

CONTRACTING WITH ROGUES

A Study of Mistake of Identity in the Sale of Goods

BY HORST K. LUCKE*

A contract which has been procured by fraudulent means is not void as the maxim "fraud vitiates consent" might lead us to believe; it is merely voidable at the option of the defrauded party.¹ Until rescinded by an act of election, it is fully valid.² An example of such a contract would be the sale of a secondhand article as new. Another example would be the purchase of a thing under the pretence that the purchaser is willing and able to pay for it; but this type of case becomes problematical when the rogue creates a front of credit-worthiness by impersonating some other, respectable, person. A quick glance at the cases seems to show that contractual consent procured fraudulently in this way does not result in a voidable sale but rather is characterized as "one side to a contract only, where two are required."³ The problem of defining the dividing line between these two types of fraud, between voidness and voidability, has called forth an astonishing wealth of judicial and academic comment.⁴ In the most recent judicial pronouncement on the subject, Sellers L.J.⁵ endorsed Goodhart's earlier observation that "there is no branch of the law of contract which is more uncertain and difficult."⁶ The principles on "mistake of identity" in the law of contract are not well settled.

Some writers seem to have considered that legal means are not sufficient to solve the problems of mistake of identity. Glanville Williams, for instance, prefaced his well-known contribution to the subject with references to no fewer than seven weighty philosophical essays on the distinction between substance and quality.⁷ More recently, Samek suggested a solution derived primarily from logical

* LL.B. (Adelaide), M.C.J. (New York), Dr. Jur. (Cologne), Senior Lecturer in Law, University of Adelaide.

1. *Chitty on Contracts* (22nd ed., 1961) vol. 1, 278.

2. *Id.* at 279.

3. *Cf. Cundy v. Lindsay* (1873) 3 App. Cas. 459, 465f. See also *Ingram v. Little* [1961] 1 Q.B. 31.

4. Some of the main literary contributions are cited by Samek. Some reflections on the logical basis of mistake of identity of party (1960) 38 *Canadian Bar Review* 479, notes 1-5.

5. *Ingram v. Little* [1961] 1 Q.B. 31, 46, 52.

6. Mistake as to identity in the Law of Contract (1941) 57 *Law Quarterly Review* 228.

7. Mistake as to party in the Law of Contract (1945) 23 *Canadian Bar Review* 271, 272, n. 1.

considerations.⁸ Something can, no doubt, be gained on occasion from such extra-legal materials, but they are not themselves recognized sources of law and must therefore play a strictly ancillary role in the elucidation of legal principles. The problems raised by mistake of identity are, after all, problems of construction. Ontological or logical considerations are only relevant insofar as they are necessary for the ascertainment or clarification of the rules of construction which apply to mistake of identity—to find these must be the main object of our investigation. Not only has there been a tendency to emphasize unduly extra-legal sources, but there has also been some neglect of material which does constitute a recognized source of law, namely the historical background to the principles now thought to govern the recovery of goods stolen or obtained by fraudulent means. An examination of this material has convinced the present writer that it contains important clues which cannot safely be disregarded. The emphasis in this article will be placed entirely on cases involving the sale of goods; it is in this field that the problem has arisen most frequently. It should not be taken for granted that mistake of identity in other types of contract⁹ is necessarily subject to the same considerations.

The general principles which govern the recovery of stolen or fraudulently obtained goods have been regarded as well-settled at least since the 1870's. In *Cundy v. Lindsay*¹⁰ Lord Cairns L.C. explained:

“ . . . with regard to the title to personal property, the settled and well known rules of law may, I take it, be thus expressed: by the law of our country the purchaser of a chattel takes the chattel as a general rule subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt, he obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract, which would enable the original owner of the goods to reduce it, and to set it aside because these circumstances so enabling the original owner of the goods, or of the chattel, to reduce the contract, and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced.”¹¹

8. *Op. cit. supra*, n. 4.

9. *Cf. Sowler v. Potter* [1940] 1 K.B. 271.

10. (1878) 3 App. Cas. 459.

11. *Id.* at 463-464.

An analysis of the historical evolution of these principles reveals a fact which Lord Cairns' statement does not make us suspect. The principles concerning the influence of fraud on contracts and the principles concerning the recovery of stolen and fraudulently obtained goods applied by the courts in the late 18th and early 19th centuries were strangely different from those which Lord Cairns expounded so confidently and proposed to apply so rigorously.

The recovery of stolen property.

It is impossible to sketch the historical evolution of the principles stated by Lord Cairns without a somewhat elaborate treatment of the rules on the recovery of stolen property. At the time when Lord Kenyon was Chief Justice of the King's Bench,¹² there was a protection of sorts for *bona fide* purchasers of stolen property. The owner of a stolen chattel could not recover it by legal action, even from the thief, without having first performed what was thought to be his duty by prosecuting the thief to conviction or by at least assisting as a witness in his prosecution. The law on this subject was very ancient and partly embodied in a statute passed in the twenty-first year of the reign of Henry VIII:

"Be it enacted by this present Parliament, That if any Felon or Felons hereafter do rob, or take away any Money, Goods, or Chattles, from any of the King's Subjects, from their person or otherwise, within this Realm, and thereof the said Felon be indicted, and after arraigned of the same Felony, and found guilty thereof, or otherwise attainted by reason of Evidence given by the Party so robbed, or Owner of the said Money, Goods, or Chattles, or by any other by their Procurement; that then the party so robbed, or Owner, shall be restored to his said Money, Goods, and Chattles; and that as well the Justices of Gaol-delivery, as other Justices, afore whom any such Felon or Felons shall be found guilty, or otherwise attainted, by reason of Evidence given by the Party so robbed, or Owner, or by any other by their Procurement, have Power, by this present Act, to award, from time to time, Writs of Restitution for the said Money, Goods, and Chattles, in like Manner as though any such Felon or Felons were attainted at the Suit of the Party in Appeal."¹³

If he failed in his duty to prosecute and the thief was not convicted, the law would assist the original owner in recovering the property; if, on the other hand, the felon was convicted without the participation of the original owner, the stolen goods were regarded as belonging to the felon and were forfeited to the king together with all the felon's property.¹⁴ One might be tempted to conclude that the owner's

12. 1788-1802.

13. 21 H. VIII, c.11, 2 Statutes at Large, 132.

14. Cf. Ames, *The disseisin of chattels* in *Lectures on legal history* (1913) 172, 190.

difficulties existed only *vis à vis* the thief. However, the owner's legal position was not necessarily enhanced when the thief passed on possession to others. In *Horwood v. Smith*,¹⁵ a case frequently cited on this subject in the 19th century, Grose J. explained:

"For if third persons, in whose possession goods which had been stolen came fairly and for a valuable consideration, were compelled to deliver them up before a conviction of the felon, it would take away the incitement to the prosecutor to convict the felon, which it was the intention of the Legislature to give."¹⁶

A puzzling feature of this *dictum* is that it is confined to cases in which third parties have obtained possession "fairly and for a valuable consideration." Surely the intention of the statute, as understood by Grose J., would be defeated by recovery from third parties regardless of the circumstances under which they had obtained possession. May we interpret Grose J.'s dictum as an indication that the claim of the *bona fide* purchaser to retain the goods was supported by something more than just the policy of the statute? Was it also supported by a property right, acquired by purchasing the goods "fairly and for a valuable consideration"?

The action in *Horwood v. Smith* was in trover for the value of sheep which had been stolen from the plaintiff and sold to the defendant in market overt. The plaintiff initiated proceedings which eventually led to the conviction and execution of the thief. During the proceedings the plaintiff warned the defendant that he would claim the property after the felon had been convicted. The defendant, defying the warning, sold the sheep, determined to keep the proceeds. The plaintiff's action met with difficulty: to establish trover, he had to make out that the defendant had, at some stage, been possessed of his, the plaintiff's, property. On this issue, Buller J. stated: ". . . when did the plaintiff's property begin in this case? Not till after the conviction of the felon; because before that time the property had been altered by a sale in market overt."¹⁷ Judged by our present-day law, this observation is both obvious and accurate. Lord Kenyon however, might have been inclined to call the emphasis placed on market overt "misleading". Like Buller J., he denied the plaintiff a right of recovery. He stated:

". . . during the interval between the felony and the conviction, the property remains in dubio, liable to be defeated by the attainder: now during that time the defendant purchased the goods in question for a valuable consideration. . . . There is no case in which it has been held that this action can be maintained against a person in the defendant's situation."¹⁸

15. (1788) 2 T. R. 750.

16. *Id.* at 756. But see *White v. Spettigue* (1845) 13 M. & W. 603.

17. *Id.* at 756.

18. *Id.* at 755.

A significant point about Lord Kenyon's judgment was rightly emphasized by Amos in his unsuccessful argument for the defendant before the Court of King's Bench in *Peer v. Humphrey*.¹⁹

"Lord Kenyon's judgment in *Horwood v. Smith* does not notice the fact of the sale having taken place in market overt, and it may, therefore, be assumed that his decision would have been the same, whatever the nature of the sale had been."

Lord Kenyon's *dictum* that the property is liable to be defeated by the attainder appears to attribute a defeasible property right in the stolen goods to all those who are dealing with them as purported owners, "during the interval between the felony and the conviction." This derives support from the wording of the statute 21 H VIII c11. The statute not only provided the machinery for restitution, but it also ordained that the owner "shall be restored to the goods" on conviction of the felon. This might have been a tautologous description of the restitution procedure, but it was not interpreted as such; rather, it was taken to be a substantive clause²⁰ concerned with the re-vesting of the property right. Blackburn J. in his judgment in *Lindsay v. Cundy* took the correctness of this interpretation for granted in his discussion whether "restores" meant restored from the time of conviction, or restored with retrospective effect.²¹ The *Sale of Goods Act* seems based on the same view. Whilst preserving the substance of the old statute, sec. 24 of the *Sale of Goods Act* made its meaning clearer by substituting "revest" for "restore."²² If the property reverts in the original owner on conviction of the thief, then it must by definition have been in some one else before.

There is further historical evidence that Lord Kenyon's view was in accordance with the old common law. As Ames has informed us,²³ the disseisor of a chattel was regarded as having acquired, through his disseisin, a property right in the chattel. He had the power of

19. (1836) 2 Ad. & E. 495, 497.

20. Cf. Counsel for the plaintiff in *Horwood v. Smith*—at 751 argued: "The plaintiff's claim to restitution is founded upon the 21 H. 8, c.11, which directs that goods stolen shall be restored to the owner upon certain conditions, namely, that he shall give, or procure evidence, against the felon, and that the felon be prosecuted to conviction thereon. Upon performance of these, the right of the owner which was before suspended, becomes perfect and absolute; now both these conditions were satisfied in this instance. . . . The statute . . . declares that the owner, on proof of the above-mentioned conditions shall be restored to his goods, this is a substantive clause; and as to the directions for issuing the writ of restitution, that is only as to the manner of regaining possession . . ."

21. (1876) 1 Q.B.D. 348, 357, 358. Blackburn J. was dealing not with the original statute, but with s. 100 of 24 and 25 Vict. c. 96(5) which was substantially a re-enactment of s. 57 of 7 and 8 Geo. c. 29; this latter had re-enacted the original statute and extended it to cases of fraud—cf. (1876) 1 Q.B.D. 348, 350, n. 5.

22. *Sale of Goods Act*, 1893 (56 and 57 Vict.) c. 71.

23. *Op. cit.*, *supra*, at 189 f.; see also Pollock & Maitland, *History of English Law*, vol. 2 (1911) 164.

present enjoyment and the power of alienation. Although he was subject to personal actions by the disseised, he had a power to sell or bail the chattel.²⁴ Even if these principles were not specifically designed to protect *bona fide* purchasers, they could, with only slight adaptations, have been turned to such use. Lord Kenyon's judgment bears out Pollock and Maitland's suggestion²⁵ that the strong position of the owner of a chattel *vis à vis bona fide* purchasers is not very ancient. It indicates that the property ascribed to the felon was sufficient to enable the rogue to transfer a good title to a *bona fide* purchaser for value. When Lord Kenyon's judgment in *Horwood v. Smith* came under attack in *Peer v. Humphrey* before the Court of King's Bench, N. R. Clarke for the plaintiff was able to point out that Buller J. in *Horwood's Case* had specifically stated that the property had been altered by the sale in market overt.²⁶ He further advanced the argument: "But a sale not made in market overt does not alter the property; otherwise the whole law as to market overt would be superfluous." This argument is certainly impressive, but it loses some of its seeming conclusiveness when it is remembered that the original function of the market overt rule was not to secure property to a *bona fide* purchaser, but to save him from the gallows.²⁷

Lord Kenyon's judgment in *Horwood v. Smith* was put to the test in *Peer v. Humphrey*.²⁸ The facts in this case were indistinguishable from the facts in *Horwood v. Smith* except for the fact that the defendant had purchased the goods—three oxen—not in market overt but "on the high road." In neither case was the action of the defendant in disposing of the goods after having been notified of the impending conviction of the felon particularly commendable. Ashhurst J.'s attempt to support the judgment in *Horwood v. Smith* by adducing equitable considerations was not really convincing:

"There would have been no doubt in this case that the plaintiff could not recover, if it had not been for the circumstances of the notice given to the defendant relative to the felony; but that does not alter the law. For there would be great hardship in determining that, notwithstanding the notice, the defendant should have been obliged to keep possession of the goods, when it was doubtful whether the felon would or would not be attainted. The property may perhaps be of a perishable nature; and in this case the keeping of the sheep would have been attended with a considerable expense."²⁹

There may be some truth in these suggestions; nevertheless, the fact remains that the defendant sold the goods under circumstances which

24. Ames, *op. cit. supra*, at 189 f.

25. Pollock & Maitland, *op. cit. supra*, 155.

26. (1835) 2 Ad. & E. 495, 496.

27. Pollock & Maitland, *op. cit. supra*, vol. 2, 164.

28. (1835) 2 Ad. & E. 493.

29. (1788) 2 T. R. 750, 755-756.

made the buyer's title most precarious. To allow recovery was just in more ways than one, since it not only gave the original owner the value of his property, but also ensured that the person who bought the goods from the defendant was able to retain the benefit of his bargain. It may have been the defendant's knowledge of the impending conviction which made the Court of King's Bench (Lord Denman C.J., Littledale and Williams JJ.) reluctant to endorse Lord Kenyon's views. Unfortunately, no express reliance was placed on this special circumstance. Instead, the judgments are based on the sweeping proposition that the rogue had no power to sell and that for this reason the property right remained in the plaintiff throughout.

The judgments in *Peer v. Humphrey* nipped in the bud any kind of comprehensive principle protecting *bona fide* purchasers of stolen property. The owner of a chattel had now only one thing to fear: a sale in market overt; and even the consequences of that were reversible by a conviction of the thief. Apart from this, he was able to charge any person who had had dealings with his property with conversion and recover damages.

The recovery of goods obtained by fraud.

To Lord Kenyon the recovery of stolen property and the recovery of property obtained by fraud were closely linked. His Lordship appears to have recognized only one distinction: since the statute of 21 H.VIII c.11 did not apply to property in the latter category, a *bona fide* purchaser was not deprived of his property by the conviction of the rogue as he would have been if he had purchased stolen property. *Parker v. Patrick*,³⁰ even though it may be a poorly reported decision, reveals at least this much quite unambiguously. The action was brought by a pawnbroker in trover for goods which had been pledged to him for money advanced to the pledgor. The pledgor had obtained the goods from the defendant, the original owner, by fraudulent means. The defendant had prosecuted the felon to conviction and had obtained—the report does not tell us how—possession of the goods again. The plaintiff, alleging that he had a property right in the goods, sued in trover and obtained a verdict. Counsel for the defendant moved that a nonsuit be entered. In support, counsel argued that no distinction could be drawn between goods obtained feloniously and goods obtained by fraud; but Lord Kenyon held:

“This is distinguishable from the case of felony; for there by a positive statute (21 Hen. 8, c.11) the owner, in case he prosecutes the offender to conviction, is entitled to restitution: but that does not extend to this case, where the goods were obtained from the defendant by a fraud.”³¹

30. (1793) 5 T. R. 175.

31. *Id.* 176.

The effect of this judgment was that the plaintiff's *bona fide* purchase of the goods, even though it had not taken place in market overt, was ranked higher than the owner's interest. The only difference recognized by Lord Kenyon between stolen goods and goods obtained by fraud was that the rogue's conviction would defeat the *bona fide* purchaser's property only in the case of theft. If we view Lord Kenyon's judgments in *Horwood v. Smith* and in *Parker v. Patrick* in conjunction, we are presented with a picture of fairly complete protection for *bona fide* purchasers, excepting only the fact that, in the case of theft, the owner's property would revive at the expense even of *bona fide* purchasers upon the conviction of the felon.

Parke B. later saved *Parker v. Patrick* from being overruled by basing it on a new rationalization.³² The case, so he stated, was rightly decided because it must be assumed that the seller of the goods had obtained them from the defendant under a fraudulently induced contract which had not been reduced by avoidance at the time the goods were pawned to the plaintiff. This was an explanation Lord Kenyon could not possibly have provided himself because the principle that fraud makes a contract voidable rather than void did not become established until about the middle of the 19th century. "Fraud vitiates consent" is an ancient maxim and if we consider that fraudulently procured contractual consent is not the real or genuine consent normally required for the formation of contracts we might well want to conclude that a contract induced by fraud is void.

In *Noble v. Adams*³³ a trader in London sued a wharfinger in trover for alleged conversion. The defendant had taken delivery of a consignment of goods for the plaintiff, but then, in accordance with a request from the sellers, had failed to hand it on because the plaintiff had bought the goods with forged bills of exchange. An effort was made to describe the defendant's act as an exercise of the sellers' right of stoppage *in transitu*, but when this failed, the defendant relied on the contention that title had not passed to the buyer since the contract was induced by fraud and therefore void. Gibbs C.J. instructed the jury at the trial that "it was a question for the jury, whether Cross and Co. had merely made an improvident sale, or whether the defendant had proved that the plaintiff had fraudulently obtained the goods [in which case] the sale would not change the property," the reason being, as Gibbs C.J. put it, that the fraud "would vitiate the sale."³⁴ The jury found that this was a fraudulent transaction and consequently gave verdict for the defendant. A rule *nisi* for a new trial was obtained and, although the case was decided

32. *Load v. Green* (1846) 15 M. & W. 216, 219.

33. (1816) 7 Taunt. 59.

34. *Id.* at 60, 61.

on another basis, here not relevant, the judges intimated that they agreed with the statement of the law contained in the ruling of Chief Justice Gibbs.

Similarly in *Earl of Bristol v. Wilsmore*,³⁵ Abbott C.J., speaking of the competing claims of the defrauded owner and a creditor of the rogue who has seized the goods in the execution of a judgment, stated:

“If Miller contracted for and obtained possession of the sheep in question with a preconceived design of not paying for them, that would be such a fraud as would vitiate the sale, and according to the cases which have been cited, would prevent the property from passing to him.”³⁶

But it was realized that to call a contract induced by fraud void would make it impossible for the defrauded party to adopt and thus validate it by an act of election. In *Campbell v. Fleming*³⁷ it was made clear that, after its express or implied adoption by the defrauded party, the contract was fully valid. What *Campbell v. Fleming* did not settle was the question whether a contract induced by fraud was *valid unless avoided* or *void unless validated*. It was this issue which came squarely before the Court of King’s Bench in the key case of *White v. Garden*.³⁸

In that case the plaintiffs purchased, in good faith and for value, a quantity of iron from one Parker. The iron, while still in a barge alongside the plaintiff’s wharf, was removed by the defendants after they had discovered that Parker, who had previously bought it from them, had done so under fraudulent circumstances; he had given the defendants a false address and paid the price by means of a bill of exchange “signed” by a fictitious acceptor. The plaintiffs sued in trover, alleging that the removal of the iron constituted conversion. If the contract was valid unless avoided, then the normal incidents of contract followed and title had passed to Parker and from him to the plaintiffs; if, however, the contract was void unless validated, then the usual incidents of contract had not flowed and Parker had not obtained any property right which he could have passed on to the plaintiff. Humphrey and Willes, for the defendant, argued that the latter proposition represented the law and that the property had not passed under the “pretended sale”.³⁹

Cresswell J. asked *arguendo* whether it was ever possible that the property in goods pass under a fraudulently induced sale.⁴⁰

35. (1823) 1 B. & L. 514. In *Campbell v. Fleming*—(1834) 1 Ad. & E. 40, 42—Patterson J. stated: “No contract can arise out of a fraud.”

36. (1823) 1 B. & C. 514, 521.

37. (1834) 1 Ad. & E. 40.

38. (1851) 10 C. B. 919.

39. *Id.* at 921.

40. *Id.* at 924.

Counsel replied:

“Under certain circumstances, undoubtedly, it may: the vendor may choose to affirm the sale; but, unless he does some act to affirm the sale, it is void. There is a semblance of a contract here; but there is not the assent of both minds to the same thing.”⁴¹

The court unanimously rejected this argument and adopted the proposition that a contract is valid unless avoided and that property passes under it. One reason why the court took this course was given by Erle C.J. as follows:

“The question is one of considerable importance, as effecting the mercantile transactions of this country for if the argument urged on the part of the defendants were well founded, goods at all tainted by fraud might be followed through any number of *bona fide* purchasers, a most inconvenient, and, as it strikes me, a most absurd doctrine. A vendor, who does not choose to avail himself of means of inquiry, would thus, by trusting the vendee, be giving him unlimited means of defrauding the rest of the world.”⁴²

Since *White v. Garden*, it has been clear that the protection of *bona fide* purchasers, other than purchasers in market overt, depends on the existence of a contract between the rogue and his victim under which title passes to the rogue. This protection is less complete than and therefore inferior to the comprehensive protection which Lord Kenyon appears to have envisaged. Worse still, the new doctrine means that the protection of *bona fide* purchasers now depends upon the technical rules on the formation of contract. Since these are designed to adjust the rights of the immediate parties to the contract, they cannot be expected to protect *bona fide* purchasers in any but a completely fortuitous manner. An owner induced by fraud to part with his goods can now defeat the *bona fide* purchaser's attempt to invoke *White v. Garden* by showing that the supposed contract between the rogue and himself is not only affected by fraud but also void or non-existent for failure to comply with some other prerequisite to contract.

The manifold positive requirements and vitiating factors which the general law of contract has evolved, such as offer and acceptance, consideration, common mistake, vagueness, consent on terms, illegality,⁴³ authority in the case of contracts concluded through agents,⁴⁴ to name the most important ones, can all be employed to defeat the attempt of *bona fide* purchasers to rely on the doctrine

41. *Ibid.*

42. *Id.* at 927 f.

43. For an example of a fraudulently induced contract which is void for illegality, see *Parkinson v. College of Ambulances, Ltd. and Harrison* [1925] 2 K.B. 1.

44. A clear example is *Higsons v. Burton* (1857) 26 L. J. (Ex.) 342.

of *White v. Garden*. If these factors have anything in common, it must surely be that none of them has the slightest bearing on the natural merits of a *bona fide* purchaser's claim to be allowed to keep what he has acquired with hard cash. But, if there is any meaning in the distinction between what the law is and what it ought to be, we cannot deny that the law on the conclusion of contracts is an essential element in *bona fide* purchaser protection. One of the first cases which turned on these principles was *Hardman v. Booth*.⁴⁵

In that case a clerk employed by Gandell & Co. ordered goods from the plaintiffs, acting as if he were a member of the firm and had authority to buy for the firm. When the goods arrived he sold them to the defendants in his own name and kept the proceeds. The plaintiffs sued the defendants for conversion; the defendants, relying on *White v. Garden*, claimed that the purchase from the clerk had given them title to the goods:

"No doubt, the plaintiffs supposed that they were dealing with Gandell & Co., but where a person represents himself as belonging to a particular firm, and a party, believing that, contracts with him, though he may be liable to an action for a false representation the contract is nevertheless valid."⁴⁶

The plaintiffs, on the other hand, argued that there was no contract at all. "No property in the goods ever passed from the plaintiffs. They only intended to sell to Gandell & Co., through their agent, Edward Gandell."⁴⁷ The plaintiffs argument prevailed and the defendants had to pay damages. Pollock C.B. relied on the fact that Edward Gandell was not a member of that firm and had no authority to act as their agent."⁴⁸ Wilde B. stated:

"The real question therefore is, whether there has been such a dealing as amounts to a sale. It is clear that there was no sale to Gandell & Co., because they never authorized Edward Gandell to purchase for them; and it is equally clear that there was no sale to Edward Gandell, because the plaintiffs never intended to deal with him personally."⁴⁹

Devlin L.J. stated the effect of *Hardman v. Booth* incisively in his dissenting judgment in *Ingram v. Little*:⁵⁰

"If the person addressed is posing only as an agent, it is plain that the party deceived has no thought of contracting with him but only with his supposed principal; if then there is no actual or ostensible authority, there can be no contract. *Hardman v. Booth* is, I think, an example of this."⁵¹

45. (1863) 1 H. & C. 802.

46. *Id.* at 805.

47. *Id.* at 806.

48. *Id.* at 807.

49. *Id.* at 808.

50. [1961] 1 Q.B. 31, 62.

51. *Id.* at 66-67.

Baron Wilde's statement that there was no sale to Gandell & Co., because Edward Gandell was not authorized to purchase for them, must not make us overlook the fact that according to the rule in *Bolton Partners v. Lambert*⁵² there was at least a potential contractual bond created by the unauthorized acts of Edward Gandell which Gandell & Co. could have turned into a valid contract by ratification. The law gives this right to the principal whenever an unauthorized agent has acted for him regardless of whether its exercise is probable or improbable. This power of ratification would, of course, be defeated if the courts considered the contracts to have been concluded with the unauthorized agent himself. It is this legally recognized power to adopt and ratify which constitutes perhaps the strongest argument against the construction contended for by the defendant.

The storm centre of the debate about mistake of identity is still the litigation which followed the fraudulent practices of Alfred Blenkarn in Cheapside in the latter part of 1873.⁵³ Blenkarn had set up his establishment in close proximity to the business premises of Blenkiron & Son, and by using a blurred signature and a closely similar address, he had succeeded in having goods supplied to himself from, amongst others, the plaintiffs, who had had past dealings with Blenkiron & Son and who supplied the goods on credit under the mistaken belief that they were dealing with the respectable firm of Blenkiron & Son. The defendants had bought the goods from Blenkarn. The case was tried before Blackburn J.⁵⁴ The jury found that the defendants had purchased the goods *bona fide*. Blackburn J. reserved for the court the question whether the action was maintainable. Before Blackburn, Mellor and Lush JJ., counsel for the plaintiff argued *inter alia*:⁵⁵

"No property passed from the plaintiffs, inasmuch as they intended to contract with Blenkiron & Co., and not with Blenkarn, so that there was no contract of sale at all: *Hardman v. Booth*."⁵⁶

If this was a genuine case of impersonation and if these propositions were to be upheld, serious inroads would be made into the protection of *bona fide* purchasers. Impersonation is not an infrequent method of committing fraud and if, in all such cases, the doctrine of *White v. Garden* failed, a situation existed which Erle C.J. would probably have

52. (1889) 41 Ch. D. 295.

53. *Lindsay v. Cundy* (1876) 1 Q. B. D. 348 (Queen's Bench Division); *Cundy v. Lindsay* (1877) 2 Q. B. D. 96 (Court of Appeal); *Cundy v. Lindsay* (1878) 3 App. Cas. 459 (House of Lords).

54. (1876) 1 Q. B. D. 348.

55. *Id.* at 349.

56. Counsel also submitted that the plaintiff would be entitled to the proceeds of the sale by virtue of sec. 100 of 24 and 25 Vict. c. 96, even if property had passed. This part of the argument is of no interest now since the section has been repealed.

described without hesitation as "most inconvenient and most absurd".⁵⁷

The judges of the Queen's Bench Division saw little difficulty in rejecting the argument. Blackburn J. intimated during argument that he and his brother judges considered that there was a contract between Blenkarn and Messrs. Lindsay:

"Blenkiron & Co. are at 123, Wood Street; the plaintiffs addressed their letters and sent the goods to the person be he Blenkarn or Blenkiron, 37, Wood Street."⁵⁸

"We are agreed⁵⁹ that the property passed from the plaintiffs, as they intended to sell to the people at 37, Wood Street, and sent the goods there."⁶⁰

Without reserving judgment, the learned judges acted on this view, giving added reasons for it only very briefly.⁶¹ The construction put upon the contractual communications of Messrs. Lindsay, namely that they were addressed to and intended for the person trading at 37 Wood Street, whoever he might be, produced a result which was thoroughly in keeping with the policy which had caused the court in *White v. Garden* to adopt the principle of voidability in the first place. Was it wrong in law? The argument that there was a lack of *consensus ad idem*⁶² had been rejected in *White v. Garden*. Should the same argument have been accepted in *Lindsay v. Cundy*?

Whether Blackburn J.'s construction of Messrs. Lindsay's communications was in accordance with the law appears to this writer to be the *most important single question* in the maze that surrounds the problem of mistaken identity. Is it true that Messrs. Lindsay addressed their letters to the person, be he Blenkarn or Blenkiron, 37, Wood Street? Despite the reversal of the judgment of the Queen's Bench Division in the higher courts, there have been persistent voices, both judicial and academic, to say that the Queen's Bench judges were right. Lord Denning has cited *Cundy v. Lindsay* as one of the cases where, before the fusion of law and equity, the courts "held contracts to be void which were really only voidable."⁶³ His Lordship even went so far as to suggest that Blackburn's judgment, and not that of the House of Lords, would be followed nowadays.⁶⁴

57. Cf. (1851) 10 C.B. 919, 927 f. See also *supra* at n. 42.

58. (1876) 1 Q. B. D., 348, 350.

59. I.e. Blackburn, Mellor and Lush JJ.

60. *Id.* at 352.

61. Blackburn J. deals with the matter at pp. 354-355, Mellor J. at p. 360, and Lush J. at pp. 360-361.

62. "There is a semblance of a contract here; but there is not the assent of both minds to the same thing."—(1851) 10 C.B. 919, 925.

63. *Solle v. Butcher* [1950] 1 K.B. 671, 691.

64. "It is now clear that a contract will be set aside . . . if one party, knowing that the other is mistaken about . . . the identity of the person by whom it is made, lets him remain under his delusion . . . instead of pointing out the mistake. That is, I venture to think, the ground on which, according to the view by Blackburn J. of the facts, the contract in *Lindsay v. Cundy* was voidable and not void."—*Id.* at 692 f.

In *Ingram v. Little* Sellers L.J. saw fit to endorse a critical academic note on *Cundy v. Lindsay*:

"But as the learned authors of *Cheshire and Fifoot on the Law of Contract*, 5th ed. (1960) p. 197, point out, another view of the facts of that case might have been that "the plaintiffs, though deceived by the fraud of Blenkarn, intended or were at least content to sell to the person who traded at 37 Wood Street, from which address the offer to buy had come and to which the goods were sent. If this were the true position there was a contract with Blenkarn of 37 Wood Street, though one that was voidable against him for his fraud."⁶⁵

If it is true that the judges of the Queen's Bench Division on the one hand and the judges in the appellate courts on the other viewed the facts differently, then this fact and this fact alone may account for the reversal of the judgment of the Queen's Bench Division; this might indeed mean that the law expounded by Blackburn J. and his brother judges *on the facts as they saw them* is still sound. To determine the difference in the assessment of the facts between the courts is not an easy task. *Cheshire and Fifoot* have put the matter in a nutshell by pointing out that the difference arose over the issue whether the facts were exactly the same as the facts in *Hardman v. Booth*.⁶⁶

Blackburn J. thought the two cases distinguishable. *Hardman v. Booth* he described as follows: "The plaintiffs, meaning to deal with Thomas Gandell & Sons . . . took an order from a person whom they believed *to be acting for* the firm of Thomas Gandell & Sons."⁶⁷ The corresponding feature of the case before him, on the other hand, Blackburn J. described as follows: "Blenkarn had set up a pretended business at 37, Wood Street, *in the hope that people would confuse him with his namesake*, and he would get the advantage of his namesake's character. In this particular case *he did get the advantage of his namesake's character . . .*"⁶⁸ This distinction might have been described more clearly, perhaps, in the words of Benjamin. In his treatise on the Law of Sale, which was quoted in argument before the judges of the Queen's Bench Division, the learned author had drawn a distinction between "falsely representing oneself as agent for another" and "passing oneself off for another".⁶⁹ Even more briefly, we might say that whilst Edward Gandell purported to act *in* Gandell & Co.'s name, Blenkarn purported to act *under* Blenkiron & Son's name.

Drawing such a distinction would have been unobjectionable if Blenkiron had been a single trader. Blenkiron & Son, however, appears

65. [1961] 1 Q.B. 31, 54.

66. *Cheshire & Fifoot on Contract* (6th ed., 1964) 209.

67. (1876) 1 Q. B. D. 348, 354.

68. *Id.* at 355.

69. *Id.* at 350.

to have been a partnership. Although we might conclude that Blenkarn impersonated Blenkiron, this surely meant nothing more than an impersonation of one of the partners who, insofar as he acts for the partnership, acts not as principal but as representative or agent only.⁷⁰ Would Blackburn J. have had an answer to the submission that Blenkarn, whilst passing himself off for Blenkiron, was also, and more importantly, "falsely representing himself as agent for" Blenkiron & Son, the partnership? It is submitted that the supposed distinction is plausible only on the assumption that the firm of "Blenkiron & Son" was owned by a single trader. The reports contain nothing to support such an assumption. There is much to be said for rejecting the distinction drawn by the judges of the Queen's Bench Division and it was in fact rejected by all the judges in the Court of Appeal⁷¹ and in the House of Lords,⁷² excepting only Lord Cairns who did not mention *Hardman v. Booth*. Relying on these pronouncements, one could construe the famous decision of the House as standing for nothing more than for the well-settled and uncontroversial principle that a contract concluded with an agent fails if the agent lacks authority.

Lord Hatherley's judgment lends itself most readily to such a narrow interpretation. His Lordship's conclusion was that the facts before him were "really in substance . . . the identical case of *Hardman v. Booth* over again."⁷³ Counsel for the appellant had submitted the following assumed case to the House ". . . suppose this fraudulent person had gone himself to the firm from whom he wished to obtain the goods, and had represented that he was a member of one of the largest firms in London."⁷⁴ His Lordship concluded that in such circumstances no contract with the rogue would come into being and stated: "Now, I am very far, at all events on the present occasion from seeing my way to this, that the goods being sold to him as representing that firm he could be treated in any other way than as an agent of that firm . . ."⁷⁵ Another *dictum* of Lord Hatherley's bears out the same point: "The sale made out upon such a transaction as this, would have been a sale to the Blenkiron of Wood Street, if they had chosen to adopt it, and to no other person whatever . . ."⁷⁶ The emphatic "and to no other person whatever" indicated that Lord Hatherley attributed an exclusive right of ratification to Blenkiron & Son. This

70. *Watteau v. Fenwick* [1893] 1 Q.B. 346.

71. (1877) 2 Q. B. D. 96. In a joint judgment Mellish, Brett and Amphlett L.JJ. stated: ". . . the case is directly within the rule established by *Hardman v. Booth*."—*id* at 100.

72. (1878) 3 App. Cas. 459. Both Lord Hatherley and Lord Penzance stated that they were unable to distinguish *Hardman v. Booth*—*cf. id.* at 467, 471.

73. *Id.* at 467.

74. *Ibid.*

75. *Ibid.*

76. *Ibid.*

seems consistent only with the view that Blenkarn concluded the contract as agent for Blenkiron & Son, without authority.⁷⁷

There are some *dicta* in the judgment of Lord Penzance which support to some extent the narrow interpretation suggested above. *Higgins v. Burton*⁷⁸ was an even more clear cut case of pretended agency than *Hardman v. Booth* and Lord Hatherley stated that *Higgins v. Burton* was "decided on the same principle as *Hardman v. Booth*."⁷⁹ Lord Penzance also cited *Higgins v. Burton* and *Hardman v. Booth* in conjunction as precedents with direct application to the facts before him.⁸⁰

A wider interpretation of the decision of the House could be based on the failure of their Lordships to examine at all closely the question whether Blenkarn purported to act as agent or whether he passed himself off as the proposed principal party to the contract. This could be taken as an indication that there was no contract in the opinion of their Lordships on either view of the facts. So interpreted, the decision would amount to a full endorsement of Benjamin's statement, as quoted before the Queen's Bench Division:

"Where a person passes himself off for another, or falsely represents himself as agent for another, for whom he professes to buy, and thus obtains the vendors assent to a sale, and even delivery of the goods, the whole contract is void, it has never come into existence, for the vendor never assented to sell to the person thus deceiving him."⁸¹

It is the judgment of Lord Cairns in particular, which must be taken to stand for such a wide construction. His Lordship analysed the facts as follows:

". . . Blenkarn—the dishonest man, as I call him—was acting here just in the same way as if he had forged the signature of Blenkiron & Co., the respectable firm, to the applications for goods, and as if, when, in return, the goods were forwarded and letters were sent, accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods, and of the letters which were addressed to, and intended for, not himself but, the firm of Blenkiron & Co. . . . Of [Blenkarn] [Messrs. Lindsay] know 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. . . ."⁸²

77. Cf. *Bolton v. Lambert Partners* (1889) 41 Ch. D. 295.

78. (1857) 26 L. J. (Ex.) 342.

79. (1878) 3 App. Cas. 459, 467.

80. *Id.* at 471.

81. (1876) 1 Q. B. D. 348, 350.

82. (1878) 3 App. Cas. 459, 465.

The legal conclusions were stated as follows:

"Now, my Lords . . . I ask the question, 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? . . . As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required."⁸³

If *Cundy v. Lindsay* is open to two possible interpretations, the question arises which of these must be or should be preferred.

Lord Cairns characterized the dilemma which had been created by the fraud of Blenkarn as follows: "My Lords, you have in this case to discharge a duty which is always a disagreeable one for any court, namely to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall."⁸⁴ Ever since the decision of the House of Lords, lawyers have time and again described the dilemma created by the rogue in such terms. Cheshire and Fifoot,⁸⁵ for instance, regard the problem in *Cundy v. Lindsay* as a particular instance of the well-known *dictum* by Ashhurst J.: ". . . whenever one of two innocent persons must suffer by the act of a third, he who enables such person to occasion the loss must sustain it."⁸⁶ The learned authors suggest that this principle, if indeed it be a principle, would justify the courts in denying recovery to the plaintiff in cases such as *Cundy v. Lindsay*, since "it will, indeed, generally be found in cases of this kind that the original dupe has been negligent to a greater or less degree, and in fact it may be argued that to contract with the wrong person must always imply at least a lack of vigilance, especially when it is followed by a delivery of goods on credit."⁸⁷ On the other hand, it has been argued that Ashhurst J.'s *dictum* is a dubious guide to any one solution of the predicament produced by rogues, since the buyer of stolen or fraudulently obtained property might be just as careless in purchasing it as the owner was in allowing it to be taken; indeed, the respective fault of the parties is likely to vary from case to case. It was this consideration which prompted Devlin L.J. to suggest in *Ingram v. Little*⁸⁸ that apportioning the loss would be the fairest solution.

83. *Id.* at 465, 466. There are *dicta* in the judgment of Lord Penzance which lend support to the wider view:

". . . there is [no] decided case in which a sale and delivery intended to be made to one man, has been held to be a sale and delivery so as to pass the property to another against the intent and will of the vendor."—*id.* at 471.

84. *Id.* at 468.

85. *Op. cit. supra* n. 66, at 213.

86. *Lickbarrow v. Mason* (1787) 2 T. R. 63, 70.

87. *Op. cit. supra* n. 66, at 213.

88. [1961] 1 Q.B. 31, 73-74.

With respect, the debate just described appears to this writer to show the predicament produced by rogues in the wrong light. Though the actual litigation usually occurs between two parties, there is no limit to the number of people potentially involved in litigation generated by the one fraud or theft, for the owner may have not only one but a number of *bona fide* purchasers from which to choose. Since he can sue any one in the chain of purchasers, can he recover the value of the goods more than once, or in addition to the goods themselves? Can a *bona fide* purchaser who has been sued successfully seek indemnity by suing his predecessor in the chain for breach of warranty of title? Does the need for protecting the owner's property outweigh the interests of a potentially unlimited number of purchasers in being free from molestation for what is, after all, past history for all but the last purchaser and actual possessor? The important point, so far as legal practice is concerned, is not that these questions can legitimately be asked, but rather that the judges, prior to *Cundy v. Lindsay*, were keenly aware of and sensitive to them. In *Horwood v. Smith* Lord Kenyon commented:

“... if the plaintiff could maintain the present action, he may recover with equal propriety against any one of the various persons through whose hands the goods may have passed in the intermediate time. Now it cannot be conceived that he should have his remedy against so many; there must be some person to answer him to the extent of his demand.”⁸⁹

This *dictum* was relied on repeatedly by common law judges prior to the decision of the House of Lords in *Cundy v. Lindsay*.^{89a} If the conflict of interests does not exist between two innocent parties, but between the original owner on the one hand and a potentially unlimited number of innocent parties on the other, then we must surely be critical of Lord Cairns' description of the predicament, since it implies that for the law to favour the *bona fide* purchaser would be no better than to allow the owner to prevail. It is submitted that the older view, as represented by Lord Kenyon's *dictum*, is sounder, and that the *bona fide* purchaser's case should be favoured by the law. If it is too late to construct a comprehensive set of principles to bring this about, at least we can try to avoid the adoption of principles which will impair the protection of *bona fide* purchasers even further. As a matter of policy, the narrow *ratio* of *Cundy v. Lindsay* would therefore be preferable. The interpretation of the decision of the House of Lords does, of course, not depend only on considerations of convenience and principle. The main question is: which interpretation is compatible with the later cases?

89. (1788) 2 T. R. 7750, 755.

89a. Cf. *White v. Garden* (1851) 10 C.B. 919, 925 per Cresswell J.; *Lindsay v. Cundy* (1876) 1 Q. B. D. 348, 359 per Blackburn J.

*Edmunds v. Merchants' Despatch Co.*⁹⁰ was decided in a way compatible with the narrow but not with the wide interpretation of *Cundy v. Lindsay*. To be sure, the judgment of Morton C.J. in the Supreme Judicial Court of Massachusetts mentions *Cundy v. Lindsay* only in passing,⁹¹ but the headnote in *Edmund's case* states substantially the same distinction as that on which Blackburn J. and his brother judges acted in the Queen's Bench Division.

"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.

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."⁹²

Edmunds case might be of no significance to English law if it were not for the fact that the principles stated by Morton C.J. had later been adopted by Horridge J. in *Phillips v. Brooks*.⁹³ In that case one North passed himself off as the respectable and wealthy Sir George Bullough and this induced the plaintiff, a jeweller who knew Sir George by repute, to part with a ring worth £450 in exchange for a forged and worthless cheque. North pledged the ring to the defendant, a pawnbroker, for an advance of £350. The plaintiff sued to have either the ring returned or damages paid. Horridge J. found for the defendant, since, in his opinion, the rogue had obtained a voidable title under the contract with the plaintiff and had passed this on to the defendant before the contract had been rescinded. *Phillips v. Brooks* has been subjected to some strained rationalizations. Wade, for example, has suggested that the misrepresentation occurred *after* the sale had been concluded and the property had passed.⁹⁴ It must be emphasized that Horridge J. expressly found as facts (1) that Phillips, the jeweller, was misled into thinking that North was Sir George Bullough and (2) that the sale and delivery, not just the delivery, were obtained by means of false pretence.⁹⁵ It may be legitimate, on occasion, to explain a decision on a legal ground not mentioned by the court; but to explain a case by assuming that the true facts differed from those found by the court, seems to this writer to be taking the process of rationalization one step too far. Nothing in the judgment justifies such "interpretation." What Horridge J. did say was that, however strenuously the plaintiff insisted that he had not intended to contract

90. (1883) 135 Mass. 283.

91. *Ibid.*

92. *Ibid.*

93. [1919] 2 K.B. 243.

94. Wade, Mistaken identity in the Law of Contract (1922) 38 *Law Quarterly Review*, 201, 204. The same suggestion was made by Viscount Haldane L.C. in *Lake v. Simmons* [1927] A.C. 487, 501.

95. [1919] 2 K.B. 243, 246.

with anyone other than Sir George Bullough, it was still for him, Horridge J., to decide as a matter of law whether a contract had arisen with the person whom the plaintiff had mistaken for Sir George, i.e. with North.⁹⁶ Phillips' intention to deal with the man in his shop was just as much beyond dispute as was his intention to deal with Sir George, and it was the former intention which Horridge J. relied on, deciding as a matter of law to ignore the mistake of identity: "I have come to the conclusion that [Phillips] in fact contracted to sell and deliver [the ring] to the person who came into his shop . . . who was . . . a man by the name of North."⁹⁷

Horridge J. does not seem to have considered that the decision in *Cundy v. Lindsay* had an immediate bearing on the case before him, since it involved *inter absentes* dealings, whilst in *Phillips v. Brooks* the parties were contracting face to face. This writer is content to accept the guidance of Sellers L.J. who appears to have thought in the recent case of *Ingram v. Little*⁹⁸ that the *inter absentes* and *inter praesentes* dichotomy does not constitute a distinction of significance in principle.⁹⁹ To say that a person present is always identified by sight and hearing,¹⁰⁰ is indeed a doubtful contention. Mere presence has no such unique status as an identifying criterion. Sellers L.J. pointed out that the rogue might make himself look and sound like the person whom he attempts to impersonate, in which case "sight and hearing" will not prevent but assist the mistake of identity which the rogue induces. Even where impersonation *inter praesentes* is achieved merely by "verbal cosmetics",¹⁰¹ the person deceived, though he sees the rogue's true exterior, does not know who he really is. The criteria for identification vary from case to case; they depend entirely on the context. A person who is "the tall man with glasses over there" to one, is "the president of the football club" to another, or "the unknown person who witnessed the accident in X-street" to a third. That mere seeing and hearing does not always suffice for identification follows from the question "who was that?" which people often ask after having seen, heard and even spoken to a person about whom they lacked some vital piece of information. If seeing and hearing were always sufficient for identification, such a question would be pointless. Whether impersonation is achieved by cosmetics, by verbal persuasion¹⁰² or by letter, if it is successful, the result is surely

96. *Ibid.*

97. *Ibid.*

98. [1961] 1 Q.B. 31.

99. *Id.* at 50.

100. A *dictum* by Morton C.J. to this effect was quoted with apparent approval by Horridge J. [1919] 2 K.B. 243, 247.

101. [1961] 1 Q.B. 31, 57, *per* Pearce L.J.

102. For examples, see *Ingram v. Little* [1961] 1 Q.B. 31, 50 f. *per* Sellers L.J. and 57 f. *per* Pearce L.J.

exactly the same in each case: the party so misled is dealing with one person in the mistaken disbelief that he is dealing with another. Once it is acknowledged that there is no valid distinction of this kind, the question whether *Phillips v. Brooks* can be reconciled with *Cundy v. Lindsay* becomes all important. Even though Horridge J., attaching greater significance to the *inter absentes-inter praesentes* distinction than it deserved, might have underestimated the task of reconciliation, he did provide the essential clue by referring to Lord Hatherley's example of a rogue who buys goods in a personal interview with the vendor by misrepresenting that he is a member of a large and well-known firm in London.¹⁰³ It will be remembered that Lord Hatherley had intimated that the rogue in such circumstances would have to be treated as a pretended agent. This was taken up by Horridge J. who stated that the illustration seemed to him to fall within the second proposition in the headnote of *Edmund's case*, namely "representation by a person present that he was an agent for somebody else as to induce the seller to make a contract with a third person whom the person present had no authority to bind."¹⁰⁴ If it is true that Blenkarn created the impression with Messrs. Lindsay that the writer of the letters was a member of the firm of Blenkiron & Son, and if it is further true that no significant distinction can be drawn between misrepresenting such things in person and doing so by letter, then it follows that the actual case of *Cundy v. Lindsay* itself would also fall within the second proposition in the headnote of *Edmund's case*. That proposition is, of course, identical with what has previously been referred to as the narrow construction of *Cundy v. Lindsay*.¹⁰⁵ This narrow interpretation of the decision of the House achieves two things at once: it reconciles *Cundy v. Lindsay* and *Phillips v. Brooks*, and it leaves intact the law expounded in *Lindsay v. Cundy* by the Queen's Bench Division. *Lindsay v. Cundy* and *Phillips v. Brooks* thus stand side by side establishing the same rule for cases of written and of oral impersonation: a contract with the rogue is not prevented by the mere fact that the seller was fraudulently induced to believe that he was dealing with a person other than the rogue.

Counsel for the plaintiff in *Ingram v. Little*¹⁰⁶ urged the Court of Appeal to overrule *Phillips v. Brooks*, but the Court declined to do so. After half a century, the decision of Horridge J. still stands. However, the voices of two formidable academic critics combine to persuade us that *Phillips v. Brooks* was wrongly decided.¹⁰⁷

103. Cf. *supra* at nn. 74-75.

104. [1919] 2 K.B. 243, 248.

105. *Supra* at n. 72.

106. [1961] 1 Q.B. 31, 41 f.

107. Goodhart, *Mistake as to identity in the Law of Contract* (1941) 57 *Law Quarterly Review* 228, 240-241; Glanville Williams, *Mistake as to party in the Law of Contract* (1945) 23 *Canadian Bar Review* 271, 276-277, and in particular 393-394.

Goodhart based his disapproval on the undisputed fact that Phillips intended to sell to Sir George and that North knew this; in these circumstances the offer, so the learned author submitted, must be construed as really made to Sir George so that North could not accept it. Cases in which B. might validly accept an offer made by A., although B. knows that the offer is intended for C., are by no means as inconceivable as Goodhart seems to suggest. For example, if B. buys from C. a retail store which bears C.'s name, B. will for some time, provided this is permitted under the contract, retain the name "C." so as to preserve the good will. The customers, in these circumstances, continue to believe that they are dealing with C., a mistake not only known, but even actively encouraged by B. Goodhart appears to be saying that in such a case every single contract made in the store after the take-over and before the change of ownership becomes known to the customers, is void for mistake of identity. Is the law really so far removed from the realities of business? Where the identity of the owner is a matter of complete indifference to the customer, why should the law allow him to ride free on what must *ex hypothesi* be a mere pretext, namely a plea of mistake of identity? True, where B. knows that it is important to the customer A. that the seller be C., B. is not, in the words of Baron Bramwell, "at liberty to step in and maintain that he is the party contracted with."¹⁰⁸ Indeed, *Boulton v. Jones*^{108a} appears to commit the courts to the entirely reasonable proposition that B., in accepting an offer which he knows to be intended for C., takes his chance of finding later that the identity of the seller was for reasons unknown to B. and contrary to his expectations, of importance to A. This interpretation of the well-known case of *Boulton v. Jones* might be called the orthodox one.¹⁰⁹ Goodhart contested it,¹¹⁰ but his arguments have been effectively destroyed by Glanville Williams.¹¹¹ That learned author argued convincingly that, on facts such as the ones described above, the existence of a contract depends simply on the question whether the identity of the seller is material or immaterial to the buyer.

It was on this "materiality" criterion that Glanville Williams relied for his disapproval of *Phillips v. Brooks*.¹¹² North knew that Phillips intended to contract with Sir George, and it was indisputable that it was most material to him that the person in front of him was in fact Sir George. The materiality principle, if applicable, would indeed mean that there was no contract. But is it applicable? Does Glanville

108. *Boulton v. Jones* (1857) L. J. Ex 117, 119.

108a. *Ibid.*

109. Cf. Anson, *Principles of the English Law of Contract* (18th ed., 1937) quoted by Goodhart, *op. cit.*, at 232 f.

110. *Op. cit. supra*, at 233.

111. *Op. cit. supra*, at 387 ff.

112. *Op. cit. supra*, at 394.

Williams' argument not overlook the fact that it is the element of fraud which makes the identity of the buyer material, and that the rule in *White v. Garden* tells us to ignore the fraud in assessing the validity of an unrescinded fraudulently induced contract? Furthermore, it should not be overlooked that Glanville Williams raises an objection with which Horridge J. dealt expressly and, it is submitted, convincingly. The plaintiff's counsel had argued that North's identity was material and that this prevented a contract from arising.¹¹³ Horridge J. answered this submission with a distinction. The materiality principle might be appropriate to disputes between the original parties; but it must not be allowed to interfere with the rights of third parties, acquired innocently under the contract.¹¹⁴ It might be objected that it is not permissible to construe the contractual relationship between the immediate parties to the contract, namely Phillips and North, by introducing the interests of third parties.¹¹⁵ Such an argument must surely fail when it is remembered that the whole principle of voidability of fraudulently induced contracts was adopted by the courts to cater for the needs of *bona fide* purchasers.¹¹⁶

The question remains whether the rule for impersonation cases, as adopted by *Phillips v. Brooks*, is open to serious or even fatal objections

In the law of Germany, the principle has been accepted that acting *under* another person's name is to be treated, so far as the law of agency is concerned, in the same way as acting *in* another person's name.¹¹⁷ In accordance with this view, a power to ratify and adopt is given to the person whose name has been used.¹¹⁸ If this doctrine were part of the English law of agency, then the power of ratification

113. Horridge J. described the argument of plaintiff's counsel as follows: "It was argued before me that the principle quoted from Pothier (*Traité des Obligations*, s 19) in *Smith v. Wheatcroft* (9 Ch. D. 223, 230), namely, "Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract" applies."—*id.* at 248. Glanville Williams himself has argued convincingly that the extract from Pothier is in substance intended as a statement of the "materiality" principle—*op. cit. supra* at 393.
114. *Id.* at 249.
115. Indeed, in a very similar context, the Court of Appeal has recently declared irrelevant the interests of *bona fide* purchasers: *Car and Universal Finance v. Caldwell* [1963] 2 All E. R. 547.
116. *Cf. supra* at n. 42.
117. Enneccerus—Kipp—Wolff, *Lehrbuch des Bürgerlichen Rechts* vol. 1 (15th ed., 1960) at p. 1127 state: "A distinction must be made between acting in some one else's name (*falsa procuratio*) and acting under some one else's name. An imposter is not an agent, since he is not acting on another man's behalf. But to conclude that his transactions are null and void would be completely incompatible with business convenience. Rather, the principles of agency . . . must *a fortiori* be applied. . . . It is in accordance with these principles that the question must be decided whether the party impersonated has a power of ratification."
118. *Ibid.*

possessed by the impersonated "principal" would yield a very strong, if not a conclusive argument against the construction adopted by Blackburn J. in *Lindsay v. Cundy*,¹¹⁹ and by Horridge J. in *Phillips v. Brooks*.¹²⁰ Indeed, it would be impossible to distinguish in principle cases of pretended agency and cases of impersonation, since in both cases the principal's power of ratification would be incompatible with the finding that a contract had come into being between the rogue and his victim. But, there is no indication anywhere that the said doctrine is part of the common law. No doubt acting under another's name *with* authority must be taken to be capable of creating a contract; this seems to follow from elementary considerations of estoppel. But where the impersonation is fraudulent and not authorized, the effects of unauthorized agency surely do not follow. *Keighley, Maxstead and Co. v. Durant*¹²¹ might well be incompatible with such an idea. Also, and perhaps more importantly, a power of ratification would be of little practical value where the third party has an undoubted power to rescind the contract for fraud. It is submitted that the German principles on impersonation have no counterpart in the common law.

No less decisive than a power to ratify would be a power of acceptance, if it were vested in the impersonated third party as a result of the dealings between the rogue and his victim. If the law granted this right, it would surely be wrong to defeat it by finding that there was a contract between the seller and the rogue. The majority judgments in *Ingram v. Little*¹²² seem open to the construction that the person impersonated possesses such a power of acceptance, and that this rules out a contract between the seller and the rogue. The facts in *Ingram v. Little* were very similar to the facts in *Phillips v. Brooks*. One Hardy induced the plaintiffs by impersonating P. G. M. Hutchinson, a respectable person with an impressive London address, to sell and deliver their car to him for a worthless cheque. The plaintiffs had not heard of P. G. M. Hutchinson before, but they made sure that there was such a person by secretly checking his entry in the telephone directory during negotiations. Hardy sold the car to the defendants who acquired it in good faith and for value. A majority of the Court of Appeal affirmed the judgment of Wade J., summed up in the following *dictum*:

"I have not the slightest hesitation in reaching the conclusion that the offer which the plaintiffs made . . . was made solely to, and . . . [was] capable of being accepted only by, the honest Hutchinson."¹²³

119. (1876) 1 Q. B. D. 348, 355.

120. [1919] 2 K.B. 243, 246.

121. [1901] A. C. 240.

122. [1961] 1 Q.B. 31.

123. *Id.* at 59.

If this passage, which was approved by Sellers and Pearce L.JJ.¹²⁴ in the Court of Appeal was intended to convey simply that the real Hutchinson could have accepted the offer, had he been the person who conducted the negotiations, no exception could be taken to it. But there is another construction which can be put upon these words, namely that the offer physically addressed to Hardy was one which the real Hutchinson could have accepted validly. If this truly reflected the legal position, a finding that there was a contract with Hardy would not be feasible since it would prejudice Hutchinson's power of acceptance. But extending a power of acceptance to Hutchinson would be incompatible with the most elementary principles of the law on the formation of contracts. The plaintiffs' offer had not been communicated to the real Hutchinson at all, and there is authority for the proposition that an offer does not become effective without communication.¹²⁵ Let us imagine an extremely unlikely occurrence: Hutchinson descends upon the scene, either during the negotiations with Hardy or later, and says "I accept the offer." If this were to produce a contract with the plaintiffs, it would be a contract which the plaintiffs had no intention of making. Giving effect to such an "acceptance" would mean springing a surprise on the parties, and there is ample authority to say that this cannot be done.¹²⁶ Furthermore, such a power of acceptance could only be extended to Hutchinson if the offer had come from the plaintiffs and not from Hardy—an assumption which the judges in the Court of Appeal expressly refused to make.¹²⁷ If, however, the judgment of the majority is not based on the need to preserve Hutchinson's power of acceptance, then it becomes extremely difficult to discern any basis for it at all, or to see how the case could possibly be distinguished from *Phillips v. Brooks*. It is submitted that Devlin L.J. was right when he suggested in his dissenting judgment that *Phillips v. Brooks* was directly in point.¹²⁸ To say, as Sellers L.J. did, in *Ingram v. Little*, that *Phillips v. Brooks* "is not an authority to establish that where an offer or acceptance is addressed to a person (although under a mistake of identity) who is present in person, then it must in all circumstances be treated as if actually addressed to him"¹²⁹ reflects precisely the same confusion of thought and terminology which Glanville Williams so effectively exposed in his criticism of Goodhart's article.¹³⁰ The

124. *Id.* at 49 and 59.

125. *Cf. Treitel on Contract* (1962) 11.

126. "Parties become bound by contract when, and in the manner in which, they intend and contemplate becoming bound."—*Eccles v. Bryant and Pollock* [1948] Ch. 93, 104 *per* Lord Greene M.R.; see also *Timm v. Hoffman & Co.* (1873) 29 T. L. 271.

127. [1961] 1 Q.B. 31, 56.

128. *Id.* at 73.

129. *Id.* at 51 *per* Sellers L.J.

130. *Op. cit.* at 391.

majority judgments in *Ingram v. Little* are a valuable contribution in so far as they dispose of the fallacious distinction between *inter absentes* and *inter praesentes* dealings. But apart from this, they are little more than a reminder of the dangers inherent in an effort by counsel and by the courts to seek guidance in difficult legal problems by selecting arbitrarily one single contribution to a complex academic debate.

So far we have concentrated on the question whether the rule adopted by Horridge J. is prejudicial to legitimate and legally recognized interests of the person impersonated. Similar questions might be asked with regard to the defrauded party, who is given the power to avoid the contract with the rogue. One of the chief characteristics of impersonators is that they vanish after having committed their fraud and cannot thereafter be contacted. If we extend the voidability principle to such cases, are we not giving the defrauded party a right of rescission which is illusory? This argument might have had force prior to the decision of the Court of Appeal in *Universal Finance v. Caldwell*¹³¹ when it was thought that notice of rescission was necessary for the exercise of the right. But since the decision of the Court of Appeal, it is clear that the requirement of notice is dispensed with when the fraudulent party deliberately makes himself unavailable. Any act which manifests the defrauded party's desire to rid himself of the contract now suffices for rescission. It would thus be quite untrue to say that the construction adopted in *Phillips v. Brooks* imposes a "voidable" contract on the defrauded party in a situation where he is deprived of the means of exercising his right of avoidance.

CONCLUSIONS

1. The problem of mistake of identity in the sale of goods usually arises in cases of fraudulent impersonation carried out for the purpose of obtaining goods without having to pay for them. This type of situation occurs not infrequently and sometimes gives rise to litigation between persons whom the rogue has involved in the fraud. All the cases falling under this head seem sufficiently similar for us to be able to adopt one single principle to control the legal standing of the transaction between the rogue and his first victim, i.e. the person from whom he first obtains the goods. It is submitted that many of the suggested distinctions are unwarranted in principle, whether they be between *inter praesentes* and *inter absentes* situations, between fundamental and non-fundamental mistake of identity, between impersonating persons who are alive and persons who have died, between impersonating persons who are known and persons who are not known to the victim of the fraud.

131. [1963] 2 All E.R. 547.

2. Most writers who have contributed to the discussion of this subject, have failed to seek assistance through a study of the historical evolution of the principles on the protection of *bona fide* purchasers. It is submitted that to remove the problem of mistake of identity from its historical context is a potential source of error. Although the historical material available cannot be used to modify the leading authorities, in particular the decision of the House of Lords in *Cundy v. Lindsay*, these authorities can, and should be read and interpreted with an understanding of their historical background.
3. *White v. Garden*, which establishes the principle of voidability for contracts induced by fraud, stands for the proposition that it is legitimate to allow considerations derived from the need to protect *bona fide* purchasers to influence the construction of the contractual communications between the rogue and his victim. Furthermore, the insight of Lord Kenyon and of these common law judges who followed his lead, into the true nature of the predicament produced by rogues, yields a strong argument for adopting constructions which will favour *bona fide* purchasers for value.
4. The leading cases, in particular *Cundy v. Lindsay* and *Phillips v. Brooks*, are compatible with the principle that the mere fact of fraudulent impersonation does not prevent a contract between the rogue and his victim, if the prerequisites to contract are otherwise satisfied. It would be deplorable if the decision of the English Court of Appeal in *Ingram v. Little* were allowed to inhibit the adoption of a simple and satisfactory formula. The judgments of the majority in that case lack a clear *ratio* and there is high authority for the proposition that no court is obliged to rationalize an ambiguous judgment merely for the purpose of finding something by which to regard itself as bound.¹³²

132. *Scruttons, Ltd. v. Midland Silicones, Ltd.*, [1962] A.C. 446.