be dismissed as fictitious without further ado. But to what extent can it be sustained?

The term "construction" of a declaration of intent would seem to imply the act of establishing the meaning which may be at-

tributed to the words, signs, behaviour, and mode of expression in general of the person from whom the declaration has emanated. In certain circumstances (cf. the rules on construction of wills, etc.), this meaning is strictly determined by the intention which that person has presumably purported to express, by his "will" as expressed in the declaration. In the Scandinavian law of contracts outside family law, however, no such principle of construction is applied; the meaning of the relevant words, or other expressions, is established according to a more objective method, based primarily upon that opinion of the meaning of the words which prevails among people in general or among those who have a decisive influence upon linguistic usage. It may perhaps be stated that, in the first place, the purpose is to find out on an objective basis, by means of construction, "what has been present to the mind of the person acting and the object of his decision". Such a statement is too narrow, however. Words or expressions may have a certain meaning—which normally becomes binding as covered by the promise—even if this meaning has not been present to the mind of the party at the time of the conclusion of the contract. The essential thing is to find out what the words may mean in general usage or according to some other comparable standard of decision. It is obviously possible that a person has a general idea of the underlying facts denoted by a word or a concept, although a more exact definition of what is covered by that idea can be established only afterwards. In certain cases, it would even seem that the "lexical" meaning of a word or a term should be decisive, a solution which may be useful when it is difficult for a court to find out with certainty what people in general or those who have a compelling influence upon linguistic usage understand by the word or term.

This being so, it may be stated without further enquiry that, in principle, such specific words, expressions, terms, formulae, etc., as are used in sales of goods or in other contracts are defined, with regard to their meaning and implications, by that very construction which is normal among people in general, or in the trade concerned. Thus, it is obvious that customs—this term being taken to mean both mercantile and other usages—must assume importance with regard to the meaning attributed to these words, expressions, formulae, etc. No court can disregard the customs when interpreting such expressions, and consequently customs have a claim to be applied in this particular respect. In fact, the draft for a law on international sales of movables justly embodies a rule to the effect that clauses and formulae used in trade should

be constructed in accordance with the usages prevailing in commercial contracts.

In several cases, however, this is not of immediate interest to our subject. For the above-mentioned function of customs is very largely restricted to situations where statutory law (or precedents) has left the question covered by customs without any relevant provisions. Consequently, this function does not concern—at least not directly—those situations where customs set aside non-mandatory rules of law. Still, even apart from the objections which have just been raised against this distinction, it is far from certain that, in this field, customs have only a "gap-filling" function as distinct from a clearly "law-correcting" effect. The meaning of words and expressions may be defined in, or otherwise appear from, non-mandatory enactments, while the same words or expressions are interpreted quite differently according to customs. In such cases, as stated above, courts are justified in basing their decisions upon the meanings given by custom to the words concerned. As examples may be mentioned such terms as the "risk" for the goods, "carriage paid" or "free on quay", "cash" payment. As a consequence of the importance attached to customs in the construction of contracts, the rules applied by courts will differ from those laid down in the Sales of Goods Act or in other statutes of non-mandatory character. It would appear from what has been said above that it is immaterial whether the individual parties concerned have given any thought to the meaning of the terms they use, and to its effect of setting the statute aside. The "meaning" of the term will nevertheless be decisive—even if either party, or possibly both, ignored the custom. It is another matter that, under particular circumstances, evidence of relevant "counteracting facts" (Olivecrona) may give the court reasons for setting aside the preliminary results of construction. It may be proved, e. g., that either party has been in error with regard to the objective meaning of a certain term or expression, and that the other party realized the mistake, or would have realized it if he had taken proper care.

It is tempting to state that in these cases the parties have submitted to the custom. But such a statement would be misleading, for, obviously, courts will require no evidence as to the existence of any intention to that effect. It is sufficient that in common—or even commercial—language the term or expression concerned has this or that meaning. Thus the submission of the parties is assumed *a priori*. They are bound in accordance with the meaning

of the word or expression, unless, as stated above, evidence to the contrary is produced, based on possibly existing counter-acting facts.

Would it not be possible, then, to proceed further along this path and state, in a more general fashion, that if, under prevailing customs, certain rules are generally observed in one particular kind of contracts, e.g. sales of goods, it must be held that, when concluding the contract, the parties have *ipso facto* made an implicit declaration to the effect that they are willing to apply these rules? It would thus be assumed, not only with regard to certain words, formulae, or terms, but in general, that customs determine the meaning and implications of the words, or other means of expression, of the parties. As an element in the process of construction, courts would be entitled to give the promises of the parties that meaning which according to prevailing customs is normal in the type of contract concerned. It might indeed be said that the applicability of these customs is agreed upon, as they have the quality of *naturalia negotii*. This is a mode of reasoning which is certainly likely to seem attractive to practising lawyers, and there are even many scholars who accept such reasoning.

However, the suggested solution would seem to imply that the rule of positive law embodied in the formula *pacta sunt servanda* —contracts are binding in private law—is extended far beyond the meaning normally, and reasonably, attributed to that rule. As a mere consequence of construction, liability for an engagement or other manifestations of intent does not go as far as that.

To illustrate this point, a few words in addition to what has already been said must be devoted to the question how much of the legal consequences of a contract or other legal transaction may be held covered by the declarations of the parties. In other words: What are the implications of the contract or transaction as determined by construction?

However, at the very outset of our enquiry, we may be confronted by the objection that the problem has been wrongly stated. For it may be argued that it is an arbitrary distinction to hold that if a contract involves certain legal consequences by operation of law, some of these, being particularly essential, have been the object of a "declaration" by the parties, whereas others, of a more peripheral kind, are assumed to follow immediately from the applicable rules of law, without any direct connection with the intentions of the parties. It may be contended that as soon as a person has undertaken a legal transaction to which the law at-

taches certain effects, he has thereby declared that *all* these effect are embraced by his intention. They are all realized if the lega transaction is undertaken, whereas they do not materialize i the person does not act. It would be erroneous in principle to mak a distinction between such legal effects as are covered by th intention and its manifestation and such as fall outside that frame Here as at other points the operation of legal rules is the essentia fact. By virtue of the law, the manifestation of the intention produces all the legal effects characteristic of the type of contract concerned, regardless of their more or less peripheral character, and the promisor has reason to expect all these effects to occur.

Thus, *if* the law has given binding force to a custom, its applicability is thereby "explained" in the present sense; in the converse situation, it is not. But since this discussion purports to be dealing with the question *whether* such legal effects should be granted to customs, and the effects of the contract in this respect are consequently unknown so far, it would be useless to raise the question whether an implicit reference to customs is embodied in the contract, in the declarations of the parties.

Further developed, our reasoning would be as follows. Contracts and other legal transactions by parties would be meaningless if a system of rules did not exist in the community—for present purposes, a system of legal rules, the machinery of the law. In those parts of that system which we are now considering, the declarations of parties are a condition for the machinery to start working. To use an image invented by Professor Olivecront,[5] what they do is to press different buttons in a machine which is so constructed that, according to the button pressed, a box of this or that kind is produced. In our case, the boxes stocked in the machine correspond to that set of legal effects which is called *naturalia negotii,* and the declarations of the parties produce these effects just as boxes. The mere fact that one of the parties purports e.g. to "sell" a certain object, is sufficient: he has *declared* that all those legal effects which follow from the rules of the legal system for sales of goods are covered by his intention. He has pressed the button, and that is enough for the machinery to start. Courts do not proceed to any enquiry into the question whether the party has really wanted all these effects to occur (unless, in the second round, rules on mistake or other rules concerning nullity are

[5] Olivecrona, *Penningenhetens problem,* Lund 1953, p. 146. Cf. the English version of this book, *The Problem of the Monetary Unit,* Stockholm 1957, pp. 125 f., where, however, the image is omitted.

applied after certain counter-acting facts have been proved). By declaring that he sells the object concerned, the party has "submitted" or referred to *all* the legal effects which the legal system attaches to sales of goods, whether these are essential or more peripheral in character.

It cannot be denied, however, that legal rules on the law of contracts are normally not based upon such an extensive conception of the terms "contract" or "promise" as has been outlined above, and that courts, practising lawyers and writers are equally unfamiliar with the idea of the mechanism of contract just described. Although this fact is not in other respects a decisive argument against the view we have just developed, it is nevertheless almost impossible to overlook it in this connection. When a promise of a party or a contract is referred to in common legal language, which follows, in this respect, the view adopted in the *travaux préparatoires* of various statutes on matters of private law, these terms are used in a far narrower sense. Usually, it is not contended that all those legal effects of contracts or other transactions which may be called *naturalia negotii* are covered by the intentions of the parties. The idea is rather that the effects provided by the legal system supplement and complete those fields which the parties have not dealt with in their promissory declarations but have left without any contractual provisions. The legal effects commonly denoted by the term *naturalia negotii* become applicable, as the expression goes, "immediately" by operation of law; it is obviously implied in this statement, too, that what the parties expressly or implicitly have "declared" derives its effect from the operation of the legal system, viz. because that system recognises the principle *pacta sunt servanda*. However, it is not at all clear to what extent the legal effects are held to be embraced by the intention of the parties and thus are founded upon the above-mentioned rule—as distinguished from those effects which are not covered by the declarations of the parties but come into operation immediately through the legal system, as *naturalia negotii*. Certain fundamental effects definitely fall within the meaning of what has been declared, whereas others, being of a more peripheral kind, are not covered by it. Thus it would not seem permissible to argue that although the great majority of the effects belonging to the group of *naturalia negotii* have not been present to the conscious minds of the parties (or cannot properly be assumed to have been present) and thus objects of their decisions, these effects are nevertheless embodied in

the "lexical" meaning of the legal concepts concerned (cf. above) —the assumed "lexicon" being the Statute Book and other compilations of legal rules—and for that reason also covered by declaration of the parties according to its objective meaning. Indeed, whatever the reason may be, it is beyond dispute that people in general, or people belonging to those groups whose linguistic habits are to be decisive, do not as a rule apprehend the general concepts now under discussion (to "sell", to "lease", etc.) in such an extensive sense—covering all sorts of legal effects pertaining to the category of *naturalia negotii*—as the present course of reasoning would assume. In these cases, the situation is different from that which confronts us when discussing the meaning of such special words or expressions as have been dealt with above. As stated already, there is no need to enter into the reasons for this difference. It may possibly have some connection with the fact that our attention is but rarely drawn to the coming into operation of the vast majority of legal effects belonging to the category of *naturalia negotii* and that consequently the relation between these and the general concepts referred to does not emerge very clearly.

Under such premises, the borderline between what is "declared" by the parties (parts of their promises) and what is "supplemented" by the legal system becomes rather vague. However, as some scholars have emphasized, there is indeed an important motive for making such a distinction. The reasons why legal effects are attached to the contents of promises of the parties in the present sense are only partly identical with those which decide the supplementary functions of the legal system. It is true that, in order to satisfy the purpose assigned to the mechanism of contracts by the legal system, there is provided a possibility for individual parties to produce effects which are identical with their intentions in *essential* respects. They must be offered such an extensive assortment of "boxes", and such a variation in their contents, that each person may get a box which contains at least some part which he considers essential. This is indeed the reason why it is held that the effects flowing from the contents of declarations in the proper sense are founded upon particular consideration of the intentions of the individual parties. But anyone who makes use of the legal instrument known as the contract has to put up with a number of other effects which are connected with such a legal transaction but not necessarily founded upon consideration of the parties *in casu*. Such effects may be based upon more general

considerations or, at least, serve only the average interests of parties of the category concerned. The person who makes the promise may get a box the contents of which are desired only *in part*.

It follows from what has been said that there may be reasons for the view that different legal rules bestow validity upon the contents of the promise as it has been declared, on the one hand, and upon such effects connected with the declarations as belong to the category of *naturalia negotii,* on the other hand. In both cases, however, validity is founded upon the legal system actually in force. If that system did not exist, it would be unreasonable to make any promises at all (other systems of rules than that of the law being disregarded). But in the first case, a sufficient ground for validity is found in the general and undisputed legal rule that contracts and other transactions in private law have the effects indicated by their contents. Conversely, this is not sufficient in the second case. Information as to the implications of *naturalia negotii* must be obtained through other means, and it is not permissible simply to assume that these implications will coincide with the intentions of the individual parties concerned.

The present distinction is relevant, *inter alia,* from the point of view of positive law when applying legal rules on error and misunderstanding in transactions falling within the field of private law. Suppose that it can be ascertained that both parties to a sale had a notion of the rules concerning the "risk" for the goods which differs from the meaning attached to that term in the Sales of Goods Act. This mere fact is not a sufficient ground for holding that, in the absence of a particular clause (cf. above) on the transfer of risk, the contract embodies a rule on this matter which is different from those laid down in the statute. Nor would the fact that only one of the parties had an incorrect view of the law on this particular topic—combined with the circumstance that the other party realized, or ought to have realized, the mistake—constitute a sufficient ground for holding that the "contents" of the promise made by the former party did not properly express his intention (as understood in the Swedish Contracts Act) through this mistake. It would seem to be the prevailing view that, in order to make the contract void in such cases, other rules on error must be invoked, e.g. rules based on "the doctrine of the underlying assumptions".

If due regard is paid to what has now been said, the conclusion must be that, provided the contents of the contract are chosen as a starting point, no explanation is given why prevailing customs

should be considered part of the law, even though these may be in the largest sense of the word *naturalia* in legal transactions of the kind concerned. If decisive importance is attached to the promise as such in the usual, narrow sense, it is impossible to proceed further than the statement that the application of customs *may* have been agreed upon. The question of their applicability *may* have been present in the minds of the parties at the conclusion of the contract in such a manner that it is possible to find, without resort to fictions, that the parties have at least made an implicit reference to the customs (see further next paragraph). But it is hardly reasonable to contend that this has always—or even regularly—been the case. Thus the rule that contracts, as properly constructed, shall have effect is not in itself a sufficient ground for assuming that the customs shall have effect, too, even if they are very widely spread and have long been followed in real life. If the courts are to be bound by customs, another "legal ground" is required.

But, on the other hand, one may reasonably argue like this. Although even an extensive construction of contracts may not justify the view that the parties have actually *declared* that their intentions cover all elements of prevailing customs, it is equally certain that very often indeed—probably in the majority of cases—parties to contracts either consciously assume that prevailing customs shall be applicable to their relations or base their actions upon such an assumption without giving much thought to the question. In other words, the applicability of customs is an underlying assumption—whether conscious or unconscious—that is very frequently made by both parties when concluding the contract. Similarly, it quite often happens that at least one of the parties acts on such an assumption whereas the other party does not, either because he is ignorant of the custom or for some other reason. In such circumstances, it may seem reasonable that, in spite of absence of proof that there is an agreement concerning its applicability, the custom is nevertheless considered an element of the contract. The custom appears to be a natural *Geschäftsgrundlage*. The fact that one of the parties was ignorant of the custom would not be a sufficient reason for the opposite result. For if the requirements on the "established" character of the custom etc. are sufficiently strict,[6] it may be argued that at any rate the party concerned "ought to" have known of it and con-

[6] Cf. *infra*, pp. 61, 70.

templated the possibility of its application. The other party should not have to pay for his ignorance.

It must be admitted, indeed, that there is a certain antinomy between the fact that observance of the custom is general in real life—from which it follows that it is a natural basis for the relations of the parties—and the fact that the custom need not be covered, and usually is not covered, by the promises of the parties, with the result that under normal rules non-mandatory enactments would interfere. Should the underlying assumption, on which no agreement has been made, be applicable, or should the legal rules apply in this case as in others where a matter has not been subject to an agreement? In short, we are confronted by the problem of the "doctrine of underlying assumptions", although in a form which is not immediately recognizable.

However, before going on towards the discussion of these problems, it should further be examined whether, after all, it is not possible to find another justification for the view that the application of customs is something which may normally be considered as an implicit element of the contract. To follow a line of thought which is very common among writers, we might argue as follows. Let us stick to the opinion that when the parties do not reject a custom which is generally known and applied within the branch concerned, this *may* be an expression of their wish that the custom shall apply. Thus it is *possible* that the intention implied in the contract also covers the application of the custom; this is no fiction. Since the actual meaning of the custom is that the behaviour concerned is customarily observed, it must be presumed, in the absence of evidence to the contrary—or to put it in other words: it must be considered as proved, under normal rules on evidence—that such is the intention of the parties. It may equally be asserted that this latter conclusion is not fictitious. By application of rules on the burden of proof, or posssibly on the evaluation of evidence, the court makes a deduction from what is customary *in abstracto* to the situation *in concreto*. Thus, on the basis of the assumed intention of the parties under these rules on evidence (and not on the customs as a particular source of law), it is justifiable to hold that, in the absence of evidence to the contrary, customs are applicable even when inconsistent with non-mandatory rules of law. For the intention of parties must set aside such legal provisions.

This argument may seem an attractive one. However, it will not stand a critical examination. In the first place, it is subject to

doubt whether it is possible to contend, in such a simplified form, that the mere commonness of a certain state of things must be accepted as a sufficient ground for a presumption (or as full evidence) that this state of things also prevails in the case at bar. A general application of such a doctrine might produce inadmissible consequences. There may be some justification for a general statement to the effect that commonness as such has a *certain* value as evidence, but no more. This implies, *inter alia,* that when evidence is invoked by either party in order to eliminate an assumption, based merely upon commonness, the presumption will be rebutted even when this evidence to the contrary does not carry the weight generally connected with the expression "full" evidence. We do not, however, attach decisive importance to this objection. But, in the second place, it should be observed that, even if such a "commonness" rule on evidence is accepted, the matter is not settled. What may be regarded as common, with some justification, is only that parties *assume* that prevailing customs shall be applied. Consequently, it must be denied that it is common that parties refer to such customs in their contracts, implicitly or otherwise. As we have already stated, it is impossible to say more than this. When entering into their agreement, the question of the applicability of a custom *may* have been present to the minds of the parties in such a manner that it may be held, under the generally accepted opinion, that an intention to that effect can be found. Their inactivity, in other words the omission to reject a custom the existence of which is known, *may* be taken to imply an intention that the custom shall be applicable. This is the case when the parties have had the custom in mind—or when one of the parties has had it in mind, whereas the other party has realized or ought to have realized this—and have refrained, because the custom exists, from inserting a clause embodying the custom into the contract, as would otherwise have been done. In this situation, the inactivity of the parties is an expression of an actual attitude with regard to the custom, and thus its effect is not "an effect of inactivity", but a normal result of a promise. Consequently, if it were a *naturale* at the entering of contracts that the parties do not only give attention to prevailing customs but also refrain from inserting contract clauses on the topic because of their existence, it would indeed be possible to speak about a high degree of probability (whether it may be considered as "full" evidence or not) for the assumption that, even in the case at bar, the contract refers to the custom. However, we

must insist on the point that this is not the case in real life. Rarely, parties when entering agreements account for their attitude to the custom. We have to content ourselves with the statement that it is common and typical that parties *assume* the applicability of customs, and possibly also that, if they had not entertained the basic assumption that customs are applicable *ipso facto,* they *would* in fact have inserted clauses making them part of the contract.

This statement, however, takes us back to the question whether rules which have not been agreed upon but only assumed can be allowed to produce such radical effects as are pointed out in sec. 1 of the Swedish Sales of Goods Act and in similar enactments. In so far as it is only by a fiction that we can say that the contract of the parties refers to prevailing customs, it must be a strange rule which makes a contract clause out of that which was only assumed. For various reasons, a party may be ignorant of the custom concerned. Even though—as stated above—it may be argued that, in case of a well-established custom, he "ought" to know it or obtain information about it, it is nevertheless an excessively severe demand that he shall give attention to, and possibly make enquiries about, what customs are prevailing within the trade concerned. Moreover, the fact that a custom is known to a party need not mean that he has had it in mind when concluding the contract. In the light of this consideration, it may occasionally be quite severe to let a party pay for his failure to protect himself against a custom which is inconsistent with his interests by entering a reservation into the contract.

Here, we may expect the objection that, if it is thought to be typical that both parties to a contract take the applicability of the customs prevailing in their trade for granted, the importance attached to these customs is not very astonishing after all, even from the point of view of general principles of contract. It is generally recognized that an assumption which is *individual* does not constitute a supplement to the contract only because it is common to the parties. The case would be different with *standard* assumptions. From this point of view, it would not be astonishing to find that in respect of a common assumption regarding customs, sec. 1 of the Sales of Goods Act contains a rule which is adapted to standard assumptions in general. However, there is not sufficient justification for the proposition that standard assumptions in general are relevant in the manner now called in question. They are relevant to some extent, and in the first place by virtue of

those rules on *naturalia negotii* which have been developed in various branches of the law through legislation and judicial decisions. Apart from that, however, legal significance is not necessarily attached to assumptions, not even to typical standard assumptions —such as the possibility of performance, the utility of assigned goods to the assignee, and also, in some cases, assumptions as to the *causa* of remuneration.

Our essential task, then, is to enquire what are the important reasons which, in the absence of support in the contract of the parties and without any connection with general principles of Swedish law on underlying assumptions, may be invoked in favour of such an extensive rule on the effects of customs as that laid down in sec. 1 of the Sales of Goods Act and similar enactments.

III

Obviously, a convincing reason for a comprehensive applicability of customs inconsistent with non-mandatory statutory provisions would exist if the principles governing customary law could be invoked in this connection. Therefore, it would seem appropriate to consider what is generally taught about customary law, with a view to finding—possibly after some modifications have been introduced—a basis for a reasonable rule on the legal effects of customs.

When approaching the problem from this aspect, it is natural to give particular attention to the "historical" field of applicability of customs, and, indeed, that field which was of principal interest to the drafters of the Scandinavian Sales of Goods Act, viz. that of the (well-established and relatively widespread) mercantile customs and commercial usage.

The part played by customs in the history of mercantile law is well known. Even if their importance as independent elements in economic life has lately been reduced, partly because the drafters of modern laws have seen fit to embody them in statutes, they nevertheless retain a considerable weight. It has often been emphasized that the existence, among merchants, of this complex network of usages—be it a matter of the law of sales, maritime law, or any other branch of law—implied that in commercial life a system of rules was functioning along with, yet independently of, the rules of law framed in statutes and in the decisions of courts.

Experience taught that this system of rules was strong enough to set aside the applicable system or systems of law to a considerable extent. At an early stage, there was reason to describe this state of things as a commercial legal "autonomy" prevalent within a vast field. Business men created and applied their own rules, and acted in accordance with gradually developed usages. In these circles, more often than not, the parties concerned thought it a question of minor importance whether such usages differed from, or harmonized with, statutes and rules applied by the courts in their countries—all the more so as they were but seldom subjected to the examination of courts. Particularly conspicuous in international sales, in other commercial transactions of international scope and, generally speaking, in contracts concluded in the sphere of large-scale trade, this autonomous system of rules was a reality to which even more recent legislation in the branches of law concerned had to pay some attention. It was not feasible to disregard these rules, which had been tried out in actual practice for a considerable length of time, particularly as statutory rules must in the nature of things be rather sweeping and therefore cannot satisfy all those varying needs which claim attention with regard to the factual conditions prevailing in various branches of commercial life. Thus, as was the case in Sweden at the time when the Sales of Goods Act was drafted, a benevolent attitude towards the independent development of mercantile rules was adopted in different countries. The respect bestowed upon these rules is indeed not very astonishing, since modern mercantile law as a whole is very largely derived from extra-judicial customs, from rules and usages prevailing among merchants.

Nowadays, when the rules on sales and other important elements of mercantile law have been embodied in statutes in various countries, it is obvious that the development of such independent rules for the purposes of mercantile life will no longer find the same fertile ground as before. It is difficult to state with any certainty whether "autonomy" in the above-mentioned sense is still a well-founded expression; at any rate, certain statements to that effect are clearly exaggerated.[7] But in so far as merchants in their transactions are still found making use of rules of their own, which are without any close connection with statutes and

[7] In this connection, a reference to the widespread use of arbitration is hardly decisive in itself, for it is not known to what extent the law as administered in arbitral awards is independent in relation to the application of legal rules that is carried out by courts of justice.

judicial decisions, this is obviously a fact which speaks strongly in favour of the application of such rules—in spite of their disagreement with non-mandatory rules of law, in statutes or elsewhere—in those cases where decisions on the part of courts are after all called for. Incidentally, this statement is equally true if a similar system of customs could be found elsewhere than in mercantile law—a possibility which the drafters of the Sales of Goods Act obviously considered rather remote.

Against the background of these facts, it is particularly tempting to use the principles governing customary law as a path towards the finding of a rule on the effectiveness of customs which may be defensible from various points of view. Indeed, it might be argued, it is by no means exceptional that the legal system has to yield to rules actually in force, in spite of their extra-judicial character. Ultimately, this case would seem to be identical with that of a statutory rule becoming fret—regardless of its imperative character, the fact that it "should" or "must" be obeyed—because a different rule actually is applied with some consistency by the courts, whether for moral, traditional, or practical considerations. Thus the statutory rule ceases to be part of the law in force—its character of "legal rule" is lost. If the law is defined exclusively on the basis of the imperative character of its rules—as is often the case—our idea of the real essence of the law will be incomplete. A further indispensable requirement is that these rules do actually function, above all by the adjudication of courts (or other public authorities). Obsolete rules are not "legal rules". It is true that, in the case now under discussion, the situation is radically different, inasmuch as the behaviour diverging from the law does not emanate from courts of justice but constitutes only an extra-judicial factual pattern of behaviour. The fact that certain groups of members of the community act otherwise than is prescribed in the law would mean, then, that the statutory rules concerned would lose their reality. However, in the conflict between the imperative of statute and the actual patterns of behaviour of the persons concerned—the conflict between *Sollen* and *Sein*—the former element has a tendency to yield. This statement is confirmed by experience from various fields; for example, we may mention the ever-increasing importance attached in recent times to the so-called "effects of inactivity" (laches). Thus, we would be confronted by a similar development if the imperatives of statutory rules had to yield to the solid facts of habits and customs, as would seem to follow from sec. 1 of the Sales of Goods Act and similar

enactments. Indeed, it is generally taught that statutory provisions are set aside not only by rules consistently applied by the courts, but also by customary law founded upon extra-judicial traditions.

Is it possible, then, to set reasonable limits to the applicability of customs by general observations on the character of customary law? In that case, under what conditions would customs serve as "law-correcting" elements?

If the binding force attributed to customs is based upon the reasoning outlined above, it would seem that, above all, strict requirements must be raised with regard to what we may call their quality. If a custom is to have the legal effect now discussed, it is an indispensable condition that it shall be really "established", i.e. characterized by fixed contents and by permanence. Otherwise, it cannot possibly be argued that the "living law" in the field concerned is represented by the custom but not by the statutory rule. Moreover, it is tempting to make it a condition that the custom shall have a reasonably wide application, geographically speaking. However, this would raise certain difficulties in the light of the fact that it is obviously necessary also to respect local mercantile usage and other customs confined to one place.

In this connection it should be emphasized that what is relevant is obviously not the mere fact that the groups of people concerned entertain the common *opinion* that a rule diverging from statutory enactments is applicable to legal relations of the kind actually contemplated. This opinion must also have been embodied in an actual—and, as pointed out above, "established"—conduct in that field. It is the *application* of the rule, its permanent application, that is decisive, and not—be they never so uniform and settled—opinions held by merchants or other interested parties as to the conduct which *should* be observed in a given case. Moreover, it is a matter of course that we are not permitted to take into account an application which is founded on a contractual provision to the effect that customs should be observed. It is even immaterial for the present purpose that, among the groups of people concerned, it is a usual pattern for the parties to conclude contracts which embody clauses diverging from statutory enactments. Rather, the very fact that such contracts are concluded shows that the parties realize that the statutory rule will be applied unless particular measures are taken in order to set it aside. It is an entirely different matter that after it has become customary to insert a contract clause diverging from the law, a custom may be created by the gradual growth of the opinion that the rule expressed by that

clause is applicable without being mentioned, and by the fact that people ultimately begin to act according to the rule without any contract at all.

However, the fulfilment of these requirements in respect of the "quality" etc. of customs is by no means sufficient to endow the customs with the effect of setting aside non-mandatory enactments. It cannot reasonably be held that an extra-judicial customary law which is binding upon the courts may be created in such an easy way. We must add the well-known requirement of *opinio necessitatis*. What does that requirement mean, and is it likely that this approach will be helpful?

First of all, then: if we agree that a general rule on the legal effects of customs should be established, it is hardly permissible to assume that a legal enactment must be set aside merely because there exists in mercantile life or in any other field a usage inconsistent with the enactment, even if that usage fulfils all reasonable claims with regard to permanence and geographical extent. We cannot avoid the further claim that those who practise the usage generally act under the assumption that this is the very manner of acting which "should" or "must" be observed. The *purely factual* character of a usage is not enough. For our purposes, there must be a custom not only in the sense of regular acting, or habit, but also in the sense of a manner of acting bound by rules. In principle, those who have embraced the habit must consider it as normative for their behaviour in one way or another. In other words, non-compliance with the custom must appear "incorrect" or even improper. This means a most considerable reduction of the extent to which customs are effective.

Without a limitation of this kind, one would arrive at conclusions which must seem likely to deter even the most enthusiastic advocates of a judicial practice willing to lend its ear to customs. It is necessary utterly to reject the proposition that any custom or habit developed in mercantile life or other fields of legal transactions and based merely upon *practical* considerations—reasons of expediency etc., which will be discussed presently—should enter through the opening left by sec. 1 of the Sales of Goods Act and similar enactments, assume the status of legal rules, and modify existing statutory provisions. To quote one instance: it has hardly ever been argued that the "courtesy" of tradesmen towards their customers, however regular it may be, can give rise to legal claims, so that a business man who in an individual case refrains from customary "courtesy" would become liable to pay damages or

incur other legal sanctions. In general, there may be several reasons in favour of a mode of conduct which offers to the other contracting party favours additional to those provided for by the law—and this conduct may be followed with such regularity within the trade concerned that, in this respect, the requirements for an established custom are certainly fulfilled—but this does not imply a negation of the right to stick to the law if the matter is brought to a head. Thus, in consideration of possible competition and for other practical motives, it may easily happen that in certain trades customs of this kind are developed, e.g. that when defects in the goods are discovered, the vendor does not dismiss the buyer's complaints merely by referring to the fact that the latter has not put in his claim in the order prescribed by law, that in some legal relations no action is taken because the payment of a debt is delayed a few days after its date of maturity, that the duty to pay interest is not enforced to the extent allowed by law, particularly with regard to small amounts. But it hardly follows that if a party demands his due under the law, courts would reject his claim merely by referring to the fact that the relevant enactments have been set aside by custom. Nor would evidence showing that in this or that situation insurers consistently make certain allowances cause the non-applicability of such enactments as would otherwise govern the case. Further examples may be quoted. At least in certain connections, it is an established custom that a creditor is not required to present his credentials as often as the law authorizes the debtor to make such a demand, that shopkeepers allow their customers to think better of transactions already concluded (even if their second thoughts are not expressed immediately after the bargain), either by exchanging the goods for others or in some other way, perhaps even that creditors who have written a claim off in their books refrain from further action for recovering it from the debtor. But few people would have the courage to assert that as a direct result of this state of things, statutory rules are set aside by diverging customs. The examples may be multiplied. Incidentally, the reasons of expediency underlying customs diverging from statutory law may be of the most varying kinds. Among others mention should be made of customs developed in order to obtain organizational simplifications or to satisfy interests of pure convenience. Moreover, a custom—even a very well-established one—may develop through mere routine and without conscious motive.

Now, it is true that experience confirms the statement that a

course of action originally founded upon reasons of expedien or forming a more or less unconscious habit *may* later be co sidered by the parties as a binding tradition, a procedure circu scribed by rules. In what circumstances this transformation tak place would seem to be a psychological and sociological proble upon which the present writer is unable to express any opinio But so long as the transformation has not yet taken place, and i those cases where it never takes place, the difference betwee regularities of the one type (actions bound by rules) and regula ities of the other kind (habitual procedures of a purely "factual character) is of great importance.

So far, we would seem to be on firm ground, at least inasmuc as principle is concerned. But what about the practical aspects Is this distinction between customs observed because of reasons o expediency, routine, etc., on the one hand, and customs considere as binding rules, on the other hand, a useful instrument fo present purposes? That is indeed doubtful. The distinction take a very important piece of reality into account, but from a lega point of view it can hardly be adopted as a line of demarcation In many cases, the answer to the question to which of the two categories a custom should be referred is obvious; occasionally, the very nature of the problem provides a clear answer. But quite often, this drawing of a line must confront the courts with insuperable difficulties. In a great number of cases, it is impossible to decide with any degree of certainty under what conditions and at what time notions of duty arise in the minds of persons who observe a custom which was previously based upon motives of expediency or mere routine. A legal rule on such an important subject—shall the law be applied or not?—can hardly be attached to a fact so elusive as that discussed above. In order to realize this, it is sufficient to assume, for the sake of argument, that a court in need of guidance orders some chambers of commerce to give their opinion on the matter.[8] For very good reasons, the chambers would certainly feel it should not be their task to answer that question, particularly as the very persons actually observing the custom must often be most uncertain about the reasons *why* their mode of acting is as regular as it is. Statements to the effect that this or that custom is based upon notions of duty entertained by the parties, while this or that other custom is of a different and

[8] In Sweden, *responsa* from one or more chambers of commerce constitute the usually adopted method of proving the existence and contents of a usage.

lower order, can hardly ever be anything but speculations built upon the weakest of foundations.

Be that as it may, however. The attempt to solve the problem of customs by resorting to the principles governing customary law confronts us with further difficulties, some of which are similar in character to those already considered while others are of a different order.

Indeed, a general rule on the applicability of customs opposed to non-mandatory statutory provisions cannot be upheld on this ground, even if we introduce the qualifications mentioned above. According to established doctrine it is not sufficient for a custom to be supported, in the minds of those who act upon it, by notions of an "ought"—it is also required that they consider this action as the performance of a *legal* obligation laid upon them. This requirement is also embodied in the traditional claim for *opinio necessitatis*—it is characteristic that the term *opinio juris* is used as a synonymous expression—and this aspect of the meaning of customary law is usually emphasized quite specifically. Thus the principle that customary law is binding upon the courts and sets aside statutory rules is not applicable if the observance of the customary rule concerned is based not on a conviction that it is *legally* binding but on considerations of morality or courtesy: the parties do not wish to violate the standards set by social conventions or by common decency.

Against this distinction, objections founded upon the difficulty of its practical application and similar to those put forward above may be invoked with even greater strength. In most cases, it is certainly impossible for a judge who refuses to fall into habits of loose thinking to determine to what extent an extra-judicial manner of acting has been essentially based upon legal considerations, consciously or unconsciously. It must frequently happen that a custom is observed simply because the acting party feels that he "ought" to observe it; whether any considerations of possible legal consequences have contributed to this result or whether any legal influence has asserted itself in the mind of the parties observing the custom are questions which the parties would not be able to make clear to themselves even after close reflection. The scope of legal influence is highly disputable even where only merchants are concerned; there are so many other elements besides legal ones—although some of them are more or less closely connected with the legal sphere—which stand in a causal relationship with the maintenance of regularity in people's conduct. It is extremely difficult for

courts to arrive at a well-founded opinion in these matters, and the problem is by no means made easier by the fact that the solution in such subtle matters would chiefly depend upon the views of chambers of commerce. When put in this form, the whole question is inaccessible from a legal point of view. What sort of evidence could in fact be brought to prove the existence or non-existence of the *opinio juris*? In this case, the methods of legal technique simply come to naught. They are unable to cope with this sort of distinction, which can be tackled only with the weapons of sociology or other branches of science. Obviously, courts as well as chambers of commerce may entertain certain ideas as to the views held in this respect by parties observing a given custom, and it is equally obvious that these ideas may quite often be correct. But it must be considered a defect that a rule of law concerned with this essential issue is based upon such vague foundations.

Furthermore, when considered from the point of view of substantial solutions, the value of this distinction seems doubtful, and its results most remarkable. Indeed, it seems a strange condition, at least in our days, that the effect of a custom concerning contractual relations, an effect which is inconsistent with—possibly repugnant to—statutory provisions or well-established precedents, should be based upon the fact that those who observe the custom nevertheless consider it an expression of prevailing rules of law. Thus, a rule which is not in itself a legal rule assumes that character simply because the parties *believe* that it is a legal rule. This reasoning may possibly be acceptable in so far as the above-mentioned "autonomy" of mercantile life is still a working reality. If not, the condition encounters considerable difficulties of a logical kind. At any rate, if it is really upheld, the number of cases where customs can claim validity will be rather small, and the enactment in sec. 1 of the Sales of Goods Act (and similar rules in other statutes) would thus assume a relatively modest scope. Obviously, this would not agree with the intentions held by the drafters of the statutes on this topic—even if proper allowance is made for the vagueness of these intentions. It is hardly a matter for hesitation that, when drafting the Sales of Goods Act, the draftsmen did not only contemplate customary law in the classical sense. In fact, Scandinavian writers generally agree that sec. 1 of the Sales of Goods Act *also* covers such customs as do not fulfil the requirements upon customary law in that sense because they lack the *opinio necessitatis* (*juris*). Moreover, it is probable that the framers of the Act considered customs belonging to the

classical group of customary law to be such rare phenomena that the real emphasis must be laid upon customs and usages of a "factual" kind.

It could certainly be objected that it would be possible to retain the justifiable elements of the doctrine of *opinio juris* without being pushed to the unacceptable consequences mentioned above. It should not be considered a *positive* condition for the enforcement of a custom that those who observe it do so because they conceive it to be legally binding. What would be retained, then, would be only the negative aspect: the custom would become ineffective if the intention to be legally bound by it were provably lacking. Indeed, if it could be proved that those who observe the custom reject the notion of legal obligation—they act as they do, but only because of prevailing notions of morality and decorum, and not as a legal duty—then the custom would not assume the relevance of which we are now speaking. The ultimate *ratio* of the doctrine of *opinio juris* would not go beyond emphasizing this fact. The distinction would be the same as that we meet elsewhere in the law of contracts: if a promise has been given, no court will enquire whether the promisor has intended to undertake a legal obligation unless specific evidence to the contrary has been brought. If, however, it appears from such evidence that the parties have been opposed to the idea of becoming legally obligated, no such obligation will be enforced.

This standpoint, however, will lead to the converse result: customary law, and consequently customs, will become part of the law and assume the capacity to set statutes aside to such a vast extent that serious misgivings must arise. It is true that we would exclude those cases where a party observing the custom has, as can be proved, expressed his intention not to be legally bound—or in other words: where some kind of activity to that effect may be assumed on more or less reliable grounds. But in all other cases, where people act under the influence of moral or traditional rules *without* defining in any tangible way their attitudes to the question whether they have also intended to undertake a legal obligation, customs would be applicable. These cases are certainly by far the most common ones. Is it permissible to make only that narrow exception and endow all sorts of moral and traditional standards with the status of legally binding rules—rules, indeed, capable of setting the law aside? Such a course of action would be more than audacious. That solution *cannot* be realized, whatever sec. 1 of the Sales of Goods Act and similar enactments

may prescribe. It may possibly be argued that from the field of application of customs we could further pick out those cases where it is possible to produce reliable evidence for the assumption that the customary rule concerned is based entirely (or chiefly?) upon moral or traditional considerations, and not upon a legal influence. We have already pointed out, however, that from a legal point of view it is preposterous to raise such a point as a question to be established by evidence. Evidence of that kind is hardly ever successful unless we are prepared to indulge in recklessly loose thinking.

Thus, the conclusion must be that, if we adopt the classical doctrine of customary law, considerations of customary law are equally unhelpful in our attempts to find a general rule on the enforcement of customs at the expense of non-mandatory legal rules—at least if we expect the rule to fulfil reasonable requirements of usefulness.

In this connection, finally, it may perhaps be pointed out that if we make the classical doctrine of customary law our starting point, it is difficult to explain why customs should not set aside even mandatory rules of law—a result which has certainly never been intended even by the most ardent advocates of the doctrine.

IV

The situation is indeed a curious one. Just where a rule of law capable of offering some guidance is most badly needed, it is impossible to find one. Not only so, but suitable connecting factors which might facilitate the finding of such a rule are also lacking. It is beyond doubt that, to some extent, customs must be held capable of setting aside non-mandatory rules of law even in cases where it is impossible—if no fiction is to be resorted to—to prove the existence of any intention as to their applicability on the part of the acting parties. It is equally obvious that this application of customs on objective grounds cannot be limited to those cases where the conditions for the existence of customary law—as laid down in the classical doctrine of such law—are fulfilled. What is needed is a criterion for drawing a dividing line between customs which are capable of setting aside legal rules and those customs that are devoid of that capacity. To the present writer's knowledge, however, no such criterion has ever been found.

The difficulties arising in this connection are due not only—as pointed out above—to the fact that we are confronted by problems of "underlying assumptions" but also to the particular importance and scope which these problems assume here rather than anywhere else. The fact that we are dealing with underlying assumptions is in itself sufficient to explain the difficulty of giving a clear answer to the question when customs are capable of setting aside rules of law and statutory provisions and when they are not endowed with that capacity. For it is well known that in spite of all efforts—and in spite of the fact that it has immeasurably enriched Scandinavian legal writing and judicial thinking—the "doctrine of underlying assumptions" has not, on the whole, given rise to fixed rules which can give any guidance to courts. In this respect, considerable scope has been left for the "supplementing" activity of the bench. What should be pointed out above all, however, is that in this connection, i.e. within the limits drawn by sec. 1 of the Sales of Goods Act and similar enactments, the field of application of underlying assumptions is far vaster than usual. Here, for several reasons, there are valid grounds for attaching importance to assumptions in a much more liberal way than is usually possible.

One fact which contributes to that result is that in these cases the doctrine of underlying assumptions is used for a different purpose from that for which it is employed in other fields of law. The possible effect of its applications is not to deprive a *contract* of its validity, or give it a modified construction. Conversely, its possible effect is to set aside a non-mandatory rule of law and thus produce the result that the contract is given the construction it would have had if the assumption had been a condition embodied in the contract. Doubtlessly, the disregarding of non-mandatory rules of law by virtue of the assumptions of the parties is not likely to meet with the same resistance as a modification of actually concluded contracts by means of the same instrument. Courts still watch intently over the "sanctity" of contracts.

Moreover—and this is a vital point—the fact which is to be inserted into the contract with the help of this doctrine has a force unparalleled in most other cases where underlying assumptions are discussed, namely the force of actual and established observance (cf. III, *supra*). That a rule differing from a non-mandatory enactment is upheld in the actual conduct of people is something which must be entitled to particular respect. Indeed, this is a fact of great importance, although it has hardly been

sufficiently emphasized by the advocates of the "doctrine of underlying assumptions". If people have permanently submitted to the operation of a certain rule, there would seem to be a good deal to say for the conclusion that the rule is beneficial or at least acceptable. It is an inherent tendency of courts to do their best to maintain an established state of things, unless sufficiently strong reasons can be invoked for not doing so. The enforcement of customs on "objective" criteria is justifiable, though not to such an unlimited extent as would seem to follow from the language of the Sales of Goods Act and similar enactments. *So far* the application of customs can, after all, be supported by considerations characteristic of the doctrine of customary law—that doctrine being apprehended in a manner differing from the classical interpretation. It is obvious, incidentally, that even if the basis adopted here is different from the classical one, strict requirements upon the quality of the customs must be upheld for this purpose. If the observance of customs is to have such importance for the decision whether or not an underlying assumption is relevant it is necessary, as a general proposition, that the custom concerned shall fulfil the above-mentioned requirements as to its "established" character, etc. However, it would hardly seem necessary to maintain these requirements quite as strictly as under the classical doctrine of customary law.

One further relevant consideration should be pointed out. As mentioned above, the real question is *why* there is a tendency in these cases to attribute such great importance to the implied assumptions of the parties when these are founded upon the existence of customs. Why, within a large area, is there a general willingness to treat the customs as if they were conditions embodied in the contract?

To answer this question, we may revert to the statement made above that even where there is no evidence for the hypothesis that the question of adhering to customs has been present to the parties at the time of the conclusion of the contract and has determined its contents as an implicit condition, it is always *possible* that this has been the case. It may be that because of the existence of the custom the parties have found it unnecessary to insert into the contract a clause diverging from the non-mandatory statutory provisions but harmonizing with the custom—and in that case, it may well be stated, without resort to fictions, that the applicability of the custom as opposed to the legal rule has been tacitly agreed upon. On the other hand, one seldom knows with certainty

that this has been the case. It is far too difficult to produce any evidence on that point. It is indeed a well-nigh impossible task to decide, on the basis of the facts that may have been proved, how much of the customary elements of the contract has been covered by the tacit declarations of intention by the parties, and how much has remained merely "underlying assumptions". In these circumstances, it is hardly surprising that—particularly if there is no deep-rooted conflict with the non-mandatory statutory provision, so that the proposed solution is not *wholly* out of touch with it (see further below)—courts are prepared to consider such elements as have not been proved to be contract provisions, but may be of that character, as if they had been embodied into the agreement. Thus, when referring to contract conditions, courts are not indulging in pure fiction. It is possible that the assumption is true, although no conclusive evidence to that effect has been produced and, indeed, no proof worth mentioning has been shown for this hypothesis. Thus, after all, there is implied a *certain* element of contract in the enforcement of customs.

It should not be overlooked in this connection that, in *those cases* (cf. p. 47) where the question turns upon the meaning of specific words, terms, and expressions, courts have to follow customs in their interpretative activity. As we have found, this is something essentially different from the problem now under discussion. But if customs assume decisive importance in these cases, this must nevertheless induce the court to treat them with a good deal of respect even when they concern other contractual elements. From interpretation in its true sense in the first-mentioned cases, it is only a short way to fictitious construction as to the other cases.

Finally, to complete the picture, it should be added that in the foregoing discussion we have not at all dealt with the fact that quite independently of the support which may be given by sec. 1 of the Sales of Goods Act and similar enactments, there may be reasons, under the general rules of the Scandinavian doctrine of underlying assumptions, to attach importance to the fact that the parties have taken the applicability of a custom for granted without making specific reference thereto in the contract. To what extent this should reasonably be done is a question which concerns the doctrine of underlying assumptions as such, and cannot be further enlarged upon in the present paper. Obviously, it may occur that the application of a customary rule is of essential importance for the mutual performances of the parties, or that

non-observance of the custom would otherwise entirely upset the basis upon which the contract has been founded.

The conclusion from the foregoing enquiry is that, in the cases now under discussion, the contents of sec. 1 of the Sales of Goods Act and similar enactments on the effects of mercantile usage or other customs are so vague that it is, after all, doubtful whether one can call them rules of positive law. These enactments may rather be understood merely as a general authorization to the courts in certain cases, where it is considered reasonable, to set aside non-mandatory provisions in favour of prevailing customs, even when the applicability of these customs neither is an implicit part of the agreement nor can be supported by the doctrine on customary law in the classical sense. Thus, if courts wish to apply a custom, it is unnecessary to adopt the fiction of a tacit agreement on its applicability. But neither the Act with its *travaux préparatoires,* nor legal writing in Sweden or in Continental Europe, have so far given any real guidance for the solution of the problem of when customs are relevant and when they are not. However, for various reasons—*inter alia,* as demonstrated above, considerations of legal technique—the drawing of a general line of demarcation encounters almost insuperable difficulties, difficulties as insuperable as the problem of finding a general rule on underlying assumptions in the law of contracts has so far proved to raise.

Reported Swedish decisions do not give any clear indication of the attitude to customs prevailing in this country. It cannot be stated with certainty whether courts usually attribute binding force to customs—provided they fulfil the requirements of permanence, etc.—or consider themselves as authorized to make use of customs only when this is held desirable. It would seem, however, that—principally on the strength of the language used in statutes—the prevailing Swedish view tends to follow the first-mentioned course. In several reported cases, the language of the decisions conveys the impression that where the parties have not agreed upon any provision to the contrary, it has been taken for granted that established customs have an unconditional claim to be applied. On the other hand, there is no evidence for the view that in those cases which have been dealt with by courts the question has been the subject of a decision involving general principles. It may be assumed that courts would hesitate before making a deep and extensive use of customs setting aside important statutory provisions, whereas the observance of such usages in

more peripheral matters would be more willingly accepted. More over, reported pronouncements by the chambers of commerce on the existence of mercantile usage do not justify the conclusion that, as a general rule, mercantile usage radically conflicts with important enactments. It should be borne in mind that, in most cases, customs inconsistent with statutory provisions do not set these entirely aside, but do so only with important limitations. In actual practice, the conflict with non-mandatory enactments has therefore not *quite* the same bearing as it might seem to have at first glance. With some exceptions, most customs imply a partial reduction of the field of application of the enactment, or a modification of its contents, rather than its general annulment. If confronted by a situation where customs would tend to break down the system of statutory provisions within really decisive areas, courts would certainly give up their attitude of willingness to give importance to customs. Even if the interpretation of sec. 1 of the Sales of Goods Act and similar enactments which has been criticized above is adopted, it is moreover far from impossible for a court to disregard a custom which for some reason it considers with distrust or antipathy, without explaining the true reasons in the judgment. One course of action is to heighten considerably the requirement of "permanence" which is commonly agreed to be necessary for its applicability. Swedish courts have certainly not refrained from making use of this solution in certain cases.

Let us assume that, in the future, the courts will not consider customs binding upon them in the sweeping way which seems to follow from sec. 1 of the Sales of Goods Act and other enactments. Still, there is reason to expect that they are likely to adopt a view more favourable to customs than the opinion that these enactments only imply an authorization to make use of customs when special reasons call for this. Rules which give the courts a right of free discretion usually need a complement, namely some sort of instruction as to the course which should be adopted *in dubio*. Considering all those elements, outlined above, which make an extensive recognition of the applicability of customs as it were predestinate, it is a natural solution for the courts to act upon at least a *presumption* of the applicability of customs. This would imply that customs would not be respected if, for one reason or another, they lead to a solution of the legal question at bar which, in the opinion of the court, is less proper than that of the statutory provision in view. This would be the case not only where the term "abuse of rights" would be justified

(regarding this term, cf. below). But the customs would be respected—in the absence of any objectionable feature—even though they had no advantage which would make them preferable to the statutory provisions.

To avoid misunderstanding, it seems proper in this connection to emphasize that, even if it could be held that customs in themselves set aside non-mandatory enactments, there is no reason for the opinion that they are equally capable of making *contracts* void. In *this* conflict customs must in any case yield, as may be held to follow from sec. 1 of the Sales of Goods Act and similar enactments. If contracts are entitled to preference over statutory provisions, that preference must be even stronger in respect of customs. At the utmost, it may be held that some regard should be paid to customs, when a court has to examine whether a contract should be deprived of its validity, because its contents, in the view of the court, are improper. The improper character of the contract may be considered more obvious if contracts of that kind are avoided under prevailing customs (or are generally considered inconsistent with decent standards among interested parties). It does not seem permissible to go any further than this.

An additional warning against a general rule on the preference of customs over non-mandatory statutory provisions will obviously be found in the fact that the implications of customs may be such as to facilitate what is commonly called "abuse of rights". Certain customs, for instance, have developed within branches dominated by one or a few enterprises, and have consequently become one-sided and capable of hurting the "justified" interests of parties on the opposite side. It is important that the legal system should react against such abuses connected with monopolistic tendencies. And provided the courts realize that the enactments on the applicability of customs are not to be taken quite so seriously as might seem to follow from their wording, it is easy enough to introduce suitable reactions by deciding in accordance with statutory provisons regardless of the customs concerned.

Even from the opposite point of view—that enactments like sec. 1 of the Sales of Goods Act endow customs (provided they are established) with a general validity at the expense of non-mandatory provisions—it may be argued that it is not impossible to find remedies against abuses of this kind. In spite of the recognition in principle of the applicability of customs there would be nothing to prevent their being pronounced null and void in those cases where the court finds the customs unacceptable from the point

of view of public interest. This would mean that the inconveniences attending the systematic setting aside of non-mandatory rules of law in favour of customs would be removed at least in these cases. This idea has lately been adopted by several Scandinavian writers.

This method of dismissing customs disapproved by the legal system may not be very efficient. It is certainly true that a custom may also be held null and void under established nullity rules—there is no reason whatsoever for granting a more far-reaching effect to customs than to contract clauses in this respect. However, according to the prevailing Swedish view, these nullity rules will hardly go as far as would be desirable in this connection. Courts are extremely cautious about making use of rules on the nullity of contracts inconsistent with "decent standards" or "improper" on account of their contents, and they are hardly to be blamed for this. It is likely that if customs were to be nullified because of their contents in accordance with general rules on the nullity of contracts as applied so far, this would happen only in extreme situations. But the present problem is whether the correct solution with regard to customs is to make use of a more extensive concept of nullity than in the law of contracts. This would mean abandoning, at least in part, the hypothetical—but, as would appear from the discussion above, untenable—assumption, that customs are valid *per se* in the manner which would seem to follow from sec. 1 of the Sales of Goods Act and similar enactments. At the same time as the general effectiveness of customs was recognized in principle, the practical consequences of this recognition would be reduced by the adoption of special grounds of nullity in respect of customs. It is uncertain, though, whether Swedish courts would approve of this twofold doctrine of nullity and make such use of it as to put the desirable check upon customs unacceptable to the legal system.

However, it is not only in cases of obvious "abuse of rights" that the considerations mentioned above (viz. that customs may have been developed unilaterally, in favour of certain interested parties, and to the prejudice of the reasonable claims of a party on the opposite side) argue strongly against an uncritical acceptance of customs, even if they have sufficient permanence and local extension. From our present point of view, more decisive objections may be raised. With regard to commercial customs, mercantile usage, it is easy to demonstrate a development which must result, to some extent, in a view of the problem of customs entirely dif-

ferent from that which has prevailed so far. At the stage in the history of mercantile usages when they were given such considerable legal importance, the prevailing view would seem to have been that the observance of these usages was, as it were, something arising from the very nature of things, a spontaneous application of rules in commercial life. They embodied a conduct which the interested parties considered as natural, perhaps even obviously correct. The idea was that customs had emerged as a direct product of the legal transactions of commercial life, adapted to its needs. Under these circumstances, it may be reasonable to treat them in the same way as mercantile contracts. However, as writers—and among them the German scholar Otto Schreiber in his well-known book *Handelsbräuche* (1922)—have shown, this ideal picture is not very true to real life. It would seem that, to a very large extent, mercantile usages must be considered as products of a conscious creation of rules, based upon the desire to give some interested parties, members of certain organizations, a stronger legal protection, or increased legal advantages, in their contractual relations with others, at the expense, *inter alia,* of the unorganized "public". It is inevitable that general conditions of delivery and other standardized contractual rules—often established with the participation of branch organizations, applied by merchants and other business men and usually drafted unilaterally for the exclusive benefit of these parties—should exercise an influence in commercial life which later, after a longer or shorter period of time has elapsed, gives rise to a tendency to endow these rules with the character of binding mercantile usage, i.e. enforcement without any support in the contracts of parties. As early as at the time when the Sales of Goods Act was drafted writers drew attention to the tendency of this body of rules to expand and to the possibility that standard clauses of this kind might actually assume the character of legal provisions. It was pointed out that this was a line of development which mercantile usage might pursue, and also a source of information about the contents of such customs. In the last few decades, the influence of "standard clauses" has certainly been reinforced, both generally and with particular regard to the development of mercantile usage. This seems to be a result particularly of the continued growth of organizations.

In so far as mercantile usage is nowadays directly or indirectly determined by standard clauses, it is impossible to approve a principle which implies that customs based upon the use of such