CONTRACTS—MISTAKE—NON EST FACTUM—ERROR AS TO IDENTITY OF PARTIES

The House of Lords has by its recent decision in *Saunders* v. *Anglia Building Society*[1] effected radical changes in the English law of *non est factum.* Should Canadian courts follow the lead of the House of Lords, or should they continue to follow the earlier English decisions[2] upon which they have hitherto based their decisions?[3]

I

In the *Saunders* case, the appellant is the executrix of a 78-year-old woman who was persuaded by her nephew and a friend to give her interest in her house to the nephew. Unfortunately, the papers which they presented for her signature gave her interest to the friend, not the nephew, a fact she did not discover because she had broken her glasses. The transaction was of course voidable for fraud, but before she discovered the truth the respondent's predecessor had innocently advanced money to the friend on the strength of the documents so signed.

In the early centuries of pleading, one who had been sued on a deed could plead that the deed was not his (*non est factum*), and in time this plea was extended to some cases where he had in fact signed the deed, but in error. In later centuries the phrase *non est factum* has become divorced from the technicalities of pleading and the action of covenant (on a deed) and instead has just come to refer to mistake as to the nature of the transaction. The House of Lords quite rightly pointed out here that the deceased had not been under any mistake at all as to the nature of the transaction (but only as to the donee) and so could not rely upon the plea of *non est factum.*[4]

One would have thought that that would not have been an end to the question in the present case, for error as to the nature of the transaction is not the only kind of mistake for which the common law gives relief. There are also error as to the nature of the subject matter, and error as to the identity of the parties. And is not the present case one of error as to the identity of the parties? She intended to give her house to her nephew, not his friend, and that was the gist of her complaint in court. Could the appellants not have relied upon *Cundy* v. *Lindsay*[5] and the line of cases[6] stemming from it? The fact that the error occurred because she did not read a piece of paper should not change the basic nature of the error. One might object that the cases on error as to identity were cases of sales for value, not gratuitous transactions, but there does not appear to be any authority for such a distinction, and there is an impressive *dictum*[7] to the contrary.

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[1] [1970] 3 W.L.R. 1078, [1970] 3 All E.R. 961 (H.L.).

[2] *See especially Carlisle and Cumberland Banking Co.* v. *Bragg* [1911] 1 K.B. 489, 80 L.J.K.B. 472 (C.A.); and *Howatson* v. *Webb* [1908] 1 Ch. 1, 77 L.J.Ch. 32 (C.A.), *affirming* [1907] 1 Ch. 537, 76 L.J.Ch. 346.

[3] *See especially Prudential Trust Co.* v. *Cugnet* [1956] S.C.R. 914, 5 D.L.R. (2d) 1; *Dorsch* v. *Freeholders' Oil Co.* [1965] S.C.R. 670, 52 D.L.R. (2d) 658, *affirming* (1964) 48 W.W.R. 257 (Sask. C.A.); *J. R. Watkins Co.* v. *Minke* [1928] S.C.R. 414, *affirming* [1928] 1 W.W.R. 199 (Sask. C.A.).

[4] [1970] 3. W.L.R. 1078, at 1084A, 1086A.

[5] (1877) 3 App. Cas. 459, 47 L.J.K.B. 481, [1874-80] All E.R. Rep. 1149 (H.L.).

[6] *E.g., Ingram* v. *Little* [1961] 1 Q.B. 31, [1960] 3 All E.R. 332 (C.A.), though *cf. Lewis* v. *Averay* [1971] 3 W.L.R. 603 (C.A.).

[7] *Morgan* v. *Ashcroft* [1937] 2 All E.R. 92 at 99 A-B, [1938] 1 K.B. 49 (per Greene M.R.).

II

Therefore it is exceedingly difficult to disentangle the *ratio* from the *dicta* in the *Saunders* case. For a Canadian court that problem is not very serious, for anything said by the House of Lords is of course only persuasive, not binding. Should what was said there persuade?

Their Lordships made reference[8] to the history of *non est factum*, but we should presumably be governed by a consideration of the present-day rationale for the rules. And it is submitted that the reason any court enforces contracts and penalizes their breach is the defendant's voluntary assumption of duty, purchased freely by the plaintiff. Where a plea of mistake succeeds, it is because the defendant did not really consent. Whatever may be the precise delineation of the rules, that surely is their broad outline. Yet curiously enough none of the speeches in the House of Lords proceeded on anything like that basis. They dwelt at length on whether or not the deceased had been at fault in not reading or checking the documents, without any mention of whether she had really consented. And they spoke several times of the heavy onus resting on one who pleads *non est factum*, as though it were some special privilege, and as though a plaintiff pleading in contract was automatically entitled to relief.

In any event, the speeches in the House of Lords[9] explode the fallacy found in some of the cases[10] which would exclude consideration of "negligence" in the present context because there is no duty of care. *Charlesworth on Negligence*[11] and at least one Canadian judgment[12] point out (as does the House of Lords now) that "negligence" is used here as a synonym for carelessness, not the concept of the same name in torts law. But that is not to say that therefore negligence *is* relevant: that only proves that it may be. After all, the concept of duty of care in torts is just a mechanism to give a cause of action in certain circumstances and deny it in others. There is no logical reason why the same could not be the case here.

Indeed, there is much to be said for adopting such a rule with respect to the plea of *non est factum*. The speeches in *Saunders'* case[13] are all to the effect that the plea should only be open to persons guilty of no carelessness. But that again assumes that someone who commences a lawsuit in contract has a vested right to judgment, not to be lightly taken away. Why without more should negligence debar one from pleading *non est factum*? If the carelessness causes someone to change his position to his detriment, then one could see a strong argument for "estopping" the defendant from use of the plea of *non est factum*.[14] That seems to be a rule which is at the same time flexible, just, and logically tidy, but at least *one* of the Lords of Appeal in Ordinary[15] rejected such an idea in order to avoid the technicalities of estoppel. This of course falls into the very trap exposed with respect to negligence,

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[8] [1970] 3 W.L.R. 1078, at 1081E, 1085C, 1089.

[9] *Id.* at 1084-85, 1091G, 1101-2, 1088C.

[10] *Carlisle and Cumberland Banking Co.* v. *Bragg*, *supra*, n. 2, *per* Vaughan Williams and Buckley L.JJ.; *cf.* Locke J. in *Prudential Trust Co.* v. *Cugnet*, *supra*, n. 3.

[11] ss. 4-7 (4th ed. 1962).

[12] Cartwright J. (dissenting) in *Prudential Trust Co.* v. *Cugnet*, *supra*, n. 3, *approving* Anson, 28 L.Q.R. 190, 194.

[13] [1970] 3 W.L.R. 1078, at 1081-82, 1084-85, 1092, 1101-02, 1088B.

[14] *See* the Saskatchewan Court of Appeal in the *Cugnet* case (1955) 15 W.W.R. 385 (*affirmed supra*, n. 6).

[15] [1970] 3 W.L.R. 1078, at 1102D, *per* Lord Pearson; *cf.* 1085B *per* Lord Hodson.

namely the assumption that the "estoppel" spoken of here is one of the established kinds with its own technical rules, such as estoppel *in pais*.

Where there is no element of reliance or detriment or change of position, why should the defendant be prevented from pleading *non est factum* if his mistake was serious enough? He may have been negligent or careless or the author of the mistake, but what of it? If a busy man signs and mails out a large pile of papers without reading them and one of them is a draft contract which has got into the wrong pile, what possible ground in morals, logic, or social engineering can there be for immediately holding him to the ostensible contract thereby created? If the error is detected within a few days and no one is hurt, who is the worse off? Why give the plaintiff a windfall at the signer's expense?

If that is true of carelessness in signing, it must equally be true of ability to read, education, sight, and so forth. The House of Lords tried to draw a distinction[16] between ordinary persons and those with defective eyesight, education, or literacy. But history apart,[17] what significance can that have other than carelessness? (We of course omit consideration of the person who knew the contents of the document but misunderstood their effect, for that is just mistake as to law, not facts.[18])

III

The outstanding feature of the common law rules as to mistake is their strictness. Relief will be given for a mistake as to the identity of the parties, but not as to their attributes. Relief will be given for mistake as to the identity or existence of the subject matter, but not its quality. And similarly, the cases laid down the rule that mistake had to be as to the very nature of the transaction, not merely to its terms.[19] It is therefore perplexing to note that while every speech in the *Saunders* case is hostile to the plea of *non est factum* and wishes to restrict its field, this most important restriction is loosened. The Master of the Rolls has long advocated more flexible rules allowing the judges more discretion as to when to grant or withhold a cause of action,[20] even in the field of mistake in contract.[21] His formulation of a rule with the same aim in view for *non est factum* in the *Saunders* case[22] has found favor in most of the speeches on appeal from his decision.[23] The gist of the argument here is that relief should be given for mistakes which are serious or of more consequence to the parties, whether or not they involve a mistake as to the very nature of the transaction. In other words, the distinction between a conveyance outright and a mortgage[24] should not be great

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[16] *Id.* at 1081-82, 1091, 1086C; *but cf.* 1098 *ff.*

[17] *Cf. Thoroughgood's Case* (1582) 2 Co. Rep. 9a, 76 E.R. 408 on illiteracy.

[18] [1970] 3 W.L.R. 1078, at 1082C; *cf. Prudential Trust Co.* v. *Forseth* [1960] S.C.R. 210, 30 W.W.R. 241.

[19] *Blay* v. *Pollard* [1930] 1 K.B. 628, 99 L.J.K.B. 421, [1930] All E.R. Rep. 609 (C.A.); *Dorsch* v. *Freeholders' Oil Co., supra*, n. 3.

[20] *See* Morris, *Palm Tree Justice in the Court of Appeal*, (1966) 82 L.Q.R. 196.

[21] *Solle* v. *Butcher* [1949] 2 All E.R. 1107, 1118-20 (C.A.); *Rose* v. *Pim* [1953] 2 Q.B. 450; [1953] 3 W.L.R. 497, 503-05, [1953] 2 All E.R. 739 (C.A.); *cf. Kiriri Cotton Co.* v. *Dewani* [1960] A.C. 192, [1960] 2 W.L.R. 127, [1960] 1 All E.R. 177 (P.C.).

[22] [1969] 2 Ch. 17, [1969] 2 W.L.R. 901, [1969] 1 All E.R. 1062 (C.A.), *sub. nom. Gallie* v. *Lee, reversing* [1968] 2 All E.R. 322, [1968] 1 W.L.R. 1190.

[23] [1970] 3 W.L.R. 1078, at 1082F, 1084C-D.

[24] *Cf. Howatson* v. *Webb, supra*, n. 2.

enough for relief, while the difference between a note for a pound and a note for ten thousand should be.

The trouble with that is that it is really a reincarnation of Pothier's old test of whether I would have made the contract anyway had I known the true facts.[25] In the vast majority of cases the answer will be no, and in *all* cases that will be the effect of my testimony. That is asking the court to speculate after the event as to someone's state of mind in an hypothetical situation. The task is almost always impossible, and in practice it will lead to the court's asking whether or not it wants to enforce the contract. Once again would the cadi sit under the palm tree.[26]

Now it may be that the old test of how great was the mistake as to the nature of the transaction, was not happily expressed by using the words "character" and "contents."[27] And it may be that in some cases the distinction had been applied with too much regard to theory and form and not enough to the real nature of the transaction at hand.[28] But that is not to say that there was anything wrong with the basic idea. If the distinction is to be as to how basic or fundamental was the mistake, and the House of Lords seem to feel that that is still the idea,[29] then surely the test must be what it has always been. The trouble with the Master of the Rolls' test is not just that it would introduce too much uncertainty and judicial discretion, though those are serious enough drawbacks, the real objection is that we are here dealing with contract, which is liability based on consent. And when we look to consent we are not asking what the defendant *would have* consented to, but what he *did* consent to. Leaving aside transactions whose basic nature is disguised (such as a mortgage disguised as a sale and option to repurchase), there is a very real sense in which anyone who enters into a contract is giving his consent to the basic nature of the transaction. If one makes changes in it, there must be some point at which one can say that it is no longer the same transaction, but something completely different, something he did not consent to, and that is a difference in kind, not in quality. There is a very strong analogy here with the rules for mistake as to the subject matter, as expounded in *Bell* v. *Lever Bros.*[30] and the cases preceding it.[31] A lease of mineral rights is still a lease whether or not the bonus or delay rentals are large or small, and whatever may be the obligation, or lack of it, to drill. But however similar the consideration, it is just not the same thing as a sale of mineral rights.

Therefore, it is submitted that the *Saunders* case does far more harm than good, and that Canadian courts should follow their own applica-

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[25] *See* (as it applies to error as to the identity of a party) the test of materiality in s. 19 of his *Traite des Obligations*, quoted in *Smith* v. *Wheatcroft* (1878) 9 Ch.D. 223, 230; 47 L.J.Ch. 745, [1874-80] All E.R. Rep. 693; *Gordon* v. *Street* [1899] 2 Q.B. 641, 69 L.J.Q.B. 45 (C.A.); *Phillips* v. *Brooks Ltd.* [1919] 2 K.B. 243, 88 L.J.K.B. 953, [1918-19] All E.R. Rep. 246; *Lake* v. *Simmons* [1927] A.C. 487, 96 L.J.K.B. 621, [1927] All Rep. 49 (H.L.); *Sowler* v. *Potter* [1940] 1 K.B. 271, [1939] 4 All. E.R. 478. *But cf. Boulton* v. *Jones* (1857) 2 H. & N. 564, 157 E.R. 232, 27 L.J.Ex. 117.

[26] *Supra*, n. 20.

[27] *See* Lord Wilberforce's comments on *Howatson* v. *Webb* [1970] 3 W.L.R. 1078 at 1090 A-B.

[28] *E.g.* a guarantee vs. an endorsement in *Foster* v. *Mackinnon* (1869) L.R. 4 C.P. 704, 38 L.J.C.P. 310.

[29] [1970] 3 W.L.R. 1078, at 1082H, 1084D, 1091A, 1103, 1086D, 1088A.

[30] [1932] A.C. 161, [1931] All E.R. Rep. 1, 101 L.J.K.B. 129 (H.L.).

[31] *E.g. Couturier* v. *Hastie* (1856) 5 H.L. 673, 10 E.R. 1065, 25 L.J.Ex. 253, [1843-60] All E.R. Rep. 280 (H.L.); *cf. Scriven Bros. & Co.* v. *Hindley & Co.* [1913] 3 K.B. 564, 83 L.J.K.B. 40.

tion of the earlier English cases, and the Supreme Court of Canada decisions,[32] rejecting the House of Lords' deviations in the manner they rejected their deviations with respect to the effect of income tax on injury awards,[33] and exemplary damages.[34]

—J. E. COTE*

[32] *Supra*, n. 12, 18.

[33] *British Transport Commission* v. *Gourley* [1956] A.C. 185, [1955] 3 All E.R. 796 (H.L.), *rejected* in *R.* v. *Jennings* [1966] S.C.R. 532.

[34] *Rookes* v. *Barnard* [1964] A.C. 1129, [1964] 1 All E.R. 367 (H.L.), *rejected* as to exemplary damages, in *Gouzenko* v. *Lefolii* [1967] 2 O.R. 262, 268 (C.A.) (modified on other grounds, [1969] S.C.R. 3); Spence J. (dissenting on other grounds) in *McElroy* v. *Cowper-Smith* [1967] S.C.R. 425; *McKinnon* v. *F. W. Woolworth Co.* (1968) 70 D.L.R. (2d) 280, 289 (Alta. App. Div.).

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THE DOWER ACT—DISPENSING WITH CONSENT—
Truesdale v. *Truesdale* (unreported)

This is an application by the husband for an order dispensing with the wife's consent to the sale of the homestead quarter section in Alberta. The application was made before His Honour Chief Judge Feir, in Lethbridge, and was opposed by the wife. The parties had been married about seven years but at the time were living apart under a separation agreement.

After hearing *viva voce* evidence, the learned Judge found that blame for the break-up of the marriage rested "in much greater degree upon the husband," and that the wife "had gone the second mile in most instances to save her marriage." The homestead was worth $7,690.00. The order was granted and the wife was awarded $1,000.00 for the withdrawal of her right to withhold consent. The decision was upheld on appeal by Mr. Justice Riley and the Alberta Court of Appeal. One Judge in the appeal court said that the wife was fortunate to get $1,000.00. So, in effect, a wife who has been a good wife is entitled to about one-seventh of the sale price of the homestead, on these facts.

Suppose things are changed somewhat. The wife has not been a good wife and has caused the separation. The husband sells the homestead, without her consent or a dispensing order, for the said sum. Under Section 12 of the Dower Act the wife is entitled to recover one-half, namely, $3,845.00. Perhaps this is some indication that the Legislature intended the dower interest to be one-half of the sale price or true value.

The good wife gets one-seventh and the other kind could get one-half.

—T. J. COSTIGAN, Q.C.*

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