

Mistake of Identity

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sent of the losing party to a duel. While it is submitted that the defence of necessity is the real and only defence open to the surgeon who has removed an appendix, the surgeon who performs an operation for purely cosmetic reasons might sometimes find it difficult to bring his defence within the threefold frame adumbrated by Kenny. The rabbi, who performs the operation of circumcision for purely ritual reasons without there being any genuine clinical need for it, may be in even greater peril. If the cosmetic surgeon and the rabbi are in fact not guilty, this surely indicates that the defence of necessity is wider in its scope than has hitherto been realised.

But to this negative argument must be added the cases where the defence has been successful, but has not been recognised as the defence of necessity. It is here submitted that the positive legal obligations to repel the Queen's enemies, to maintain and restore the Queen's peace, to prevent the commission of grave crimes and to arrest persons committing certain offences are, all of them, really only examples of the working of the doctrine of necessity. To these may also be added the right of self-defence and the defence (where it exists) of duress.

The scanty nature of the authorities on the subject indicates that one must be very tentative in suggesting a solution. Perhaps one is safe in following Kenny and saying that the defence cannot succeed unless the evil to be averted is greater than the evil committed. Perhaps one should add that the defence cannot succeed without there being present some degree of urgency. One can recognise the cogency of the observation in Harris that mere personal necessity cannot justify a criminal offence; but possibly the statement is too sweeping. You probably may not help yourself to my stamps simply because you have an urgent letter to post; but perhaps you may lawfully take my towels to staunch a gaping wound or destroy my hearthrug by wrapping it round the flames enveloping the body of the victim of a fire.

The whole question is sufficiently basic and important to justify a reference to the Law Commission: an examination of the doctrine of necessity could healthily force us back onto a consideration of fundamentals.

E. GARTH MOORE.

MISTAKE OF IDENTITY

THE problem of mistake of identity in contract commonly presents itself in the setting of a drama with three principal actors: an innocent party or first victim, a rogue, and an innocent third party. The incidents of the drama do not greatly differ. Usually the rogue succeeds by plausible misrepresentation in inducing the first victim to

part with something—often it is a motor car, with its log-book—in return for a worthless cheque. In a second act of the drama the rogue sells the article to the third party, takes his money and leaves the stage. The final act is the contest between the two innocent parties, generally waged in the form of an action for conversion in which the crucial question is whether the property in the article passed from the first victim to the rogue, and so from him to the third party. Whether the property has passed depends upon whether the contract between the first victim and the rogue was valid (although voidable for fraud) or a nullity.

So it was in *Lewis v. Averay* [1972] 1 Q.B. 198. Lewis, the first victim, placed an advertisement in a newspaper offering to sell his car for £450. The rogue telephoned Lewis to make an appointment to see the car; arrived at Lewis's flat; was shown the car and drove it about; declared that he liked it. Then, talking with Lewis and his fiancée, the rogue gave his name as Richard Green, and led them to believe that he was Richard Greene, the well-known film actor who had played Robin Hood in the "Robin Hood" series. The price of £450 was agreed for the car, and the rogue wrote out a cheque for that sum on a form taken from a stolen cheque book, signing the name R. A. Green. The rogue would take the car at once; Lewis, anxious to see the cheque cleared first, protested that there were some small jobs still to be done to the car. The rogue being insistent, Lewis asked for proof that he was Richard Green. The rogue then produced an admission pass to Pinewood Studios bearing an official stamp, the name Richard A. Green and the actor's address, and a photograph of the rogue himself. Satisfied, Lewis took the cheque and let the rogue have the car and its log-book.

Averay, the third party, had placed an advertisement in "Exchange and Mart" seeking a car for £200. It was the rogue who telephoned, saying he had a car to sell, and it was arranged that he should bring it to show to Averay. When Averay had driven in the car—none other than that obtained from Lewis—he agreed to buy it. The rogue, giving his name now as Lewis, handed over the car and the log-book, the latter showing Lewis as the owner. The rogue received from Averay a cheque for £200 and was gone. All this occurred before Lewis discovered that he had been cheated.

Lewis, affirming that the car was still his, sued Averay for damages for conversion, and so in the final act of the drama the Court of Appeal had to determine whether the contract between Lewis and the rogue was void—and therefore ineffective to pass title—or only voidable.

Previous cases on this question have been decided on the footing

that if the mistake induced by the rogue's deception is operative at all, its effect is to render the contract void. Since voidness of the contract prevents acquisition of title by the innocent third party who deals with the rogue, the courts have attempted to limit for the third party's protection the scope of operative mistake of identity. Thus the courts have held that the supposed identity of the rogue must have been an essential element in the transaction. There are some contracts, after all, in which one party is prepared to deal with another whoever that other may be. Then a distinction has been drawn between the identity and attributes of a person, and it is affirmed that a mere mistake as to attributes—as to name, for example, or reputation, or creditworthiness—will not affect the contract. After *Phillips v. Brooks* [1919] 2 K.B. 243 it might have seemed that much of the mischief had been expunged from the doctrine of mistake of identity, for Horridge J. there held, in a case where rogue and first victim had dealt face to face, that despite the rogue's assumption of the name and character of another, and the victim's protestation in evidence that he had intended to contract only with that other, the victim must be taken to have intended to contract *with the person actually present*.

Unfortunately no sufficient new foundation of principle was laid in Horridge J.'s judgment, and subsequently doubts began to settle upon the case. Lord Haldane in *Lake v. Simmons* [1927] A.C. 487, at 501–502, placed a severely limiting construction upon *Phillips v. Brooks*, and in *Ingram v. Little* [1961] 1 Q.B. 31, at 60, Pearce L.J. said that it was "a border-line case decided on its own particular facts." The insistence of the Court of Appeal in *Ingram v. Little* that the question whether mistake of identity prevents a contract from arising is one of fact (with whom did the vendor intend to deal?) served only to thicken the fog.

In *Lewis v. Averay* the Court of Appeal decided that the contract with the rogue was valid, although voidable for fraud, and accordingly that title in the car had passed to the rogue and so to Averay. Phillimore L.J. followed the ruling of *Ingram v. Little* that the question was one of fact, and on the facts considered that there was nothing to displace the presumption that a contract had been made with the person actually present. The case was on all fours with *Phillips v. Brooks*; the facts of *Ingram v. Little* had been "very special and unusual." Megaw L.J. considered that Lewis's mistake about the rogue was a mistake only as to his attributes, not his identity: "It was simply a mistake as to the creditworthiness of the man who was there present and who described himself as Mr. Green." The reasoning of their Lordships was on orthodox lines; it achieved a

satisfactory result but provides little illumination for future cases. Will the next case reveal that the facts of *Lewis v. Avery* were "very special and unusual"?

Lord Denning M.R. reached the same conclusion by a characteristic frontal attack on established doctrine. He rejected the distinction between mistake as to identity and mistake as to attributes: "These fine distinctions do no good to the law." Moreover, he declined to accept the doctrine (somewhat depreciated by being termed a "theory") that a mistake of identity renders the contract void: the true principle was that the contract is only voidable. (See also *Gallie v. Lee* [1969] 2 Ch. 17 at 33, 45, *per* Lord Denning M.R. and Salmon L.J.) This is the solution that was recommended by the Law Reform Committee in its 12th Report (Cmnd. 2958/1966, §§ 15–16) and it would be a great improvement upon the rule as traditionally formulated. Neither rule, it must be said, makes due allowance for the respective degrees of carelessness or fault of the "innocent" parties. Usually it is the first victim who has been insufficiently circumspect and has provided the rogue with the means of duping the third party; sometimes the third party has been gullible or rash. In these circumstances the solution of apportionment of the loss has a certain attractiveness, and it is arguably open to a court to apportion the damages between the parties under section 1 of the Law Reform (Contributory Negligence) Act 1945: in the recent case of *Lumsden & Co. v. London Trustee Savings Bank* [1971] 1 Lloyd's Rep. 114 (noted *post*, p. 29) it was accepted by Donaldson J. that the Act applied in relation to a claim for conversion of cheques. But that there are formidable practical objections to this solution in the present context was demonstrated in the Law Reform Committee's 12th Report (§§ 8–12).

C. C. TURPIN.

DAMAGES FOR PRE-CONTRACT EXPENDITURE

THE plaintiff who sues for breach of contract usually seeks to recover the loss of his bargain: he seeks to be put in the position he would have been in had the contract been performed. But sometimes he will frame his action in a different way: he will seek to recover the expenses incurred with a view to performing the contract, *i.e.*, he seeks to be put in the position he would have been in had the contract never been made at all.

When will a plaintiff take the latter course? He will be compelled to do so if he is the purchaser of land which the seller fails to transfer, under the rule in *Bain v. Fothergill* (1874) L.R. 7 H.L. 158. He may