

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.

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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.

to identity. It is true that in both these cases there was only one physical entity involved, the person with whom the plaintiffs contracted, but it is submitted that there is an essential difference between the facts of *King's Norton Metal Co. v. Eldridge* and those in *Sowler v. Potter*. In *King's Norton Metal Co. v. Eldridge* there was no real company called Hallam and Co. known to the plaintiffs and, as A. L. Smith L.J. said in his judgment, if there had been a real Hallam and Co. known to the plaintiffs the result would have been different, but there was a real Anne Robinson known to Mrs. Sowler. It follows, therefore, that the plaintiffs in *King's Norton Metal Co. v. Eldridge* intended to contract with the person with whom they did contract and were mistaken only as to his attributes, but that Mrs. Sowler did not intend to contract with the person with whom she did contract, and was mistaken as to her identity.

Professor A. L. Goodhart⁴ has criticized the decision in *Sowler v. Potter* on the grounds that, for a contract to be void for mistake as to person, there must be two distinct physical entities—the person with whom the mistaken party thought that he was contracting, and the person with whom he actually did contract; with respect it is hard to follow this reasoning. If A contracts with B thinking that he is contracting with C the contract is void: why should the result be any different if A contracts with B thinking that he is contracting with anyone else in the world but not B? In both cases A has been mistaken as to the identity of the person with whom he has contracted and had he not been so mistaken he would not have entered into the contract. The proposition that if A contracts with B thinking that he is contracting with anyone else in the world but not B the contract is void, and that *Sowler v. Potter* was correctly decided, can be supported by the decision in *Said v. Butt*.⁵ In *Said v. Butt* the plaintiff wished to purchase a ticket for a performance at a theatre of which the defendant was manager, but was unable to do so because he had deeply offended the manager. He therefore sent a friend, a Mr. Pollock, to buy a ticket, which Mr. Pollock did without disclosing that he was buying it on behalf of the plaintiff. When the plaintiff presented himself at the theatre on the night of the performance he was refused admittance, and he sued the defendant for procuring a breach of contract between himself and the theatre. It was held that the alleged contract was void for mistake. It is true that in *Said v. Butt* there were two physical entities—Said and Pollock, while in *Sowler v. Potter* there was only one—Robinson/Potter, but it is submitted that in both cases the thought process was the same. In *Said v. Butt* the defendant did not

4. "Mistake as to Identity in the Law of Contract," (1941) 57 L.Q.R. 228.

5. [1920] 3 K.B. 497.

say to himself "Ah, here comes Pollock, a grand man Pollock, just the man to make a contract with", what he said was "I do not know who this man is, but at least he is not that ghastly man Said," just as Mrs. Sowler in *Sowler v. Potter* said to herself "I do not know who this woman is, but at least she is not that dreadful woman Robinson." Moreover, the adoption of Professor Goodhart's view could lead to absurdities. Suppose that the plaintiff in *Said v. Butt*, instead of sending a friend on his behalf, had gone to the theatre box-office disguised in a false nose and beard and thereby obtained a ticket, would the contract then have been valid? According to Professor Goodhart's view it would, and Professor Goodhart himself says that if B knows that A does not wish to make a contract with him and therefore disguises himself to look like C, a contract entered into between A and B is void, but that if B disguises himself with a false beard so that A does not recognize him the contract is valid.⁶ But, with respect to the learned author, this is ridiculous, for it means that the validity of a contract—and the fate of property which has passed into the hands of equity's darling, the bona fide purchaser for value without notice—will depend on whether the person who seeks to conceal his identity uses a stooge or a false beard, or even what sort of a false beard he uses: the law is surely not such an ass as all that.

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CRIMINOLOGY: A VIEW FROM THE PAST?

The following Editorial appeared in (1932) 4 *Manitoba Bar News*, No. 7, at p. 4 and is reprinted with the kind permission of the *Manitoba Bar News*.

The average man's idea of a criminal is simply a scoundrel who has chosen to break the law and injure his fellow men. Therefore he deserves to be punished swiftly and without mercy. The criminologists, most of them sob sisters, are swinging from that point of view. They claim that crime is not caused by free will but that a criminal's intents and actions are determined from without. Crime, as they depict it, becomes a disease, either inherited or acquired by contagion.

The criminal is no longer a villain who must be suppressed by force, but an unfortunate individual who is the victim of circumstances. So every time a bounder holds up a bank, robs his crippled grandmother, shoots a politician, steals an automobile, or kicks his neighbour's child

6. *Op. cit.*, at 242.

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