Page 506 (16.3.3.) refers to 'a number of important cases which precede *Shogun*' and states that 'extracts from these cases can be found on the website which supports this book.' The extracts are set out below:

Cundy v. Lindsay
(1878) 3 App Cas 459, House of Lords

In late 1873 Alfred Blenkarn wrote to the plaintiff linen manufacturers (the respondents in the appeal) and ordered from them goods which included cambric handkerchiefs. The letters were written from 37 Wood Street where Blenkarn had hired a room (although he pretended to have a warehouse there). He signed his letters in such a way as to make it appear as if they had come from Blenkiron & Co. The plaintiffs knew of a respectable firm of W Blenkiron & Co which carried on business in Wood Street, albeit they did so at number 123 and not number 37. The plaintiffs sent the goods on credit to 'Messrs Blenkiron & Co., 37 Wood Street, Cheapside' where they were received by Blenkarn. Blenkarn then sold the goods on to bona fide purchasers. He sold 250 dozen cambric handkerchiefs to Messrs Cundy, the defendants (the appellants in the appeal). When payment was not made for the goods the plaintiffs brought an action initially against Blenkarn. Blenkarn's fraud was then discovered and he was prosecuted, convicted and sentenced. The plaintiffs then brought an action against the defendants in the tort of conversion.[1] The jury found that Blenkarn had, 'with fraudulent intent to induce the plaintiffs to give him the credit belonging to the good character of Blenkiron & Co' written the letters and by fraud induced them to send the goods to 37, Wood Street. They also found that the goods bought by the defendants were the same goods as had been supplied to Blenkarn. Finally the jury found that the plaintiffs did not intend, as a matter of fact, to adopt Blenkarn as their debtor. On the basis of these findings judgment was entered for the defendants at first instance. The plaintiffs appealed to the Court of Appeal who allowed the appeal. The defendants then appealed to the House of Lords. Their appeal was dismissed. It was held that no contract had been concluded between the plaintiffs and Blenkarn for the sale of the handkerchiefs and, this being the case, Blenkarn had no title to the goods which he could confer on the defendants. The defendants were therefore liable to the plaintiffs for the value of the goods.

Lord Cairns, LC

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. My Lords, in discharging that duty your Lordships can do no more than apply, rigorously, the settled and well known rules of law. Now, 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

[1] Conversion was defined by Atkin J. in *Lancashsire and Yorkshire Railway v. MacNicholl* (1919) 88 LJKB 601 as 'dealing with goods in a manner inconsistent with the rights of the true owner. . .provided. . .there is an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right.'

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.

My Lords, the question, therefore, in the present case, as your Lordships will observe, really becomes the very short and simple one which I am about to state. Was there any contract which, with regard to the goods in question in this case, had passed the property in the goods from the Messrs. Lindsay to Alfred Blenkarn? If there was any contract passing that property, even although, as I have said, that contract might afterwards be open to a process of reduction, upon the ground of fraud, still, in the meantime, Blenkarn might have conveyed a good title for valuable consideration to the present Appellants.

Now, my Lords, there are two observations bearing upon the solution of that question which I desire to make. In the first place, if the property in the goods in question passed, it could only pass by way of contract; there is nothing else which could have passed the property. The second observation is this, your Lordships are not here embarrassed by any conflict of evidence, or any evidence whatever as to conversations or as to acts done, the whole history of the whole transaction lies upon paper. The principal parties concerned, the Respondents and Blenkarn, never came in contact personally - everything that was done was done by writing. What has to be judged of, and what the jury in the present case had to judge of, was merely the conclusion to be derived from that writing, as applied to the admitted facts of the case.

Now, my Lords, discharging that duty and answering that inquiry, what the jurors have found is in substance this: it is not necessary to spell out the words, because the substance of it is beyond all doubt. They have found that by the form of the signatures to the letters which were written by Blenkarn, by the mode in which his letters and his applications to the Respondents were made out, and by the way in which he left uncorrected the mode and form in which, in turn, he was addressed by the Respondents; that by all those means he led, and intended to lead, the Respondents to believe, and they did believe, that the person with whom they were communicating was not Blenkarn, the dishonest and irresponsible man, but was a well known and solvent house of Blenkiron & Co., doing business in the same street. My Lords, those things are found as matters of fact, and they are placed beyond the range of dispute and controversy in the case.

If that is so, what is the consequence? It is that 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. Now, my Lords, stating the matter shortly in that way, 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? Of him they knew nothing, and of him they never thought. With him they

never intended to deal. Their minds never, even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever. 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. 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.

The result, therefore, my Lords, is this, that your Lordships have not here to deal with one of those cases in which there is de facto a contract made which may afterwards be impeached and set aside, on the ground of fraud; but you have to deal with a case which ranges itself under a completely different chapter of law, the case namely in which the contract never comes into existence. My Lords, that being so, it is idle to talk of the property passing. The property remained, as it originally had been, the property of the Respondents, and the title which was attempted to be given to the Appellants was a title which could not be given to them.

My Lords, I therefore move your Lordships that this appeal be dismissed with costs, and the judgment of the Court of Appeal affirmed.

Lord Hatherley and **Lord Penzance** delivered concurring judgments. **Lord Gordon** concurred.

COMMENTARY

The claim brought by the plaintiffs was an action in tort. The essence of the claim was that the defendants had wrongfully taken possession of goods that belonged to the plaintiffs. The defence was that the goods belonged to the defendants, not the plaintiffs. In order to ascertain whether property in the handkerchiefs had passed to the defendants, it was necessary to decide whether property had passed from the plaintiffs to Blenkarn. The general rule is *nemo dat quod non* habet; in other words, you cannot give what you do not have. This rule is not without exceptions. One exception which was recognised at the time of *Cundy,* but has since been abolished, was market overt. But, as Lord Cairns observed, this exception was not applicable on the facts of the case. This being the case, it was necessary for the court to examine with some care the nature of the transaction that had taken place between the plaintiffs and Blenkarn. If Blenkarn did obtain good title to the handkerchiefs, then he could give good title to the defendants. Conversely, if he did not obtain good title then he could not. In order to show that Blenkarn had not obtained good title to the handkerchiefs, it did not suffice for the plaintiffs to show that they had been induced to enter the contract by the fraud of Benkarn because fraud renders a contract voidable and not void. A voidable contract which has not been set aside is, prior to it being set aside, effective to pass property in the goods to a bona fide purchaser for value (see *Car and Universal Finance Co v. Caldwell* [1965] 1 QB 525). It was therefore necessary for the plaintiffs to show that the contract between themselves and Blenkarn was void because the mistake which rendered the contract void would also suffice to prevent property in the goods passing to Blenkarn.

The House of Lords held that the contract was void; that is to say, it had never in law come into existence. Blenkarn therefore never acquired title to the handkerchiefs and could not confer title on the defendants. On what basis did the House of Lords conclude that the contract was void for mistake? Was it on the basis that Blenkarn knew that the plaintiffs did not

intend to deal with himself? Or was it on the ground that the plaintiffs intended to deal with Blenkiron and not Blenkarn? The latter view was adopted by the Court of Appeal in *King's Norton Metal Co v. Edridge Merrett & Co Ltd* (1897) 14 TLR 98. In this case the rogue assumed the name of Hallam & Co and the plaintiffs dealt with him on this basis. The rogue, Wallis, received goods from the plaintiffs on credit and sold them on to the defendants who bought them in good faith. When Wallis' fraud was discovered the plaintiffs brought an action in conversion against the defendants and relied upon the decision in *Cundy*. Their claim failed. The Court of Appeal held that the plaintiffs intended to contract with the writer of the letters. A.L. Smith L.J. stated (at p 99) that

> '[I]f it could have been shown that there was a separate entity called Hallam & Co, and another entity called Wallis then the case might have come within the decision in *Cundy v. Lindsay.*'

But on the facts there was 'only one entity, trading it might be under an alias, and there was a contract by which the property passed to' the person who wrote the letters. The difference between *Cundy* and *King's Norton* would appear to be that the plaintiffs in *Cundy* knew of the entity with which they intended to deal, Blenkiron & Co, and that entity was different from the identity of the author of the letters, whereas the plaintiffs in *King's Norton* intended to deal with the author of the letters but were under the mistaken impression that the author was a company called Hallam & Co when in fact it was Wallis.

Lord Cairns in *Cundy* noted that the plaintiffs and Blenkarn 'never came in contract personally'. The task of the jury and the court was to draw conclusions from the written documents that passed between the parties. Matters are much more difficult in the case in which the parties have met personally.

Phillips v. Brooks
[1919] 2 KB 243, King's Bench Division

A man entered the plaintiff's shop and asked to see some pearls and some rings. He selected pearls priced at £2,550 and a ring priced at £450. He then produced a cheque book and wrote out a cheque for £3,000. As he signed the cheque he said 'You see who I am, I am Sir George Bullough' and he gave an address in St James' Square. The plaintiff knew of the existence of Sir George Bullough. Having checked the address given in a directory he said to the man 'Would you like to take the articles with you?' The man replied: 'You had better have the cheque cleared first, but I should like to take the ring as it is my wife's birthday tomorrow'. The plaintiff let him have the ring. The cheque was subsequently dishonoured. The person in the shop was not Sir George Bullough but a man called North who was later convicted of obtaining the ring by false pretences. Prior to his arrest North pledged the ring with the defendants who, in good faith and without notice, advanced £350 to him. The plaintiff brought an action for the value of the ring against the defendants. The claim failed.

Horridge J

This is an action brought by the plaintiff, who is a jeweller in Oxford Street, London, for the return of a ring or its value, and for damages for detaining the same. The value of the

ring was agreed as being £450, and no evidence was given before me of any damage, apart from the value of the ring which was taken. I have carefully considered the evidence of the plaintiff, and have come to the conclusion that, although he believed the person to whom he was handing the ring was Sir George Bullough, he in fact contracted to sell and deliver it to the person who came into his shop, and who was not Sir George Bullough, but a man of the name of North, who obtained the sale and delivery by means of the false pretence that he was Sir George Bullough. It is quite true the plaintiff in re-examination said 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 draw where a verbal contract is made and an article delivered to an individual describing himself as somebody else.

After obtaining the ring the man North pledged it in the name of Firth with the defendants, who bona fide and without notice advanced £350 upon it. The question, therefore, in this case is whether or not the property had so passed to the swindler as to entitle him to give a good title to any person who gave value and acted bona fide without notice. This question seems to have been decided in an American case of *Edmunds v. Merchants' Despatch Transportation Co.* 135 Mass 283, 284. The headnote in that case contains two propositions, which I think adequately express my view of the law. They are as follows: (1.) 'If A., fraudulently assuming the name of a reputable merchant in a certain town, buys, in person, goods of another, the property in the goods passes to A.' (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.'

The following expressions used in the judgment of Morton C.J. seem to me to fit the facts in this case: 'The minds of the parties met and agreed upon all the terms of the sale, the thing sold, the price and time of payment, the person selling and the person buying. The fact that the seller was induced to sell by fraud of the buyer made the sale voidable, but not void. He could not have supposed that he was selling to any other person; his intention was to sell to the person present, and identified by sight and hearing; it does not defeat the sale because the buyer assumed a false name or practised any other deceit to induce the vendor to sell.' Further on, Morton CJ says:

> 'In the cases before us, there was a de facto contract, purporting, and by which the plaintiffs intended, to pass the property and possession of the goods to the person buying them; and we are of opinion that the property did pass to the swindler who bought the goods.'

The rule laid down by Lord Cairns L.C. in *Cundy v. Lindsay* 3 App Cas 459, 464 is as follows:

[he set out a passage from the judgment of Lord Cairns extracted above and continued]

The question whether or not the property would pass if a fraudulent person had gone himself to the firm from whom he wished to obtain the goods and had represented that he was someone else was raised in the argument in *Cundy v. Lindsay* 3 App. Cas. 459, 462. In the speech of Lord Penzance, he says *ibid* 471:

> 'Hypothetical cases were put to your Lordships in argument in which a vendor was supposed to deal personally with a swindler, believing him to be someone else of credit and stability, and under this belief to have actually delivered goods into his hands. My Lords, I do not think it necessary to express an opinion upon the possible effect of some cases which I can imagine to happen of this character, because none of such cases can I think be parallel with that which your Lordships have now to decide.'

Lord Hatherley, in his speech, seems to me to have rather put the case of a man's obtaining goods by representing that he was a member of one of the largest firms in London, which would be a case of representation as to authority to contract, as he says 3 App Cas 469:

> '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.'

The illustration given by Lord Hatherley and the facts in the case of *Hardman v. Booth* 1 H & C 803 seem to me to be cases which fall within the second proposition in the headnote in *Edmunds v. Merchants' Despatch Transportation Co.* 135 Mass 283, namely, representation by a person present that he was an agent for somebody else so as to induce the seller to make a contract with a third person whom the person present had no authority to bind.

It was argued before me that the principle quoted from Pothier (*Traité des Obligations*, §19), in *Smith v. Wheatcroft* (1878) 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. I do not think, however, that that passage governs this case, because I think the seller intended to contract with the person present, and there was no error as to the person with whom he contracted, although the plaintiff would not have made the contract if there had not been a fraudulent misrepresentation. Moreover, the case of *Smith v. Wheatcroft* was an action for specific performance, and was between the parties to the contract, and had no relation to rights acquired by third parties innocently under the contract, and misrepresentation would have been an answer to the enforcement of the contract. In this case, I think, there was a passing of the property and the purchaser had a good title, and there must be judgment for the defendants with costs.

COMMENTARY

Horridge J. distinguished *Cundy* on the basis that the plaintiff in *Phillips* 'intended to contract with the person present'. Could it not have been said that the plaintiff intended to contract with Sir George Bullough and not with North? Why did the plaintiff check the directory if the identity of the person in the shop was not of vital significance to him? In *Lake v. Simmons* [1927] AC 487, 502 Viscount Haldane stated that Horridge J

> 'found, as a fact, that though the jeweller believed the person to whom he handed the jewel was the person he pretended to be, yet he intended to sell to the person, whoever he was, who came into the shop and paid the price, and that the misrepresentation was only as to payment. There was therefore consensus with the person identified by sight and hearing, although the title to delivery was voidable as having been induced by misrepresentation.'

The difficulty with this rationalisation of *Phillips* is that it is not at all clear that this was the factual finding of Horridge J. The issue was re-examined by the Court of Appeal in the following case:

Ingram v. Little
[1961] 1 QB 31, Court of Appeal

The plaintiffs, two sisters, advertised their car for sale at £725 or nearest offer. They were visited by a man who said that his name was Mr. Hutchinson. They agreed a price of £717 for the car. The man produced his cheque book but one of the sisters said that they would not take a cheque. He then said that he was Mr P.G.M. Hutchinson, that he lived at Stanstead House, Stanstead Road, Caterham and had business interests in Guildford. On being told this one of the sisters went to a nearby Post Office and checked in a telephone directory that there was such a person living at this address. The sisters then decided that they could take a cheque. The cheque was later dishonoured but not before the rogue had sold the car to the defendant car dealer who bought the car in all good faith. The plaintiffs brought an action in conversion against the defendant and sought to recover the car or its value. The trial judge found for the plaintiffs and the Court of Appeal affirmed his decision. The Court of Appeal held, by a majority, that the contract between the plaintiffs and the rogue was void for mistake, with the result that the plaintiffs remained the owner of the car and were entitled to bring an action in conversion against the defendant.

Sellers LJ

The judgment [of Slade J at first instance] held that there never was a concluded contract, applying, as I understand it, the elementary factors required by law to establish a contract.

The judge, treating the plaintiffs as the offerors and the rogue 'Hutchinson ' as the offeree, found that the plaintiffs in making their offer to sell the car not for cash but for a cheque. . . . . were under the belief that they were dealing with, and therefore making their offer to, the honest P. G. M. Hutchinson of Caterham, whom they had reason to believe was a man of substance and standing. 'Hutchinson,' the offeree, knew precisely what was in the minds of the two ladies for he had put it there and he knew that their offer was intended for P. G. M. Hutchinson of Caterham and that they were making no offer to and had no intention to contract with him, as he was. There was no offer which he 'Hutchinson' could accept and, therefore, there was no contract.

The judge pointed out that the offer which the plaintiffs made was one which was capable of being accepted only by the honest P. G. M. Hutchinson of Caterham and was incapable of acceptance by 'Hutchinson.'

In all the circumstances of the present case I would accept the judge's findings. Indeed the conclusion so reached seems self-evident. . . . . .

Where two parties are negotiating together and there is no question of one or the other purporting to act as agent for another, and an agreement is reached, the normal and obvious conclusion would no doubt be that they are the contracting parties. A contrary finding would not be justified unless very clear evidence demanded it. The unfortunate position of the defendant in this case illustrates how third parties who deal in good faith with the fraudulent person may be prejudiced.

The mere presence of an individual cannot, however, be conclusive that an apparent bargain he may make is made with him. If he were disguised in appearance and in dress to represent someone else and the other party, deceived by the disguise, dealt with him on the basis that he was that person and would not have contracted had he known the truth then, it seems clear, there would be no contract established. If words are substituted for outward disguise so as to depict a different person from the one physically present, in what circumstances would the result be different?

Whether the person portrayed, by disguise or words, is known to the other party or not is important in considering whether the identity of the person is of any moment or whether it is a matter of indifference. If a man said his name was Brown when it was in fact Smith, and both were unknown to the other party, it would be difficult to say that there was any evidence that the contract was not made and intended to be made with the person present. . . .

But personal knowledge of the person fraudulently represented cannot, I think, be an essential feature. It might be a very strong factor but the qualities of a person not personally known might be no less strong. If a man misrepresented himself to be a Minister of the Crown or a stockbroker, confidence in the person so identified might arise although the individual so described was wholly unknown personally or by sight to the other party.

It would seem that there is an area of fact in cases of the type under consideration where a fraudulent person is present purporting to make a bargain with another and that the circumstances may justify a finding that, notwithstanding some fraud and deceit, the correct view may be that a bargain was struck with the person present, or on the other hand they may equally justify, as here, a finding the other way. . . . .

[he considered the case law and continued]

The question in each case should be solved, in my opinion, by applying the test, which Slade J. applied, 'How ought the promisee to have interpreted the promise' in order to find whether a contract has been entered into. I am in agreement with the judge when he quotes, accepts and applies the following passage from Dr. Goodhart's article –

> '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. The English law is not concerned with the motives of the parties nor with the reasons which influenced their actions. For practical reasons it has limited itself to the simple questions: what did the promisor promise, and how should this be interpreted?'. . . . . .

The legal position is, I think, well illustrated by Dr. Goodhart in the article (57 LQR 228, 241) already referred to. 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 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. . . . .

I would dismiss the appeal.

Pearce LJ

I agree. The question here is whether there was any contract, whether offer and acceptance met. . . . . .

The real problem in the present case is whether the plaintiffs were in fact intending to deal with the person physically present, who had fraudulently endowed himself with the attributes of some other identity, or whether they were intending only to deal with that other identity. If the former, there was a valid but voidable contract and the property passed. If the latter, there was no contract and the property did not pass. . . . .

The mere fact that the offeror is dealing with a person bearing an alias or false attributes does not create a mistake which will prevent the formation of a contract: *King's Norton Metal Co. Ltd. v. Edridge, Merrett & Co. Ltd.* . . . .But where a cheat passes himself off as another identity (e.g., as someone with whom the other party is accustomed to deal), it is otherwise. . . .

[he referred to *Cundy v. Lindsay* and continued]

An apparent contract made orally inter praesentes raises particular difficulties. The offer is apparently addressed to the physical person present. Prima facie, he, by whatever name he is called, is the person to whom the offer is made. His physical presence identified by sight and hearing preponderates over vagaries of nomenclature. 'Praesentia corporis tollit errorem nominis'[2] said Lord Bacon (Law Tracts (1737), p 102). Yet clearly, though difficult, it is not impossible to rebut the prima facie presumption that the offer can be accepted by the person to whom it is physically addressed. To take two extreme instances. If a man orally commissions a portrait from some unknown artist who had deliberately passed himself off, whether by disguise or merely by verbal cosmetics, as a famous painter, the impostor could not accept the offer. For though the offer is made to him physically, it is obviously, as he knows, addressed to the famous painter. The mistake in identity on such facts is clear and the nature of the contract makes it obvious that identity was of vital importance to the offeror. At the other end of the scale, if a shopkeeper sells goods in a normal cash transaction to a man who misrepresents himself as being some well-known figure, the transaction will normally be valid. For the shopkeeper was ready to sell goods for cash to the world at large and the particular identity of the purchaser in such a contract was not of sufficient importance to override the physical presence identified by sight and hearing. Thus the nature of the proposed contract must have a strong bearing on the question of whether the intention of the offeror (as understood by his offeree) was to make his offer to some other particular identity rather than to the physical person to whom it was orally offered.

In our case, the facts lie in the debatable area between the two extremes. At the beginning of the negotiations, always an important consideration, the name or personality of the false Hutchinson were of no importance and there was no other identity competing with his physical presence. The plaintiffs were content to sell the car for cash to any purchaser. The contractual conversation was orally addressed to the physical identity of the false Hutchinson. The identity was the man present, and his name was merely one of his attributes. Had matters continued thus, there would clearly have been a valid but voidable contract.

I accept the judge's view that there was no contract at the stage when the man pulled out his cheque book. From a practical point of view negotiations reached an impasse at that stage. For the vendor refused to discuss the question of selling on credit. It is argued that there was a contract as soon as the price was agreed at £717 and that from that moment either party could have sued on the contract with implied terms as to payment and delivery. That may be theoretically arguable, but, in my view, the judge's more realistic approach was right. Payment and delivery still needed to be discussed and the parties would be expecting to discuss them.

[2] The presence of the body cures the error in the name.

Immediately they did discuss them it became plain that they were not ad idem and that no contract had yet been created. But, even if there had been a concluded agreement before discussion of a cheque, it was rescinded. The man tried to make Miss Ingram take a cheque. She declined and said that the deal was off. He did not demur but set himself to reconstruct the negotiations. For the moment had come, which he must all along have anticipated, as the crux of the negotiations, the vital crisis of the swindle. He wanted to take away the car on credit against his worthless cheque, but she refused. Thereafter, the negotiations were of a different kind from what the vendor had mistakenly believed them to be hitherto. The parties were no longer concerned with a cash sale of goods where the identity of the purchaser was prima facie unimportant. They were concerned with a credit sale in which both parties knew that the identity of the purchaser was of the utmost importance. She now realised that she was being asked to give to him possession of the car on the faith of his cheque.

This was an important stage of the transaction because it demonstrated quite clearly that she was not prepared to sell on credit to the mere physical man in her drawing room though he represented himself as a man of substance. He proceeded to 'give to airy nothing a local habitation and a name.' He tried to persuade her to sell to him as P. G. M. Hutchinson of Stanstead House, a personality which no doubt he had selected for the purpose of inspiring confidence into his victim. This was unsuccessful. Only when she had ascertained (through her sister's short excursion to the local post office and investigation of the telephone directory) that there was a P. G. M. Hutchinson of Stanstead House in the directory did she agree to sell on credit. The fact that the man wrote the name and address on the back of the cheque is an additional indication of the importance attached by the parties to the individuality of P. G. M. Hutchinson of Stanstead House.

It is not easy to decide whether the vendor was selling to the man in her drawing room (fraudulently misrepresented as being a man of substance with the attributes of the real Hutchinson) or to P. G. M. Hutchinson of Stanstead House (fraudulently misrepresented as being the man in her drawing room). Did the individuality of P. G. M. Hutchinson of Stanstead House or the physical presence of the man in the room preponderate? Can it be said that the prima facie predominance of the physical presence of the false Hutchinson identified by sight and hearing was overborne by the identity of the real Hutchinson on the particular facts of the present case?

The judge said: 'I have not the slightest hesitation in reaching the conclusion that the offer which the plaintiffs made to accept the cheque for £717 was one made solely to, and one which was capable of being accepted only by, the honest Hutchinson - that is to say Philip Gerald Morpeth Hutchinson of Stanstead House, Stanstead Road, Caterham, Surrey, and that it was capable of being accepted only by the honest Hutchinson.' In view of the experience of the judge and the care which he devoted to the present case, I should hesitate long before interfering with that finding of fact, and I would only do so if compelled by the evidence or by the view that the judge drew some erroneous inference. Where, as here, a borderline case is concerned with ascertaining the intention of the parties, the views of the trial judge who hears the witnesses should not lightly be discarded. I am not persuaded that on the evidence he should have found otherwise.

[He then turned to the case-law and considered *Phillips v. Brooks, Hardman v Booth* (1863) 1 H & C 803 and *Lake v. Simmonds* and continued]

Each case must be decided on its own facts. The question in such cases is this. Has it been sufficiently shown in the particular circumstances that, contrary to the prima facie presumption, a party was not contracting with the physical person to whom he uttered the offer, but with another individual whom (as the other party ought to have understood) he believed to be the physical person present. The answer to that question is a finding of fact.

It is argued that although such a finding might properly have been reached if the cheat had pretended to be some great man or someone known already to the vendor by dealing or by reputation, it could not be so in this case, since the vendor had no knowledge of P. G. M. Hutchinson of Stanstead House. Had it not been for investigation of the telephone directory, that might well be so; but here the entry represented an individual of apparent standing and stability, a person whom the vendor was ready to trust with her car against his cheque. His individuality was less dominating than that of a famous man would be, but that is a question of degree. It does not, I think, preclude the judge from finding that it was with him that the vendor was intending to deal.

The court is naturally reluctant to accept the argument that there has been a mistake in such a case as this since it creates hardship on subsequent bona fide purchasers. The plaintiffs' unguarded transaction has caused loss to another. And, unfortunately, when the contract is void at common law, the court cannot (as the law stands now) by its equitable powers impose terms that would produce a fairer result. However, in the present case the subsequent purchasers, although the judge found that there was no mala fides, were no more wise or careful than the plaintiffs. The regrettable case with which a dishonest person can accomplish such a fraud is partially due to the unfortunate fact that registration books are not documents of title and that registration and legal ownership are so loosely connected. . . . .

I agree that the appeal should be dismissed.

Devlin LJ (dissenting)

In the textbooks, cases of mistaken identity are to be found both in the chapters that deal with the formation of contract and in those that deal with the effect of mistake. Whichever way it is looked at, the essential question is the same: has a contract been made? If the fatal defect goes to form, the question is answered with a simple negative and the case is put under the head of formation. If the defect is one of substance, that is, where the outward form is complete but the necessary consensus is vitiated by mistake, the question is answered by saying that the contract is void. It may be objected that a void contract is a meaningless expression; but it is a useful one to describe a contract that is perfect in form but void of substance. There is also this practical difference. It is for the plaintiff to prove offer and acceptance in form. But mistake is a ground of defence and it is for the defendant to plead it and assert that the contract is not what it seems to be. If the contract is complete on the surface, as when it is a formal document, the burden will be on him from the outset. But in oral contracts it may well be in question whether there is a contract even in appearance.

So the first thing for a judge to do is to satisfy himself that the alleged contract has been properly formed. . . . .There must be offer and acceptance. . . . . .Before, therefore, I consider mistake, I shall inquire whether there is offer and acceptance in form. There is no doubt that H.'s offer [H being the rogue] was addressed to Miss Ingram and her acceptance, apparently, addressed to him. But, it is argued, the acceptance was in reality addressed to P. G. M. Hutchinson, who was not the offeror, and, therefore, no contract was made. There can be no doubt upon the authorities that this argument must be settled by inquiring with whom Miss Ingram intended to contract: was it with the person to whom she was speaking or was it with the person whom he represented himself to be? It has been pressed upon us that this is a question of fact and that we ought to give great weight to the answer to it provided by the trial judge. It is, I think, a mixed question of fact and law. I am sure that any attempt to solve it as a pure question of fact would fail. If Miss Ingram had been asked whether she intended to contract with the man in the room or with P. G. M. Hutchinson, the question could have no meaning for her, since she believed them both to be one and the same. 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. . . . . .

Courts of law are not inexperienced in dealing with this sort of situation. They do so by means of presumptions. . . . .In my judgment, the court cannot arrive at a satisfactory solution in the present case except by formulating a presumption and taking it at least as a starting point. The presumption that a person is intending to contract with the person to whom he is actually addressing the words of contract seems to me to be a simple and sensible one and supported by some good authority. . . . .

I do not think that it can be said that the presumption is conclusive, since there is at least one class of case in which it can be rebutted. 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* (1863) 1 H & C 803 is, I think, an example of this. 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 dealing only with offer and acceptance; contracts in which identity really matters may still be avoided on the ground of mistake. I am content to leave the question open, and do not propose to speculate on what other exceptions there may be to the general rule. 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 and, whether it is proved simpliciter or proved to the hilt, it does not go any further than to show that she was the victim of fraud. With great respect to the judge, the question that he propounded as the test is not calculated to show any more than that. He said: 'Is it to be seriously suggested that they were willing to accept the cheque of the rogue other than in the belief, created by the rogue himself, that he, the rogue, was in fact the honest P. G. M. Hutchinson of the address in Caterham with the telephone number which they had verified?' In my judgment, there is everything to show that Miss Ingram would never have accepted H.'s offer if she had known the truth, but nothing to rebut the ordinary presumption that she was addressing her acceptance, in law as well as in fact, to the person to whom she was speaking. I think, therefore, that there was offer and acceptance in form.

On my view of the law, it, therefore, becomes necessary to consider next whether there has been a mistake that vitiates the contract. As both my brethren are of opinion that there has been no offer and acceptance, the result of this further inquiry cannot affect the decision in the present case or its ratio, and I shall, therefore, state my conclusions and my reasons for it as briefly as may be.

In my judgment, there has been no such mistake. I shall assume without argument what I take to be the widest view of mistake that is to be found in the authorities; and that is that a mistake avoids the contract if at the time it is made there exists some state of fact which, as assumed, is the basis of the contract and as it is in truth, frustrates its object. Cases of mistaken identity have usually been dealt with in the authorities by the application of the test propounded by Pothier, *Traite des Obligations* (1803), s 19, p 13, where he said: '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.' If this is wider than the principle I have stated, I do not think it can be part of the law of England, for I can see no reason why mistake as to identity should operate more easily to avoid a contract than any other sort of mistake. If Pothier is correctly interpreted, the word 'ingredient' is very wide; but the examples which he gives to illustrate his proposition are examples in which mistaken identity would generally destroy a fundamental assumption and frustrate the object of the contract. The whole object of contracting for a

portrait, for instance, is to have it done by the particular artist selected and so his identity is normally essential.

The fact that Miss Ingram refused to contract with H. until his supposed name and address had been 'verified' goes to show that she regarded his identity as fundamental. In this she was misguided. She should have concerned herself with creditworthiness rather than with identity. The fact that H gave P. G. M. Hutchinson's address in the directory was no proof that he was P. G. M. Hutchinson; and if he had been, that fact alone was no proof that his cheque would be met. Identity, therefore, did not really matter. Nevertheless, it may truly be said that to Miss Ingram, as she looked at it, it did. 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 or opinions or wishes of the parties themselves. That is the rule in the case of frustration: see *Hirji Mulji v. Cheong Yue S.S. Co. Ltd.* [1926] AC 497. It is the rule also in a case such as *Scammell (G.) & Nephew Ltd. v. Ouston* [1941] AC 251 where the parties believed themselves to have contracted, but had failed to reach agreement on essentials with sufficient particularity. This rule applies in the case of mistake because the reason for the avoidance is the same, namely, that the consent is vitiated by non-agreement about essentials. It is for the court to determine what in the light of all the circumstances is to be deemed essential. In my judgment, in the present case H's identity was immaterial. His creditworthiness was not, but creditworthiness in relation to contract is not a basic fact; it is only a way of expressing the belief that each party normally holds that the other will honour his promise.

[He then turned to a detailed consideration of the opinions of their Lordships in *Lake v. Simmons* [1927] AC 487 and continued]

There can be no doubt, as all this difference of opinion shows, that the dividing line between voidness and voidability, between fundamental mistake and incidental deceit, is a very fine one. That a fine and difficult distinction has to be drawn is not necessarily any reproach to the law. But need the rights of the parties in a case like this depend on such a distinction? The great virtue of the common law is that it sets out to solve legal problems by the application to them of principles which the ordinary man is expected to recognise as sensible and just; their application in any particular case may produce what seems to him a hard result, but as principles they should be within his understanding and merit his approval. But here, contrary to its habit, the common law, instead of looking for a principle that is simple and just, rests on theoretical distinctions. Why should the question whether the defendant should or should not pay the plaintiff damages for conversion depend upon voidness or voidability, and upon inferences to be drawn from a conversation in which the defendant took no part? The true spirit of the common law is to override theoretical distinctions when they stand in the way of doing practical justice. For the doing of justice, the relevant question in this sort of case is not whether the contract was void or voidable, but which of two innocent parties shall suffer for the fraud of a third. The plain answer is that the loss should be divided between them in such proportion as is just in all the circumstances. If it be pure misfortune, the loss should be borne equally; if the fault or imprudence of either party has caused or contributed to the loss, it should be borne by that party in the whole or in the greater part. In saying this, I am suggesting nothing novel, for this sort of observation has often been made. But it is only in comparatively recent times that the idea of giving to a court power to apportion loss has found a place in our law. I have in mind particularly the Law Reform Acts of 1935, 1943 and 1945, that dealt respectively with joint tortfeasors, frustrated contracts and contributory negligence. These statutes, which I believe to have worked satisfactorily, show a modern inclination towards a decision based on a just apportionment rather than one given in black or in white according to the logic of the law. I believe it would be useful if Parliament were now to consider whether or not it is practicable by means of a similar act of law reform to provide for the victims of a fraud a better way of adjusting their mutual loss than that which has grown out of the common law.

COMMENTARY

Ingram is notable for two reasons. First, it is a rare example of a court concluding that an agreement made between two parties face-to-face was void for mistake. Second, the dissenting judgment of Devlin LJ has been widely discussed, particularly his suggestion that the most appropriate solution is to divide the loss between the parties 'in such proportion as is just in all the circumstances.' We shall return to the judgments in *Ingram* in the light of the judgment of the Court of Appeal in the following case:

Lewis v. Averay
[1972] 1 QB 198, Court of Appeal

The plaintiff, Keith Lewis, a postgraduate student in Bristol, advertised his Austin Cooper for sale for £450 in a newspaper. On 8 May 1969 he was visited by a man who claimed to be Richard Greene, a well-known actor who played Robin Hood in a television series. The man agreed to pay £450 for the car and wrote a cheque for £450, signing it 'R. A. Green'. He wanted to take the car away immediately but Mr Lewis was not willing to allow him to take the car away until the cheque had cleared. The man repeated that he wanted to take the car immediately and so Mr Lewis asked him if he had anything to prove that he was Richard Green. The man then produced a pass from Pinewood Studios, which had an official stamp on it. The pass had the name of Richard A Green on it and a photograph of the man. Mr Lewis was satisfied at this and gave him the car, the log book and the MOT certificate in return for a cheque for £450. The cheque turned out to be worthless, as it had been stolen. In the meantime, the man sold the car, using the name of Mr Lewis, to another student, Mr Averay, for £200. Two weeks after he bought the car Mr Averay wrote to Mr Lewis asking him to send him the workshop manual for the car. At this point the fraud came to light. Mr Lewis brought an action in conversion against Mr Averay. The trial judge found for Mr Lewis and awarded him £330 in damages. Mr Averay appealed to the Court of Appeal. The Court of Appeal held that Mr Averay was not liable to the plaintiff, Mr Lewis. The contract between Mr Lewis and the rogue was held to be voidable with the result that Mr Averay had acquired a good title to the car because he purchased it in good faith and for value before Mr Lewis had acted to set aside the contract with the rogue.

Lord Denning MR

The real question in the case is whether on May 8, 1969, there was a contract of sale under which the property in the car passed from Mr Lewis to the rogue. If there was such a contract, then, even though it was voidable for fraud, nevertheless Mr Averay would get a good title to the car. But if there was no contract of sale by Mr Lewis to the rogue - either because there was, on the face of it, no agreement between the parties, or because any apparent agreement was a nullity and void ab initio for mistake, then no property would pass from Mr Lewis to the rogue. Mr Averay would not get a good title because the rogue had no property to pass to him.

There is no doubt that Mr Lewis was mistaken as to the identity of the person who handed him the cheque. He thought that he was Richard Greene, a film actor of standing and worth: whereas in fact he was a rogue whose identity is quite unknown. It was under the influence of that mistake that Mr Lewis let the rogue have the car. He would not have dreamed of letting him have it otherwise.

What is the effect of this mistake? There are two cases in our books which cannot, to my mind, be reconciled the one with the other. One of them is *Phillips v. Brooks Ltd* [1919] 2 KB 243, where a jeweller had a ring for sale. The other is *Ingram v. Little* [1961] 1 QB 31, where two ladies had a car for sale. In each case the story is very similar to the present. A plausible rogue comes along. The rogue says he likes the ring, or the car, as the case may be. He asks the price. The seller names it. The rogue says he is prepared to buy it at that price. He pulls out a cheque book. He writes, or prepares to write, a cheque for the price. The seller hesitates. He has never met this man before. He does not want to hand over the ring or the car not knowing whether the cheque will be met. The rogue notices the seller's hesitation. He is quick with his next move. He says to the jeweller, in *Phillips v. Brooks*: 'I am Sir George Bullough of 11 St. James's Square'; or to the ladies in *Ingram v. Little* 'I am P. G. M. Hutchinson of Stanstead House, Stanstead Road, Caterham'; or to the post-graduate student in the present case: 'I am Richard Greene, the film actor of the Robin Hood series.' Each seller checks up the information. The jeweller looks up the directory and finds there is a Sir George Bullough at 11 St. James's Square. The ladies check up too. They look at the telephone directory and find there is a 'P. G. M. Hutchinson of Stanstead House, Stanstead Road, Caterham.' The post-graduate student checks up too. He examines the official pass of the Pinewood Studios and finds that it is a pass for 'Richard A. Green' to the Pinewood Studios with this man's photograph on it. In each case the seller feels that this is sufficient confirmation of the man's identity. So he accepts the cheque signed by the rogue and lets him have the ring, in the one case, and the car and logbook in the other two cases. The rogue goes off and sells the goods to a third person who buys them in entire good faith and pays the price to the rogue. The rogue disappears. The original seller presents the cheque. It is dishonoured. Who is entitled to the goods? The original seller? Or the ultimate buyer? The courts have given different answers. In *Phillips v. Brooks*, the ultimate buyer was held to be entitled to the ring. In *Ingram v. Little* the original seller was held to be entitled to the car. In the present case the deputy county court judge has held the original seller entitled.

It seems to me that the material facts in each case are quite indistinguishable the one from the other. In each case there was, to all outward appearance, a contract: but there was a mistake by the seller as to the identity of the buyer. This mistake was fundamental. In each case it led to the handing over of the goods. Without it the seller would not have parted with them.

This case therefore raises the question: What is the effect of a mistake by one party as to the identity of the other? It has sometimes been said that if a party makes a mistake as to the identity of the person with whom he is contracting there is no contract, or, if there is a contract, it is a nullity and void, so that no property can pass under it. This has been supported by a reference to the French jurist Pothier; but I have said before, and I repeat now, his statement is no part of English law. I know that it was quoted by Lord Haldane in *Lake v. Simmons* [1927] AC 487, 501, and, as such, misled Tucker J in *Sowler v. Potter* [1940] 1 KB 271, into holding that a lease was void whereas it was really voidable. But Pothier's statement has given rise to such refinements that it is time it was dead and buried together.

For instance, in *Ingram v. Little* [1961] 1 QB 31, the majority of the court suggested that the difference between *Phillips v. Brooks Ltd* [1919] 2 KB 243 and *Ingram v. Little* was that in *Phillips v. Brooks* the contract of sale was concluded (so as to pass the property to the rogue) before the rogue made the fraudulent misrepresentation: see [1961] 1 QB 31, 51, 60: whereas in *Ingram v. Little* the rogue made the fraudulent misrepresentation before the contract was concluded. My own view is that in each case the property in the goods did not pass until the seller let the rogue have the goods.

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

As I listened to the argument in this case, I felt it wrong that an innocent purchaser (who knew nothing of what passed between the seller and the rogue) should have his title depend on such refinements. After all, he has acted with complete circumspection and in entire good faith: whereas it was the seller who let the rogue have the goods and thus enabled him to commit the fraud. I do not, therefore, accept the theory that a mistake as to identity renders a contract void. I think the true principle is that which underlies the decision of this court in *King's Norton Metal Co. Ltd. v. Edridge Merrett & Co. Ltd.* (1897) 14 TLR 98 and of Horridge J in *Phillips v. Brooks* [1919] 2 KB 243, which has stood for these last 50 years. It is this: When two parties have come to a contract - or rather what appears, on the face of it, to be a contract - the fact that one party is mistaken as to the identity of the other does not mean that there is no contract, or that the contract is a nullity and void from the beginning. It only means that the contract is voidable, that is, liable to be set aside at the instance of the mistaken person, so long as he does so before third parties have in good faith acquired rights under it.

Applied to the cases such as the present, this principle is in full accord with the presumption stated by Pearce LJ and also Devlin LJ in *Ingram v. Little* [1961] 1 QB 31, 61, 66. When a dealing is had between a seller like Mr Lewis and a person who is actually there present before him, then the presumption in law is that there is a contract, even though there is a fraudulent impersonation by the buyer representing himself as a different man than he is. There is a contract made with the very person there, who is present in person. It is liable no doubt to be avoided for fraud, but it is still a good contract under which title will pass unless and until it is avoided. In support of that presumption, Devlin LJ quoted, at p 66, not only the English case of *Phillips v. Brooks*, but other cases in the United States where 'the courts hold that if A appeared in person before B, impersonating C, an innocent purchaser from A gets the property in the goods against B.' That seems to me to be right in principle in this country also.

In this case Mr Lewis made a contract of sale with the very man, the rogue, who came to the flat. I say that he 'made a contract' because in this regard we do not look into his intentions, or into his mind to know what he was thinking or into the mind of the rogue. We look to the outward appearances. On the face of the dealing, Mr Lewis made a contract under which he sold the car to the rogue, delivered the car and the logbook to him, and took a cheque in return. The contract is evidenced by the receipts which were signed. It was, of course, induced by fraud. The rogue made false representations as to his identity, But it was still a contract, though voidable for fraud. It was a contract under which this property passed to the rogue, and in due course passed from the rogue to Mr Averay, before the contract was avoided.

Though I very much regret that either of these good and reliable gentlemen should suffer, in my judgment it is Mr Lewis who should do so. I think the appeal should be allowed and judgment entered for the defendant.

Megaw LJ

For myself, with very great respect, I find it difficult to understand the basis, either in logic or in practical considerations, of the test laid down by the majority of the court in *Ingram v. Little* [1961] 1 QB 31. That test is, I think, accurately recorded in the headnote, as follows:

'- 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 ought the promisee to have interpreted the promise.'

The promisee, be it noted, is the rogue. The question of the existence of a contract and therefore the passing of property, and therefore the right of third parties, if this test is correct, is made to depend upon the view which some rogue should have formed, presumably knowing that he is a rogue, as to the state of mind of the opposite party to the negotiation, who does not know that he is dealing with a rogue.

However that may be, and assuming that the test so stated is indeed valid, in my view this appeal can be decided on a short and simple point. It is the point which was put at the outset of his argument by Mr Titheridge on behalf of the defendant appellant. The well-known textbook *Cheshire and Fifoot on the Law of Contract* 7th ed. (1969), 213 and 214, deals with the question of invalidity of a contract by virtue of unilateral mistake, and in particular unilateral mistake relating to mistaken identity. The editors describe what in their submission are certain facts that must be established in order to enable one to avoid a contract on the basis of unilateral mistake by him as to the identity of the opposite party. The first of those facts is that at the time when he made the offer he regarded the identity of the offeree as a matter of vital importance. To translate that into the facts of the present case, it must he established that at the time of offering to sell his car to the rogue, Mr Lewis regarded the identity of the rogue as a matter of vital importance. In my view, Mr Titheridge is abundantly justified, on the notes of the evidence and on the findings of the judge, in his submission that the mistake of Mr Lewis went no further than a mistake as to the attributes of the rogue. It was simply a mistake as to the creditworthiness of the man who was there present and who described himself as Mr Green. . . . . .

Phillimore LJ delivered a concurring judgment.

COMMENTARY

The relationship between *Lewis v. Averay* and *Ingram v. Little* is an uneasy one. It is at least clear that the prima facie presumption is that a party intends to contract with the person in front of him. What is not clear is the factors that will lead a court to conclude that the presumption has been rebutted. Why was the presumption rebutted in *Ingram* but not in *Phillips* nor in *Lewis*? In all three cases the plaintiffs checked the identity of the rogue (in *Phillips* and *Ingram* the plaintiffs checked a directory, whereas in *Lewis* the plaintiff checked the studio card produced by the rogue) yet it was only in *Ingram* that the identity of the rogue was held to be fundamental to the contract. Faced with the difficulty of distinguishing between these cases there is a temptation simply to conclude that each case must be decided on its own facts. In *Citibank NA v. Brown Shipley & Co Ltd* [1991] 2 All ER 690, 700 *Phillips*, *Ingram* and *Lewis* were cited to Waller J. He concluded that these cases did not assist him very much except to emphasise

'(1) that each case rests on its own facts, (2) that in the bilateral contract context for no title to pass it must be established that there is no contract under which such a title can pass and (3) the no contract situation, as opposed to a voidable contract, only arises if it is fundamental

to the contract that one party to the contract should be who he says that he is. That is easier to establish where contracts are made entirely by documents and less easy to establish in an inter praesentes position.'

Two points are worth noting here. The first relates to the conclusion that each case rests on its own facts. This evades the issue and it gives judges in future cases very little guidance in terms of distinguishing between the different cases. The second point is that it accepts that there is a difference of degree, if not kind, between the case where the parties' dealings are in writing and the case where they meet face-to-face.

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