SOME REFLECTIONS ON THE LOGICAL BASIS OF MISTAKE OF IDENTITY OF PARTY

R. A. SAMEK*
Melbourne

In spite of many disagreements on points of detail, legal writers on contract almost unanimously subscribe to what I shall call the "subjective theory" of mistake of identity. Dr. Williams[1] and Mr. Wilson[2] criticize this theory in some important respects, but basically their approach is the same: English law has not adopted Pothier's view that a contract requires a concurrence of intentions,[3] and normally holds the parties to an "apparent contract"[4] bound by it, but an exception *must* be made in the case of mistake of identity (and of mistake as to the promise).[5]

This article is divided into two parts. In the first part I shall show that the subjective theory is rooted in a number of confusions, and that its statement of the case in which a "mistake of identity"[6] occurs is incorrect. In the second part I shall examine the leading English cases in the light of the logical findings.[7]

I

The subjective theory consists of the following five propositions:

(1) Subject to (2), a contract requires a concurrence of inten-

*R. A. Samek, Senior Lecturer in Commercial Law, University of Melbourne, Australia.

[1] Mistake as to Party in the Law of Contract (1945), 23 Can. Bar Rev. 271, 380.

[2] Identity in Contract and the Pothier Fallacy (1954), 17 Mod. L. Rev. 515.

[3] Law of Obligations (1806), Translation by W. D. Evans, vol. I, ss. 3 & 4.

[4] See *infra*.

[5] See also Goodhart, Mistake as to Identity in the Law of Contract (1941), 57 L.Q. Rev. 228; C. J. Slade, The Myth of Mistake in the English Law of Contract (1954), 70 L.Q. Rev. 385; Cheshire & Fifoot, The Law of Contract (5th ed., 1960), p. 195 *et seqq.*; Anson, Principles of English Law of Contract (21st ed. 1959), p. 253 *et seqq.*

[6] "Mistake of identity" will be used in what we consider to be its correct sense (see *infra.*), and mistake of identity in its widest current sense.

[7] The cases involving an undisclosed principal are beyond the scope of this article.

tions, that is the parties to the alleged contract (A and B) must be *ad idem.*

(2) Subject to (3), if A exhibited all the outward signs of assenting to a contract with B, A is estopped from denying that he assented to the "apparent contract" with B.

(3) If A exhibited all the outward signs of assenting to a contract with B, but A was mistaken in regard to B's identity (or in regard to B's promise), then, provided that B knew of A's mistake, A is not estopped from denying that he assented to the "apparent contract" with B.

(4) A mistake of identity occurs in the case where A intends to deal with C, but deals with B in the belief that B is C.

(5) A mistake of attribute occurs in the case where A intends to deal with B, but is mistaken in regard to one or more of B's qualities.

The popular appeal of the subjective theory rests on what may be called the argument from necessity. This argument is based on two assumptions: (1) that there is an "apparent contract" between the party who makes the mistake of identity (or the mistake as to the promise), A, and the party who induces the mistake, B; and (2) that the existence of an "apparent contract" between A and B involves an objective finding that A agreed to enter into a contract with B. It would follow from the truth of these assumptions that if the courts applied the normal objective test in order to decide whether A can avoid an "apparent contract" with B on the ground of mistake of identity (or mistake as to the promise), the "apparent contract" would always be upheld. Since the courts do permit A to avoid an "apparent contract" with B in the case where A has made an operative mistake of identity (or an operative mistake as to the promise), they cannot apply the normal objective test in this case.

The above assumptions are a consequence of the ambiguity of the statement "A has entered into an 'apparent contract' with B". This statement may mean:

(i) that it is alleged that A has entered into a contract with B;

(ii) that a reasonable man[8] would infer from A's conduct in the surroundings *at the crucial time* (that is at the time when the alleged contract was made) that A agreed to enter into the alleged contract with B;

(iii) that a reasonable man would infer from A's conduct in the surroundings at the crucial time that A, *on the sup-*

[8] See *infra.*

position that his conduct was reasonable, agreed to enter into the alleged contract with B;

(iv) that a reasonable man would infer *from all the relevant evidence before the court* (at the trial of the action) that at the crucial time A agreed to enter into the alleged contract with B;

(v) that a reasonable man would infer *from all the relevant evidence before the court* that at the crucial time A, *on the supposition that his conduct was reasonable*, agreed to enter into the alleged contract with B.

The statement "A has entered into an 'apparent contract' in the sense of (i) and (or) (ii), (iii) and (iv)" does not involve that A has entered into an "apparent contract" in the sense of (v). Hence, granted that this is the normal objective test, *and* that an operative mistake of identity (or an operative mistake as to the promise) prevents the formation of an "apparent contract" in the sense of (v),[9] the statement "A has entered into an 'apparent contract' with B" does not involve an objective finding that A agreed to enter into a contract with B. Consequently, the courts would not have to apply the subjective test of intention in place of the normal objective test in order to decide whether A has made an operative mistake of identity (or an operative mistake as to the promise). In short, the subjective theory would be redundant.

According to the subjective theory, a mistake of identity occurs in the case where A intends to deal with C, but deals with B in the belief that B is C. This statement does not make sense. The first part of the statement "A intends to deal with C" presupposes that *at the crucial time* A identifies C as C. If at the crucial time A does not identify C as C, then it cannot be asserted that *at that time* A intends to deal with C (as distinguished from B). The second part of the statement "A deals with B in the belief that B is C" involves that at the crucial time A does not distinguish between B and C, namely, that A does not identify B as B, and C as C. Hence, either the presupposition contained in the first part of the statement or the second part of the statement must be incorrect. They cannot both be correct.

The gist of my argument is this:

If at the crucial time A did not identify B as B, and C as C, then, although it can be asserted that at that time A intended to deal with a particular,[10] it cannot be asserted that he intended to

[9] See discussion *infra*.

[10] "Particular" will be used in the sense of a particular person or entity (whether a juristic entity or not).

deal with the particular B (as distinguished from C), or with the particular C (as distinguished from B). This can be demonstrated if we imagine that *at the crucial time* A is pressed to give the fullest possible description he can give of the particular with whom he intends to deal. Since it is assumed that at the crucial time A does not identify B as B, and C as C, it follows that this description would not refer uniquely either to B or to C.

The following illustration may be helpful: Suppose Lord L has a daughter Sarah who is tall, blonde and plain, and a chamber maid Rosalind who is petite, dark and pretty. Rosalind learns that A has designs on Sarah, or rather on her fortune, and is trying to obtain an introduction to her. With the help of a friend, Rosalind meets A and passes herself off as Sarah. In due course A falls in love with Rosalind and proposes marriage. Now A may have started off with the intention of marrying Lord L's daughter Sarah, regardless of her looks. At this stage, he may have been in a position to identify Sarah because, for instance, there is only one Lord L with a daughter called Sarah. But as soon as A meets Rosalind and believes that she is Lord L's daughter Sarah, it can no longer be asserted that he intends to marry Sarah. If we imagine that at the time when A proposes marriage he is pressed to give the fullest possible description he can give of the person whom he intends to marry, this description must include (though not necessarily in that order) "Sarah, the petite, dark and pretty daughter of Lord L". In the face of this description, it cannot be asserted (i) that A intends to marry Lord L's daughter Sarah, for she is not petite, dark and pretty; (ii) that A intends to marry Rosalind, for she is not Lord L's daughter; (iii) that A intends to marry the person designated by this description, for she does not exist.

This point may be shown in another way. From the supposition that A intends to marry "Sarah, the petite, dark and pretty daughter of Lord L", it follows (i) that A intends to marry "Lord L's daughter Sarah". It follows (ii) that A does not intend to marry "Lord L's daughter Sarah", for Lord L's daughter Sarah is not "petite, dark and pretty". It follows (iii) that A intends to marry Rosalind, for Rosalind is "petite, dark and pretty". It follows (iv) that A does not intend to marry Rosalind, for Rosalind is not "Lord L's daughter Sarah".

Hence, it cannot be asserted (i) that A intends to marry Lord L's daughter Sarah; (ii) that A intends to marry Rosalind; (iii) that A intends to marry "Sarah, the petite, dark and pretty daughter of Lord L".

Of course, when A learns that Rosalind is not Lord L's daughter Sarah, he may revert to his original intention of marrying Sarah. But even his hard heart may have been softened by Rosalind's charms, and he may say: "I intend to marry Rosalind, regardless." Finally, he may well decide not to marry either Sarah or Rosalind, but to marry Nita, the daughter of D, the international shipping tycoon, after having her identity checked by a private detective.

According to Mr. Wilson, a mistake of identity occurs in the case where A does not intend to deal with B, but deals with B in the belief that B is not B.[11] This statement also does not make sense. The first part of the statement "A does not intend to deal with B" presupposes that *at the crucial time* A identifies B as B. The second part of the statement "A deals with B in the belief that B is not B" involves that *at the crucial time* A does not identify B as B. Hence, either the presupposition contained in the first part of the statement or the second part of the statement must be incorrect. They cannot both be correct.

Taking the above illustration, it cannot be asserted that at the time when A proposes marriage he does not intend to marry Rosalind, for we have seen[12] that his description of the person whom he intends to marry would include a description of the physical attributes of Rosalind.

It is important to note that Mr. Wilson's definition of mistake of identity does not mark off a mistake of identity from a mistake of attribute. According to Mr. Wilson, A does not intend to deal with B if he believes him to be C, but A may not intend to deal with B *unless he possesses certain attributes.* With this in mind presumably, Mr. Wilson seeks to narrow the scope of mistake of identity by adopting Pothier's "materiality rule"[13] as a condition of its

[11] See *op. cit., supra,* footnote 2, at p. 527.

[12] See discussion *supra.*

[13] Pothier states this rule as follows: "Wherever the consideration of the person with whom I contract is an ingredient of the contract which I intend to make, an error respecting the person destroys my consent, and consequently annuls the agreement; for instance, if with the intention of giving or lending a thing to Peter, I give or lend it to Paul, whom I mistake for Peter, the gift or loan is void for want of my consent, for I did not intend either to give or lend the thing to Paul, but only to Peter; a consideration of the person of Peter was an ingredient in the contract that I intended to make . . . .

On the contrary, when the consideration of the person with whom I suppose myself to contract, forms no ingredient in the contract, and I should equally have made the contract with any other person, the contract would be valid. For instance, if I buy a book in boards from a bookseller, who engages to deliver it to me bound; although this bookseller, at the time of the sale, supposes me to be Peter, to whom I have a resemblance, and even calls me Peter, without my undeceiving him, this error on his part respecting the person to whom he makes the sale, does

operation. Indeed, he claims that Pothier's view of mistake of identity is consistent with his own, though all the evidence suggests that Pothier would have supported the subjective theory and not Mr. Wilson.

Pothier's "materiality rule" is open to the same objection as the subjective theory. Both the statement "A intends to deal with C" and the statement "A regards C's identity as an ingredient of the contract" presuppose that at the crucial time A identifies C as C. On the other hand, the statement "A deals with B in the belief that B is C" involves that at the crucial time A does not identify B as B, and C as C.[14]

Quite apart from this difficulty, the "materiality rule" is either redundant, or inconsistent with the subjective test of intention. If all hinges on A's intention, then, by hypothesis, everything turns on whether at the crucial time A intended to deal with B, or with C, regardless of whether A's error was material. The materiality of the error can only be a motivating factor, and Pothier makes it clear that such factors must be disregarded.[15]

There is an element of objectivity in the "materiality rule", which is belied by its origin. This appears from Pothier's statement that where the consideration of the person is not material, A, even though he believed B to be C, *must* have intended to deal with B. It is significant that both Mr. Wilson[16] and Dr. Williams[17] use the

---

not annul the agreement; for although he thought he was selling the book to Peter, nevertheless, as it was indifferent to him who purchased his goods, and it was not precisely and personally to Peter that he wanted to sell the book, but to anybody who was willing to give the price of it, it may be truly affirmed of me, that I was the person to whom he intended to sell his book, and to whom he is obliged to deliver it . . . .

An error in the motive which induces a party to contract, does not affect the agreement and affect its being valid; because there is much less reason to presume that the parties intended their agreement to depend on that motive as upon a condition . . . ." *Op. cit.*, *supra*, footnote 3, Art. III, ss. 19-20.

English judges have occasionally quoted this rule with approval, and it was applied by Tucker J. in *Sowler* v. *Potter*, [1940] 1 K.B. 271, with unfortunate results. In that case the defendant, who had been convicted under the name of Ann Robinson, secured a lease from the plaintiff under the name of Potter. Tucker J. held that the lease was void on the ground that the plaintiff would not have granted it to the defendant if she had been aware of her true identity. Since the plaintiff's mistake was clearly a mistake of attribute, the decision is hard to understand, and it has met with almost universal disapproval. For a possible explanation of the case, see Cheshire & Fifoot, *op. cit.*, *supra*, footnote 5, p. 198. See also *Ingram* v. *Little*, [1960] 3 W.L.R. 504, discussed *infra*.

[14] See discussion *supra*. [15] *Ibid.*

[16] "The more important point, however, is that the test does not attempt to define mistake as to identity, but merely outlines the conditions in which mistake can operate. Pothier makes no effort to explain in terms what amounts to an error with regard to the person, and consequently such an error can only be defined with reference to the common

"materiality rule" not as a self-sufficient test, but as a condition precedent for narrowing the scope of mistake of identity. Although the rule would have some merit if it were stated objectively, it would still be open to the criticism advanced by Professor Goodhart, that "the identification of an individual as *the* A, as the supporter of this *vinculum juris*, is always material in any contract . . . ."[18]

According to Dr. Williams, the distinction between identity and attributes is, like the distinction between substance and qualities, merely a matter of linguistic convenience and does not exist in nature. Hence, the common statement that while mistake as to the identity of a party to the contract generally avoids the contract, mistake as to an attribute does not, is unsatisfactory without further explanation. "If every 'thing', and therefore every person, can be reduced verbally to a bundle of attributes, it follows that error of identity (that is error of person) can be reduced verbally to attributes; also, error of personal attribute can be reduced verbally to error of person."[19]

If the identity-attribute distinction exists in law, it must be *made* meaningful. The suggested distinction is that "a so-called mistake of identity for legal purposes always involves a confusion of attributes of two nameable persons, while a so-called mistake of attribute does not involve this."[20]

Dr. Williams proposes the following criterion for deciding whether in a given case A has made a mistake of identity:

"In order to discover whether there has been an error of identity, we must look into the mind of the person under the mistake, whom we will call A, and ask whether he has confused in his mind the attributes of two particular persons, B and C, thus making in his mind a composite person out of these attributes."[21]

Dr. Williams' conclusions are open to the following criticisms:

(1) Although it is true that a particular B would not be B if he did not possess all the attributes of B, and that he cannot be identified except by his attributes, it does not follow that B *is* his attributes.

(2) If the concept of "identity" were intrinsically empty, Dr.

law decisions on the subject." *Op. cit., supra*, footnote 2, at p. 521. It is suggested that Pothier did treat the "materiality rule" as a test, and that the reason why he did not define an "error *as to the person*" is that he did not distinguish between "error as to the person" and "error as to attributes". See *op. cit., supra*, footnote 3, Art. III, s. 18.

[17] See *op. cit., supra*, footnote 1.

[18] *Op. cit. supra*, footnote 5, at p. 229. See discussion *infra*.

[19] *Op. cit., supra*, footnote 1, at p. 273.

[20] *Ibid.*, at p. 275.

[21] *Ibid.*, at p. 280.

Williams definition of "mistake of identity" would not mark off a "mistake of identity" from a "mistake of attribute". This difficulty is not one of terminology, as Dr. Williams seems to think,[22] but one of substance. If B and C were indistinguishable from their attributes, it would be impossible to distinguish between attributes belonging to B and attributes belonging to C. Hence, it would be impossible to confuse attributes belonging to B with attributes belonging to C.

(3) The proposed criterion is unworkable. If at the crucial time A confused the attributes of B and C, it would follow that at that time he did not know of the confusion. Consequently, it cannot be asserted that at the crucial time A made up *in his mind* a composite person *out of these attributes.*

(4) Dr. Williams' basic definition of "mistake of identity" is so wide that he is forced to graft on to it a large number of difficult and doubtful conditions in order to narrow its scope.[23]

Dr. Williams' concern with the concept of personal identity illustrates a confusion which permeates the whole treatment of mistake of identity. This confusion can be traced back to the statement that a mistake of identity occurs in the case where A intends to deal with C, but deals with B in the belief that B is C. The identification of a particular B, in respect of whose identity A is mistaken, has led to the view that a mistake of identity is a mistake *as to B's person,* and a mistake of attribute a mistake as to one (or more) of B's qualities. The result has been a confusion of two different senses of "identity". "B's identity" may mean (1) his personal identity or individuality, namely that by virtue of which B *is* the particular B; or (2) his identification, namely that by virtue of which B can be *identified.* The first meaning of "identity" is extraneous to the present inquiry. This becomes obvious if the problem is stated in the neutral form of "what are the conditions in which it is correct to affirm that A has made a mistake of identity?".

Conclusion

The logical basis of "mistake of identity" is failure of identification of a particular, namely, *failure of unique reference to a particular.* A "mistake of identity" does not occur in the case where A intends to deal with C, but deals with B in the belief that B is C. It occurs in the case where A's intention of dealing with a particular is frustrated by his inability to give a description which refers uniquely to a particular. I shall say:

[22] *Ibid.*, at p. 279. [23] *Ibid.*

(1) *The assertion "A has made a mistake of identity" is true if at the crucial time A believed that he described, or was capable of describing, a particular in such a way that the description referred uniquely to a particular, but the description does not in fact refer uniquely to a particular.*[24]

(2) *The assertion "A has made a mistake of attribute" is true if at the crucial time A described, or was capable of describing, a particular in such a way that the description referred uniquely to a particular, but the description differs in one or more material respects from a correct description of that particular.*[25]

Let us now revert to the case of the unfortunate adventurer A.[26] Suppose that someone conversant with all the facts says: "Poor A. He made a mistake of identity." Would that assertion be true? Clearly, yes, because at the time when A proposed marriage he believed that he was capable of describing the girl whom he wished to marry in such a way that the description referred uniquely to one girl, but the description would not in fact have referred uniquely to one girl. If, on the other hand, Lord L had not had a daughter called Sarah, the description would have referred uniquely to Rosalind, though it would have differed in at least one material respect from a correct description of Rosalind, namely, in respect of her name. In this case someone conversant with all the facts would not normally say "A made a mistake of identity". He would say something like this: "Poor A. He was tricked by Rosalind." If he were sufficiently imprecise in his language to say "A made a mistake of identity", this assertion would not be true. One must hope that he would be corrected at once and informed that A merely made a mistake of attribute.[27]

[24] It is not correct to say that A referred to a non-existent person composed of the attributes of B and C, for a description of a non-existent person is not a reference to a particular. To use a metaphor, A's purported reference fails in the same way as a shot may fail to hit the target. We would not say that such a shot really hit a target, but that the target was non-existent.

[25] The assertion "A has made a mistake of attribute" presupposes that A has not made a "mistake of identity". This time the shot has hit the target, but the target turns out, for instance, to bear a different manufacturer's name.

[26] See discussion *supra*.

[27] The decision in *King's Norton Metal Co.* v. *Edridge* (1897), 14 T.L.R. 98, is consonant with the logical finding. In that case a fraudulent person Wallis assumed the fictitious name of Hallam & Co., and induced the plaintiffs to supply goods to him, which he later sold to the defendants, an innocent third party. It was held that the defendants had obtained a good title, since the plaintiffs "intended" to deal with the person who ordered the goods. But "if it could have been shown that there was a separate entity called Hallam & Co. and another entity called

II

Smith v. *Hughes*[28] is generally cited as the authority for the subjective theory. In that case the plaintiff sued the defendant for the price of a parcel of oats. According to the defendant, the plaintiff described it as "good old oats". The sale was by sample, and the oats corresponded with the sample. The trial judge left two questions to the jury: whether the word "old" had been used, and whether the plaintiff had believed that he was contracting for old oats. If the answer to either question was "yes", he directed the jury to find for the defendant. The jury found for the defendant, but did not state whether in answer to the first or to the second question. On a motion for a new trial, Cockburn C.J. held that the second question should not have been left to the jury. Hannen and Blackburn J.J. held that it was misleading; for "in order to relieve the defendant, it was necessary that the jury should find not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that he believed the defendant to believe that he, the plaintiff, was contracting to sell old oats."[29]

Both Hannen and Blackburn J.J. took the view that if the jury had found that the defendant was mistaken as to the plaintiff's promise, and the plaintiff knew of that mistake, he could not succeed because "one of the parties to an apparent contract may, by his own fault, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party".[30] But this view was *obiter*, and no authorities were cited in support, except a quotation of Pollock's from Paley.[31] Moreover, no innocent third party was involved in the case.

Wallis, then the case might have come within the decision in *Cundy* v. *Lindsay* ((1878), 3 App. Cas 459)". *Per* A. L. Smith L.J., at p. 99.

[28] (1871), L.R. 6 Q.B. 597. [29] *Ibid.*, *per* Hannen J., at p. 611.

[30] *Ibid.*, *per* Hannen J., at p. 609.

[31] *Ibid.*, at p. 610. "Where the terms of a promise admit of more senses than one, the promise is to be performed in that sense which the promisor apprehended, at the time that the promisee received it." Paley, The Principles of Moral and Political Philosophy (1827), Vol. 1, Ch. v., p. 79.

Paley's rule is criticised by Austin as follows: "When we speak of the *intention* of contracting parties, we mean the sense in which it is to be inferred from the words used, or from the transaction, or from both, that the one party gave and the other received the promise. Paley's rule would lead to this: that a mistaken apprehension by the promisor of the apprehension by the promisee, would exonerate the promisor. This would be to disappoint the promisee. If the apprehension of the promisee did not extend to so much as the promisor apprehends that it did . . . there is no reason for giving the promisee an advantage which he did not expect . . . . If, on the other hand, the promisor underrates the expectation of the promisee he disappoints an expectation. The true rule is the understanding of both parties. If the facts in evidence are such as to raise the legal inference that the understanding of the parties differed materially, there is no *consensus* and therefore, no contract." Lectures on Jurisprudence (1875), Lecture XXI, para. 649. p. 309.

In *Boulton* v. *Jones*[32] the defendants sent a written order for goods addressed to a manufacturer Brocklehurst, with whom they had had dealings in the past and against whom they had a set-off. Unknown to them, the plaintiff had recently taken over Brocklehurst's business. The plaintiff executed the order without informing the defendants of the change of ownership, and the defendants consumed the goods. An invoice was subsequently sent by the plaintiff to the defendants, who said they knew nothing of him. It was held that the plaintiff could not maintain an action for the price of the goods against the defendants.[33]

According to the subjective theory, the decision is explained as follows:

(i) There was an "apparent contract" between the defendants and the plaintiff.
(ii) The defendants intended to deal with Brocklehurst.
(iii) The defendants entered into the "apparent contract" with the plaintiff in the belief that they were dealing with Brocklehurst.
(iv) The plaintiff knew of the defendants' mistake.

Hence, the defendants made a mistake of identity and were not estopped from denying that they assented to the "apparent contract" with the plaintiff.

No support can be found in any of the judgments for this explanation. Admittedly, the court attached decisive importance to the defendants' "intention" of dealing with Brocklehurst, but this does not amount to a judicial endorsement of the subjective theory for the following reasons:

(1) It cannot be asserted that the defendants made a mistake of identity *as defined by the subjective theory*. If they had dealt with the plaintiff in the belief that he was Brocklehurst, it would follow that at the crucial time they did not identify the plaintiff, or Brocklehurst. Hence, it cannot be asserted that at that time they intended to deal either with the plaintiff (as distinguished from Brocklehurst) or with Brocklehurst.[34]

(2) The defendants did not make a "mistake of identity". This can be demonstrated if we imagine that at the crucial time they had been pressed to give the fullest possible description they could give of the particular with whom they intended to deal.

[32] (1857), 2 H. & N. 564, 27 L.J. (Ex.) 117.
[33] The facts of *Boulton* v. *Jones* are unusual. The party who made the mistake was not the plaintiff, but the defendants; and the party who induced the mistake was not a rogue, but the plaintiff.
[34] See discussion *supra*.

This description would have differed in at least one material respect from a correct description of Brocklehurst, namely, in respect of his present ownership of the business, but it would nevertheless have referred uniquely to Brocklehurst. Consequently, the defendants' mistake was a mistake of attribute and it can be asserted that at the crucial time they intended to deal with Brocklehurst.

The decision of the court is consonant with the logical finding. The case was not decided on the ground of mistake of identity.[35] It was decided on the ground that the defendants "intended" to deal with Brocklehurst and never contemplated dealing with the plaintiff. Their offer was made to Brocklehurst, and "if you propose to make a contract with A, then B cannot substitute himself for A without your consent and to your disadvantage securing to himself all the benefits of the contract".[36]

(3) It does not follow that because judges attach decisive importance to the "intention" of the party mistaken, they infer his intention regardless of whether his conduct is reasonable or not. A person's intention can only be inferred from the available evidence of his conduct, and since the average person is a reasonable man, that is an ordinary man capable of reasoning,[37] the inferences drawn from his conduct are *prima facie* based on the supposition that he is such a man. The difference between the subjective and the objective test consists in the weight attached to this supposition. In the subjective test the function of the reasonable man is to help in inferring a party's intention. Hence, if the evidence of his conduct suggests that he is not a reasonable man, the supposition that he is such a man will be discarded. In the objective test, on the other hand, the function of the reasonable man is to set a uniform standard to which everyone must conform. The supposition is treated as a conclusive presumption, which cannot be rebutted by evidence of unreasonableness.

In most cases, of course, the subjective and the objective test produce the same result. A party's intention usually coincides with what I shall call his "hypothetical intention", that is *the intention which a reasonable man would attribute retrospectively*

[35] The expression "mistake of identity" is not mentioned in *Boulton* v. *Jones*, or in any of the leading cases we shall discuss, except *Ingram* v. *Little*, *supra*, footnote 13.

[36] *Per* Pollock C.B., 27 L.J. (Ex.) 117, at pp. 118-119.

[37] To lawyers "a reasonable man" connotes "the man on the Clapham omnibus by reference to whom a standard of care in civil cases is ascertained. In judging of intent, however, it really denotes an ordinary man capable of reasoning who is responsible and accountable for his actions . . . ." *Per* the Lord Chancellor in *Director of Public Prosecutions* v. *Smith*, [1960] 3 W.L.R. 546, at p. 557.

to the party in the light of all the relevant evidence before the court, on the supposition that his conduct was reasonable. Consequently, it is impossible to say whether in a given case the intention of a party was inferred by means of the subjective or of the objective test, unless the court made it clear which test it applied, or unless the evidence shows that a reasonable man in the position of the party could not have had the intention attributed to him. There is good reason to believe that even in the nineteenth century, when Pothier's prestige was at its peak in England, the "intentions" of contracting parties were inferred by means of the objective test.[38] But whatever the position may have been then, to-day the objective test is unchallenged, except in the area of mistake of identity and mistake as to the promise.

(4) The onus is on the supporters of the subjective theory to prove their thesis, namely, that the courts *in order to decide whether A can avoid an "apparent contract" with B on the ground of mistake of identity* apply the subjective test *in place of the objective test.* Except for the *dicta* of Sellers and Pearce L.J.J. in *Ingram* v. *Little*,[39] the authorities do not support this thesis. The need for *consensus ad idem* was constantly stressed in nineteenth century contract cases, and not merely in the cases generally classified as cases of mistake of identity. Nor is there anything to suggest that while the courts normally inferred the "intentions" of contracting parties by means of the objective test, they applied the subjective test in these cases.

(5) According to the subjective theory, A cannot go behind an "apparent contract" with B and show that he has made a mistake of identity, unless B knew of A's mistake; but if B knew of A's mistake, then A can avoid the "apparent contract" with B, although a reasonable man in A's position would not have made the mistake. This proposition is a far cry from Paley's rule, on which Hannen and Blackburn J.J.'s *dicta* in *Smith* v. *Hughes*[40] were based. It is at least arguable[41] that if B knew that A was mistaken in regard to the sense of B's promise, *B should be estopped* from denying that it was not intended in the sense in which A apprehended it. But it does not follow from Paley's rule that A cannot set up a mistake of identity, or any other mistake, unless

[38] See Cheshire & Fifoot, *op. cit.*, *supra* footnote 5, pp. 21-22, and Austin, *op. cit.*, *supra.*, footnote 31.

[39] *Supra*, footnote 13. Hannen and Blackburn J. J's. *dicta* in *Smith* v. *Hughes*, *supra.*, footnote 28, were confined to mistake as to the promise.

[40] *Ibid.*

[41] For a penetrating criticism of this rule see Austin *op. cit.*, *supra.*, footnote 31.

B knew of A's mistake, nor that A can always set up a mistake of identity, provided only that B knew of A's mistake. Paley's rule, and Hannen and Blackburn J.J.'s *dicta*, were confined to a dispute *between a promisor and a promisee as to the sense of the promise.* The rule does not apply to the case where A sets up a mistake of identity *against an innocent third party* who claims title through B. Why should *the fact that B knew of A's mistake* entitle A to recover damages *against an innocent third party?* It is no answer to say that A should be entitled to succeed because A and B were not *ad idem* and that consequently the alleged contract between them was void, for if that were the decisive factor, then B's knowledge of A's mistake should be irrelevant. According to the subjective theory, however, A cannot go behind the "apparent contract" and show that he was not *ad idem* with B, unless B knew of A's mistake.

The above proposition is bad policy and bad law. Although there was knowledge of the mistake in all the so-called cases of mistake of identity, such knowledge was not treated as a *condition* of an operative mistake of identity. Moreover, in all the cases, with the exception of *Boulton* v. *Jones*,[42] knowledge of the mistake was a concomitant of fraud, and since it was the fraud which induced the mistake, the judges naturally stressed this factor. In the absence of fraud, knowledge of an unreasonable mistake is virtually impossible to establish, and even knowledge of a reasonable mistake is hard to prove. For instance, it is generally assumed that the plaintiff in *Boulton* v. *Jones*[43] knew of the defendants' mistake. But it is certainly possible that the plaintiff may have believed in all good faith that the order was addressed to the present owner of the business and not to Brocklehurst personally. It is likely, however, that the decision of the court would have been different if that had been proved or if the plaintiff had been a harmless lunatic who had genuinely believed that he was Brocklehurst and that the order was addressed to him.

To sum up. The defendants' mistake in *Boulton* v. *Jones* was not a "mistake of identity", but a mistake of attribute. The defendants intended to deal with Brocklehurst and with no one else. It can be asserted that they had this intention, because if at the crucial time they had been pressed to give the fullest possible description they could give of the particular with whom they intended to deal, this description, though inaccurate, would nevertheless have referred uniquely to Brocklehurst. The defendants' intention coincides with their "hypothetical intention".[44] In other

[42] *Supra*, footnote 32. [43] *Ibid.* [44] See discussion *supra.*

words, *a reasonable man would infer from all the relevant evidence before the court that at the crucial time the defendants, on the supposition that their conduct was reasonable, made a unique reference to Brocklehurst.*

The decision of the court is consonant with the logical finding. The case was not decided on the ground of mistake of identity. It was decided on the ground that the defendants' offer was addressed to Brocklehurst and that consequently only Brocklehurst could accept it.

The above analysis applies *mutatis mutandis* to *Cundy* v. *Lindsay*.[45] In that case a rogue by the name of Blenkarn, who had hired a room at 37 Wood Street, Cheapside, wrote to the plaintiffs and offered to buy goods from them. He signed his letter in such a way as to make his signature appear to be "Blenkiron & Co.". It was, of course, no coincidence that a highly respectable firm, Blenkiron & Co., carried on business at 123 Wood Street. The plaintiffs answered the letters, sent the goods and addressed the invoices to "Messrs. Blenkiron & Co., 37 Wood Street". They were received by Blenkarn, who sold them to the defendants, an innocent third party. The House of Lords held that there was no contract between the plaintiffs and Blenkarn.

No support can be found in any of the speeches for the subjective theory. All the learned Lords attached decisive importance to the plaintiffs' "intention" of dealing with Blenkiron & Co., but for the reasons given, this does not amount to a judicial endorsement of the subjective theory. It cannot be asserted that the plaintiffs made a mistake of identity as defined by that theory. Nor did they make a "mistake of identity". They intended to deal with Blenkiron & Co. and with no one else. It can be asserted that they had this intention, because if at the crucial time they had been pressed to give the fullest possible description they could give of the particular (entity) with which they intended to deal, this description, though inaccurate, would nevertheless have referred uniquely to Blenkiron & Co. Consequently, the plaintiffs' mistake was a mistake of attribute and not a "mistake of identity". The plaintiffs' intention coincides with their "hypothetical intention". A reasonable man would infer from all the relevant evidence before the court that at the crucial time the plaintiffs, on the supposition that their conduct was reasonable, made a unique reference to Blenkiron & Co.

The decision of the House of Lords is consonant with the

[45] *Supra*, footnote 27.

logical finding. The case was not decided on the ground of mistake of identity. It was decided on the ground that the plaintiffs "intended" to deal with Blenkiron & Co. and never contemplated dealing with Blenkarn. "As between him and them there was merely the one side of a contract, where, in order to produce a contract two sides would be required. With the firm of Blenkiron & Co. of course there was no contract, for as to them the matter was entirely unknown, and therefore the pretence of a contract was a failure." [46]

Hardman v. *Booth*[47] is a case of purported agency. The plaintiff, a manufacturer, called at the place of business of the firm of Gandell & Co. for orders for goods. At that time the firm consisted of Thomas Gandell only, and the business was managed by Edward Gandell, a clerk. On inquiring for Messrs. Gandell, the plaintiff was directed to a counting house where he saw Edward Gandell, who misrepresented himself to be a member of the firm. No order seems to have been given on that day, but subsequently at the request of Edward Gandell, presumably made by letter, the plaintiff sent one lot of goods to the place of business of the firm. A receipt for it was given by one of the firm's men. Another lot was taken away in a cart belonging to Gandell & Co., which Edward Gandell had offered to send for it. The plaintiff drew a bill of exchange for the first lot of goods on "Messrs. Thomas Gandell & Co.", but at the request of Edward Gandell the name was altered to "Edward". Both lots were invoiced to "Edward Gandell & Co." Edward Gandell obtained possession of the goods and pledged them with the defendant, an innocent third party. All the judges held that there was no contract either with Edward Gandell or with Gandell & Co.

According to the subjective theory, the decision is explained as follows:

(i) There was an "apparent contract" between the plaintiff and Edward Gandell.

(ii) The plaintiff intended to deal with the firm of Gandell & Co.

(iii) The plaintiff entered into the "apparent contract" with Edward Gandell in the belief that he was dealing with the firm through one of its partners.

(iv) Edward Gandell knew of the plaintiff's mistake.

Hence, the plaintiff made a mistake of identity and was not estopped from denying that he assented to the "apparent contract" with Edward Gandell.

[46] *Ibid.*, *per* Lord Cairns L.C. at p. 465. [47] (1863), 1 H. & C. 803.

Again, no support can be found in any of the judgments for the subjective theory. All the judges attached decisive importance to the plaintiff's "intention" of dealing with the firm, but we have seen that this does not amount to a judicial endorsement of the subjective theory.[48] It cannot be asserted that the plaintiff made a mistake of identity as defined by that theory. Nor did the plaintiff make a "mistake of identity". He intended to deal with the firm of Gandell & Co. and with no one else. It can be asserted that he had this intention, because if at the crucial time he had been pressed to give the fullest possible description he could give of the particular (entity) with which he intended to deal, this description, though inaccurate, would nevertheless have referred uniquely to the firm which carried on business under the name and at the address of Gandell & Co. Consequently, the plaintiff's mistake was a mistake of attribute and not a "mistake of identity"[49] The plaintiff's intention coincides with his "hypothetical intention" A reasonable man would infer from all the relevant evidence before the court that at the crucial time the plaintiff, on the supposition that his conduct was reasonable, made a unique reference to the firm of Gandell & Co.

The decision of the court is consonant with the logical finding. The case was not decided on the ground of mistake of identity. It was decided on the ground that the plaintiff "intended" to deal with the firm of Gandell & Co. and never contemplated dealing with Edward Gandell personally. In the words of Baron Wilde:[50]

> It is clear that there was no sale to Gandell & Co., because they never authorised Edward Gandell to purchase for them; and it is equally clear that there was no sale to Edward Gandell, because the plaintiff never intended to deal with him personally.

In *Phillips* v. *Brooks*[51] a fraudulent person North entered the plaintiff's shop and asked to see some pearls and rings. Having selected pearls and a ring, he produced a cheque for the price of the articles. In signing it, he said: "You see who I am, I am Sir George Bullough", and gave the plaintiff an address in St. James' Square. The plaintiff knew that there was such a person as Sir

---

[48] See discussion *supra.*

[49] It is irrelevant that if the plaintiff had been pressed to give a description of *Edward Gandell*, this description, though inaccurate in respect of Edward Gandell's membership of the firm, would nevertheless have referred uniquely to him; for it would not have been a description *of the particular (entity) with which the plaintiff believed he was dealing*, but a description of a supposed agent of this particular.

[50] *Supra*, footnote 47, at p. 808. [51] [1919] 2 K.B. 243.

George Bullough, and finding on reference to a telephone directory that Bullough lived at the address mentioned, he allowed North to take away the ring. North then pledged the ring with the defendants, an innocent third party. Horridge J. gave judgment for the defendants.

The decision has been criticised as wrongly decided.[52] More often it is explained on the ground that North did not misrepresent his identity until after the contract of sale was concluded and that the misrepresentation only went to payment and delivery.[53] Indeed, Horridge J.'s decision can be justified on this ground. It can be asserted that *at the crucial time* (that is at the time when the alleged contract was made) the plaintiff intended to deal with North, because if at that time he had been pressed to give the fullest possible description he could give of the particular with whom he intended to deal, this description, though inaccurate, would nevertheless have referred uniquely to North. The plaintiff's intention coincides with his "hypothetical intention". Consequently, his mistake was a mistake of attribute and not a "mistake of identity".

Unfortunately, Horridge J. did not decide the case on this ground, and there can be little doubt that he would have come to the same decision if North had misrepresented himself to be Bullough before the contract of sale was concluded. He ostensibly based his decision on two propositions taken from the headnote to the American case of *Edmunds* v. *Merchants' Despatch Co.*,[54] which "adequately expresses my view of the law. They are as follows: (1) If A, fraudulently assuming the name of a reputable merchant in a certain town, buys, in person, goods of another, the property in the goods passes to A. (2) If A, representing himself to be a brother of a reputable merchant in a certain town, buying for him, buys, in person, goods of another, the property in the goods does not pass to A."[55]

The second proposition is consistent with the decision in *Hardman* v. *Booth*,[56] and the first proposition is not inconsistent with the decision in *Cundy* v. *Lindsay*,[57] since the proposition is limited to face to face situations. Horridge J. cited both these cases, and although he did not expressly say so, there can be little

[52] See, for instance, Goodhart, *op. cit.*, *supra*, footnote 5, at p. 241, and Williams, *op cit.*, *supra*, footnote 1, at p. 394.

[53] This explanation is supported by a *dictum* of Viscount Haldane in *Lake* v. *Simmons*, [1927] A.C. 487, at pp. 501-502, a case which turned on the construction of an insurance policy.

[54] (1883), 135 Mass. 283.

[55] *Supra*, footnote 51, at p. 246.

[56] *Supra*, footnote 47.

[57] *Supra*, footnote 27.

doubt that he distinguished *Cundy* v. *Lindsay* on the ground that the plaintiffs in that case did not deal personally with Blenkarn.[58]

At first sight the distinction between face to face and other situations seems to have little merit, but the presumption that where parties deal personally with each other they are *prima facie* the contracting parties can be justified on the ground that visual evidence is usually the strongest evidence of identification. Moreover, it can be argued that if the correct description of the physical attributes of a particular B corresponds with the description, which at the crucial time A would have given of the physical attributes of the particular with whom he believed he was dealing, then, although the rest of the description corresponds with the correct description of another particular C, it cannot be asserted that at the crucial time A intended to deal with C, unless B disguised himself as C. In other words, it can be argued that in such a case A has made a "mistake of identity", because the description which at the crucial time he would have given of the particular with whom he believed he was dealing, would not have referred uniquely to a particular. But it would be wrong to conclude, as Horridge J. seems to have done, that where the parties to the alleged contract are face to face, they *must* be deemed to refer uniquely to each other, unless one of them, or both, hold themselves out to be mere agents. The assertion "A has made a mistake of identity" may be true, although the description, which at the crucial time A would have given of the particular with whom he believed he was dealing, included a correct description of the physical attributes of a particular B, even if B did not hold himself out to be an agent. If North had misrepresented himself to be Bullough before the alleged contract was made, and the plaintiff, having learnt of the fraud, had said to his wife "I made a mistake of identity", she would not normally have replied: "No, you didn't. You intended to deal with the man in the shop."

In short, if North had misrepresented himself to be Bullough *before* the alleged contract was made, it could not be asserted that the plaintiff intended to deal with North, or with Bullough. The question still remains whether a reasonable man would nevertheless infer from all the relevant evidence before the court that at the crucial time the plaintiff, on the supposition that his conduct was reasonable, made a unique reference to North. We have seen that whatever the position may have been in the nineteenth century, to-day the courts infer the "intentions" of contracting

[58] *Supra*, footnote 51, at pp. 247-248.

parties by means of the objective test. The following passage from Horridge J.'s judgment implies that he endorsed this view:[59]

> It is true that the plaintiff in re-examination said that he had no intention of making any contract with any other person than Sir George Bullough; but I think I have myself to decide what is the proper inference to be drawn where a verbal contract is made and an article delivered to an individual describing himself as somebody else.

The function of the reasonable man in contract is to correct the uncertainties of a purely consensual system, but not to substitute a network of legal presumptions for the free choice of contracting parties, *with the ulterior object of assisting third parties.*[60] Hence, it should not be laid down *as a matter of law* that in face to face transactions *a reasonable man must* infer a unique reference by one party to the alleged contract to the other unless the other party purports to act for a principal.

This conclusion is supported by the recent decision of the Court of Appeal in *Ingram* v. *Little*.[61] In that case the plaintiffs advertised a car for sale which they owned jointly. A rogue, who introduced himself as Hutchinson, telephoned in reply to the advertisement and subsequently called at the plaintiffs' house. He looked at the car and asked Miss Elsie Ingram, one of the plaintiffs who conducted the negotiations for the others, to take him for a run in it. During the run he told her that he came from Surrey and that his home was at Caterham. After the drive they came back to the house and the rogue eventually offered Miss Elsie Ingram £717 for the car, which she accepted. At that moment the rogue pulled out a cheque book and Miss Elsie Ingram immediately told him that she would only accept cash. The rogue then said for the first time that he was P. G. M. Hutchinson, that he had business interests in Guildford, and that he lived at Stanstead House, Stanstead Road, Caterham. Miss Hilda Ingram, Elsie's sister and a co-plaintiff, slipped out of the room and verified in the telephone directory that there was such a person listed at that address. The sisters then decided that they would let the rogue have the car in exchange for a cheque. The rogue was not P. G. M. Hutchinson and the cheque was dishonoured. Meanwhile he had sold the car to the defendant, an innocent third party. The Court of Appeal by a majority (Devlin L.J. dissenting) affirmed the decision of Slade J. in favour of the plaintiffs.

---

[59] *Ibid.*, at p. 246.

[60] See discussion *infra*.

[61] *Supra*, footnote 13. The case of *Fawcett* v. *Star Car Sales Ltd.*, [1960] N.Z.L.R. 406, which was cited by the Court of Appeal, involved an undisclosed principal.

It is impossible to read the judgments of the Court of Appeal without being struck by a marked change from the simple traditional approach in terms of offer and acceptance. For the first time the subjective theory, as stated in Professor Goodhart's article,[62] gained judicial approval,[63] though ultimately it was discarded in favour of the normal objective test advocated by him and adopted by the trial judge.

The *ratio* of the case is accurately stated in the headnote:

> *Held* (Devlin L.J. dissenting), that where a person physically present and negotiating to buy a chattel fraudulently assumed the identity of an existing third person, the test to determine to whom the offer was addressed was how the promisee ought to have interpreted the promise; applying that test to the present case and treating the plaintiffs as the offerors, the offer was made solely to the real P.G.M.H., the rogue was incapable of accepting it, and the plaintiffs' mistake, therefore, prevented the formation of a contract with the rogue; accordingly, the plaintiffs' claim succeeded.[64]

It is important to distinguish between the proposed test and Paley's rule.[65] Under Paley's rule the sense of the promise is the promisor's apprehension of the promisee's understanding of it. According to the proposed test, the sense of the promise is the promisee's apprehension of it, on the supposition that he is a reasonable man. Paley's rule was effectively criticised by Austin, who pointed out that the "intention" of *both* parties must be inferred from all the circumstances of the case.[66] In English law a contract is a bargain, and this usually consists of a number of interlocking promises. If each promise had to be interpreted in the light of the understanding of a reasonable man in the position of the promisee at the time when the promise was made, the true sense of the bargain would be obscured. Moreover, it does not follow from the supposition that the promisee is a reasonable man, that he must interpret the promise on the supposition that the promisor is a reasonable man. It is suggested that the courts do in fact determine the sense of the alleged bargain (unless its terms are contained in a document) with reference to the "hypothetical intentions" of the parties, that is with reference to the intentions which a reasonable man would attribute retrospectively to the parties in the light of all the relevant evidence before the

[62] *Op. cit., supra*, footnote 5.

[63] As Devlin L.J. points out *supra*, footnote 13, at p. 523, "it is noteworthy that the word 'mistake' is not mentioned in the judgments of *Boulton* v. *Jones*, and *Cundy* v. *Lindsay*". See *supra* footnote 35.

[64] *Ibid.*, see especially, at pp. 515 and 516.

[65] See discussion, *supra*, footnote 31.

[66] *Ibid.*

court, on the supposition that their conduct was reasonable.[67] If their "hypothetical intentions" differ materially, the alleged bargain does not make sense and there is no contract.[68]

Whatever may be the merits of the proposed test as a criterion for determining the sense of the promise, it is inappropriate for the purpose of identifying the promisee. A promise is *addressed to a person*, but the identity of that person is not necessarily revealed *in the promise*, nor is it as Professor Goodhart claims,[69] necessarily a term of the contract, unless the contract is contained in a document. In any event, the question "Who is the promisee?" cannot be answered by saying: "That person whom a reasonable man in the position of the promisee would interpret to be the promisee".

The circularity of the proposed test can be avoided if we assume that "promisee" is used in the sense of "alleged promisee". But this, of course, would not make it any more appropriate and the test would still be unworkable for the same reason as the subjective theory. If it cannot be asserted that at the crucial time A intended to deal either with B or with C in the case where A has made a "mistake of identity",[70] it follows that it cannot be asserted that in such a case B, or a reasonable man in his position, inferred *from A's promise* that A intended to deal with B, or with C. A's promise is necessarily inconclusive. This point was taken by Devlin L.J. He said:[71]

> If Miss Ingram had been asked whether she intended to contract with the man in the room or with P.G.M. Hutchinson, the question could have no meaning for her, since she believed them to be both one and the same. The reasonable man of the law—if he stood in Miss Ingram's shoes—could not give any better answer. Whether it is fact or law, it is not a question that the trial judge is any better equipped to answer than we are.

The proposed test is also open to criticism on policy grounds. Since a reasonable man in B's position may infer from A's promise that he is not the promisee, the identification of the promisee, and consequently the title of an innocent third party, may depend on the judgment of an outsider (on the supposition that he is a reasonable man).

Sellers and Pearce L.J.J. did not define the relation of the proposed test to the subjective theory and to the "materiality

[67] See Cheshire & Fifoot, *op. cit.*, *supra*, footnote 5, p. 192. Hannen and Blackburn J.J.'s *dicta* in *Smith* v. *Hughes*, *supra*, footnote 28 are open to the same objections as Paley's rule, *supra*, footnote 31.

[68] See *Raffles* v. *Wichelhaus* (1864), 2 H. &. C 906.

[69] *Op. cit.*, *supra*, footnote 5, at p. 231.

[70] See discussion *supra*.

[71] *Ingram* v. *Little*, *supra*, footnote 13, at pp. 523-524.

rule", which figure prominently in their reasoning.[72] We have seen that the popular appeal of the subjective theory rests on the argument from necessity, but since both judges held that Miss Ingram had made a mistake of identity *on the basis of the proposed test, that is on the basis of the normal objective test*, it can scarcely be maintained that they accepted this argument.[73] According to the subjective theory, moreover, B's knowledge of A's mistake is decisive. If B does not know of A's mistake, then A cannot go behind the "apparent contract" with B and set up a mistake of identity.[74] According to the proposed test, on the other hand, A can go behind the "apparent contract" with B if a reasonable man in B's position would know of A's mistake. Nor does the statement "B knows of A's mistake" involve that a reasonable man in B's position would necessarily interpret A's promise in the sense in which A apprehended it. This would only be true on the assumption that A's intention is paramount, but in that case there would be no need for the proposed test.

As regards the "materiality rule", nothing turns either on B's knowledge of A's mistake, or on the interpretation of A's promise by a reasonable man in B's position.

It follows from what we have said that the proposed test does not necessarily produce the same result as the subjective theory or the "materiality rule".[75]

Although Sellers and Pearce L.J.J. did not define the relation of the proposed test to the subjective theory and to the "materiality rule", the former went out of his way to endorse a distinction enunciated by Professor Goodhart,[76] which supports the subjective theory at the expense of Mr. Wilson.[77]

> There is a difference between the case where A makes an offer to B in the belief that B is not B but is someone else, and the case where A makes an offer to B in the belief that B is X. In the first case B does

---

[72] Sellers L.J., however, made a point of not declaring himself either for or against the "materiality rule". *Ibid.*, at p. 515.

[73] Nevertheless, Sellers L.J., *ibid.*, at p. 514, quoted with approval the following passage from Professor Goodhart's article (*op. cit., supra*, footnote 5, at p. 231), which supports the argument from necessity *on the basis of Paley's rule:*

> "It is the interpretation of the promise which is the essential thing. This is *usually* based on the interpretation which a reasonable man, in the promisee's position, would place on it, but in those cases where *the promisor knows that the promisee has placed* a peculiar interpretation on his words, then this is the binding one."

[74] See discussion *supra.*

[75] Pearce L.J. seems to have taken the contrary view. See *supra*, footnote 71, at p. 516.

[76] *Op. cit., supra*, footnote 5, at pp. 241-242.

[77] *Op. cit., supra*, footnote 2.

> in fact receive an offer, even though the offeror does not know that it is to B he is making it, since he believes B to be someone else. In the second case, A does not in truth make any offer to B at all; he thinks B is X, for whom alone the offer is meant. There was an offer intended for and available only to X. B cannot accept it if he knew *or ought to have known* that it was not addressed to him.[78]

This passage is at best ambiguous,[79] but the suggested difference appears to be that in the first case A intends to deal with anybody except B, though he in fact deals with B in the belief that he is not B, while in the second case A intends to deal only with X, though he in fact deals with B in the belief that B is X. To use Professor Goodhart's illustrations, in the first case B hides behind a false beard, and in the second case he disguises himself to look like X.

With respect, the statement of this difference does not make sense. The statement "A intends to deal with anybody except B" presupposes that at the crucial time A identifies B, but the statement "A deals with B in the belief that B is not B" involves that at the crucial time A does not identify B. Similarly, the statement "A intends to deal only with X" presupposes that at the crucial time A identifies X, but the statement "A deals with B in the belief that B is X" involves that at the crucial time A does not identify X.[80]

To avoid self-stultification it is necessary to look at the facts of the cases without any prior assumptions. The first case is that where B, wearing a false beard, walks into A's jewellery shop and without saying anything selects a ring. A, perhaps because he has a Cuban grandfather, loves beards, but he hates B and would never sell anything to him if he had the choice. But no risk is too great for the charming beard in the shop. He can have the ring and a cheque will be quite sufficient. In this case A has not made a "mistake of identity". *At the crucial time* he intended to deal with the customer in the shop, namely B. It can be asserted that A had this intention, because if at the crucial time he had been pressed to give the fullest possible description he could give of the particular with whom he intended to deal, this description though inaccurate in respect of B's name and beardedness, would nevertheless have referred uniquely to B. A's intention coincides with his "hypothetical intention".

The second case is that where A disguises himself to look like

[78] *Ingram* v. *Little*, *supra*, footnote 13, at pp. 514-515. The words in italics do not appear in the original passage.

[79] See Williams, *op. cit.*, *supra*, footnote 1, at p. 391.

[80] See discussion *supra*.

Sir George B., who is A's favourite customer. He is treated like Sir George and allowed to walk off with the ring. Here A has made a "mistake of identity". The situation is the same as it would have been in *Phillips* v. *Brooks*[81] if North had misrepresented himself to be Sir George Bullough before the alleged contract was made.

Suppose now that in the first case A had spotted a faint resemblance between his customer and the hated B, and had said to B: "I am sure you are not that scoundrel B, but one can't be too careful. I only sell you the ring on the condition that you are not B." In this case A has made a "mistake of identity".[82] If at the crucial time he had been pressed to give the fullest possible description he could give of the particular with whom he intended to deal, this description would not have referred uniquely to a particular, since it would have included "the particular who is not B".

An express declaration, such as the above, is not essential to establish that A made a "mistake of identity". Any evidence will do which establishes that *at the crucial time A did not make a unique reference to a particular*. But no evidence will be relevant unless it is directed to this issue, that is unless it would have been included in the fullest possible description which at the crucial time A would have given of the particular with whom he intended to deal. Hence, evidence to the effect that A *in the past* refused to have anything to do with B would be irrelevant.[83] It is not sufficient, of course, to show that A's description of the particular with whom he intended to deal is not an accurate description of B. It must be shown that the inaccuracies are such that the description as a whole does not refer uniquely to a particular. Any evidence short of that would merely establish a mistake of attribute and not a "mistake of identity".

The only remaining question is whether in the above case a reasonable man would infer from all the relevant evidence before the court that at the crucial time A, on the supposition that his conduct was reasonable, made a unique reference to B. It is

[81] *Supra*, footnote 51.

[82] According to Professor Goodhart, the contract is only void if there is a term in the contract that B is not B. "Here the principle in *Smith* v. *Hughes* is applicable just as it is to all other *terms in the contract*." *Op. cit.*, *supra*, footnote 5, at p. 242.

The statement "there is no contract because it is a term of the contract that B is not B" does not make sense. The statement "this is a term of the contract" presupposes that there is a contract.

[83] Cases, such as *Said* v. *Butt*, [1920] 3 K.B. 497, which involve an undisclosed principal are not in point.

suggested that a reasonable man would not draw such an inference and that consequently A's mistake would prevent the formation of a contract with B.

None of these difficulties were faced by Sellers and Pearce L.J.J. They were preoccupied with the task of distinguishing *Phillips* v. *Brooks*.[84] As a first step they held that although where parties deal personally with each other they are normally the contracting parties, *Phillips* v. *Brooks* "is not an authority to establish that where an offer or acceptance is addressed to a person . . . who is present in person, then it must in all circumstances be treated as if actually addressed to him . . . . The issue [is] a question of fact in each case depending on what was said and done and applying the elementary principles of offer and acceptance in the manner in which Slade J. directed himself."[85]

Sellers and Pearce L.J.J. were thus free to hold that the presumption had been rebutted in the present case, the decisive consideration being apparently that the purported sale was on credit. The nature of the transaction and Miss Hilda Ingram's attempt to check the rogue's identity, the result of which she communicated to her sister, showed that the offeree's identity was material to the plaintiffs, that is that the offer was not addressed to the person present, whatever his true identity might be.[86]

Phillips v. *Brooks*[87] was distinguished on the basis of Viscount Haldane's *dictum* in *Lake* v. *Simmons*,[88] namely, on the ground that in that case the fraudulent misrepresentation was not made until after the parties had agreed upon a sale.[89] In the present case, on the other hand, there was no concluded contract before the rogue misrepresented himself to be P. G. M. Hutchinson and produced the cheque book.[90] Both Sellers and Pearce L.J. also held that even if a concluded contract had come into being when the price was agreed, it would have been rescinded, and according to Sellers L.J., the property in the car would not have passed until cash was paid.[91]

---

[84] *Supra*, footnote 51.
[85] *Ingram* v. *Little*, *supra*, footnote 13, *per* Sellers L.J., at p. 512.
[86] *Ibid.*, at pp. 510, 512 and 518.
[87] *Supra*, footnote 51. [88] *Supra*, footnote 53.
[89] *Ingram* v. *Little*, *supra*, footnote 13, at pp. 512 and 519.
[90] *Ibid.*, at pp. 510 and 518. The majority endorsed this holding of the trial judge and Devlin L.J. seems to have accepted it.
[91] *Ibid.*, at pp. 510 and 518. The title of an innocent third party depends, of course, generally on whether the property in the goods passed to the rogue *under the alleged contract of sale*. If that contract is void, the property in the goods could not have passed *under it*. But it does not follow from this that if the alleged contract is valid, the property in the goods passed to the rogue *at the time when the alleged contract was made*.

It would seem difficult to distinguish *Phillips* v. *Brooks*[92] on the ground that in the present case the alleged contract was not made when the price was agreed, or that the property in the car was not "intended" to pass until cash was paid, but it does seem possible to distinguish it on the ground that if a contract had been made when the price was agreed, it would have been rescinded. Phillips apparently accepted a cheque without insisting on cash. Miss Ingram, however, at first refused to take a cheque and said that the deal was off. The rogue "did not demur but set himself to reconstruct the negotiations."[93]

Devlin L.J. held that the presumption that where parties deal personally with each other they are the contracting parties, had not been rebutted in the present case. Although he stated that this presumption was not conclusive, it is significant that the only example he gave of such a rebuttal was the case put in Horridge J.'s second proposition, namely, where the person addressed purports to act as an agent.

> Are there any other circumstances in which the presumption can be rebutted? It is not necessary to strain to find them, for we are here only dealing with offer and acceptance; contracts in which identity really matters may still be avoided on the ground of mistake .... What seems plain to me is that the presumption cannot in the present case be rebutted by piling up the evidence to show that Miss Ingram would never have contracted with H. unless she had thought him to be P.G.M. Hutchinson. That fact is conceded . . . it does not go any further than to show that she was the victim of fraud.[94]

The presumption that where parties deal personally with each other they are *prima facie* the contracting parties is defensible on the ground that visual evidence is usually the strongest evidence of identification. But it cannot be justified, as the Court of Appeal seems to have done, on the ground that where B's identitity is

---

The time when the property in goods passes to the buyer must be ascertained with reference to the relevant provisions in the sale of goods legislation.

[92] *Supra*, footnote 51.

[93] *Ingram* v. *Little*, *supra*, footnote 13, at p. 518.

[94] *Ibid.*, at p. 525. Devlin L.J. held that the contract was not vitiated by mistake because the rogue's identity was not fundamental to the contract, although it was material to Miss Ingram.

> "In my judgment, Miss Ingram's state of mind is immaterial to this question. When the law avoids a contract *ab initio*, it does so irrespective of the intentions . . . of the parties themselves .... It is for the court to determine what in the light of all the circumstances is to be deemed essential .... In the present case H's identity was immaterial. His creditworthiness was not, but creditworthiness in relation to contract is not a basic fact ...." (at p. 527).

With respect, "mistake of identity" is logically related to offer and acceptance and there is no authority to the effect that the principle enunciated by Devlin L.J. is relevant to this issue.

not "material" to A, A's offer is not addressed to a specific offeree, but to the person present whoever he may be. Clearly, this need not necessarily be A's intention. The function of the reasonable man in contract is to correct the uncertainties of a purely consensual system, but not to substitute a network of legal presumptions for the free choice of contracting parties, *with the ulterior object of assisting third parties*. Hence, it should not be laid down *as a matter of law* that in face to face transactions *a reasonable man must* infer a unique reference by one party to the alleged contract to the other, or that he must infer such a reference unless there is a *special reason* why the offer should be deemed to have been made to a specific offeree and not simply to the person present.

Whether stated subjectively or objectively, the "materiality rule" fails to take account of the fact that the identification of the person to whom the offer is made (or whose offer is accepted) is always material.[95] There is a strong case for limiting the existing quasi-consensual system where it is exploited, or where it conflicts with the interests of third parties, but this should not be, and cannot be done effectively, by distorting the function of the reasonable man. The injustices resulting from the present approach to mistake could be obviated either by extending the doctrine of estoppel, or by abolishing the distinction between void and voidable contracts and apportioning the loss between the parties.[96]

The actual decision of the Court of Appeal can be justified on the following ground: The crucial time at which a unique reference by one party to the alleged contract to the other must be established is the time when the alleged contract was made. In the present case it was argued that the alleged contract was made as soon as the price was agreed and that from this moment either party could have sued on the contract with implied terms as to payment and delivery.[97] But the Court of Appeal held that, quite apart from the question of mistake of identity, the alleged contract was not made at that time, and that even if a contract had been made at that time, it had been rescinded. The alleged contract was not made until after the rogue misrepresented himself to be P. G. M. Hutchinson. Hence, the situation in the present case was essentially the same as it would have been if North had misrepresented himself to be Bullough *before* the alleged contract was made. We have

[95] See discussion *supra*.
[96] In *Ingram* v. *Little*, Devlin L.J. favoured the latter course. *Supra*, footnote 13, at p. 531.
[97] *Ibid.*, at p. 518.

seen[98] that in that event it could not be asserted that Phillips intended to deal either with North or with Bullough, and that a reasonable man would not infer from all the relevant evidence before the court that at the crucial time Phillips, on the supposition that his conduct was reasonable, made a unique reference to North. Similarly, it cannot be asserted that at the crucial time Miss Ingram intended to deal either with the rogue or with P. G. M. Hutchinson, nor would a reasonable man infer from all the relevant evidence before the court that at that time Miss Ingram, on the supposition that her conduct was reasonable, made a unique reference to the rogue. In short, Miss Ingram made a "mistake of identity", which prevented the formation of a contract with the rogue.

Conclusion

Except for the *dicta* of Sellers and Pearce L.J.J. in *Ingram* v. *Little*,[99] the subjective theory is not supported by the authorities. In *Boulton* v. *Jones*,[100] *Cundy* v. *Lindsay*,[101] and *Hardman* v. *Booth*[102] no "mistake of identity" occurred and that expression does not appear in any of the judgments. No "mistake of identity" occurred in *Phillips* v. *Brooks*,[103] and *Ingram* v. *Little*[104] leaves no doubt that if such a mistake had occurred the alleged contract would have been void. Miss Ingram did make a "mistake of identity", but, with respect, although the actual decision of the Court of Appeal is consonant with the logical finding, the test proposed by the majority is unworkable and not in accordance with previous authority.

Granted that the "intention" of the party mistaken was inferred by means of the objective test, the principle on the basis of which *Boulton* v. *Jones*,[105] *Cundy* v. *Lindsay*,[106] and *Hardman* v. *Booth*[107] were decided can be stated as follows:

> *If it is alleged that A has entered into a contract with B, the alleged contract, although a valid contract in all other respects, is nevertheless void if a reasonable man would infer from all the relevant evidence before the court that at the crucial time A, on the supposition that his conduct was reasonable, intended to enter into a contract with C.*

It is suggested that this principle is a corollary of the following rule, which covers both the case where A "intends" to deal with

[98] See discussion *supra*.
[99] *Supra*, footnote 13.
[100] *Supra*, footnote 32.
[101] *Supra*, footnote 27.
[102] *Supra*, footnote 47.
[103] *Supra*, footnote 51.
[104] *Supra*, footnote 13.
[105] *Supra*, footnote 32.
[106] *Supra*, footnote 27.
[107] *Supra*, footnote 47.

C, and the case where A makes a "mistake of identity", that is where he does not make a unique reference to a particular:

> *If it is alleged that A has entered into a contract with B, the alleged contract, although a valid contract in all other respects, is nevertheless void if a reasonable man would not infer from all the relevant evidence before the court that at the crucial time A, on the supposition that his conduct was reasonable, made a unique reference to B.*

The above rule is not an exception to, but merely an elaboration of the normal objective test, which can be stated as follows:

> *If it is alleged that A has entered into a contract with B, A must be deemed to have agreed to enter into the alleged contract if a reasonable man would infer from all the relevant evidence before the court that at the crucial time A, on the supposition that his conduct was reasonable, agreed to enter into the alleged contract.*