does not mean that relief in the form of a lower interest rate will be given; all it means is that the court may add a term to an otherwise reasonable contract to give the borrower the right to prepay along with a rebate of unearned finance charges. In the *Brock Acceptance* case, Matas J. allowed interest on the amount actually advanced by the lender at the rate of 1% per month to date of payment.

E. A. BRAID*

MISTAKE IN EQUITY: *SOLLE v. BUTCHER* RE-EXAMINED

Twenty years ago, in *Solle v. Butcher,*[1] Denning L.J. (as he then was)propounded his doctrine of equitable mistake.[2] According to this doctrine a contract is voidable in equity if the following conditions are satisfied: 1. The mistake must either be mutual or, if only one party is mistaken, the other party must have induced or at any rate be aware of the existence of the mistake; 2. It must be unjust in all the circumstances for the party seeking to enforce his legal rights to be allowed to do so; 3. The party seeking to have the contract set aside must not have been at fault. This doctrine has been criticized academically,[3] but it has recently been applied on both sides of he Atlantic in *Ivanochko v. Sych*[4] and *Grist v. Bailey.*[5]

In *Ivanochko v. Sych* the appellant agreed to sell a house and chattels to the defendant for $20,000, and some two years later it was discovered that the monthly payments were not sufficient to pay the interest on the outstanding balance of the purchase price and that unless these instalments were increased the agreement would never be paid up. The Saskatchewan Court of Appeal held that, although there was no mistake on the part of either party sufficient to render the contract void at law, the contract was voidable in equity because the parties were under a common misapprehension as to the effect of the monthly payments, each taking it for granted that these payments would in time liquidate the balance of the purchase price, and granted rescission of the contract on terms. In *Grist v. Bailey* the defendant had agreed to sell a house to the plaitniff for £850, "subject to the

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1. [1949] 2 All E.R. 1107, at 1119.
2. For the sake of brevity this doctrine will be referred to in future as "Lord Denning's doctrine."
3. C. J. Slade, The Myth of Mistake in the English Law of Contract (1954) 70 L.Q.R. 385.
4. (1967) 58 W.W.R. 633.
5. [1966] 2 All E.R. 875.

existing tenancy thereof." Both parties were under the impression that the house was occupied by a statutory tenant, whereas in fact it was not. The value of the house if it was in the occupation of a statutory grant was about £850, but with vacant possession it was about £2,250. The plaintiff brought an action for specific performance of the contract of sale, and the defendant counterclaimed for rescission of the sale agreement: Goff J. held, applying Lord Denning's doctrine, that the agreement was voidable in equity, and refused specific performance and set aside the agreement.

In *Ivanochko v. Sych* the Saskatchewan Court of Appeal gave no reasons for applying Lord Denning's doctrine, merely citing his judgment in *Solle v. Butcher*. In *Grist v. Bailey*, however, Goff J. said:—[6]

> ". . . I cannot dismiss what Denning L.J., said in *Solle's case* as mere dictum. It was in my judgment the basis of the decision and is binding on me; and, as I have said, I think Bucknill, L.J., took the same view."

It is submitted that Goff J. was only partially correct in his view of the reasons for the decision in *Solle v. Butcher*, and that while Denning L.J. was prepared to base his decision on his doctrine of equitable mistake, Bucknill L.J. decided the case on the ground that the contract was void because the parties were mistaken as to the identity of the subject matter. In *Solle v. Butcher* a landlord had acquired a long lease of a war-damaged house which in 1939 had been let in flats subject to the Rent Restrictions Acts. After carrying out repairs and alterations to the house, he let one of the flats to a tenant for a lease of seven years at a rent of £250 a year; the maximum rent permitted by the Rent Restrictions Act being £140 a year. Both the landlord and the tenant were under the impression that the repairs and alterations carried out by the landlord were so substantial they they altered the identity of the flat, so as to take it out of the ambit of the Rent Restrictions Act. After holding that the repairs and alterations had not altered the identity of the flat, Bucknill L.J. granted rescission of the lease and said:—[7]

> "In my opinion, therefore, there was a mutual mistake of fact on a matter of fundamental importance, namely, as to the *identity* of the flat . . ."

It is submitted that it is clear that Bucknill L.J. granted rescission on the grounds of mutual mistake as to the identity of the subject matter; and it is trite law and orthodox doctrine to say that mistake as to identity of subject matter will render a conract void for mistake. The only authority, therefore, for Lord Denning's doctrine is his own judgment in *Solle v. Butcher*, and the doctrine must stand or fall on its merits.

6. Ibid., at 879.
7. [1959] 2 All E.R. 1107, at 1116. Italics added by writer. W.E.D.D.

In *Solle v. Butcher* Lord Denning said that all cases on mistake must be read in the light of Bell v. Lever Bros.;[8] but *Bell v. Lever Bros.*, it is submitted, so far from lending support to Lord Denning's doctrine, is directly against such a view. In *Bell v. Lever Bros.* Messrs. Bell and Snelling had been employed by Lever Bros. as chairman and vice-chairman of the board of directors of the Niger Co., a subsidiary of Lever Bros. When the Niger Co. became amalgamated with another company, Messrs. Bell and Snelling agreed to relinquish their posts with the Niger Co. in return for generous compensation. It later transpired that during their employment Messrs. Bell and Snelling had engaged in private trading in breach of the terms of their contracts of employment, a fact which would have entitled Lever Bros. to dismiss them summarily without compensation: at the time that Messrs. Bell and Snelling were negotiating their compensation agreements with Lever Bros., however, this fact was not in their minds. Lever Bros. sought to recover the sums they had paid in compensation to Messrs. Bell and Snelling on the ground that the compensation agreements were void for mistake, but the House of Lords (Lord Atkin, Lord Blanesburgh and Lord Thankerton; Viscount Hailsham and Lord Warrington of Clyffe dissenting) held that the contract was not void as the mistake was as to the subject matter of the contract, *i.e.* the contracts of service between Lever Bros. and Messrs. Bell and Snelling, and the mistake was only as to the quality of the subject matter and not as to its identity. In the course of a judgment, with which Lord Blanesburgh and Lord Thankerton agreed, Lord Atkin said:—[9]

> "A buys B's horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known as the fact is that the horse is unsound. If B has made no representation as to soundness and has not contracted that the horse is sound, A is bound and *cannot recover back the price.* A buys a picture from B; both A and B believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A *has no remedy* in the absence of representation or warranty. A agrees to take on lease or to buy from B an unfurnished dwelling-house. The house is in fact uninhabitable. A would never have entered into the bargain if he had known the fact. A *has no remedy,* and the position is the same whether B knew the facts or not, so long as he made no representation or gave no warranty. A buys a roadside garage business from B abutting on a public thoroughfare: unknown to A, but known to B, it has already been decided to construct a byepass road which will divert substantially the whole of the traffic from passing A's garage. Again A *has no remedy.* All these cases involve hardship on A and benefit B, as most people would say, unjustly. They can be supported on the ground that it is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts—i.e., agree in the same terms on the same subject-matter—they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them."

8. [1932] A.C. 161.

9. **Ibid.**, at 224. Italics added by writer. W.E.D.D.

It is submitted that it is clear from this judgment that, in the opinion of Lord Atkin, mistake either renders a contract void ab initio or else has no effect at all, and that there is no room for an intermediate type of mistake which renders a contract voidable in equity, for all the hypothetical examples given by Lord Atkin are examples of contracts which, according to Lord Denning's view, would be voidable in equity, yet Lord Atkin clearly states that in such cases the mistaken party *has no remedy at all;* indeed *Bell v. Lever Bros.* itself is a classical example of a contract which would, under Lord Denning's doctrine, be voidable in equity. Professor A. G. Guest has suggested that "in view of the very narrow scope of mistake at common law, there is considerable force in the argument that the Court should be allowed a residuary discretion to impose such a solution as justice demands,"[10] and Lord Atkin himself admitted that the rule which he expounded could cause hardship, but it is submitted that the cure proposed by Lord Denning is worse than the disease and that Lord Denning's doctrine is objectionable not only because it is flatly contrary to authority, but because it represents Palm Tree Justice in its purest and most objectionable form. According to Lord Denning's doctrine a contract will be set aside if it is unjust in all the circumstances to enforce it and the party seeking to set it aside has not been at fault. But who is to say what is "unjust in all the circumstances" or what constitutes "fault"? Under Lord Denning's doctrine equity would vary not only with the length of the chancellor's foot, but with the feet of every judge in the land. The concept of "what is just and fair" may be all very appealing to a judge on the Olympian heights of the bench or to an academic lawyer in the cloistered confines of a university, but for the practising solicitor in his office, trying to advise his client with at least a reasonable degree of certainty, it can make life impossible. As Lord Atkin said, it is of the utmost importance that contracts should be observed, and it is also of the utmost importance that people should be able to plan their affairs secure in the knowledge that if they follow their solicitor's advice the courts will uphold their transactions: if certainty in the law is important to solicitors, it is even more important to the business men who are their clients.

It is submitted that a better approach to the problem is that adopted by the High Court of Australia in *Macrae v. Commonwealth Disposals Commission.*[11] In that case the Commonwealth Disposals Commission purported to sell to the plaintiff a wrecked oil tanker, supposed to be on a reef near New Guinea, but it turned out that no such tanker existed. When the plaintiff sued for damages for breach of contract

10. Anson, Law of Contracts (22nd ed.), 295.
11. (1950-51) 84 C.L.R. 377.

Webb J. held, on the authority of *Couturier v. Hastie*,[12] that as there was no tanker there was no contract. On appeal, however, the High Court of Australia (Dixon, McTiernon and Fullagar J.J.) reversed this decision and denied that *Couturier v. Hastie* is authority for the proposition that if the subject matter of a contract is not in existence at the time that a conract is made, then the contract is void. The true rule in such cases, so said the High Court of Australia, is that it is a matter of the construction of the contract—there may be an implied condition precedent that the subject matter exists, in which case no contract ever came into existence, or one party may have impliedly warranted to the other that the subject matter exists, in which case he is liable to the other party in damages for breach, as was the case in *Macrae v. Commonwealth Disposals Commission*. It is submitted with respect that the decision of the High Court is clearly correct, and that text-book writers who have asserted that *Couturier v. Hastie* is authority for the proposition that a contract is void for mistake if the subject matter of the contract is not in existence at the time that the contract was made have read far too much into that case. In *Couturier v. Hastie* the defendant sold a cargo of corn belonging to the plaintiff to a buyer in London on a *del credere* commission. Unknown to the parties the cargo had already been disposed of before the contract was made, and when the buyer repudiated the contract the plaintiff sued the defendant for the price. The House of Lords held that he could not succeed, and the Lord Chancellor said:—[13]

> ". . . *the whole question turns upon the construction of the contract* which was entered into between the parties . . . looking to the contract itself alone, it appears to me clearly that what the parties contemplated, those who bought and those who sold, was that there was an existing something to be sold and bought, and if sold and bought, then the benefit of the insurance should go with it."

It is submitted that it is clear from this passage that the decision in *Couturier v. Hastie* was based not upon mistake, but upon the construction of the contract based upon the presumed intention of the parties— in this case that there was an implied condition precedent that the cargo should be in existence.[14] Although in *Macrae v. Commonwealth Disposals Commission* the High Court of Australia was dealing with a case where the subject matter of the contract had never existed, it is submitted that their approach is equally applicable in cases such as *Bell v. Lever Bros.* and that to adopt such an approach would in no way run counter to the decision in that case; for in the passage from his judgment already cited Lord Atkin made it clear

12. (1856) 5 H.L.C. 673, 10 E.R. 1065.

13. (1856) 5 H.L.C. 673, at 681, 10 E.R. 1065, at 1068. Italics added by writer. W.E.D.D.

14. Indeed the word "mistake" was never mentioned in the Lord Chancellor's judgment, nor, for that matter in the headnote.

that the mistaken party would have no remedy only if there had been no representation or term of the contract that the facts were as he imagined them to be.

W. E. D. DAVIES*

MISTAKE AS TO PERSON: IN DEFENCE OF *SOWLER v. POTTER*

There can be few cases in the law of contract, if any, that have been so roundly condemned by academic writers as *Sowler v. Potter*.[1] However, although this case has received judicial as well as academic criticism, it has never been overruled and it is submitted that this much maligned case was correctly decided and is good law.

In *Solle v. Butcher*[2] Denning L.J. (as he then was) said that *Sowler v. Potter* was inconsistent with *King's Norton Metal Co. v. Eldridge*.[3] It is submitted with respect that *King's Norton Metal Co. v. Eldridge* is not inconsistent with *Sowler v. Potter*, and is not even relevant. In *Sowler v. Potter* the defendant obtained a lease of a café from the plaintiff under the name of Anne Potter. She had been convicted under the name of Anne Robinson of permitting disorderly conduct in a café. Before the lease was granted, but after the negotiations had commenced, she changed her name from Robinson to Potter. When the plaintiff, who was aware of the existence of a convicted person by the name of Anne Robinson, discovered the true facts, she applied to have the lease set aside, and Tucker J. held that it was void for mistake as to person. In *King's Norton Metal Co. v. Eldridge* the plaintiffs had been induced to sell goods on credit to a fraudulent person, trading under the fictitious name of Hallam and Co., who represented himself as being a most prosperous firm. The fraud then resold the goods to the defendant who bought them in good faith, and the plaintiffs sought to recover the goods on the grounds that the contract with the fraud was void for mistake. The Court of Appeal (A. L. Smith, Rigby and Collins L.JJ.) held that the contract was not void for mistake, as the plaintiffs intended to contract with the person with whom they corresponded and their mistake was merely as to attribute and not as

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1. [1940] 1 K.B. 271.
2. [1949] 2 A.E.R. 1107, at 1119.
3. (1897) 14 T.L.R. 98.