This test would cover the case of the husband who attacks his wife with an iron bar because he is about to become the recipient of a bucket of cold water. Such a commonsense approach would not be beyond any jury. Moreover, its adoption would mean that the important decision in *The Queen v. Howe*[21] would remain unscathed.

Whether the interpretation of the court in *The Queen v. Tikos*[22] will meet with the approval of the High Court must await decision at a later date. It is worth noting, however, that Tikos sought special leave to appeal to the High Court. The High Court,[23] in refusing special leave to appeal, stated that the reason for the refusal was that there was no evidence on which a jury could have put such a construction as to entitle the accused either to an acquittal or to a verdict of manslaughter. This refusal of leave to appeal is reported in a brief paragraph at the end of the report of *The Queen v. Tikos* (No. 2).[24] Whether the mention of this reason indicates a rejection of the reasoning of the Supreme Court of Victoria on an *expressio unius* interpretation must await decision on another day.

J. J. GOODMAN

PORTER v. LATEC FINANCE (QUEENSLAND) PTY. LTD.[1]

Mistake—Recovery of money paid—Who paid money—Materiality of mistake—Fraudulent misrepresentation—Effect of fraudulently signed mortgage—Mistake of fact.

This was an action brought by the respondent in the Supreme Court of Queensland to recover from the appellant money which it was alleged the respondent's solicitors had paid to the appellant under a mistake of fact.

The complicated facts may be briefly stated as follows: L. H. Gill whose father, X, owned property mortgaged with Y, fraudulently represented himself to be the owner of that property to the appellant in order to borrow money from him on the security of the land. Porter agreed and paid off X's mortgage to Y, the latter handing Porter the documents of title and a mortgage discharge. L. H. Gill later approached the respondent for a larger loan by way of mortgage over the land. The respondent agreed and handed £3,000 to their solicitors, who then, on instructions of L. H. Gill and the respondent, paid Porter the amount which he (Porter) had advanced to Gill, Porter undertaking to uplift the mortgage discharge and the title documents from the office of the Registrar of Titles to hand them to the respondent's solicitors. Gill gave the respondent a mortgage over the land and a bill of sale over certain chattels on the land. The frauds were discovered, Gill was arrested and convicted, but, as he was a man of straw, Latec Finance was unable to recover the money advanced. They then sued Porter for

21 *Ibid.* 753, *Ibid.* 448. 22 [1963] V.R. 306.
23 Dixon C.J., Kitto, Menzies, Windeyer and Owen JJ.
24 [1963] V.R. 306.
1 38 A.L.J.R. 184. High Court of Australia; Barwick C.J., Kitto, Taylor, Windeyer and Owen JJ.

> money had and received by the defendant to the use of the plaintiff, such sum having been paid . . . under a mistake of fact.[2]

Instead of dealing with the matter in the usual way, a case was stated for the opinion of the Full Court of the Supreme Court of Queensland, from the decision of which the appellant took an appeal to the High Court of Australia.[3] Here by a 3-2 majority, the decision of the lower court was reversed, the court holding that Gill had in fact borrowed money from both the appellant and the respondents, and that the respondent's solicitors had paid the money to Porter on the instructions of Gill, thereby discharging Gill's indebtedness to Porter, and that accordingly the action failed.

Although the majority held that this followed from the facts stated in the case, Barwick C.J. and Owen J., also reached this conclusion on different grounds. The minority went beyond the case stated and considered the question raised without reference to the agreed facts.

On the first question, whether Gill had in fact entered into any loan agreements at all, Barwick C.J. and Owen J.[4] were clearly of the opinion that, on the facts, such was the case, while Kitto and Windeyer JJ. disagreed.[5]

Barwick C.J. supplied a further reason why this was the correct result when he referred to *Fung Ping Shan v. Tong Shun*,[6] by which he considered himself bound and where it is stated that:

> A person who signs, seals and delivers a deed of covenant cannot avoid liability under the deed by signing a name which he represents as, but which is not in fact, his own.[7]

If, as is the usual procedure in Victoria, the mortgages given by Gill, were in the form of a deed, this statement clearly applies and loan agreements were concluded between the parties.[8]

Kitto J. held that Gill did not owe the appellant or the respondent any money lent because:

> In my opinion the fraud which Gill practised upon the respondent was so fundamental to the transaction between them that no contract of loan ever came into existence between them.[9]

2 38 A.L.J.R. 194.

3 Several judges commented on the form which the parties had selected. Taylor J. 38 A.L.J.R. 191, held that that form prevented him from considering the facts in the light of such decided cases as *Phillips v. Brooks Ltd.* (1919) 2 KB 243; *Ingram v. Little* (1961) 1 Q.B. 31, etc. Windeyer J. 38 A.L.J.R. 192 said that it was unfortunate that the parties had adopted the medium of a special case.

4 38 A.L.J.R. 185 and 195. 5 *Ibid.* 190 and 193.

6 (1918) A.C. 403, in the Privy Council, consisting of Lord Parker of Waddington who delivered the judgment, Lord Shaw of Dunfermline and Lord Sumner. This was a matter where property had been bought by a Chinese whose name translated in English was Tong Shun. The name of his uncle also translated to this, although the Chinese characters representing the names were different. The nephew signed his uncle's name to the documents in Chinese characters, to enable him to commit frauds at a later stage. 7 *Ibid.* 407.

8 It should be noted that Barwick C.J. at 38 A.L.J.R. 185 states 'that the borrower should have given a false identity and signed by another name, even in the case of a speciality, would not prevent the writing or the deed from being operative against the borrower personally'. He thus extends the ratio of the case quoted in support of his decision to include 'writing'. 9 38 A.L.J.R. 188.

This conclusion is explained by him when he states that the transaction between the parties was not of the *Phillips v. Brooks Ltd.*[10] type. By this he apparently means a case where a contract is entered into between A. and B. *inter praesentes*, B after the contract representing himself to be C in order to induce A to part with the property earlier than was intended by A. If this is so, clearly the present matter does not fall within that type, because the fraudulent misrepresentation was here made before the contract was entered into.

He finds that there was no loan on two grounds, namely that the grant of the loan to C was implicitly, if not expressly, on the condition precedent that the recipient was identical with the registered proprietor of the land,[11] and that on either of the theories existing in the law with regard to the test to be applied in deciding whether impersonation by one party to a purported contract makes this void or voidable, the result must be that there was no contract.[12]

The theories mentioned in (b) are both derived from *Ingram v. Little*[13] and may be stated as:

(i) To whom ought Gill have understood the respondent to have been prepared to advance the money? The answer being: To X, the true owner of the land.[14]

(ii) Was Gill's assertion that he was the proprietor, misrepresenting his identity, fundamental to the supposed contract? The answer given is: Yes, because unless Gill and the proprietor were identical no security could be given for the loan, when the respondent would not have advanced the money.[15]

[10] [1919] 2 K.B. 243.

[11] 38 A.L.J.R. 190; Kitto J. seems to be prepared to make this implication of a condition precedent, thus advancing an argument similar to that advanced in the joint judgment of Dixon and Fullager JJ. in *McRae v. Commonwealth Disposal Commission* (1951), 84 C.L.R. 377, 409, that the parties contracted on the condition that a certain state of facts should be a condition precedent to the coming into existence of the contract, the special fact here being that Gill was the owner of the property. This view was also supported by Lord Atkin in *Bell v. Lever Brothers Ltd.* (1932) A.C. 161, 225, where he agreed that few people would dispute the correctness of the formulation used during argument by Sir John Simon that: 'Whenever it is to be inferred from the terms of a contract or its surrounding circumstances that the consensus has been reached upon the basis of a particular contractual assumption, and that assumption is not true, the contract is avoided: *i.e.*, it is void *ab initio* if the assumption is of a present fact and it ceases to bind if the assumption is of a future fact'. This decision of Kitto J. is surprising because it means that the parties actually succeeded in entering into a contract, subject to that condition, something which he denies throughout his judgment.

[12] 38 A.L.J.R. 190.

[13] [1961] 1 Q.B. 31.

[14] *Ibid per* Pearce L.J. at 61. 'Each case must be decided on its facts: The question in such cases is this. Has it been sufficiently shown in the particular circumstances that, contrary to the prima facie assumption, a party was not contracting with the physical person present to whom he uttered the offer, but with another individual whom (as the other party ought to have understood) he believed to be the physical person present.' See also *per* Sellers L.J. at page 55, to the same effect.

[15] *Ibid. per* Devlin L.J. at 64, when he asks with whom did she intend to contract: 'Was it with the person to whom she was speaking or was it with the person whom he represented himself to be?'

The test under (i) is expressed in 'subjective' terms, inquiring into the knowledge of Gill, however the test suggested by Pearce L.J. in *Ingram's Case*[16] is in 'objective' terms. It is there, however, pointed out by the Lord Justice that both tests, in cases like the present, produce the same result. So, that, based on the consideration that the rogue knows that he is a rogue the question 'What did the promisor intend when he made the promise?' ought to receive the same answer as the objective question 'How ought the promisee have interpreted the promise?'[17]

Windeyer J. states that he agrees with the conclusion of Kitto J., holding that no contract had ever been concluded between the parties, because Gill could not have accepted the offers made by the appellant and the respondent, which he knew were meant to be addressed to X.[18]

He also considered it not necessary to enter into the questions of philosophy and legal theory that surround the real or supposed distinction between unilateral mistake as to the identity of a person and a unilateral mistake as to his attributes.[19]

Clearly, on the view that Gill was unable to accept the offers of Porter and Latec Finance addressed to X, such discussion is superfluous.

The second question to be decided was whether or not Latec Finance through their solicitors paid the money on their own behalf to Porter.[20]

Barwick C.J. provides three answers to this question, all in favour of Porter. The special case meant that the solicitors chose to pay on the borrower's (Gill's) behalf. He points out that

> The question, for the purposes of the respondent's action, is not whose money was it that was used for the payment, but on whose behalf was it paid.[21]

To that question the mistake of both the appellant and the respondent as to Gill's identity was immaterial and did not affect the analysis of the transaction made by him.

Secondly, even if the solicitors of the respondent had only obtained Gill's concurrence to payment being made on Latec's behalf to obtain the discharge of the encumbrance held by Porter and possession of the certificate of title, *Aiken v. Short*[22] constrained him to hold that such payment was made as agent for Latec Finance.[23]

Aiken v. Short[24] was a case where a person owed a debt as security for which he gave an equitable mortgage over an interest which he thought he owned in the estate of a deceased person. He then assigned his supposed interest in that estate to a bank, subject to the equitable charge. The bank wanted to sell the interest unencumbered and agreed with the debtor to pay off the equitable charge. After having so paid, it was discovered that the supposed interest did not exist, for the will which bequeathed it had been revoked by a later one under which the

16 (1961) 1 Q.B. 31. 17 *Ibid.* 18 38 A.L.J.R. 193.
19 *Ibid.* 192. 20 *Ibid.* 186. 21 *Ibid.* 186.
22 (1856), 1 H. and N. 210; 156 E.R. 1180. 23 38 A.L.J.R. 186.
24 (1856) 1 H. and N. 210.

debtor took nothing. The bank then sued the person who had held the equitable charge for the amount it had paid him. The court held that the bank's mistaken belief that by making payment it was freeing the property in which it had an interest from a charge over it was not such a mistake as to entitle it to succeed in the action. Bramwell B. said that the mistake must be

> as to a fact which if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money.[25]

Barwick C.J. rejected the view of the Supreme Court of Queensland that because Gill was using a false name his authority to Latec's solicitors could be disregarded, holding that this authority would have been an answer by the solicitors if Gill ever had asserted their lack of authority to pay on his behalf, even after the fraud was discovered.[26]

Thirdly, even if the correct construction of the facts should be that payment had been made on behalf of the respondent, they still could not recover the money. Two reasons were advanced by him for this conclusion.

Firstly, if the payment was made on behalf of the respondent, it was made to secure themselves against what they believed to be a good security in favour of Porter. Such a payment was not a matter of obligation but purely one of convenience, and the identity of the borrower was not fundamental to this.[27]

Also, Latec Finance obtained by the payment what it sought to obtain, although due to the mistaken identity, what it got was not of the significance which it thought it had, an analysis which makes *Aiken v. Short*[28] very pertinent. He rejected the idea advanced by the Supreme Court of Queensland that there was a contract between the appellant and the respondent supported by good consideration, whereupon *Aiken v. Short*[29] was inapplicable.[30]

He concluded this part of his argument by stating that it is preferable 'to test the matter by determining whether the mistake is fundamental

[25] *Ibid.* 214. [26] 38 A.L.J.R. 186.

[27] *Ibid.* 186. Barwick C. J. states this as follows: 'For its own protection, on the assumption that it made the payment on its own behalf, it decided that it would pay the borrower's debt, believing itself, of course to be able to recover the amounts so paid from him as part of the total loan. This was not a payment in which the identity of the borrower was fundamental in the sense of the case law,' and 'that belief (i.e. the belief that it would be a good security) was induced by its mistake as to the identity of the borrower. But this mistake did not enter into the transaction with the appellant, though it would be a motivating fact in the respondent's decision to make the payment to the appellant.' The Chief Justice therefore clearly distinguishes between the two transactions as follows: the one between Gill and Porter to which the mistaken belief might be fundamental, but which nevertheless culminated in a loan between them, as compared to the one between the appellant and the respondent to which the mistaken belief was not fundamental.

[28] (1856), 1 H. and N. 210; 156 E.R. 1180. [29] *Ibid.*

[30] 38 A.L.J.R. 187. The Supreme Court of Queensland based this on the thought that the payment of money which the respondent was not obliged to make to the appellant was the consideration for the appellant agreeing to hand to the respondent the documents of title immediately upon these being uplifted from the office of the Registrar of Titles.

to the transaction, properly identifying the transaction and the relationship of the mistake to it',[31] thus expressing his preference for the first conclusion reached by him.

Kitto J. rejected the argument accepted by Barwick C.J. that what Latec paid Porter, Latec paid voluntarily though under a mistake of fact, and that money so paid was irrecoverable unless the payer would have been liable to pay it to the payee if the fact had been as supposed,[32] holding that the law was different when the mistake was fundamental to the payment, even though the payer would not have been liable to pay if the supposed fact had existed. For this conclusion he distinguishes *Aiken v. Short*[33] from the present matter on the basis that there:

> The only facts that were fundamental to the payment were that the debt was owing and that the bank had the debtor's authority to pay it on his behalf, so that the payment effected exactly what it was intended to effect, namely the discharge of the debt. As to these facts there was no mistake. The present case is exactly the reverse. The supposed debt did not exist, and the debtor had not authorized the respondent to pay anything on his behalf. Consequently the payment completely failed of its purpose.[34]

Windeyer J. held that the money was paid by Latec Finance to Porter, being unable to accept the proposition that the payment was made on behalf of Gill, because the solicitors or the respondent thought that they were acting for the owner of the property. He pointed out that 'they never had any instructions from X. He was never their client'.[35]

As the case stated relied on payment having been made under a

[31] 38 A.L.J.R. 187. See also n. 27. [32] *Ibid.* 188.

[33] (1856), 1 H. and N. 210; 156 E.R. 1180. He referred to *Morgan v. Ashcroft* [1938] 1 K.B. 49, 97, 103 and *Larner v. London County Council* [1949] 2 K.B. 683. An article by Sir Percy Winfield entitled 'Mistake in Law' appearing in (1943) 59 *Law Quarterly Review* 327, was also referred to. Here on page 338 by way of conclusion to the preceding discussion of cases the following statements occur: 'At Common law, mistake of fact is a ground of relief if it is fundamental (or essential),' and 'whether it is fundamental is a question which must depend on the facts of each case: It may be fundamental if, had the facts been as supposed there would have been a legal obligation to do the act that was done in consequence of the mistake. But it does not follow that in such circumstances, the mistake is always fundamental . . . Conversely, a mistake of fact may be fundamental although, if it were true, there would be no legal obligation to do the act done in consequence of it: (the case of . . . error in persona put by Greene M.R. in *Morgan v. Ashcroft supra*).' The statement here referred to appears in [1938] 1 K.B. 49, 66 and reads: 'I am disposed to think that they (the observations of Bramwell B in *Aiken v. Short*) cannot be taken as an exhaustive statement of the law but must be confined to cases where the only mistake is as to the nature of the transaction. For example, if A makes a voluntary payment of money to B under the mistaken belief that he is C, it may well be that A can recover it. This statement seems hardly applicable to the present matter, because between the parties there was no such mistaken belief. The matter and the cases referred to have been discussed in: Cheshire and Fifoot, *Law of Contract,* (6th Ed.) 566 ff. where the conclusion is reached that: 'a purely voluntary payment may be recovered if only it has been induced by a mistake regarded by the court as sufficiently serious in character.'

[34] 38 A.L.J.R. 189. This analysis proceeds on the basis that there was no debt. If the conclusion of Barwick C.J. is correct, as it is submitted it is, *i.e.* that there was a debt, there does not seem to be any difference between this matter and *Aiken v. Short,* and thus any of the refinements (to overcome the harshness of that case?) are inapplicable. [35] 38 A.L.J.R. 194.

mistake of fact, the question was: 'What was the mistake relied on?' In argument, it was assumed that it was a mistake as to identity,[36] but as Windeyer J. pointed out 'to recover in an action for money had and received the plaintiff must establish a mistake operative as between himself, the payer, and the defendant, the payee'.[37]

But the matter here was not such a mistake, it was not a 'case of unilateral mistake as to the party to a supposed contract: it is a case of a common and fundamental mistake as to the existence of a subject matter'.[38]

The mistake here being the common belief of the parties that the appellant was a creditor of X, such debt of X being secured by a legal valid mortgage.[39] With respect, as was pointed out by Barwick C.J., 'that mistake did not enter into the transaction with the appellant, though it would be a motivating fact in the respondent's decision to make the payment to the appellant'.[40]

Windeyer J. also held that the respondent could succeed in its action because:

> using words used by Dixon and Fullagar JJ. in *McRae v. Commonwealth Disposals Commission,* it is a 'case in which the parties can be seen to have proceeded on the basis of a common assumption of fact so as to justify the conclusion that the correctness of the assumption was intended by both parties to be a condition precedent to the creation of contractual obligations'.[41]

The approach of both Kitto and Windeyer JJ. would appear unsatisfactory because it overlooks the agreed facts between the parties and it puts on those facts a construction which is artificial when they hold that no money was ever lent to Gill by either of the parties, this being contrary to a common sense interpretation of the known facts.

It should be noted that Windeyer J. also held that Porter obtained an equitable charge over X's land when he paid off the latter's mortgage and that which occurred between the appellant and the respondent did not give the benefit of that charge to the respondent, thus apparently leaving it in Porter.[42] From this conclusion three possibilities follow: the charge may have remained in Porter who could enforce it against X; Porter may have come under an equitable obligation to assign it to the

36 *Ibid.*

37 *Ibid.* Windeyer J. quotes *Weld-Blundell v. Synnot* (1940) 2 K.B. 107, in support for this. Here Asquith J. reviewed the prior authorities establishing this proposition with a view to discover the correct meaning of the phrase 'as between'.

38 *Ibid.* 39 *Ibid.* 194. 40 *Ibid.* 187.

41 *Ibid.* 194. Here Windeyer J. seems to say that the dealing between the parties was of a contractual nature, a conclusion implicitly supported by Kitto J. *ibid.* 188 but rejected by Barwick C.J. *ibid* 187, Taylor J. *ibid* 192 and Owen J. *ibid* 196.

42 38 A.L.J.R. 193. The law as stated by Windeyer J. is supported by *Butler v. Rice* (1910) 2 Ch. 277 and 27 *Halsbury's Laws of England* (3rd ed.) 270 Para. 497. 'Although there is no question of salvage, and even though a mortgagor is not a party, a stranger who pays off a mortgage is presumed to keep it alive for his own benefit, and effect is given to this intention. The result is the same notwithstanding that he contemplated taking a different security, in which case he is entitled to the benefit of the old mortgage until the new security is given.'

respondent; or the charge may have been lost, thus ultimately benefiting X.

No answer is suggested as to which of these possibilities is correct, yet common sense would lead to a conclusion that, on the decision reached by the court, Porter must be held to have come under an obligation to assign the charge to the respondent.[43]

From the foregoing it appears that the following conclusions may be drawn. The medium of a case stated may be dangerous in its use because statements may be made in it which describe an action by the use of 'words which assume that it has legal efficacy corresponding to its appearance, notwithstanding that the very question whether it has that legal efficacy is in dispute',[44] or because it prevents the consideration of all the relevant facts.[45] Secondly, it would appear that there is an area of fact in cases of this type where a fraudulent person is present purporting to make a bargain with another and that circumstances may justify a finding that, notwithstanding some fraud and deceit, the correct view may be that a bargain was struck with the person present, or on the other hand they may equally justify a finding the other way.[46] Finally, it may seem that the best approach in such cases is to identify each transaction separately and then to determine the relationship of the mistake to the transaction, so testing whether the mistake is fundamental to the transaction.[47]

J. P. M. DE KONING

McHALE v. WATSON[1]

Trespass to the Person—Intent or Negligence—Onus of Proof; Original Jurisdiction of the High Court.

This was an action commenced in the original jurisdiction of the High Court[2] by Susan McHale, a resident of South Australia, and an infant, who, through her father as next friend, sued Barry Watson, also an infant, his father and his mother, all residents of New South Wales. The action was to recover damages for personal injuries suffered by the plaintiff arising out of events which occurred in January, 1957. The defendant Barry Watson, aged twelve years, threw a sharpened piece of metal, described as a dart, which struck Susan McHale, who was almost ten years of age, in the right eye and resulted in serious consequences to her. The question of limitations of actions did not arise, the delay being no bar to an action by an infant.

43 Windeyer J. is the only judge who refers to this point. He comes to the conclusion that Porter should receive the certificate of title from the respondent who must must also disclaim in favour of Porter any rights which he (the respondent) might have acquired. As the majority decided the suit in favour of the appellant, it seems logical that Porter ought to be ordered to assign his equitable charge to the respondent.

44 38 A.L.J.R. 187 *per* Kitto J.

45 *Ibid.* 191 *per* Taylor J.

46 *Ingram v. Little* [1961] 1 Q.B. 31, 50 *per* Sellers L.J.

47 38 A.L.J.R. 187 *per* Barwick C.J.

1 (1964) 38 A.L.J.R. 267 High Court of Australia; Windeyer J.

2 By section 75(iv) Constitution of Australia: