honesty[12] and "there is no way of combining an innocent principal and agent so as to produce dishonesty".[13]

R. HATCH

[12]*Derry v. Peek* (1889) 14 App. Cas. 337, 374, per Lord Herschell.
[13]Devlin J., quoted by Birkett L.J. [1952] 1 T.L.R. 82, 89. "It is difficult to see how two whites can make one black": Salmond on *Torts* (10th edn. 1945), 584.

CONTRACT—MISTAKE—NON-EXISTENT SUBJECT-MATTER

MISTAKE is one of the most difficult branches of the law of Contract, and mutual mistakes as to the existence of subject-matter is one of the least explored. Facts grounding such a case are likely to be rare, and the recent decision of the High Court in *McRae and Anor. v. Commonwealth Disposals Commission and Ors.* [1951] A.L.R. 771 is a welcome addition to the scanty law on the subject.

Most of the text writers baldly state that mutual mistake as to the existence of subject-matter avoids a contract, citing *Couturier v. Hastie.*[1] There A sold to B a cargo of Indian corn which both supposed to be on its way from Salonica to England; it had in fact, before the date of sale, become so heated and fermented that it had to be unloaded and sold at Tunis. In an action by A for the price, the trial Judge (Martin B.) directed a verdict for the defendant. The Court of Exchequer (Parke B. and Alderson B., Pollock C.B. dissenting) found for the plaintiff, the Court of Exchequer Chamber and the House of Lords, for the defendant. The decision has usually been regarded as based on the view that the contract was void.

In the instant case, the Disposals Commission invited tenders for the purchase of "an oil tanker lying on Jourmaund Reef . . . said to contain oil". A tender was accepted, and the purchaser incurred considerable expense in preparing to locate and salvage the vessel. It was afterwards discovered that no such tanker existed. This was an action for breach of a contract to sell a tanker lying at a particular place, for a fraudulent representation that there was a tanker at that place, and for a negligent failure to disclose that there was no tanker at that place after that fact became known to the Commission.

Webb J. considered that *Couturier v. Hastie* compelled him to hold the contract void on the ground of mistake. But he held the defendants liable in deceit.

On appeal to the Full Court, Dixon and Fullagar JJ., in a joint

[1](1852) 8 Ex. 40, (1853) 9 Ex. 102, (1856) 5 H.L.C. 673.

judgment prepared by the latter, took the view that *Couturier v. Hastie* did not decide that such a contract is void. That question did not arise. The case turned on the construction of the contract, and was really so treated throughout. The plaintiff's contention that all that the contract required of him was to hand over the shipping documents, was rejected: it was held that the purchaser was not bound to pay on the delivery of the documents, but only to pay on delivery of the documents if they represented at the time of making the contract goods in existence and capable of delivery. The consideration to the purchaser having failed, he was not obliged to pay the price.

The question whether the contract was void *would* have arisen, their Honours continued, if the action had been, not by the vendor for the price, but by the purchaser for damages for non-delivery. Then the question would have been, Was the contract subject to an implied condition precedent that the goods existed? Prima facie, there was no such condition, the position being simply that the vendor *promised* that the goods *were* in existence. In the instant case, it was impossible to imply any such condition precedent:

"The buyers relied upon, and acted upon, the assertion of the seller that there was a tanker in existence. It is not 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 obligation. The officers of the Commission made an assumption, but the plaintiffs did not make an assumption in the same sense. They knew nothing except what the Commission had told them. If they had been asked, they would certainly not have said: 'Of course, if there is no tanker, there is no contract.' The only proper construction of the contract is that it included a promise by the Commission that there was a tanker in the position specified. The Commission contracted that there was a tanker there."[2]

Further, even if *Couturier v. Hastie* and the instant case *should* be treated as examples of mistake, the Commission could not here rely on any mistake as avoiding the contract, because "a party cannot rely on mutual mistake where the mutual mistake consists of a belief which is, on the one hand, entertained by him without any reasonable ground, and, on the other hand, deliberately induced by him in the mind of the other party".[3]

Since the plaintiffs succeeded in Contract, it was unnecessary to

[2][1951] A.L.R. 771, 780. [3]*ibid.* 779.

decide on the two remaining causes of action. But grave doubts were expressed as to whether either would have succeeded.

As regards damages, the plaintiffs claimed some £10,000 for expenditure incurred, and some £250,000 as the value of an "average sized tanker" lying on the reef plus oil. Webb J.'s estimate was more moderate: he allowed them £756 10s., on the basis that they were justified in taking steps to see whether there was a tanker in the locality specified, but not in doing anything further.

Dixon and Fullagar JJ. first stated that no assessable loss had resulted from non-delivery *as such*. If there had been nothing more than a promise to deliver a tanker and a failure to do so, the plaintiffs could have recovered only nominal damages in addition to the price paid. But there was much more than that. It was unreal and misleading to regard the case as a simple one of breach of contract by non-delivery of goods. The practical substance of the case lay in this: the Commission had promised that there was a tanker; relying on this promise, the plaintiffs had incurred expenditure; there was in fact no tanker. They were entitled to recover this expenditure, assessed at £3,285, and including purchase money paid, loss of revenue of the purchaser's vessel used in the search for the tanker, coal and stores used on that vessel, and expenses and remuneration of persons employed in the search.

McTiernan J.'s judgment was brief. He merely concurred in the conclusions that there was a contract and that it was not void for mistake, and agreed with the assessment of damages. It is therefore impossible to say how far he agreed with the reasoning and dicta of his brethren.

ROBERT BROOKING

CRIMINAL LIBEL—NOT NECESSARY TO PROVE TENDENCY TO PROVOKE BREACH OF PEACE

THE prosecution of Frank Joseph Hardy for a defamatory libel on the wife of a well-known Melbourne citizen in his book *Power Without Glory*, which aroused immense interest last year, has reached the law reports on a point of definition—*R. v. Hardy* [1951] A.L.R. 949. Martin J. was asked to decide whether a tendency to provoke a breach of the peace was an essential element in the offence.

This question involved consideration of *R. v. Wicks*.[1] There the Court of Criminal Appeal decided this very point on an appeal on grounds of misdirection, but the language of the judgments is not

[1](1936) 25 Cr. App. Rep. 168.