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CASES ON MISTAKE

COMMON MISTAKE

***Couterier v Hastie* (1856) 5 HL Cas 673**

The plaintiff merchants shipped a cargo of Indian corn and sent the bill of lading to their London agent, who employed the defendant to sell the cargo. On 15 May 1848, the defendant sold the cargo to Challender on credit. The vessel had sailed on 23 February but the cargo became so heated and fermented that it was unfit to be carried further and sold. On May 23 Challender gave the plaintiff notice that he repudiated the contract on the ground that at the time of the sale to him the cargo did not exist. The plaintiffs brought an action against the defendant (who was a *del credere* agent, ie, guaranteed the performance of the contract) to recover the purchase price.

Martin B ruled that the contract imported that, at the time of sale, the corn was in existence as such and capable of delivery, and that, as it had been sold, the plaintiffs could not recover. This judgment was affirmed by the House of Lords.

***Griffith v Brymer* (1903) 19 TLR 434**

At 11am on 24 June 1902 the plaintiff had entered into an oral agreement for the hire of a room to view the coronation procession on 26 June. A decision to operate on the King, which rendered the procession impossible, was taken at 10am on 24 June. Wright J held the contract void. The agreement was made on a missupposition of facts which went to the whole root of the matter, and the plaintiff was entitled to recover his £100.

***Galloway v Galloway* (1914) 30 TLR 531**

See Cheshire & Fifoot, p239.

***McRae v Commonwealth Disposals Commission* (1950) 84 CLR 377**

The defendants sold an oil tanker described as lying on Jourmand Reef off Papua. The plaintiffs incurred considerable expenditure in sending a salvage expedition to look for the tanker. There was in fact no oil tanker, nor any place known as Jourmand Reef. The plaintiffs brought an action for (1) breach of contract, (2) deceit, and (3) negligence. The trial judge gave judgment for the plaintiffs in the action for deceit. He held that *Couturier v Hastie* obliged him to hold that the contract of sale was void and the claim for breach of contract failed. Both parties appealed.

The High Court of Australia stated that it was not decided in *Couturier v Hastie* that the contract in that case was void. The question whether it was void or not did not arise. If it had arisen, as in an action by the purchaser for damages, it would have turned on the ulterior question whether the contract was subject to an implied condition precedent. In the presert case, there was a contract, and the Commission contracted that a tanker existed in the position specified. Since there was no such tanker, there had been a breach of contract, and the plaintiffs were entitled to damages for that breach.

***Cooper v Phibbs* (1867) LR 2 HL 149**

An uncle told his nephew, not intending to misrepresent anything, but being in fact in error, that he (the uncle) was entitled to a fishery. The nephew, after the uncle's death, acting in the belief of the truth of what the uncle hadtold him, entered into an agreement to rent the fishery from the uncle's daughters. However, the fishery actually belonged to the nephew himself. The House of

Lords held that the mistake was only such as to make the contract voidable. Lord Westbury said "If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake" on such terms as the court thought fit to impose; and it was so set aside.

N.B. According to *Smith & Thomas, A Casebook on Contract*, Tenth edition, p506, "At common law such a contract (or *simulacrum* of a contract) is more correctly described as void, there being in truth no intention to a contract". However, Denning LJ applied *Cooper v Phibbs* in *Solle v Butcher* (1949) (below).

***Bell v Lever Bros Ltd* [1931] All ER 1**

The plaintiff company contracted with the defendants who were to act as chairman and vice-chairman of a subsidiary company. It was later agreed between the parties that the defendants should resign their positions in consideration of payments by way of compensation. It later transpired that the defendants, without the knowledge of the plaintiffs, had engaged in private transactions resulting in a secret profit to themselves. These transactions constituted breaches of the defendants' contracts, which would have entitled the plaintiffs to terminate those contracts forthwith if they had known of the transactions.

It was held by the House of Lords (3-2) that the erroneous belief on the part of both parties to the agreements, that the service contracts were determinable except by agreement did not involve the actual subject-matter of the agreements, but merely related to the quality of the subject-matter and so was not of such a fundamental character as to constitute an underlying assumption without which the parties would not have entered into the agreements, and, therefore, the plaintiffs were not entitled to succeed in their action.

See extract from the speech of Lord Atkin.

***Solle v Butcher* [1949] 2 All ER 1107**

For facts, see below. Denning LJ stated:

"Let me first consider mistakes which render a contract a nullity. All previous decisions on this subject must now be read in the light of *Bell v Lever Bros. Ltd*. The correct interpretation of that case, to my mind, is that, once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew he was under a mistake".

***Leaf v International Galleries* [1950] 1 All ER 693**

In 1944, the plaintiff bought from the sellers an oil painting of Salisbury Cathedral which was represented to him as a painting by Constable, a representation which was held to be one of the terms of the contract. In 1949 he found that the picture was not a Constable. The buyer brought an action for the rescission of the contract on the ground that there had been an innocent misrepresentation. The Court of Appeal held that the buyer had lost the right to rescind when he accepted delivery of the picture, orat least, when a reasonable time had elapsed after his acceptance, and five years was more than a reasonable time. Denning LJ stated *obiter*:

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

Harrison v Bunten **[1953] 1 All ER 903**

By two contracts in writing, the sellers agreed to sell, and the buyers agreed to buy, a quantity of Calcutta Kapok "Sree" brand. After the goods had been delivered, the buyers found that, instead of being pure kapok, they contained an admixture of cotton, which was unsuitable for their machinery. Both parties thought that Calcutta Kapok "Sree" brand was pure kapok.

Pilcher J held that when goods are sold under a known trade description, without misrepresentation or breach of warranty, the fact that both parties are unaware that goods of that known trade description lack any particular quality is irrelevant. If goods answering to the particular description are supplied, the parties are bound by their contract and there is no room for the doctrine that the contract can be treated as a nullity on the ground of mutual mistake, even though the mistake, from the purchaser's point of view, may turn out to be of a fundamental character. Therefore the contracts were not nullities and the buyers were bound by them.

Associated Japanese Bank v Credit du Nord **[1988] 3 All ER 902**

B made a sale and leaseback transaction of specified precision engineering machines with AJB. B's obligations under the leaseback agreement were guaranteed by CDN. At all times both banks believed that the four machines existed and were in B's possession. After B failed to keep up the payments it was discovered that the transaction was a fraud perpetrated by B. AJB sued CDN on the guarantee. It was held by Steyn J that on its true construction the guarantee was subject to an express or implied condition precedent that there was a lease in respect of four existing machines. It followed, therefore, that since the machines did not exist AJB's claim failed and would be dismissed.

Steyn J stated *obiter* that a contract will be void ab initio for common mistake if a mistake by both parties to the contract renders the subject matter of the contract essentially and radically different from that which both parties believed to exist at the time the contract was executed. However, the party seeking to rely on the mistake must have had reasonable grounds for entertaining the belief on which the mistake was based.

BCCI v Ali and others **[1999] 2 All ER 1005**

See Law Report.

Cooper v Phibbs **(1867)**

For facts, see above. The House of Lords set the agreement aside on the terms that the defendant should have a lien on the fishery for such money as the defendant had expended on its improvements

Solle v Butcher **[1949] 2 All ER 1107**

In 1931 a dwelling house had been converted into five flats. In 1938 Flat No. 1 was let for three years at an annual rent of £140. In 1947 the defendant took a long lease of the building, intending to repair bomb damage and do substantial alterations. The plaintiff and defendant discussed the rents to be charged after the work had been completed. The plaintiff told the defendant

that he could charge £250 for Flat 1. The plaintiff paid rent at £250 per year for some time and then took proceedings for a declaration that the standard rent was £140. The defendant contended that the flat had become a new and separate dwelling by reason of change of identity, and therefore not subject to the Rent Restriction Acts.

The Court of Appeal held that (i) the structural alterations and improvements were not such as to destroy the identity of the flat as let in 1939, and (ii) onthe evidence, the parties had addressed their minds to the material issue of identity of the new flat, and their mistake or common misapprehension as to whether the flat had been so altered as to destroy its identity was a mistake of fact, and the landlord was entitled to have the lease set asid in equity on such terms as the court thought fit.

Grist v Bailey **[1966] 2 All ER 875**

The defendant agreed to sell a house, subject to an existing tenant, for £850. The defendant refused to perform and alleged that the agreement had been entered into by her under mistake of fact. The defendant believed that the property was occupied by a statutory tenant who had actually died. Its value with vacant possession would have been £2,250. The tenant's son occupied the flat, paying the rent at the office of solicitors, but left without having claimed to have a statutory tenancy under the Increase of Rent … Act 1920. The plaintiff buyer brought an action for specific performance of the agreement. The defendant counterclaimed for rescission of the sale agreement.

It was held that there was equitable jurisdiction to set aside the sale agreement for common mistake of fact and the sale agreement would be set aside because the mistake was fundamental, even on the footing that it had been open to the son to maintain a claim to protection as a statutory tenant, and any fault of the defendant vendor in not knowing who her tenant was was not sufficient to disentitle her to relief, the defendant offering to submit to a condition that she would enter into a fresh contract to sell the property to the plaintiff at a proper vacant possession price.

Magee v Penine Insurance **[1969] 2 All ER 891**

The plaintiff signed a proposal form, filled in by his son, for the insurance of a motor car. There were a number of mis-statements in the proposal, in particular it was mis-stated that the plaintiff held a driving licence. The proposal was accepted by the defendant insurance company. The car was accidentally damaged and the plaintiff made a claim in respect of it. The insurance company offered £385 in settlement of the claim which the plaintiff accepted. The insurance company then discovered the mis-statements in the proposal form and refused to pay.

It was held by the Court of Appeal, that on its true construction, the insurance company's letter was an offer of compromise and not merely an offer to quantify the claim, but judgment would be given for the defendant insurance company on the following grounds:

(a) (per Lord Denning MR) although the acceptance by the plaintiff of the insurance company's offer constituted a contract of compromise binding at law, the parties were acting under a common and fundamental mistake in that they thought that the original policy was good and binding. The contract was therefore voidable in equity, and it would be set aside because in the circumstances it was not equitable to hold the insurance company to it;

(b) (per Fenton Atkinson LJ) the agreement to compromise was made on the basis of an essential contractual assumption, namely, that there was in existence a valid and enforceable policy of insurance. Since that assumption was false the insurance company was entitled to avoid the agreement on the ground of mutual mistake in a fundamental and vital matter.

UNILATERAL MISTAKE

Hartog v Shields **[1939] 3 All ER 566**

The defendants contracted to sell to the plaintiff 30,000 hare skins, but by an alleged mistake they offered the goods at certain prices per pound instead of at those prices per piece. The value of a piece was approximately one-third that of a pound. In verbal and written negotiations which took place prior to the sale, reference had always been made to the price per piece and never to the price per pound, and expert evidence was given that hare skins were generally sold at prices per piece.

It was held that the plaintiff could not reasonably have supposed that the offer expressed the real intention of the persons making it, and must have known it to have been made by mistake. The plaintiff did not, by his acceptance of the offer, make a binding contract with the defendants.

Smith v Hughes **[1861-73] All ER 632**

The plaintiff farmer, having new oats, asked the manager of the defendant racehorse trainer, if he wanted to buy oats. On being answered by the manager that he was always ready to buy good oats, the farmer gave him a sample and told him the price. The manager took away the sample and the next day bought the bulk, but afterwards refused to accept the oats because they were new, whereas he said, he had thought to buy old oats. In the county court, there was a conflict of testimony over the type of oats mentioned at the bargaining. It was held that the passive acquiescence of the seller in the self-deception of the buyer did not, in the absence of fraud or deceit on the part of the seller, entitle the buyer to avoid the contract, and there must be a new trial.

Webster v Cecil **(1861) 30 Beav 62**

The defendant, having refused to sell some property to the plaintiff for £2,000, wrote a letter in which, as the result of a mistaken calculation, he offered to sell it for £1,250. The plaintiff accepted but the defendant refused to complete. Romilly MR refused a decree of specific performance.

Cundy v Lindsay **[1874-80] All ER 1149**

A rogue named Blenkarn ordered goods in writing from Lindsay & Co. He gave his address as “Blenkarn & Co, 37 Wood Street, Cheapside” and signed the letter in such a way that the name appeared to be “Blenkiron & Co”. A very respectable firm known as Blenkiron & Sons which carried on business at 123 Wood Street was well known to Lindsay who did not ascertain their correct address but dispatched the goods to “Blenkiron & Co, 37 Wood Street, Cheapside.” Blenkarn was convicted of obtaining goods by false pretences, but before his conviction he had sold some of the goods to Cundy in the ordinary course of business and Cundy re-sold them all to different persons before the fraud was discovered.

It was held that as Lindsay & Co knew nothing of Blenkarn and intended to deal only with Blenkiron & Sons, a fact which was known to Blenkarn, there was no common intention which could lead to any contract between the parties, and therefore, the property in the goods remained in Lindsay and Cundy had no title to them.

King’s Norton Metal v Edridge Merret **(1897) TLR 98**

A rogue named Wallis ordered some goods, on notepaper headed “Hallam & Co”, from King’s Norton. The goods were paid for by a cheque drawn by “Hallam & Co”. King’s Norton received another letter purporting to come from Hallam & Co, containing a request for a quotation of prices for goods. In reply

King's Norton quoted prices, and Hallam then by letter ordered some goods, which were sent off to them. These goods were never paid for. Wallis had fraudulently obtained these goods and sold them to Edridge Merret, who bought them bona fide. King's Norton brought an action to recover damages for the conversion of the goods.

It was held by the Court of Appeal held that if a person, induced by false pretences, contracted with a rogue to sell goods to him and the goods were delivered the rogue could until the contract was disaffirmed give a good title to a bona fide purchaser for value. The plaintiffs intended to contract with the writer of the letters. If it could have been shown that there was a separate entity called Hallam & Co and another entity called Wallis then the case might have come within the decision in *Cundy v Lindsay*. In the opinion of AL Smith LJ, there was a contract by the plaintiffs with the person who wrote the letters, by which the property passed to him. There was only one entity, trading it might be under an alias, and there was a contract by which the property passed to him.

***Philips v Brooks* [1918-19] All ER 246**

North visited the plaintiff jeweller, and chose some pearls and a ring. While writing a cheque in payment, he represented to the plaintiff that he was Sir George Bullough, with an address in St James Sq, London. The plaintiff had heard of Sir George as a man of means, and on referring to the directory found that he lived at the address given by North. He therefore allowed North to take away the ring. In fact, the cheque was worthless and North was convicted of obtaining the ring from the plaintiff by false pretences. North had pawned the ring with the defendant pawnbrokers, who took it bona fide and without notice in the course of business, giving value for it. The plaintiff brought an action for the return of the ring.

It was held that the plaintiff intended to contract with North although he would not have made the contract, but for the defendant's fraudulent misrepresentation, and therefore, the property in the ring passed to North who could give a good title to any third party acquiring it bona fide, without notice and for value, and the action failed.

***Ingram and others v Little* [1960] 3 All ER 332**

The joint owners of a car, two sisters and a third person, advertised it for sale. A swindler called on them and agreed to buy the car. When they refused to accept a cheque, he tried to convince them that he was a reputable person and said that he was a Mr Hutchinson of Stanstead House, Caterham. One sister went to the local post office and returned to say that she had checked the name and address in the telephone directory. They decided to accept the cheque. The cheque was dishonoured and the man, who was not Mr Hutchinson, disappeared having sold the car to Little, who had bought it in good faith. The owners brought an action to recover the car or its value from Little.

It was held by the Court of Appeal (Devlin LJ dissenting) that the offer to sell on payment by cheque was made only to the person whom the swindler had represented himself to be, and as the swindler knew this, the offer was not one which was capable of being accepted by him. Therefore, there had been no contract for the sale of the car by the plaintiffs and they were entitled to recover the car or damages from the defendant.

***Lewis v Avery* [1971] 3 All ER 907**

Lewis advertised his car for sale. A man, who turned out to be a rogue, called on Lewis, tested the car and said that he liked it. He called himself "Richard Green" and made Lewis believe that he was a well-known film actor of that name. They agreed a price and the rogue wrote out a cheque. He said he wanted to take the car at once. Lewis asked for proof of identity and he was

shown a studio pass which bore the name "Richard Green" and a photograph of the rogue. On seeing this Lewis was satisfied and let the rogue have the car and log book. The cheque was dishonoured. Meanwhile the rogue had sold the car to Avery, who bought in good faith and without knowledge of the fraud. Lewis brought an action for the conversion of the car. It was held by the Court of Appeal, distinguishing and doubting *Ingram v Little*, that:

(1) the fraud perpetrated by the rogue rendered the contract between Lewis and the rogue voidable and not void because-

(a) where a transaction had taken place between a seller and a person physically present before him there was a presumption that the seller was dealing with that person even though, because of the latter's fraud, the seller thought that he was dealing with another individual whom he believed to be the person physically present. In the present case there was nothing to rebut the presumption that Lewis was dealing with the person present before him, ie the rogue; and

(b) Lewis failed to show that, at the time of offering to sell his car to the rogue, he regarded his identity as a matter of vital importance. It was merely a mistake as to the attributes of the rogue, ie his creditworthiness.

(2) Accordingly, since Lewis had failed to avoid the contract before the rogue parted with the property in the car to Avery, the latter, having bought the car bona fide and without notice of the fraud, had acquired a good title thereto and the action failed.

***Lake v Simmonds* [1927] All ER 49**

A woman, Esme Ellison, who had bought certain goods from the plaintiff jeweller on previous occasions, told him that her husband, Van der Borgh, wished to give her a pearl necklace. Believing that she was the person she represented herself to be and that her statements were true, the jeweller allowed her to take two necklaces to show her husband. In fact Esme was not Van der Borgh's wife. Having obtained the necklaces Esme sold them and retained the proceeds. The plaintiff brought an action against his insurance company, who refused to pay as the goods had been entrusted by him to the thief.

It was held by the House of Lords, that in obtaining the necklaces in the way that she did, Esme was guilty of larceny by a trick, and therefore, when the plaintiff permitted her to take the necklaces there was no *consensus ad idem* (agreement as to the same thing) between them and the necklaces were not "entrusted" to her within the exceptions clause in the policy, which was to be constructed *contra proferentem*. Accordingly, the plaintiff was entitled to succeed.

***Citibank v Brown Shipley* [1991] 2 All ER 690**

See Law Report.

MUTUAL MISTAKE

***Wood v Scarth* (1858) 1 F&F 293**

The defendant offered in writing to let a pub to the plaintiff at £63 pa. After a conversation with the defendant's clerk, the plaintiff accepted by letter, believing that the £63 rental was the only payment under the contract. In fact, the defendant had intended that a £500 premium would also be payable and he believed that his clerk had explained this to the plaintiff. The defendant refused to complete and the plaintiff brought an action for specific performance. The court refused the order of specific performance but the defendant was liable in damages.

***Raffles v Wichelhaus* (1864) 2 H&C 906**

The plaintiff agreed to sell cotton to the defendant which was "to arrive ex *Peerless* from Bombay". When the cotton arrived the plaintiff offered to deliver but the defendants refused to accept the cotton. The defendants pleaded that the ship mentioned was intended by them to be the ship called the *Peerless*, which sailed from Bombay in October and that the plaintiff had not offered to deliver cotton which arrived by that ship, but instead offered to deliver cotton which arrived by another ship, also called *Peerless*, which had sailed from Bombay in December.

Judgment was given for the defendants. It was held that there was nothing on the face of the contract to show which *Peerless* was meant; so that this was a plain case of latent ambiguity, as soon as it was shown that there were two *Peerlesses* from Bombay; and parol evidence could be given when it was found that the plaintiff meant one and the defendants the other. If this was the case, there was no *consensus ad idem*, and therefore no binding contract.

***Scriven Bros v Hindley* [1913] 3 KB 564**

The defendants bid at an auction for two lots, believing both to be hemp. In fact Lot A was hemp but Lot B was tow, a different commodity in commerce and of very little value. The defendants declined to pay for Lot B and the sellers sued for the price. The defendants' mistake arose from the fact that both lots contained the same shipping mark, "SL", and witnesses stated that in their experience hemp and tow were never landed from the same ship under the same shipping mark. The defendants' manager had been shown bales of hemp as "samples of the 'SL' goods". The auctioneer believed that the bid was made under a mistake as to the value of the tow.

Lawrence J said that as the parties were not *ad idem* the plaintiffs could recover only if the defendants were estopped from relying upon what was now admittedly the truth. He held that the defendants were not estopped since their mistake had been caused by or contributed to by the negligence of the plaintiffs.

***Foster v Mackinnon* (1869) LR 4 CP 704**

The defendant, an elderly gentleman, signed a bill of exchange on being told that it was a guarantee similar to one which he had previously signed. He had only been shown the back of it. It was held that there should be a new trial. Byles J stated:

"It seems plain, on principle and on authority, that if a blind man, or a man who cannot read, or who, for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading it to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then at least if there be no negligence, the signature obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, he never intended to sign and therefore, in contemplation of law, never did sign the contract to which his name is appended. In the present case, … he was deceived, not merely as to the legal effect, but as to the actual contents of the instrument."

***Saunders v Anglia Building Society* [1970] 3 All ER 961**

Mrs Gallie, a widow aged 78, had made a will leaving her house to her nephew, Parkin. Parkin's friend, Lee, was heavily in debt and discussed with Parkin how to raise money on the house. In Parkin's presence, Lee put before Mrs Gallie a document which he told her was a deed of gift of the house to Parkin. She did not read it because she had broken her spectacles. The deed was in fact a deed of sale of the house to Lee. Using this deed, Lee

mortgaged the house to the Anglia Building Society, and borrowed £2,000. Lee defaulted on the payments and the building society brought an action for possession of the house. Mrs Gallie sued for a declaration that the deed was void--*non est factum*--and for the recovery of the title deeds. When she died, the action was taken over by her executrix, Saunders. The Court of Appeal and the House of Lords gave judgment for the building society.

It was held by the House of Lords that the plea of *non est factum* can only rarely be established by a person of full capacity and although it is not confined to the blind and illiterate any extension of the scope of the plea would be kept within narrow limits. In particular, it is unlkely that the plea would be available to a person who signed a document without informing himself of its meaning.

The burden of establishing a plea of *non est factum* falls on the party seeking to disown the document and that:

(1) the party must show that in signing the document he acted with reasonable care. Carelessness (or negligence devoid of any special, technical meaning) on the part of the person signing the document would preclude him from later pleading *non est factum* on the principle that no man may take advantage of his own wrong.

(2) In relation to the extent and nature of the difference between the document as it is and the document as it was believed to be, the distinction formerly drawn between the character and the contents of the document is unsatisfactory and it is essential, if the plea is to be successful, to show that there is a radical or fundamental distinction.