the court regards the mistake as fundamental (Lord Reid and Lord Hodson). Neither judge felt that the personality error made by Mrs Gallie was sufficient to support the plea.

(*c*) The distinction taken in *Howatson* v *Webb* [1908] 1 Ch 1 that the mistake must be as to the class or character of the document and not merely as to its contents was regarded as illogical. Under the *Howatson* test, if X signed a guarantee for £1,000 believing it to be an insurance policy he escaped all liability on the guarantee, but if he signed a guarantee for £10,000 believing it to be a guarantee for £100 he was fully liable for £10,000. Under *Saunders* the document which was in fact signed must be 'fundamentally different', 'radically different', or 'totally different'. The test is more flexible than the character/contents one and yet still restricts the operation of the plea of *non est factum*.

Comment (i) The charge of negligence might be avoided where a person was told he was witnessing a confidential document and had no reason to doubt that he was. Many such documents are witnessed each day and the witnesses would never dream of asking to read them nor would they think themselves negligent because they had not done so. Surely the *Saunders* decision is not intended to turn witnesses into snoopers. Thus the decision in the old case of *Lewis* v *Clay* (1898) 77 LT 653 would probably be the same under modern law. In that case Clay was asked by Lord William Neville to witness a confidential document and signed in holes in blotting paper placed over the document by Neville. In fact, he was signing two promissory notes and two letters authorising Lewis to pay the amount of the notes to Lord William Neville. The court *held* that the signature of Clay in the circumstances had no more effect than if it had been written for an autograph collector or in an album and he was not bound by the bills of exchange.

In fact, the survival of the plea of *non est factum* in cases such as *Lewis* is recognised in certain of the judgments in the House of Lords in *Saunders* (see Lord Pearson at p 979 where, because of the cunning deception of a friend and the supposedly confidential nature of the documents in *Lewis*, he would have allowed the plea in *Lewis*'s case to succeed, as indeed it did).

(ii) As between the immediate parties to what is always in effect a fraud, there is, of course, no difficulty in avoiding the contract or transaction mistakenly entered into. The rules set out above are relevant only where the contract or transaction mistakenly entered into has affected a third party, as where he has taken a bill of exchange bona fide and for value on which the defendant's signature was obtained under circumstances of mistake (*Foster* v *Mackinnon* (1869) LR 4 CP 704) or has lent money on an interest in land obtained by a fraudulent assignment under circumstances of mistake (*Saunders* v *Anglia Building Society* (1970) – see above). The principles set out in *Saunders*' case apply also to those who sign blank forms as well as to those who sign completed documents without reading them (*United Dominions Trust Ltd* v *Western* [1975] 3 All ER 1017).

Unilateral mistake: ingredients: A is mistaken and B the other party to the contract knows or ought to know he is

118 *Higgins (W) Ltd* v *Northampton Corporation* [1927] 1 Ch 128

The claimant entered into a contract with the corporation for the erection of dwelling houses. The claimant made an arithmetical error in arriving at his price, having deducted a certain rather small sum twice over. The corporation sealed the contract, assuming that the price arrived at by the claimant was correct.

Held – the contract was binding on the parties. Rectification of such a contract was not possible because the power of the court to rectify agreements made under mistake is confined to common not unilateral mistake. Here, rectification would only have been granted if fraud or misrepresentation had been present.

Comment (i) Since this case was decided the courts have moved away from the idea that rectification of a contract for unilateral mistake is permissible only if there is some form of sharp practice (*Thomas Bates & Sons Ltd* v *Wyndham's (Lingerie) Ltd* (1981) – see Chapter 12, Rectification). Even so, rectification would not have been granted in this case because Northampton Corporation was not aware of the claimant's error, which is still a requirement for rectification.

(ii) The rule of unilateral mistake does not seem to apply to mistakes as to the value of the contract. If you go into a junk shop and recognise a genuine Georgian silver teapot marked at £10, your contract of purchase, if made, would be good in law, although it would be obvious that the seller had made a mistake and that the buyer was aware of it. This is the rule of *caveat venditor* (let the seller beware) and applies provided the seller intends to offer the goods at his marked price.

119 *Cundy* v *Lindsay* (1878) 3 App Cas 459

The respondents were linen manufacturers in Belfast. A fraudulent person named Blenkarn wrote to the respondents from 37 Wood Street, Cheapside, ordering a quantity of handkerchiefs but signed his letter in such a way that it appeared to come from Messrs Blenkiron, a well-known and solvent house doing business at 123 Wood Street. The respondents knew of the existence of Blenkiron but did not know the address. Accordingly, the handkerchiefs were sent to 37 Wood Street. Blenkarn then sold them to the

appellants, and was later convicted and sentenced for the fraud. The respondents sued the appellants in conversion claiming that the contract they had made with Blenkarn was void for mistake, and that the property had not passed to Blenkarn or to the appellants.

Held – the respondents succeeded; there was an operative mistake as to the party with whom they were contracting.

Comment (i) It is, however, essential that at the time of making the apparent contract the mistaken party regarded the identity of the other party as vital and that he intended to deal with some person other than the actual person to whom in fact he addressed the offer, as in *Cundy* v *Lindsay* (1878) (see above). The mistake must be as to *identity*, not *attributes*, e.g. creditworthiness. As between the parties, the result is much the same since a mistake as to attributes may make the contract *voidable*, but the difference may vitally affect the interests of third parties. Thus, in *King's Norton Metal Co Ltd* v *Edridge, Merrett and Co Ltd* (1897) 14 TLR 98, where the facts were similar to *Cundy*, a fraudulent person called Wallis ordered goods from the claimants using notepaper headed Hallam & Co. The notepaper said that Hallam & Co had agencies abroad and generally represented the company as creditworthy. The claimants sold Hallam & Co some brass rivet wire on credit. The goods were never paid for but Wallis sold the goods on to Edridge Merrett who paid for them and were innocent of the way in which Wallis had obtained them. The claimants sued Edridge Merrett in conversion saying that the contract between them and Hallam/Wallis was void for mistake so that Edridge Merrett did not become owners of the wire because Hallam/Wallis had not. The Court of Appeal *held* that the contract between King's Norton and Edridge was voidable for fraud but not void for mistake. The claimants could not show a confusion of entities. There was no other Hallam or Wallis in their business lives with whom they could have been confused.

(ii) The difference between *Cundy* and *King's Norton* is that in *Cundy* there was another entity to get mixed up with. In *King's Norton* there was no one else to get mixed up with.

Unilateral mistake: where the parties are face to face

120 *Lewis* v *Averay* [1971] 3 All ER 907

Mr Lewis agreed to sell his car to a rogue who called on him after seeing an advertisement. Before the sale took place the rogue talked knowledgeably about the film world giving the impression that he was the actor Richard Green in the 'Robin Hood' serial which was running on TV at the time. He signed a dud cheque for £450 in the name of 'RA Green' and was allowed to have the log book and drive the car away late the same night, when he produced a film studio pass in the name of 'Green'.

Held – by the Court of Appeal – Mr Lewis had effectively contracted to sell the car to the rogue and could not recover it or damages from Mr Averay, a student, who had bought it from the rogue for £200. The contract between Mr Lewis and the rogue was voidable for fraud but not void for unilateral mistake.

Comment (i) It is thought that the contract would be void for mistake in a case such as this if the dishonest person assumed a disguise so that he appeared physically to be the person he said he was.

(ii) It should not be assumed that this case is of general application. It does depend on the parties being face to face. Therefore, if as in *Shogun Finance Ltd* v *Hudson* [2000] CLY 2600 A buys a car on hire-purchase through a dealer and claims to be someone else producing that person's driving licence A forging his signature on the HP documents sent to the finance company in order to satisfy credit investigation, then the contract with the finance company is void for mistake as to the person contracted with and the impersonator does not get a title to the car nor can he give a title to a purchaser from him. The finance company therefore can recover the vehicle. Although the purchaser was not a trade purchaser, he could not rely on Part III of the Hire Purchase Act 1964 to get a good title because this applies only to sales by persons who have cars on a hire-purchase agreement and since the contract was void there never was an agreement.

(iii) Part III of the Hire Purchase Act 1964 is designed to protect bona fide purchasers for value of motor vehicles where the seller is a mere bailee under a hire-purchase agreement and where he sells the vehicle before he has become the owner as where he has not paid all the instalments. A good title can be obtained by a private purchaser but not a trade purchaser. However, the seller must have a valid agreement and therefore be what the 1964 Act describes as the 'debtor'.

121 *Ingram and Others* v *Little* [1961] 1 QB 31

The claimants, three ladies, were the joint owners of a car. They wished to sell the car and advertised it for sale. A fraudulent person, introducing himself as Hutchinson, offered to buy it. He was taken for a drive in it and during conversation said that his home was at Caterham. Later the rogue offered £700 for the car but this was refused, though a subsequent offer of £717 was one which the claimants were prepared to accept. At this point the rogue produced a cheque book and one of the claimants, who was conducting

the negotiations, said that the deal was off and that they would not accept a cheque. The rogue then said that he was PGM Hutchinson, that he had business interests in Guildford, and that he lived at Stanstead House, Stanstead Road, Caterham. One of the claimants checked this information in a telephone directory and, on finding it to be accurate, allowed him to take the car in return for a cheque. The cheque was dishonoured, and in the meantime the rogue had sold the car to the defendants and had disappeared without a trace. The claimants sued for the return of the car, or for its value as damages in conversion, claiming that the contract between themselves and the rogue was void for mistake, and that the property (or ownership) had not passed. At the trial judgment was given for the claimants, Slade, J finding the contract void. His judgment was *affirmed* by the Court of Appeal, though Devlin, LJ dissented, saying that the mistake made was as to the creditworthiness of the rogue, not as to his identity, since he was before the claimants when the contract was made. A mistake as to the substance of the rogue would be a mistake as to quality and would not avoid the contract. Devlin, LJ also suggested that legislation should provide for an apportionment of the loss incurred by two innocent parties who suffer as a result of the fraud of a third.

Comment (i) The distinction drawn in some of these cases are fine ones. It is difficult to distinguish *Ingram* from *Lewis*. As we have seen, the question for the court to answer in these cases is whether or not the offeror at the time of making the offer regarded the identity of the offeree as a matter of vital importance. The general rule seems to be that where the parties are face to face when the contract is made identity will not be vital and the contract voidable only. *Ingram* would appear to be the exceptional case.

(ii) The reader may wonder why the cheque did not give the rogue away in the sense that it would carry his name and not that of PGM Hutchinson. The reason is that cheques were not personalised in those days in the sense of carrying the name of the account holder. The rogue wrote the Hutchinson name and address on the back of the cheque, whereas today, if a seller requests this, it is only necessary to write the address of the account holder, as the name appears on the front.

Unilateral mistake: effect in equity: refusal of specific performance and rescission

122 *Webster* v *Cecil* (1861) 30 Beav 62

The parties had been negotiating for the sale of certain property. Later Cecil offered by letter to sell the property for £1,250. Webster was aware that his offer was probably a slip because he knew that Cecil had already refused an offer of £2,000, and in fact Cecil wished to offer the property at £2,250. Webster accepted the offer and sued for specific performance of the contract. The court refused to grant the decree.

Comment This is not merely a case of mistake as to the value of the contract because here Webster knew that Cecil did not intend to offer the property at £1,250. The rule of 'let the seller beware' applies where the seller is mistaken as to the value but at least intends to offer the goods at his marked price.

Common mistake: the rules of *res extincta* and *res sua*

123 *Couturier* v *Hastie* (1856) 5 HLC 673

Messrs Hastie dispatched a cargo of corn from Salonica and sent the charterparty and bill of lading to their London agents so that the corn might be sold. The London agents employed Couturier to sell the corn and a person named Callander bought it. Unknown to the parties, the cargo had become overheated and had been landed at the nearest port and sold, so that when the contract was made the corn was not really in existence. Callander repudiated the contract and Couturier was sued because he was a *del credere* agent, i.e. an agent who, for an extra commission, undertakes to indemnify his principal against losses arising out of the repudiation of the contract by any third party introduced by him.

Held – the claim against Couturier failed because the contract presupposed that the goods were in existence when they were sold to Callander.

124 *Cochrane* v *Willis* (1865) LR 1 Ch App 58

Cochrane was the trustee in bankruptcy of Joseph Willis who was the tenant for life of certain estates in Lancaster. Joseph Willis had been adjudicated bankrupt in Calcutta where he resided. The remainder of the estate was to go to Daniel Willis, the brother of Joseph, on the latter's death, with eventual remainder to Henry Willis, the son of Daniel. Joseph Willis had the right to cut the timber on the estates during his life interest, and the representative of Cochrane in England threatened to cut and sell it for the benefit of Joseph's creditors. Daniel and Henry wished to preserve the timber and so they agreed with Cochrane through his representatives to pay the value of the timber to Cochrane if he would refrain from cutting it. News then reached England that when the above agreement was made Joseph was dead, and, therefore, the life interest had vested in (i.e. become owned by)

Daniel. In this action by the trustee to enforce the agreement it was *held* that Daniel was making a contract to preserve something which was already his and the court found, applying the doctrine of *res sua*, that the agreement was void for an identical or common mistake.

Common mistakes as to quality: no effect at common law

125 *Bell* v *Lever Bros Ltd* [1932] AC 161

Lever Bros had a controlling interest in the Niger Company. Bell was the chairman, and a person called Snelling was the vice-chairman of the Niger Company's Board. Both directors had service contracts which had some time to run. They became redundant as a result of amalgamations and Lever Bros contracted to pay Bell £30,000 and Snelling £20,000 as compensation. These sums were paid over and then it was discovered that Bell and Snelling had committed breaches of duty against the Niger Company during their term of office by making secret profits of £1,360 on a cocoa pooling scheme. As directors of the Niger Company, Bell and Snelling attended meetings at which the selling price of cocoa was fixed in advance. Both of them bought and sold on their own account before the prices were made public. They could, therefore, have been dismissed without compensation. Lever Bros sought to set aside the payments on the ground of mistake.

Held – the contract was not void because Lever Bros had got what they bargained for, i.e. the cancellation of two service contracts which, though they might have been terminated, were actually in existence when the cancellation agreement was made. The mistake was as to the quality of the two directors and such mistakes did not avoid the contracts. The case is one of common mistake because although Bell and Snelling admitted that they were liable to account to the company for the profit made from office, they convinced the court that they had forgotten their misdemeanour of insider dealing when they made the contract for compensation. They thought they were good directors who were entitled to that compensation.

Comment The case also decided that an employee was not under a duty to disclose to his employer his own misconduct or breaches of duty towards his employer. However, employee/directors do have a duty to disclose their *own* breaches of contract to their companies. This is because their fiduciary position as directors overrides the ordinary employer/employee relationship. However, in the *Bell* case the directors concerned kept the compensation and were not required to disclose their wrongdoings to Lever Bros because they were not directors of Lever Bros but only of Niger. However, a director of, say, company A is under a duty to disclose his wrongdoing, if any, towards company A where he receives his compensation from company A itself. Failure so to disclose will allow the company to claim back a golden handshake of the kind given to Bell and Snelling.

It is worth mentioning that an employee is under a duty to disclose breaches of duty/misconduct of subordinate employees, even though he is not under a duty to disclose to his employer his own misconduct or breaches of duty. This follows from the decision of the Court of Appeal in *Sybron Corporation* v *Rochem Ltd* [1983] 2 All ER 707.

126 *Leaf* v *International Galleries* [1950] 1 All ER 693

In 1944 the claimant bought from the defendants an oil painting of Salisbury Cathedral for £85. A label on the back said that the painting had been exhibited as by Constable. Five years later the claimant tried to sell the drawing at Christie's and was told that this was not so. He now sued for rescission of the contract, no claim for damages being made. The following points of interest emerged from the decision of the Court of Appeal. (*a*) It was possible to restore the status quo by the mere exchange of the drawing and the purchase money so that rescission was not prevented by inability to restore the previous position. (*b*) The mistake made by the parties in assuming the drawing to be a Constable was a mistake as to quality and did not avoid the contract. (*c*) The statement that the drawing was by Constable could have been treated as a warranty giving rise to a claim for damages, but it was not possible to award damages because the appeal was based on the claimant's right to rescind. (*d*) The court, therefore, treated the statement as a representation and, finding it to be innocent, refused to rescind the contract because of the passage of time since the purchase.

Comment Mr Leaf might well have recovered damages if he had sued for these under what is now s 13 of the Sale of Goods Act 1979 (sale by description – goods described as by Constable). Mr Leaf asked for leave to amend his claim to include this when the case was in the county court but leave was refused.

Common mistake: the equitable approach

127 *Cooper* v *Phibbs* (1867) LR 2 HL 149

Cooper agreed to take a lease of a fishery from Phibbs, his uncle's daughter who became apparent owner of it on her father's death. Unknown to either party, the

fishery already belonged to Cooper. This arose from a mistake by Cooper's uncle as to how the family land was held. The uncle innocently thought he owned the fishery and before he died told Cooper so, but in fact it was owned by Cooper himself. Cooper now brought this action to set aside the lease and for delivery up of the lease.

Held – the lease must be set aside on the grounds of common or identical bilateral mistake. However, since equity has the power to give ancillary relief, Phibbs was given a lien on the fishery for the improvements she had made to it during the time she believed it to be hers. This lien could be discharged by Cooper giving Phibbs the value of the improvements.

Equity has no power to rescind a contract on the ground of mistake as to quality

128 ***Great Peace Shipping Ltd* v *Tsavliris Salvage (International) Ltd*** (2002) 152 New Law Journal 1616

A ship suffered damage in the Indian Ocean. Its owners engaged the defendant salvors to assist in the recovery. The salvors found a tug through a firm of London brokers. However, it was five or six days away from the scene. Fearing the ship would be lost the salvors approached the brokers again. The brokers asked a third party. They suggested the claimant's vessel *Great Peace* which the third party thought on the basis of false information was nearby. A contract of hire was made for *Great Peace* for a minimum of five days. In fact, *Great Peace* was several hundred miles from the damaged ship. The defendant cancelled the contract and refused to pay the hire. There was a minimum five-day hire clause in the contract (called a charterparty). This claim for the hire was then brought.

All parties to the arrangement were genuinely mistaken as to the actual position of *Great Peace*. No warranties were given or representations made as to the actual position of *Great Peace*. A common mistake as to quality therefore. Was she near or far? The defendant's case for rescission of the contract in equity based on *Solle* v *Butcher* (1950) was refused by the Court of Appeal. The court ruled that the contract was enforceable and the claimant's case succeeded. The court concluded that it was impossible to reconcile *Solle* v *Butcher* (1950) with the decision of the House of Lords in *Bell* v *Lever Bros* (1932). *Solle* had not been developed. It had been a fertile source of academic debate but in practice had given rise to very few cases and caused confusion in the law. If coherence was to be restored, it could only be done by declaring that there could be no rescission of a contract on the ground of common mistake where that contract was valid and enforceable on ordinary principles of contract law.

Comment (i) The better answer for the claimant in this case would have been to make the statement about the suitability of *Great Peace* a condition precedent of the contract. It would not then have come into being given the distance of the *Great Peace* from the damaged ship.

(ii) In spite of putting an end to rescission for common mistake, other equitable approaches survive. Thus in *Grist* v *Bailey* [1966] 2 All ER 875 a house was sold cheaply because the parties thought that vacant possession could not be obtained as there was a tenant in it who was protected by rent legislation. This was not the case and the tenant gave up possession. The claimant asked for the equitable remedy of specific performance but this was refused. The fact that the court did offer rescission to the defendant is perhaps now more dubious.

Rectification: equity can rectify mistakes made by the parties in recording their agreement

129 ***Joscelyne* v *Nissen*** [1970] 1 All ER 1213

The claimant, Mr Joscelyne, sought rectification of a written contract made on 18 June 1964, under which he had made over his car hire business to his daughter, Mrs Margaret Nissen. It had been expressly agreed during negotiations that in return for the car hire business Mrs Nissen would pay certain expenses including gas, electricity and coal bills but the agreement on these matters was not expressly incorporated in the written contract. Furthermore, the parties had agreed that no concluded contract was to be regarded as having been made until the signing of a formal written document.

Mrs Nissen failed to pay the bills and the claimant brought an action in the Edmonton County Court claiming amongst other things a declaration that Mrs Nissen should pay the gas, electricity and coal bills and alternatively that the written agreement of 18 June 1964 should be rectified to include a provision to that effect. The county court judge allowed the claim for rectification although there was no binding antecedent contract between the parties on the issue of payment of the expenses. The Court of Appeal, after considering different expressions of judicial views upon what was required before a contractual instrument might be rectified by the court, *held* that the law did not require a binding antecedent contract, provided there was some outward expression of agreement between the contracting parties. Rectification could be made even though there was no binding contract until the written agreement which was to be rectified was entered into.

130 *Frederick Rose (London) Ltd* v *William Pim & Co Ltd* [1953] 2 All ER 739

The claimants received an order from an Egyptian client for feveroles (a type of horsebean). The claimants did not know what was meant by feveroles and asked the defendants what they were and whether they could supply them. The defendants said that feveroles were horsebeans and that they could supply them, so the claimants entered into a written agreement to buy horsebeans from the defendants which were then supplied to the Egyptian client under the order. In fact, there were three types of horsebeans: feves, feveroles and fevettes, and the claimants had been supplied with feves, which were less valuable than feveroles. The claimants were sued by the Egyptian client and now wished to recover the damages they had had to pay from the defendants. In order to do so, they had to obtain rectification of the written contract with the defendants in which the goods were described as 'horsebeans'. The word 'horsebeans' had to be rectified to 'feveroles', otherwise the defendants were not in breach.

Held –

(*a*) Rectification was not possible because the contract expressed what the parties had agreed to, i.e. to buy and sell horsebeans. Thus, the supply of any of the three varieties would have amounted to fulfilment of the contract.

(*b*) The claimants might have rescinded for misrepresentation but they could not restore the status quo, having sold the beans.

(*c*) The claimants might have recovered damages for breach of warranty, but the statement that 'feveroles are horsebeans and we can supply them' was oral, and warranties in a contract for the sale of goods of £10 and upwards had in 1953 to be evidenced in writing. This is not the case today.

(*d*) The defence of mistake was also raised, i.e. both buyer and seller thought that all horsebeans were feveroles. This was an identical bilateral or common mistake, but since it was not a case of *res extincta* or *res sua*, it had no effect on the contract.

Comment This case is quite complex on its facts but, to put the rule in a simpler context, if A and B orally agreed on the sale of A's drawing of Salisbury cathedral, thought by A and B to be by John Constable, but in fact by Fred Constable, an unknown Victorian artist, and then put that agreement into a written contract, the contract could not be rectified simply because A and B thought that the drawing was by John Constable, because the written contract would be the same as the oral one, as in the above case. The approach is, after all, logical enough. You cannot sensibly ask the court to make the written agreement conform with the one actually made when it already does. The agreement is for the sale of A's drawing of Salisbury cathedral, not 'a drawing of Salisbury cathedral by John Constable'.

131 *Thomas Bates & Sons Ltd* v *Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077

The claimant granted in 1956 a lease to the defendants with an option for renewal. This lease had a clause under which the rent on renewal was to be agreed by the parties or by arbitration. The option was exercised in 1963 for a seven-year lease, and again in 1970 for a 14-year lease at a rent of £2,350 per annum for the first five years and thereafter subject to rent review every five years. This lease, which was drafted by the claimants' managing director, did not contain an arbitration clause. The defendants knew that it did not. At the end of the first five-year period the claimants suggested that a new rent should be agreed. The defendants would not agree and took the view that the rent of £2,350 should continue for the whole 14 years unless there was an agreement between the parties to the contrary. Deputy Judge Michael Wheeler QC, sitting in the High Court, ordered rectification and the Court of Appeal affirmed that decision. The clause inserted by the court allowed the rent to be settled by arbitration if the parties did not agree.

Comment At one time it was thought that rectification was available only for a common mistake by both parties. However, as appears from this case, rectification can be given for unilateral mistake. The principles on which it is granted appear in the judgment of Buckley, LJ who said: 'First, that one party, A, erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision, which, mistakenly, it did contain; second that the other party, B, was aware of the omission or the inclusion and that it was due to a mistake on the part of A; third that B has omitted to draw the mistake to the notice of A. And I think there must be a fourth element involved, namely that the mistake must be calculated to benefit B.' The general principle upon which the judgment is based would appear to be one of equitable estoppel.

Mutual mistake: effect at common law and in equity: the sense of the promise

132 *Wood* v *Scarth* (1858) 1 F & F 293

The claimant was suing for damages for breach of contract alleging that the defendant had entered into an agreement to grant the claimant a lease of a public house, but had refused to convey the property. It was shown in evidence that the defendant intended to

offer the lease at a rent, and also to include a premium on taking up the lease of £500. The defendant had told his agent to make this clear to the claimant, but the agent had not mentioned it. After discussions with the agent, the claimant wrote to the defendant proposing to take the lease 'on the terms already agreed upon', to which the defendant replied accepting the proposal. There was a mutual or non-identical bilateral mistake. The defendant thought that he was agreeing to lease the premises for a rent plus a premium, and the claimant thought he was taking a lease for rental only because he did not know of the premium. The claimant had sued for specific performance in 1855, and the court in the exercise of its equitable jurisdiction had decided that specific performance could not be granted in view of the mistake, as to grant it would be unduly hard on the defendant. However, in this action the claimant sued at common law for damages, and damages were granted to him on the ground that in mutual or non-identical mistake the court may find the sense of the promise and regard a contract as having been made on these terms. Here it was quite reasonable for the claimant to suppose that there was no premium to be paid. Thus, a contract came into being on the terms as understood by the claimant, and he was entitled to damages for breach of it. The contract clearly identified the agreement made.

Comment This case shows that equitable remedies are discretionary and not available as of right as damages at common law are. Also note the benefits of the Judicature Acts, 1873–75. In this case, which pre-dates those Acts, the action for specific performance was brought in Chancery in 1855 and the action at common law for damages in 1858. Common law and equitable remedies could not be granted in one and the same action until the Judicature Acts were passed.

133 *Raffles* v *Wichelhaus* (1864) 2 HC 906

The defendants agreed to buy from the claimants 125 bales of cotton to arrive 'ex *Peerless* from Bombay'. There were two ships called *Peerless* sailing from Bombay, one in October and one in December. The defendants thought they were buying the cotton on the ship sailing in October, and the claimants meant to sell the cotton on the ship sailing in December. In fact, the claimants had no cotton on the ship sailing in October. The defendants refused to take delivery of the cotton when the second ship arrived and were now sued for breach of contract.

Held – since there was a mistake as to the subject matter of the contract, there was, in effect, no contract between the parties, or at least no contract which clearly identified the agreement made. The claimants' action failed.

REALITY OF CONSENT II

Misrepresentation: effect of change of circumstances making a statement untrue

134 *With* v *O'Flanagan* [1936] 1 All ER 727

The defendant was a medical practitioner who wished to sell his practice. The claimant was interested and in January 1934 the defendant represented to the claimant that the income from the practice was £2,000 a year. The contract was not signed until May 1934, and in the meantime the defendant had been ill and the practice had been run by various other doctors who substituted for the defendant while he was ill. In consequence, the receipts fell to £5 per week, and no mention of this fact was made when the contract was entered into. The claimant now claimed rescission of the contract.

Held – he could do so. The representation made in January was of a continuing nature and induced the contract made in May. The claimant had a right to be informed of a change of circumstances, and the defendant's silence amounted to a misrepresentation.

Comment An interesting modern example is provided by *Spice Girls Ltd* v *Aprilia World Service BV, The Times*, 5 April 2000, where the company agreed to a contract for the Spice Girls to make a video promoting its goods on the basis that there were five Spice Girls, and logos and other material showed the five members of the band. In fact, Geri Halliwell had already disclosed her intention to leave the band, but this was not mentioned. The company was awarded damages under s 2(1) of the Misrepresentation Act 1967. The Spice Girls had no reasonable grounds to believe that there would be five of them to perform the contract.

Misrepresentation: statements of intention, opinion or belief as actionable statements of fact

135 *Edgington* v *Fitzmaurice* (1885) 29 Ch D 459

The claimant was induced to lend money to a company by a representation made by its directors that the money would be used to improve the company's buildings and generally expand the business. In fact, the directors intended to use the money to pay off the company's existing debts as the creditors were pressing hard for payment. When the claimant discovered

that he had been misled, he sued the directors for damages for fraud. The defence was that the statement that they had made was not a statement of a past or present fact but a mere statement of intention which could not be the basis of an action for fraud.

Held – the directors were liable in deceit. Bowen, LJ said: 'There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained, it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact.'

136 *Smith* v *Land and House Property Corporation* (1884) 28 Ch D 7

The claimants put up for sale on 4 August 1882 the Marine Hotel, Walton-on-the-Naze, stating in the particulars that it was let to 'Mr Frederick Fleck (a most desirable tenant) at a rental of £400 for an unexpired term of $27^1/_2$ years'. The directors of the defendant company sent the Secretary, Mr Lewin, to inspect the property and he reported that Fleck was not doing much business and that the town seemed to be in the last stages of decay. The directors, on receiving this report, directed Mr Lewin to bid up to £5,000, and in fact he bought the hotel for £4,700. Before completion, Fleck became bankrupt and the defendant company refused to complete the purchase, whereupon the claimants sued for specific performance. It was proved that on 1 May 1882 the March quarter's rent was wholly unpaid, that a distress was then threatened, i.e. the landlord was threatening to remove property from the hotel for sale to pay the rent, and that Fleck paid £30 on 6 May, £40 on 13 June, and the remaining £30 shortly before the sale. No part of the June's quarter rent had been paid. The chairman of the defendant company said that the hotel would not have been purchased but for the statement in the particulars that Fleck was a most desirable tenant.

Held – specific performance would not be granted. The description of Fleck as a most desirable tenant was not a mere expression of opinion, but contained an implied assertion that the vendors knew of no facts leading to the conclusion that he was not. The circumstances relating to the unpaid rent showed that Fleck was not a desirable tenant and there was a misrepresentation. Bowen, LJ said:

> It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion.

Comment These principles are followed in claims for negligent misrepresentation under the Misrepresentation Act 1967. Thus in *BG plc* v *Nelson Group Services (Maintenance) Ltd* [2002] EWCA Civ 547 the Court of Appeal in dealing with statements of opinion as actionable under s 2(1) stated: 'When an opinion was expressed where the person who expressed it did not know of facts that justified that opinion he is misrepresenting his state of knowledge sufficient to bring the case within s 2(1)'.

Misrepresentation: must induce the contract: materiality

137 *Peek* v *Gurney* [1873] LR 6 HL 377

Peek purchased shares in a company on the faith of statements appearing in a prospectus issued by the respondents who were directors of the company. Certain statements were false and Peek sued the directors. It appeared that Peek was not an original allottee, but had purchased the shares on what is now called the 'after-market', though he had relied on the prospectus.

Held – Peek's action failed because the statements in the prospectus were only intended to mislead the original allottees. Once the statements had induced the public to be original subscribers, their force was spent.

Comment (i) The decision has a somewhat unfortunate effect because at those times when public issues are oversubscribed it is most likely that persons who did not receive an allotment or an adequate allotment as subscribers will try to purchase further shares within a short time on the Stock Exchange (i.e. the 'after-market'). These people will clearly be relying on the prospectus, but under this decision would have no claim in respect of false statements in it.

(ii) This decision, and the one in *Re Northumberland* (see p 319), would appear to be seriously affected, at least on its own facts, by more recent legislation in the Financial Services and Markets Act 2000. As regards who can sue under an inaccurate prospectus, s 87(1) states: 'any

person who has acquired securities to which the particulars apply and suffered loss in respect of them . . .'. This would seem to include all subscribers whether they have relied on the prospectus (or listing particulars) or not. It seems, therefore, that a subscriber need not be aware of the error or even have seen the listing particulars. The sub-section would also seem to cover subsequent purchasers after the first issue thus affecting *Peek* v *Gurney* (above), at least on its own facts.

(iii) It should be noted, however, that s 87(1) is a statutory remedy in company law. So far as the law of contract is concerned, the purpose of the statements in the listing particulars (or prospectus) is to invite persons to apply for shares in the company, i.e. to induce the contract with the company, and in contract law the statement must have been relied on and be material. So far as remedies for contractual misrepresentation (including remedies under the Misrepresentation Act 1967) are concerned, the particulars cannot be relied upon by those who purchase shares from some source other than the company or by persons who have not seen them. In contract law, therefore, *Peek* and *Re Northumberland* survive. However, most claimants will sue successfully under the statutory remedy in s 87(1). There are, none the less, some special defences to a claim under s 87(1) (see p 295) and where a particular defendant, e.g. a director of the company, can claim one or more of these, the claimant may have to revert to a remedy under the Misrepresentation Act 1967. Under this Act these special defences, apart from reasonable grounds for believing the statement to be true, do not apply. Such a claimant would be faced with the rulings in *Peek* and *Re Northumberland*, though he would seem to be able to sue under the *Hedley Byrne* case (see below) where, once again, the statutory defences do not apply. The claim there is in tort (negligence) and not contract. Section 87(1) of the 2000 Act expressly reserves the right of claimants to sue under the Misrepresentation Act 1967 and/or tort under *Hedley Byrne*.

(iv) A claim in tort for damages for negligent misstatement should also be available under *Hedley Byrne* (see p 773) in that those who publicly advertise a prospectus must surely in the modern context foresee that it will be relied upon by subscribers *and* by those who purchase from subscribers on the stock market for a reasonable time after the issue of the prospectus.

(v) In fact, in the most recent decision *Possfund Custodian Trustee Ltd* v *Victor Derek Diamond*, *Financial Times*, 13 April 1996 Mr Justice Lightman in the High Court stated that nowadays it is at least arguable that those who are responsible for issuing prospectuses owe a duty of care to those who purchase the shares in what can be described as the after-market in reliance on the prospectus. This could place liability on the company's directors, the company itself and its financial advisers if they are negligent. The matter did not come to a full trial, Lightman, J's statement being made in preliminary proceedings. It should be noted that purchasers on the after-market following an issue with a listing are already protected by the Financial Services and Markets Act 2000. The only advantage of suing under *Possfund* is that not all of the 2000 Act defences are available at common law.

138 ***Redgrave* v *Hurd*** (1881) 20 Ch D 1

The claimant was a solicitor who wished to take a partner into the business. During negotiations between the claimant and Hurd the claimant stated that the income of the business was £300 a year. The papers which the claimant produced showed that the income was not quite £200 a year, and Hurd asked about the balance. Redgrave then produced further papers which he said showed how the balance was made up, but which only showed a very small amount of income making the total up to about £200. Hurd did not examine these papers in any detail, but agreed to become a partner. Later Hurd discovered the true position and refused to complete the contract. The claimant sued for breach, and Hurd raised the misrepresentation as a defence and counterclaimed for rescission of the contract.

Held – Hurd had relied on Redgrave's statements regarding the income and the contract could be rescinded. It did not matter that Hurd had the means of discovering their untruth; he was entitled to rely on Redgrave's statement.

Comment Relief is not barred simply because there is an unsuccessful attempt by the person misled to discover the truth where the misrepresentation is fraudulent.

139 ***Smith* v *Chadwick*** (1884) 9 App Cas 187

This action was brought by the claimant, who was a steel manufacturer, against Messrs Chadwick, Adamson and Collier, who were accountants and promoters of a company called the Blochairn Iron Co Ltd. The claimant claimed £5,750 as damages sustained through taking shares in the company which were not worth the price he had paid for them because of certain misrepresentations in the prospectus issued by the defendants. The action was for fraud. Among the misrepresentations alleged by Smith was that the prospectus stated that a Mr J J Grieves MP was a director of the company, whereas he had withdrawn his consent the day before the prospectus was issued.

Held – the statement regarding Mr Grieves was untrue but was not material to the claimant, because the

evidence showed that he had never heard of Mr Grieves. His action for damages failed.

Misrepresentation: negligent misrepresentation: principal but not agent liable to third party for agent's negligence

140 *Gosling* v *Anderson*, *The Times*, 8 February 1972

Miss Gosling, a retired schoolmistress, entered into negotiations for the purchase of one of three flats in a house at Minehead owned by Mrs Anderson. Mr Tidbury, who was Mrs Anderson's agent in the negotiations, represented to Miss Gosling by letter that planning permission for a garage to go with the flat had been given. Mrs Anderson knew that this was not so. The purchase of the flat went through on the basis of a contract and a conveyance showing a parking area but not referring to planning permission which was later refused. Miss Gosling now sought damages for misrepresentation under s 2(1) of the Misrepresentation Act 1967.

Held – the facts revealed a negligent representation by Mr Tidbury made without reasonable grounds for believing it to be true. Mrs Anderson was liable for the acts of her agent and must pay damages under the Act of 1967.

Comment (i) This action was against Mrs Anderson who was the other party to the contract. It was decided in *Resolute Maritime Inc and Another* v *Nippon Kaiji Kyokai and Others* [1983] 2 All ER 1 that no action is available against an agent such as Mr Tidbury under s 2(1) of the Misrepresentation Act 1967. Section 2(1) of the 1967 Act begins: 'Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto . . .'. Thus, the sub-section only applies when the representee has entered into a contract after a misrepresentation has been made to him by another party to the contract. Where an agent acting within the scope of his authority makes a representation under s 2(1), the principal is liable to the third party misled, but not the agent. The agent will be liable to the third party only if he is guilty of fraud or, under the rule in *Hedley Byrne* v *Heller* (1963) (see below), for negligence at common law. Here the principal will be liable vicariously *along with the agent* for the latter's fraud or negligence if the agent is acting within the scope of his authority.

(ii) As regards proving reasonable grounds, an expert will be expected to verify his statements in a professional way. However, those without relevant technical knowledge will often find that the court will accept a statement as made innocently if the maker of the statement had been induced to purchase the goods himself by the same statement.

Thus in *Humming Bird Motors* v *Hobbs* [1986] RTR 276 H was a young man whom the judge found to be an amateur doing a bit of 'wheeling and dealing' in the motor trade. He bought a car from a dealer who told him that the mileage recorded, 34,900 miles, was correct. H sold the car on to the claimants making the same statement, i.e. that the recorded mileage was, to the best of his knowledge and belief, correct. The claimants discovered that the vehicle had done 80,000 miles and tried to claim damages for negligent misrepresentation. The Court of Appeal decided that H was not negligent; he was an amateur and was merely repeating what he himself believed.

Misrepresentation: fraud: definition and burden of proof

141 *Derry* v *Peek* (1889) 14 App Cas 337

The Plymouth, Devonport and District Tramways Company had power under a special Act of Parliament to run trams by animal power, and with the consent of the Board of Trade (now the Department of Trade and Industry) by mechanical or steam power. Derry and the other appellants were directors of the company and issued a prospectus, inviting the public to apply for shares in it, stating that they had power to run trams by steam power, and claiming that considerable economies would result. The directors had assumed that the permission of the Board of Trade would be granted as a matter of course, but in the event the Board of Trade refused permission except for certain parts of the tramway. As a result, the company was wound up and the directors were sued for fraud. The court decided that the directors were not fraudulent but honestly believed the statement in the prospectus to be true. As Lord Herschell said: 'Fraud is proved when it is shown that a false representation had been made (*a*) knowingly, or (*b*) without belief in its truth, or (*c*) recklessly, careless whether it be true or false.'

Comment (i) This case gave rise to the Directors' Liability Act 1890 which made directors of companies liable to pay compensation for negligent misrepresentation in a prospectus, subject to a number of defences. The latest provisions are in the Financial Services and Markets Act 2000.

(ii) It will be noticed from this case that the mere fact that no grounds exist for believing a false statement does not of itself constitute fraud. There must also be an element of dishonesty which was not present in this case.

(iii) Fraud is the most difficult of all the forms of misrepresentation to prove. It must be proved beyond a reasonable doubt which is the criminal standard. The civil standard is proof on a balance of probabilities.

(iv) There is something of a problem with the meaning of the word 'recklessly' since it envisages a state of mind short of actual knowledge. It seems that the maker of the statement must be *almost sure* that it is false, but is nevertheless reckless and goes on to make it anyway.

Misrepresentation: the contribution of the tort of negligence

142 *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1963] 2 All ER 575

The appellants were advertising agents and the respondents were merchant bankers. The appellants had a client called Easipower Ltd who was a customer of the respondents. The appellants had contracted to place orders for advertising Easipower's products on television and in newspapers, and since this involved giving Easipower credit, they asked the respondents, who were Easipower's bankers, for a reference as to the creditworthiness of Easipower. The respondents said that Easipower Ltd was respectably constituted and considered good, although they said in regard to the credit: 'These are bigger figures than we have seen' and also that the reference was 'given in confidence and without responsibility on our part'. Relying on this reply, the appellants placed orders for advertising time and space for Easipower Ltd, and the appellants assumed personal responsibility for payment to the television and newspaper companies concerned. Easipower Ltd went into liquidation and the appellants lost over £17,000 on the advertising contracts. The appellants sued the respondents for the amount of the loss, alleging that the respondents had not informed themselves sufficiently about Easipower Ltd before writing the statement, and were therefore liable in negligence.

Held – in the present case the respondents' disclaimer was adequate to exclude the assumption by them of the legal duty of care, but, in the absence of the disclaimer, the circumstances would have given rise to a duty of care in spite of the absence of a contract or fiduciary relationship.

Comment (i) The House of Lords stated that the duty of care arose where there was 'a special relationship' requiring care.

The boundaries of the *Hedley* case are still not entirely clear but the requirement of a 'special relationship' between the maker of the statement and the recipient is an attempt to mark some boundaries. Can one complain, for example, if casual advice given on a train journey by a solicitor turns out to be erroneous? An extract from the judgment of Lord Devlin in the *Hedley* case is helpful. He said:

> . . . Payment for information or advice is very good evidence that it is being relied upon and that the informer or adviser knows that it is. Where there is no consideration, it will be necessary to exercise greater care in distinguishing between social and professional relationships and between those which are of a contractual character and those which are not. It may often be material to consider whether the adviser is acting purely out of good nature or whether he is getting his reward in some direct form. The service that a bank performs in giving a reference is not done simply out of a desire to assist commerce. It would discourage the customers of the bank if their deals fell through because the bank had refused to testify to their credit when it was good . . .

Thus, the solicitor's advice should not be actionable because there was no consideration to found contract liability and equally no 'special relationship' to found the tort claim. Of course, the absence of consideration and a contract prevents s 2(1) of the Misrepresentation Act 1967 from applying. However, the requirement of a 'special relationship' as a substitute for consideration brings the *Hedley* tort of negligence much closer to contract than the general law of negligence – a casual statement is not actionable, but there is obviously a claim by persons knocked over by a casual bad driver, who is, of course, the worst kind! (For further developments in professional liability see Chapter 21.)

(ii) The ease with which the duty to take care placed upon the bank was excluded in this case by the disclaimer was disappointing. However, such a disclaimer of negligence liability would, these days, have to satisfy the test of 'reasonableness' under the Unfair Contract Terms Act 1977 (see Chapter 15). It would seem that such a disclaimer would fall short of the reasonable expectations of those in business who naturally and reasonably expect that a bank will have taken proper care before giving a reference of this kind.

(iii) In this connection it was held in *Smith* v *Eric S Bush* [1987] 3 All ER 179 that it was unreasonable to allow a surveyor to rely on a general disclaimer of negligence where he had been asked by a building society to carry out a reasonably careful visual inspection of the property for valuation purposes (paid for by the would-be purchaser) when the valuer knew that the purchaser would be likely to rely on his report and not get another one. The house was purchased but, because of defects, turned out to be unfit for habitation. The surveyors when sued could not escape liability for damages on the basis of disclaimer.

The case suggests that in so far as such disclaimers are still used by professional persons they may not be effective, at least as regards ordinary consumers of professional services.

(iv) However, much would seem to depend on the sophistication of the person misled. In *McCullagh* v *Lane Fox*