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MISTAKEN IDENTITY AND ITS EFFECT ON CONTRACTUAL VALIDITY: SOME CASES FROM THE ENGLISH COURTS

by

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"There is no branch of the law of contract which is more uncertain and difficult than that which is concerned with the effect of mistake on the formation of a contract."[1] Few contract lawyers would dispute the truth of this statement, made by Professor A. L. Goodhart in response to the decision in *Sowler v. Potter*.[2] Indeed, the doctrine of mistake has grown increasingly complicated with the passage of time. Nowhere is that complexity more obvious than in the area of unilateral mistake, of which the distinguishing feature is that the mistake made by one party is known to, and almost invariably induced by the fraud of, the other.[3]

In such a situation, the "reasonable man", so endemic in all common-law systems, may quite reasonably suppose that no contract would come into existence. But as is so often the case, the "reasonable man" would be wrong in his conclusion.[4]

In order to attempt to reach any sort of understanding of the doctrine of unilateral mistake, the inquirer must pursue his task with two principles firmly in mind. The first of these, given judicial approval in 1871, is that "[t]he English law is not concerned with the motives of the parties nor with the reasons which influenced their actions."[5] This principle, while obviously of crucial importance in the area of mistake, in one of general application in contract law. Thus, in *Lucy v. Zehmer*,[6] the defendant's plea that he was "high as a Georgia pine", and that the alleged agreement to sell his property to the plaintiff was "just a bunch of two doggoned drunks bluffing to see who could talk the biggest and say the most", was rejected by the court with the comment that "[i]t is an unusual, if not bizarre, defence [sic]."[7] This reiterates the viewpoint taken in CLARK ON CONTRACTS: ". . . The law, therefore, judges of an agreement between two persons exclusively from those

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[1] Goodhart, *Mistake as to Identity in the Law of Contract*, 57 L.Q.R. 228 (1941).

[2] [1940] 1 K.B. 271.

[3] *Id.* Unilateral mistake is the point at issue in Sowler v. Potter.

[4] That the viewpoint of the reasonable man is not always the most reliable criterion when evaluating legal principles becomes apparent as soon as one begins to study contract law. The rules on offer are surely diametrically opposed to the perception of any reasonable person.

[5] *See, e.g.*, Smith v. Hughes (1871) L.R. 6 Q.B. 597.

[6] 196 VA. 493, 84 S.E.2d 516.

[7] *Id.* at 500, 84 S.E.2d at 520.

expressions of their intentions which are communicated between them."[8]

Therefore, although contract is historically based on what has been described as "the phenomena of agreement",[9] or the consensus *ad idem* which results from a meeting of the minds of the two parties, the objective theory of contract how holds sway in all common-law jurisdictions. That is:

> "[a] contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake or something else of the sort."[10]

Although Judge Learned Hand's above comment suggests that a mistake may nullify consent, it is respectfully submitted that, in litigation concerning unilateral mistake, this will rarely be the case. And this brings us to the latter of our two principles. In any case where a plea of unilateral mistake is entered, the court is usually presented with a most difficult dilemma; i.e., which of two innocent parties must suffer because of the fraud of a third party. The presence of this *mala fide* third party, the "rogue", gives the defense of unilateral mistake the dubious distinction of being possibly the most challenging of all contractual pleas.

The majority of cases dealing with unilateral mistake are situations involving mistakes of identity. In the usual scenario, a rogue, X, poses as Y, (often using faked credentials) and in the guise of Y, concludes a contract of sale with the plaintiff, Z. Because the goods 'bought' by X will be paid for by a check which will clearly be dishonored, Z will wish to recover these goods. Prima facie, this is a simple matter. Z's contract with X is voidable due to the fraudulent misrepresentation of X. However, before Z discovers the fraud and has an opportunity to avoid the contract, X will almost certainly have transferred the goods to a *bona fide* third party. Therefore, because of this third party right, it will be too late for Z to avoid the contract on the ground of misrepresentation. Of necessity, he is faced with the much more onerous task of convincing the court that his alleged contract with X is void *ab initio* due to unilateral mistake. If Z succeeds in this latter plea, he will be entitled to the return of his goods, as no rights can pass under a void contract.

In the above hypothetical situation, both Z and the *bona fide* third party are

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[8] CLARK ON CONTRACTS, 4th ed., § 3, p. 4.

[9] LAW OF CONTRACT, 11th ed., p. 26.

[10] Hotchkiss v. National City Bank of New York, 200 F. 287, 293 (S.D.N.Y. 1911).

innocent victims of the fraud perpetrated by X. Which of them must bear the resulting loss? In approaching this question the court will proceed on the prima facie presumption that, despite the mistake, a valid contract has been created between X and Z. In order to rebut this presumption, Z must prove four points to the satisfaction of the court:

1. that he intended to deal with some person other than the person with whom he has apparently made a contract;
2. that the latter was aware of this intention;
3. that, at the time of negotiating the agreement, he regarded the identity of the other party as a matter of crucial importance; and
4. that he took reasonable steps to verify the identity of the other party.

The first of these requirements would not appear to pose any problem. In our hypothetical above, for instance, it is clear that Z intends to deal with Y and not with X. However, two of the leading English authorities illustrate that even this seemingly simple point may become problematic in the context of unilateral mistake. In the first of these, *King's Norton Metal Co. Ltd. v. Edridge, Merrett & Co. Ltd.*,[11] a rogue named Wallis, for the purpose of cheating, set up in business as Hallam & Co. Writing on paper headed "Hallam & Co.", he obtained goods from the plaintiffs on credit. He then disposed of these goods to the *bona fide* defendants. The plaintiffs' action to recover the goods on the ground of unilateral mistake failed. The court held that as Hallam & Co. did not exist, the plaintiffs could not have intended to deal with the company. They must therefore have contracted Wallis, the writer of the letters. Thus, the court held, "There was only one entity, trading it might be under an alias, and there was a contract by which the property passed to him."[12]

Therefore, in order for an action on the ground of unilateral mistake to succeed, there must be confusion between two distinct entities. Should the rogue pretend to be someone who does not exist, or who has died, the first of the four requirements will not be satisfied. This principle, however, is not easily reconcilable with the decision in *Sowler v. Potter*.[13] In May of 1938, the defendant, Ann Robinson, was convicted of permitting disorderly conduct in a cafe. One month later, under the name of Ann Potter, she approached the plaintiff's agent, Mr. Tong, to negotiate a lease of premises upon which to open a restaurant.

In July of 1938, the defendant assumed the name of Ann Potter by deed poll, and one month later, the plaintiff granted her the lease. After discovering the true situation, the plaintiff sought a declaration to void the lease on the ground of mistake.

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[11] (1897) 14 T.L.R. 98.
[12] (1897) 14 T.L.R. at 99.
[13] [1940] 1 K.B. 271.

Finding in the plaintiff's favor, the court stated:

> . . . [T]he law on the subject is to be found set out in Viscount Haldane's speech in Lake v. Simmonds where he said: 'Jurists have laid down, as I think rightly, the test to be applied as to whether there is such a mistake as to the party as is fatal to there being any contract at all, or as to whether there is an intention to contract with a de facto physical individual, which constitutes a contract that may be induced by misrepresentation so as to be voidable but not void.[14]
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> * * *
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> . . . [T]his case of landlord and tenant is clearly one where the consideration of the person with whom the contract was made was a vital element in the contract . . .[15]

Therefore, the court felt the crux of the matter was the subjective belief of Mr. Tong. The court stated, "He believed that, whoever he was contracting with, it was not Mrs. Ann Robinson who had been convicted of this offence [sic] a short time beforehand."[16]

While Mr. Tong would probably not have made the contract had he known he was dealing with Ann Robinson, surely the important point is that there was only one entity: the woman known at one time as Ann Robinson, and at another as Ann Potter. It was to this one entity that the plaintiff intended to lease the premises. It is respectfully submitted that the decision seems unsound in law, and, indeed, was the object of unanimous disapproval by the Court of Appeal in *Gallie v. Lee*.[17]

The requirement that there be confusion between two separate entities is well-illustrated by the decision of the House of Lords in *Cundy v. Lindsay*.[18] The rogue, Blenkarn, rented a room at 37 Wood Street, London. The room was close to a well-known and reputable firm, Blenkiron & Sons, who carried on business at 123 Wood Street. He then ordered goods from the plaintiff, Lindsay, and signed his name so that it looked like "Blenkiron." The goods were dispatched to "Messrs. Blenkiron & Co., 37 Wood Street", where Blenkarn received and re-sold them to the *bona fide* defendant, Cundy. Cundy paid Blenkarn, but Blenkarn, of course, did not pay Lindsay. Lindsay then sued Cundy in conversion.

In the High Court, it was held that Lindsay intended to deal with the person carrying on business at 37 Wood Street—Blenkarn—so that Blenkarn got a voidable

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[14] *Id.* at 273.
[15] *Id.* at 275.
[16] *Id.*
[17] [1969] 2 Ch 17.
[18] (1878) 3 App. Cas. 459.

title to the goods and was able to pass a valid title to Cundy. But on appeal by Lindsay, the Court of Appeal and the House of Lords held otherwise. In the latter forum there were no doubts about the matter:

> . . . how is it possible to imagine that in that state of things any contract could have arisen between the Respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatsoever.[19]

Although *Cundy*[20] is clearly distinguishable from *King's Norton Metal*,[21] one may question, with respect, the logic of both the Court of Appeal and the House of Lords. While accepting that the appellant Lindsay was confused between the different entities of Blenkarn and Blenkiron & Co., one must examine the appellant's intent. Was it really the case, as both Courts unanimously thought, that the appellant intended to contract only with Blenkiron & Co., the reputable firm, or was the appellant in fact quite content to deal with Blenkarn, the rogue who traded at 37 Wood Street? It is submitted that the latter interpretation is the correct one. Indeed, it may well be argued that, even if the plaintiff succeeds in establishing confusion between two entities, this is but the first step toward a judicial declaration that the agreement with the rogue is void *ab initio*.

The second of the four requirements should present no such problem for the plaintiff. The rogue's awareness of the plaintiff's mistake is usually self-evident, as it is the rogue's fraud which has induced the plaintiff's confusion. *Hardman v. Booth*[22] is often cited as a classic example of the operation of the second requirement. The plaintiff, a manufacturer, went to the firm of Gandell & Co. to solicit orders for goods. The firm consisted solely of Thomas Gandell, and was managed by a clerk, Edward Gandell. The clerk led the plaintiff to believe that he was a member of the firm, with authority to place orders on its behalf. Under that belief, and at Edward Gandell's request, the plaintiff sent goods to the firm, invoicing them to "Edward Gandell & Co." Gandell pledged the goods with the defendant, Booth, who later sold them under a power of sale. The court held that Edward Gandell had acquired no title to the plaintiff's goods; thus, the defendant was deemed liable in conversion.

It is submitted, however, that the decision turned not on principles of mistake, but on those of agency. This contention is supported by various statements of the court, to the effect that the plaintiffs supposed that they were dealing with Gandell

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[19] *Id.* at 465.
[20] *Id.*
[21] (1897) 14 T.L.R. 98.
[22] (1863) 1 H. & C. 803, 1107.

& Co., the packers, to whom they sent the goods; the fact being that Edward Gandell was not a member of that firm and had not authority to act as their agent.[23] The court also indicated that it is clear that there was no sale to Gandell & Co., because they never authorized Edward Gandell to purchase for them.[24] Without the concept of agency, the decision in *Hardman*[25] does not seem to be reconcilable with the leading cases on contracts concluded *inter praesentes*.

This point takes us to the third obstacle which the plaintiff in a unilateral mistake action must seek to overcome: proving that he regarded the identity of his co-contractor as a matter of crucial importance. And it is in the situation where the parties are face-to-face that the problem has been most acute. Three cases illustrate the nature of the difficulty faced by the court.

In *Phillips v. Brooks*,[26] the rogue, North, went to the plaintiff's jewelry shop and selected pearls and a ring valued at three thousand pounds. He produced a check book and wrote out a check for £3,000, saying he was Sir George Bullough, and giving an address in St. James's Square. Having verified in a directory that Sir George Bullough resided at the stated address, the plaintiff agreed to accept the check in payment. North told the plaintiff he would leave the pearls until the check had been cleared. He did, however, take the ring, which he immediately pledged with the defendant, a pawn broker. The check was dishonored, and the plaintiff jeweler sued in conversion, alleging that he intended to sell to Sir George, and not to North.

The court considered two solutions:

1. The jeweler intended to contract only with Sir George Bullough and no one else. This solution would favor the approach adopted in *Hardman*.[27]
2. The jeweler was content to contract with the person who stood before him in the shop—North, the rogue.

The court adopted the second of these solutions, with the result that the pawnbroker was deemed to have good title to the ring. The court reasoned:

> The question therefore, in this case, is whether or not the property had so passed to the swindler as to entitle him to give a good title to any person who gave value and acted bona fide without notice. This question seems to have been decided in an American case of Edmunds v. Merchants' Despatch Transportation Co. The headnote in that case

[23] *Id.* at 1109.
[24] *Id.* at 1110.
[25] *Id.*
[26] [1919] 2 K.B. 243.
[27] Hardman v. Booth, (1863) 1 H. & C. 803, 1107.

contains two propositions, which I think adequately express my view of the law. They are as follows:

> 1. 'If A, fraudulently assuming the name of a reputable merchant in a certain town, buys, in person, goods of another, the property in the goods passes to A.'
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> 2. 'If A, representing himself to be a brother of a reputable merchant in a certain town, buying for him, buys, in person, goods of another, the property in the goods does not pass to A.'[28]

Professor Goodhart commented on the decision as follows:

> Did the shopkeeper believe that he was entering into a contract with Sir George Bullough and did North know this? If both answers are in the affirmative then it is submitted that there was no contract . . . The law must have lost all touch with reality if it holds that under such circumstances there is a contract.[29]

With respect, this view of Professor Goodhart seems somewhat strange. For, if adopted by the courts, the *bona fide* purchaser from the rogue *could never acquire title to the goods*. This is so because the original owner will, necessarily, be misled regarding the identity of his co-contractor. The rogue will clearly know this, as he has deliberately induced the mistake by his fraud. The view taken by Professor Goodhart would certainly protect the owner of goods, duped by the rogue. But, one may argue, it would do so at a quite unacceptable cost to the bona fide purchaser of the goods.

The hazards inherent in the view expressed by Professor Goodhart are perhaps best illustrated by the much-criticized majority decision of the Court of Appeal in *Ingram v. Little*.[30] The plaintiff's who were joint owners of a car, advertised it for sale. A rogue called at their house and offered to buy the vehicle, saying he would pay by check. The plaintiffs told him they wanted cash, and could not accept payment in any other form. The rogue thereupon said he was P.G.M. Hutchinson, a reputable businessman, and gave an address. The plaintiffs had never heard of P.G.M. Hutchinson, but subsequently confirmed that there was such a person, living at the address given by the rogue. The plaintiffs thereupon agreed to let the rogue have the car in exchange for his check. The rogue had nothing whatsoever to do with the real P.G.M. Hutchinson, and his check was dishonored. Meanwhile, the rogue had sold the car to the defendant, who bought it in good faith. The plaintiffs claimed against the defendant for the return of the car or, alternatively, damages for its

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[28] *Phillips*, 2 K.B. at 246 (citing Edwards v. Merchants' Despatch Transportation Co.).
[29] 57 L.Q.R. 228 at 240-41.
[30] [1961] 1 Q.B. 31.

conversion.

In holding that the plaintiffs' claim should succeed, the majority looked at the subjective intent of both the plaintiffs and the rogue, irrespective of the inference to be drawn by their apparent willingness to contract with one another. The two judges in the majority reasoned:

> The question in each case should be solved, in my opinion, by applying the test, which Slade J applied, 'How ought the promisee to have interpreted the promise' in order to find whether a contract has been entered into.[31]
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> In cases such as this the cheat is fully aware of the offeror's actual state of mind when he has himself deliberately and fraudulently induced it.[32]

While this is self-evidently true, it is of no help whatsoever to the innocent purchaser from the rogue. The court itself recognized this point, observing, "The court is naturally reluctant to accept the argument that there has been a mistake in such a case as this since it creates hardship on subsequent bona fide purchasers. The plaintiff's unguarded transaction has caused loss to another."[33]

The minority, however, saw the matter rather differently:

> If Miss Ingram had been asked whether she intended to contract with the man in the room or with P.G.M. Hutchinson, the question could have no meaning for her, since she believed them both to be one and the same . . . I hope that I am not diminishing the province of the trial judge, which I should always wish to honor and respect. But I cannot understand how observation of the witness can detect whether his consent was produced by a trick or induced by fraud; I doubt whether an analysis of his mental processes would help either. All that Miss Ingram or any other witness in her position can say is that she did in fact accept the offer made to her; and that, if she had not been tricked or deceived, she would not have accepted it.[34]

This view is supported by the later unanimous decision of the Court of Appeal in *Lewis v. Averay*.[35] The facts in *Lewis* were very similar to those in *Ingram*.[36] The rogue, posing as a well-known actor, offered to buy the plaintiff's car. The plaintiff

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[31] *Id.* at 53.
[32] *Id.* at 56.
[33] *Id.* 62.
[34] *Id.* at 65.
[35] [1972] 1 Q.B. 198.
[36] [1961] 1 Q.B. at 31.

accepted the offer, and a check was tendered in payment. Afraid that the check might be worthless, the plaintiff requested proof of identity. The rogue presented a pass to Pinewood Film Studios, bearing an official stamp. Satisfied with this, the plaintiff allowed the car to be taken away. The check had been stolen and was worthless. The rogue then posed as the plaintiff and sold the car to the defendant, Averay. The plaintiff brought an action of conversion against the defendant.

The trial court found that the identity of the rogue was a matter of crucial importance to Lewis. Because of this, no title had passed to the rogue, or from the rogue to Averay. Lewis was therefore awarded damages for the wrongful detention of the vehicle.

On appeal by Averay, the Court of Appeal unanimously reversed this decision, finding that the initial transaction between Lewis and the rogue gave the latter a voidable title to the car. As this title had not been avoided when the rogue sold the vehicle to Averay, the latter acquired ownership of the car.

It is clear that no simple distinction, if any, can be found among *Phillips*,[37] *Ingram*[38] and *Lewis*.[39] Indeed, to the objective observer, the three cases must surely appear to be virtually identical. The suggestion has been made, in both judicial and academic circles, that a possible way to differentiate among the cases is by drawing a distinction between the identity and the attributes of a person. Thus, according to this theory, the plaintiffs in *Ingram*[40] were mistaken concerning the *identity* of their co-contractor. In contrast, the plaintiffs in *Phillips*[41] and *Lewis*[42] were mistaken only in regard to certain *attributes* possessed by the other party (his credit-worthiness, address, etc.). This view derives from Aristotle's theory of universals[43] and, while perhaps initially attractive as a device by which we may circumvent our dilemma, the view does not appear to survive close scrutiny.

Aristotle's theory states that, in language, there are proper names and there are universals. The proper names apply to things or persons, each of whom (or which) is unique in the world. There is, for instance, only one Jesus, Napoleon, sun or moon, and these names cannot apply to any other entities. Conversely, universal words, like wise, silly, rich or poor, apply to many different entities. Thus, a proper name signifies a substance; it is a word of *identity*. A universal, on the other hand, refers to a class, indicating the sort of thing, not the actual particular thing. It relates, therefore, merely to an *attribute*.

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[37] [1919] 2 K.B. at 243.
[38] [1961] 1 Q.B. at 31.
[39] [1972] 1 Q.B. at 198.
[40] [1961] 1 Q.B. at 31.
[41] [1919] 2 K.B. at 243.
[42] [1972] 1 Q.B. at 31.
[43] For an iluminating discussion of this theory, *see* B. RUSSELL, HISTORY OF WESTERN PHILOSOPHY, 175 (2nd ed., 1961).

While the decision in *Ingram*[44] could certainly be supported on this view, it is submitted that the theory of universals is ultimately misleading. For, as Lord Denning (among others) has noted, for legal purposes '*identity*' is not opposed to '*attributes*' but is rather made manifest by them. In his judgment in *Lewis*,[45] Lord Denning stated:

> Again it has been suggested that a mistake as to the identity of a person is one thing: and a mistake as to his attributes is another. A mistake as to identity, it is said, avoids a contract: whereas a mistake as to attributes does not. But this is a distinction without a difference. A man's very name is one of his attributes. It is also a key to his identity. If then, he gives a false name, is it a mistake as to his identity . . . or a mistake as to his attributes? These fine distinctions do no good to the law.[46]

The concurring opinion in *Lewis*[47] made this comment on the decision in *Ingram*:

> . . . [I]t [is] difficult to understand the basis, either in logic or in practical considerations, of the text laid down by the majority of the court in *Ingram v. Little*. That test is, . . . accurately recorded in the headnote, as follows:
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> 'where a person physically present or negotiating to buy a chattel fraudulently assumed the identity of an existing third person, the test to determine to whom the offer was addressed was how ought the promisee to have interpreted the promise.'
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> The promisee, be it noted, is the rogue. The question of the existence of a contract and therefore the passing of property, and therefore the right of third parties, if this test is correct, is made to depend upon the view which some rogue should have formed, presumably knowing that he is a rogue, as to the state of the mind of the opposite party to the negotiation, who does not know that he is dealing with a rogue.[48]

It is respectfully submitted that the view taken by the Court of Appeal in *Lewis*[49] is the correct one. It is obvious that a plaintiff who has received payment for goods by means of a check tendered by the other party, may wish to verify the identity of his co-contractor. But how can he do this, other than by reference to certain attributes possessed by that other party?[50] To put the matter in Aristotelian

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[44] [1961] 1 Q.B. at 31.
[45] [1971] 1 Q.B. at 198.
[46] [1972] 1 Q.B. at 206.
[47] [1972] 1 Q.B. at 198.
[48] *Id.* at 208.
[49] *Id.* at 198.
[50] This point, of course, illustrates the difficulty faced by the plaintiff when attempting to satisfy the fourth

terms, while universal words may relate to various persons, each person is surely ultimately identifiable only from the sum total of his or her accumulated attributes. The distinction between the individual and the class is, therefore, much less pronounced than Aristotle would have us believe.

On more pragmatic grounds, the decisions in *King's Norton*,[51] *Phillips*[52] and *Lewis*[53] may be explained on the basis of commercial expediency. The crucial point in each of these cases is that the plaintiff has made an error of judgment with regard to the credit-worthiness of the other party. In determining this question of credit-worthiness, he has relied on his own appraisal of the matter and has taken a deliberate business risk. It is, of course, unfortunate that he has been duped by the rogue. But—and surely this is the salient factor—the plaintiff has, in a very real sense, contributed to his own loss. For in every single case, he has given the other party possession of the goods without first waiting to have the check cleared. And it is this appearance of ownership, bestowed upon the rogue by the original owner, which allows the rogue to perpetrate the fraud on the bona fide third party.

It is often suggested that, in a case of unilateral mistake, where two innocent parties have been deceived by the fraud of a third, the loss between these two should be apportioned in some way. The common law itself does not recognize any such doctrine or apportionment. However, the legislature does, and under the Law Reform (Frustrated Contracts) Act of 1943, the courts are given, within certain limits, the discretion to divide a loss between two innocent parties. That such an approach may be adopted in the area of unilateral mistake was suggested in *Ingram*:[54]

> For the doing of justice, the relevant question in this sort of case is not whether the contract was void or voidable, but which of two innocent parties shall suffer for the fraud of a third. The plain answer is that the loss should be divided between them in such proportion as is just in all the circumstances.[55]

This suggestion was considered and rejected by the Law Reform Committee in its Twelfth Report.[56] Referring to the above statement in *Ingram*,[57] the Report observed:

A power of apportionment is plainly attractive at first sight, and we

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requirement, that he took reasonable steps to verify the identity of his co-contractor. He can presumably do this only by checking the other's credentials. That such a check will fail to satisfy the requirement is clearly shown by the cases analyzed in this article.

[51] (1897) 14 T.L.R. at 98.

[52] [1919] 2 K.B. at 243.

[53] [1972] 1 Q.B. at 198.

[54] [1961] 1 Q.B. at 31.

[55] *Id.* at 73

[56] Law Reform Committee, Twelfth Report (Transfer of Title to Chattels) (Cmnd. 2958 of 1966).

[57] [1961] 1 Q.B. at 31.

> ourselves would have been in favour [sic] of a solution on these lines had we not come to the conclusion that there were overiding [sic] objections to it. We think that if the courts were given power to apportion loss in the type of case with which we are concerned it would introduce into a field of law where certainty and clarity are particularly important that uncertainty which inevitably follows the grant of a wide and virtually unrestrained judicial discretion. Such a discretion is not appropriate in the case of transactions involving the transfer of property, and we do not regard any change in the law as desirable which is likely to increase litigation and make it more difficult for businessmen and others to obtain reliable legal advice or to assess the likely financial outcome of their dealings and insure against the risks involved.[58]

The Committee foresaw great practical difficulties, particularly in cases where there had been more than one *bona fide* purchaser. Some goods, like cars, pass from hand to hand very rapidly. It may be that the rogue will have sold to A, who has sold to B, who has sold to C, before the owner of the vehicle discovers the fraud. He finds the car in C's possession, so it is C whom he sues in conversion. But in every contract of sale, there is an implied undertaking by the seller that he has a right to sell the goods. Therefore, C will wish to join B in the action on the ground that, if he (C) is guilty of conversion of the goods, it is because B is in breach of the implied term that he had a right to sell the goods. Therefore, B must indemnify C against any damages which C has to pay the owner for conversion. And, similarly, B will wish to join in A. Sometimes the chain may be much longer.

The Committee thought that the court would thus become involved in an inquiry into the degree of fault, if any, of each party in the chain, resulting in so much complexity and uncertainty as to render the proposal undesirable. The committee recommended that, where goods are sold under a mistake as to the buyer's identity, the contract should be voidable and not void. The effect of this would be that the *bona fide* purchaser would get a good title, and *Cundy*[59] and *Ingram*[60] would be reversed. This proposal, however, has not been implemented.

Therefore, the owner of goods who is asked to accept a check in payment for those goods has one of two choices: he can refuse to relinquish possession of the goods until the check has been honored, or he may hand the goods over to the other party there and then, and face all the potential hazards which that decision involves. If he chooses the latter option then, should purchaser dispose of the goods to a *bona fide* third party (and the check is later dishonored), the difficulties inherent in the plea of unilateral mistake will surely prove fatal to any action brought by the owner to recover the goods in question.

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[58] Law Reform Committee, Twelfth Report, *supra* note 56.

[59] (1878) 3 App. Cas. 459.

[60] [1961] 1 Q.B. at 31.