The Effect of Common Mistake on Contracts for the Sale of Land*

by

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I. COMMON MISTAKE AT LAW

The effect at common law of a common mistake as to fact was enunciated by the House of Lords in *Bell* v. *Lever Bros.*,[1] where Lord Atkin stressed that if mistake operated at all at common law, it operated so as to negative or nullify consent.[2] Lord Atkin laid down the following test for deciding whether there was a common mistake operative at law:[3]

> Does the state of the new facts destroy the identity of the subject-matter as it was in the original state of facts?

There are, it is true, indications in other judgments in that case that there is a wider test,[4] but it is Lord Atkin's test which has been generally adopted by subsequent courts.

A year later Reed J. in *Smith* v. *Herring*[5] considered Lord Atkin's statements and found that, in relation to an agreement for the sale and purchase of land, had the defendants known that they would be required to construct a stormwater drain costing approximately £300, they would not have entered into the contract. Reed J. held that such a mistake, which could not be said to destroy the "identity of the subject-matter", did not nullify or negative the consent:[6]

> Applying these principles to the facts of the present case the defendants can get exactly what they contracted for, a conveyance of the lots or

[1] [1932] A.C. 161.
[2] Ibid., 217.
[3] Ibid., 227.
[4] E.g., Lord Warrington at 206
[5] [1933] N.Z.L.R. 825.
[6] Ibid., 829.

> sections with permission from the City Council to connect houses built on those lots with an existing sewer. That the Council has thought fit to impose conditions that had not been foreseen does not destroy the identity of the subject-matter.

In 1950 Denning L. J. in *Solle* v. *Butcher*[7] was faced with a case in which both parties mistakenly believed that the flat which was the subject-matter of their contract was not tied down to a controlled rent, and negotiated on that basis. On the effect of mistake at common law he said:[8]

> Let me first consider mistakes which render a contract a nullity. All previous decisions on this subject must now be read in the light of *Bell* v. *Lever Bros.* The correct interpretation of that case, to my mind, is that, once a contract has been made, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground.

Denning L. J. concluded that the lease was not a nullity.

In *Svanosio* v. *McNamara*[9] the High Court of Australia held that a contract for the sale of a hotel and the land on which it was situated was not a nullity, it having later been discovered that a portion of the land, upon which part of the hotel stood, was in fact Crown land and therefore incapable of being conveyed by the vendor. Dixon C. J. and Fullagar J. cited with approval the above passage from *Solle* v. *Butcher*.[10] In the other joint judgment (that of McTiernan, Williams & Webb JJ.) it was said:[11]

> In one sense there is always a common mistake where a vendor sells land to the whole of which he honestly believes he has a good title and the purchaser honestly believes that if he contracts to purchase this land he will get a good title to the whole of it. But if the vendor contracts to sell the land to the purchaser and the purchaser contracts to purchase it, the fact that they would not have entered into a contract but for such a common misapprehension does not avoid it.

In any case, they said, the contract contemplated and provided for a mistake in the description and gave a right to compensation, if claimed at the right time, and "such a mistaken belief could not possibly avoid a contract which contemplates and provides for it."[12]

As will be seen from the cases above discussed, the plea that a contract for the sale of land is void (i.e. a nullity) because it was entered into under a common mistake of fact will rarely succeed. Indeed it has been said that a contract will be void for common

[7] [1950] 1 K.B. 671.
[8] Ibid., 691.
[9] (1956) 96 C.L.R. 186.
[10] Ibid., 195-196.
[11] Ibid., 204.
[12] Ibid., 205. In this connection the speech of Lord Atkin in *Bell* v. *Lever Bros. Ltd.* [1932] A.C. 161 at 218 as to mistake as to title was referred to.

mistake only if there is nothing to contract about, either because the subject-matter does not exist at the time of the agreement *(res extincta)* or because it already belongs to the buyer *(res sua)*.[13] This view seems to have been accepted obiter by McCarthy J. in *Dell* v. *Beasley*[14] and by Goff J. in *Grist* v. *Bailey*[15] (where the learned judge applied Lord Atkin's test of mistake as to quality rendering the subject-matter something essentially different from what it was supposed to be). McMullin J. in the recent case of *Keegan Flats* v. *College Holdings Ltd.*[16] re-affirmed this view, saying that the common law admitted that mistake could only nullify the consent of the contracting parties if they were mistaken as to some fact which lay at the basis of the contract.

A contract for the sale of land which is a nullity because the subject-matter is *res extincta* is unlikely to be common—the situation usually envisaged is that of land on the top of a cliff which has in fact subsided into the sea or land swept away by a flood.[17] As to *res sua* the main authority in regard to land law is *Cooper* v. *Phibbs*,[18] a case in equity, which involved the granting of a lease, after which it was discovered that the lessee actually owned the land the subject-matter of the lease. The House of Lords, however, held that the lease was voidable, not void, and it was set aside on terms. In *Bell* v. *Lever Bros.* Lord Atkin criticised this, saying that the agreement appeared to be void rather than voidable,[19] so that it seems that if *Cooper* v. *Phibbs* had been a case at law the agreement would have been a nullity. Lord Atkin was careful to limit this type of common mistake effective at law to cases where the purchaser/lessee already has the title:[20]

> Even where the vendor has no title, though both parties think he has, the correct view would appear to be that there is a contract: but that the vendor has either committed a breach of the stipulation as to title, or is not able to perform his contract. The contract is unenforceable by him but is not void.

The decision of Sim J. in *Mackley* v. *Brighton*[21] that a contract entered into under the mistaken belief that the land concerned carried with it rights to coal was void, following *Cooper* v. *Phibbs*, would seem to be based on a misunderstanding of the earlier case, as Sim J. seems to have thought that the lease there in question was

[13] Cheshire & Fifoot, *Law of Contract* (4th N.Z. ed.), 193.
[14] [1959] N.Z.L.R. 89 at 96.
[15] [1967] Ch. 532 at 537.
[16] Unreported, Supreme Court, Auckland, 17 July 1972.
[17] See *Hitchcock* v. *Giddings* (1817) 4 Price 135, a case in equity.
[18] (1867) L.R. H.L. 149.
[19] [1932] A.C. 161 at 215.
[20] Idem.
[21] (1914) 34 N.Z.L.R. 314.

void, not voidable. It is submitted that the contract in *Mackley* v. *Brighton* was in fact only voidable in equity.[22]

There are two Canadian cases which at first sight appear to be inconsistent with the general rule as to common mistake at law. The first of these is *R.* v. *Ontario Flue-Cured Tobacco Growers' Marketing Board*[23] in which the Court of Appeal of Ontario held that a contract for the sale of land, a condition of which was that it included "14 acres of tobacco growing quota", was void ab initio where it was found that there were actually only 10.95 acres of tobacco growing quota.

Wells J. A., in delivering the judgment of the court, admitted that a mere mistake as to quantity does not always avoid a contract, even where the mistake is as to the substance of the contract.[24] In the contract in that case, however, there was the following clause: "It is expressly understood that this offer to purchase and acceptance thereof includes the 14 acres of tobacco growing quota." Wells J. A. said there was a mistake as to an essential subject-matter[25] and cited the following excerpt from Lord Atkin's speech in *Bell* v. *Lever Bros:*[26]

> The proposition does not amount to more than this that, if the contract expressly or impliedly contains a term that a particular assumption is a condition of the contract, the contract is avoided if the assumption is not true.

It is true that Lord Atkin later said that there is a common standard for mutual mistake and *implied* conditions as to existing or future facts,[27] but this test (that of destruction of the identity of the subject-matter) does not apply where there is an *express* condition which is essential to the existence of a contract, and it is submitted that the case may be supported on this basis.

In *Hyrsky* v. *Smith,*[28] a decision of the Ontario High Court, Lieff J. quoted from Cheshire & Fifoot's *Law of Contract* on *res sua* and *res extincta,* but it is submitted that the action was really one brought in equity; the relief asked for was equitable and Lieff J. concluded that equity would permit nothing less than rescission of the deed.[29]

[22] Cf. *Marsh* v. *Mudford* [1932] N.Z.L.R. 1143, where there was a mistake in a calculation as to area so that the purchaser paid for more than he got. The mistake was discovered nineteen years later when the land was brought under the Land Transfer Act and Ostler J. held that since the purchaser had obtained the specific piece of land which he had agreed to purchase the contract was not void at common law.
[23] (1965) 51 D.L.R. (2d) 7.
[24] Ibid., 13-14.
[25] Ibid., 15.
[26] [1932] A.C. 161 at 225.
[27] Ibid., 226-227.
[28] (1969) 5 D.L.R. (3d) 385.
[29] Ibid., 393.

Thus, in relation to common mistake which renders a contract for the sale of land void at common law, it can be seen that there will be very few instances in which such a plea will succeed.

II. Common Mistake at Equity

A. *Mistake as to Title*

Apart from the line of cases, which will be discussed later, involving a mistake as to private rights where the land concerned was actually owned by the purchaser (i.e., the *res sua* cases), there are basically four situations in which the courts of equity have given relief in respect of a common mistake as to title. These are:

(a) cases where the vendor has in fact no title to convey;

(b) cases where the vendor cannot give a good title to part only of the land which he has contracted to convey;

(c) cases where the vendor has the ability to convey the whole, but by a common mistake has not done so;

(d) cases where, by common mistake, title has been conveyed to more land than was contracted for.

An instance of the first type of case is *Hitchcock* v. *Giddings*,[30] where the purchaser bought the interest of the vendor in remainder expectant on an estate tail. Until the conveyance had been executed both parties were ignorant that the tenant in tail had actually suffered a recovery, so that the vendor had no title to convey. Richards C. B. said:[31]

> If contracting parties have treated while under a mistake, that will be sufficient ground for the interference of a court of equity: but in this case there is much more. Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact; am I to be allowed to receive £5000 and interest, because the conveyance is executed, and a bond given for that sum as the purchase-money, when, in point of fact, I had not an inch of the land, so sold, to sell? That was precisely the case with the present defendant; and it would be hard, indeed, if a court of equity could not interfere to relieve the purchaser.[32]

Perhaps a more relevant situation to present-day conditions would be the sale of a life interest *per autre vie*, both parties being unaware that the measuring life of the estate had ended. In this situation, it is submitted that a court of equity would refuse to decree specific performance of such a contract and, if a conveyance had been executed, would relieve the purchaser on proof of hardship.

Another instance of the defendant having no title to convey can

[30] (1817) 4 Price 135.
[31] Ibid., 141.
[32] See also *Cochrane* v. *Willis* (1865) 1 Ch. App. 58.

be seen in *Willis* v. *Milner*[33] where, in an action for specific performance of an agreement to purchase a lease, it was elicited in evidence that the vendor in fact possessed only an underlease. Chapman J. refused to decree specific performance on the ground that the plaintiff had professed to sell what he did not possess.[34] The same principle would undoubtedly apply where what was purportedly sold was a freehold title, whereas in fact the vendor only possessed a leasehold interest.

As to the second type of case, that where the vendor can only give a good title to part of that which he had contracted to convey, the best known case is *Svanosio* v. *McNamara*.[35] In that case the defendants agreed to sell certain land together with a hotel erected thereon. Unknown to both parties until after completion the hotel stood only partly on the land conveyed, the remainder (about one-third) being on adjacent Crown land. The High Court of Australia held that the plaintiff was not entitled to any relief in equity because the conveyance had been made and the only ground upon which the conveyance could be set aside was that of total failure of consideration which did not exist in this case. In delivering their judgments, however, all the judges were of opinion that the plaintiff might have been able to obtain relief had he asked for it before conveyance. Dixon C. J. and Fullagar J. said:[36]

> If the appellant had discovered before conveyance that a substantial portion of the hotel stood on land to which he had no title, it seems clear that he could not have been compelled to complete the contract. A suit by the respondents for specific performance must have been dismissed: equity has refused to enforce a contract against an unwilling purchaser of land in cases where the defect of title was much less substantial than it is in the present case.

McTiernan, Williams and Webb JJ. went further and said that in addition to refusing specific performance the court would probably have held the purchaser entitled to rescind the contract.[37]

In *Neild* v. *Davidson*[38] both parties believed mistakenly that the one could sell and the other could buy a piece of land with frontage to the water. The purchasers later discovered that there was a reservation in the Crown grant of any land within 100 feet of the water so that, if the contract were enforced, the land conveyed to them would be useless to the defendant fishermen. The Full Court of New South Wales held:[39]

[33] (1908) 28 N.Z.L.R. 62.
[34] Ibid., 64.
[35] (1956) 96 C.L.R. 186.
[36] Ibid., 196-197.
[37] Ibid., 203.
[38] (1890) 11 L.R. (N.S.W.) Eq. 209.
[39] Ibid., 218.

> We think that it would be opposed to all principle governing this class of cases if, under such circumstances, the defendant were compelled to accept a conveyance of a piece of land which either had no frontage to the water of the harbour, or if the plaintiff undertook to convey to the high-water mark, yet the defendants would clearly be without any title to the land so conveyed.

The fact that the vendor has title to all but a very small portion of the land contracted to be sold does not preclude the court from giving equitable relief. In *Knatchbull* v. *Grueber*[40] the vendor could not give a good title to a very small portion (less than two percent) of the land, but it was shown that that part of the estate, although very small in proportion to the whole of the purchase, was essential to its enjoyment and Sir Thomas Plumer V.-C. refused to decree specific performance.

As to the third category of cases, in *Shepheard* v. *Graham*[41] there was a common mistake in that both parties thought that "No 70 Idris Road" was co-terminous with "Lot 5" on a certificate of title and it was not until nearly eight years after the transfer that it was discovered that the house property concerned actually stood not only on Lot 5, but also on a triangular portion of 10.8 perches of Lot 2. Fleming J. ordered that the transfer be rectified to include the whole of "No 70 Idris Road" and specific performance of the amended transfer was decreed. The situation is different from the above cases in that the vendor here had the ability to give title to the whole of the land contracted for, but, by a common mistake, he did not.

An example of the fourth category, the situation where, by common mistake, title to more land than was contracted for was conveyed, is the case of *Beale* v. *Kyte*.[42] In that case A had conveyed land to B in 1900, but in 1906 he bought an action against B for rectification of the conveyance, alleging that by common mistake the parcels in the conveyance included more land than was comprised in the written contract in pursuance of which the conveyance was executed. Despite the passage of six years, Neville J. ordered rectification of the conveyance.

B. *Mistake as to Quantity*

As far as common mistakes as to quantity are concerned, the cases are of two types: those where there is a clause providing for compensation for misdescription and those where there is no such clause. The relief given seems to depend upon whether the mistake has been discovered before or after conveyance.

[40] (1815) 1 Madd. 153.
[41] [1947] N.Z.L.R. 654.
[42] [1907] 1 Ch. 564.

One example of a case involving a compensation clause is *Aspinalls to Powell & Scholefield*[43] where neither vendor nor purchaser had previously known the actual area of the land contracted to be sold, but had relied on a statement in a surveyor's valuation and had negotiated the price on that basis. Before completion it was discovered that the area was twenty-five percent less than that stated in the valuation and the purchasers claimed compensation under the clause in the agreement. The vendors refused to give compensation and offered to cancel the contract. It was decided that, since there was no hardship involved, the vendors were to be held to their contract and had to compensate the purchasers for the deficiency.

Another case with a compensation clause in which there was a misdescription as to area (again twenty-five percent less than stated) was the Court of Appeal decision in *Re Fawcett & Holmes' Contract*.[44] Lord Esher M. R. applied the rule which was laid down by Tindal C. J. in *Flight* v. *Booth*:[45]

> Where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such cases the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensaton.

According to Lord Esher M. R., the question depended on the view of the court as to the importance of the misdescription.[46] All the Lords Justice agreed that the mistake in that case was not important enough to take the case out of the compensation clause.

Whether the same applies after completion depends upon the wording of the compensation clause. The standard Real Estate Institute form in use in Auckland provides only for compensation if claimed before completion.

For cases where there is no provision for compensation for misdescription, the law was stated by Wynn-Parry J. in *Watson* v. *Burton*:[47]

> The authorities establish that the court is less inclined, in the exercise of its jurisdiction, to decree specific performance where there has been a misstatement as to area, and the purchaser is unable to claim compensation, than in cases where the condition is adopted which allows him to claim compensation.

In that case it was held that a difference of forty percent between the actual and stated areas was sufficient to justify the refusal of specific performance, despite the fact that the vendor had offered compensation.

[43] (1889) 60 L.T. 595.
[44] (1889) 42 Ch. D. 150.
[45] (1834) 1 Bing. (N.C.) 370 at 377.
[46] (1889) 42 Ch. D. 150 at 157.
[47] [1957] 1 W.L.R. 19 at 25.

In *Dagg* v. *Heckler*[48] there was no mistake as to the actual area of the whole farm contracted to be sold, but owing to a mistake caused by a misleading plan the purchaser believed that the quantity of good land in the farm was much greater than was actually the case. Since the vendor's conduct had unintentionally contributed to the mistake, Chapman J. refused to decree specific performance and ordered that the contract be rescinded.

As to the situation after conveyance, the recent case of *Hyrsky* v. *Smith*[49] shows that where the error as to quantity is such as to alter the quality of the subject-matter then the contract *may* be rescinded for common mistake. In that case it was not discovered until nearly four years after conveyance that the quantity of land conveyed was approximately half that contracted and paid for, and was unsuitable for the purchaser's purposes, which purposes were known to the vendor. Lieff J. said[50]

> If the mistake as to quantity is so substantial so that in essence it changes the quality of the subject matter, then a proper case for rescission may exist. In the case at bar, the deficiency approximated one-half of the land purchased and the remanent was unsuitable as a consequence for the purpose for which the purchasers bought the property. I think that on this basis, there can be little doubt that the mistake was so fundamental that the quality and the very identity of the parcel of land which was the subject-matter of the sale had undergone a transformation.[51]

The general rule, however, as regards mistakes as to quantity not discovered until after completion is that no remedy is available, unless one is given by the covenants under the contract.[52]

C. *Mistake as to Quality*

The types of common mistake as to quality which entitle a plaintiff to relief in equity are varied and it is difficult to state any general rule. In all the cases the courts have been concerned to avoid hardship and, where the mistake as to quality renders the subject-matter of the contract substantially different from that contracted for, they have not hesitated to give relief. In *Lee* v. *Rayson*[53] Eve J. said:[54]

> . . . [W]hat the Court has to do in such a case I have here to deal with is to decide whether the purchaser is getting substantially that which he bargained for, and in arriving at a conclusion on this question the Court is bound to consider every incident by which the property offered to be

[48] [1920] G.L.R. 137.
[49] (1969) 5 D.L.R. (3d) 385.
[50] Ibid., 389-390.
[51] Note: this case can also be regarded as a mistake as to title, despite the fact that Lieff J. treated it as a mistake as to quantity.
[52] *Maroney* v. *Noble* (1914) 34 N.Z.L.R. 50; *Marsh* v. *Mudford* [1932] N.Z.L.R. 1143.
[53] [1917] 1 Ch. 613.
[54] Ibid., 619.

> assured can be differentiated from that contracted for. If the sum of these incidents really alters the subject-matter, then the purchaser can repudiate the contract; if, on the other hand, the subject-matter remains unaffected, or so little as to be substantially that which was agreed to be sold, then the purchaser must be held to his contract.

With this in mind, it is now proposed to examine some of the mistakes as to quality which have been considered by the courts.

In *Dell* v. *Beasley*[55] it was alleged that there was a common mistake that the land concerned was in an area zoned for commercial purposes. McCarthy J. held on the evidence that there was unilateral mistake only, but as to the contention that there was common mistake he said that even if mistake on the part of both parties was shown, the case was not within[56]

> . . . that yet wider class where equity has gone beyond the common law and lent its aid to a mistake of a material, but not necessarily fundamental, character, as was done in *Solle* v. *Butcher*. . . .

In *Keegan Flats Ltd.* v. *College Holdings Ltd.*[57] McMullin J. gave relief in respect of a common mistake as to zoning. The mistake in this case was not so much as to the actual zoning as to the effect of the zoning. Both parties mistakenly thought that twenty three-bedroomed flats could lawfully be erected on the land, whereas in fact no more than twelve such flats could be built thereon. McMullin J., after reviewing the authorities, said:

> While I have been unable to find any direct authority on the point, it seems to me to follow that the belief of the plaintiff and the defendant that a larger number of flats could be erected on the land than in fact could be, and the mistaken transcription of defendant's calculations should be regarded as a mistake of fact for which equity will give relief. The number of flats which could be erected was not a matter which could be determined on a bare reading of the Code of ordinances or the perusal of a zoning map, but rather the result of a somewhat technical exercise based on factors such as land size, yard requirements, area, the height of building and parking provisions. It was not so much a problem for resolution by a lawyer but rather one for calculation by a draughtsman.

The distinction between these two cases may well be one of degree. In *Dell* v. *Beasley* the mistake was merely as to zoning and could have been corrected if the purchaser had taken the trouble to check the statement; in *Keegan Flats* v. *College Holdings* the mistake was as to a far more complex calculation, the accuracy of which the purchaser would have found it difficult to check.

Another factor which influenced McMullin J. in the *Keegan Flats* case was the fact that the mistake was not in any way contributed

[55] [1959] N.Z.L.R. 89.
[56] Ibid., 96.
[57] Unreported, Supreme Court, Auckland, 17 July 1972.

to by the plaintiff. As authority for this, he quoted from the speech of Denning L. J. in *Solle* v. *Butcher*:[58]

> A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misrepresentation was fundamental and that the party seeking to set it aside was not himself at fault.

An analogous situation to those concerning mistake as to zoning is that in *Brown* v. *Fox*[59] where both parties, knowing that the Railway Commissioners were under a statutory obligaton to make a street in a certain direction, contracted on the basis that the property would have about 135 feet frontage to a street. In fact, the street was built in a slightly different position and the property only had about fifty feet of street frontage. The relief granted was based on an agreement between the parties, but it is clear from the judgment of Owen J. that if this had not been the case the Court would have rescinded the contract.[60]

In *Fisher* v. *Dwan Bros.*[61] both parties were ignorant of the existence of a by-law concerning the construction of private streets. The defendant purchasers sought to repudiate the contract on the ground of common mistake. Chapman J. held that the by-law was not applicable and the following comments on mistake are obiter only:[62]

> I am very doubtful whether a mistake of the kind alleged by the defendants not induced by the plaintiff is one against which the Court would relieve. The defendants are engaged in the business of buying and selling land, and it does not seem unreasonable that they should familiarise themselves with all the general burdens which the local body may impose and has imposed upon it.

It is submitted that, even were these comments the ratio of the case, they should be confined to the case of buyers who have, or ought to have knowledge of local conditions and who have only themselves to blame for their mistake.

Another type of mistake as to quality is where both parties are mistaken either as to the length of or existence of a tenancy. This sort of mistake is usually directly related to the value of the subject-matter of the contract. A recent example is *Grist* v. *Bailey*,[63] where both parties thought that the property sold was subject to an existing statute-protected tenancy and that its value was therefore £850. Later it was discovered that the protected tenant had died and that the value was in fact £2250. In an action by the purchaser for specific performance, Goff J., following Denning L. J. in *Solle* v. *Butcher*,[64]

[58] [1950] 1 K.B. 671 at 693.
[59] (1897) 18 L.R. (N.S.W.) Eq. 8.
[60] Ibid., 26.
[61] (1908) 27 N.Z.L.R. 529.
[62] Ibid., 532-533.
[63] [1967] Ch. 532.
[64] [1950] 1 K.B. 671.

held that the mistake was fundamental and that the defendant who was seeking to set aside the agreement was not at fault. The agreement was set aside on terms.

Related mistakes which have come before the courts are mistakes concerning either the nature or the terms of a tenancy. In *Caballero* v. *Henty*,[65] for instance, the conditions of sale of a public house stated that it was in the occupation of a tenant. A brewer, intending to use the public house for the sale of his beer, agreed to buy it and afterwards learnt that it was under lease to another brewer for a term of which eight years were unexpired. It was held that the vendor could not enforce the agreement. Another case in which mistake as to the nature of an existing tenancy was the basis for equitable relief was *Hope* v. *Walter*[66] where a property was sold under the description of an eligible freehold property for investment, but before completion it was discovered that the tenant was using it as a disorderly house. Specific performance was refused on the ground that it would expose the innocent purchaser to criminal proceedings.

As to mistake as to terms of a tenancy, in *Lee* v. *Rayson*[67] it was held that the rights to let the thirteen houses in that case were such that the purchaser, if compelled to perform the contract, would be forced to take something for which he had never bargained. A related case is *Beyfus* v. *Lodge*,[68] where the vendors bona fide gave an incorrect answer to a requisition asking whether any landlord's notices had been served. Later the vendors discovered the mistake and informed the purchaser who declined to complete unless the vendors complied with the notices at their own expense. Russell J., in refusing specific performance, said that it was a matter directly affecting the value of the property which the innocent purchaser could not have ascertained.

The two general areas of mistake as to quality above discussed are not exhaustive and there is an infinite variety of types of mistakes which could come under this head. For instance, in *Hyrsky* v. *Smith*[69] it was considered that a mistake as to area which resulted in the conveyance of only half the land contracted and paid for was so substantial that it changed the quality of the subject-matter. The general principles in this area of mistake appear to be that the party relying on the mistake ought not to be at fault, that any difference in the value of the property is an important factor and that the mistake must not be caused by a mere failure to check details or statements.

[65] (1874) L.R. 9 Ch. App. 447.
[66] [1900] 1 Ch. 257.
[67] [1917] 1 Ch. 613.
[68] [1925] Ch. 350.
[69] (1969) 5 D.L.R. (3d) 385.

D. Mistake as to Private Rights

The types of mistake as to private rights for which relief is given at equity fall into two basic categories: (a) where the mistake is as to the actual ownership of the property and the property is in fact vested in the purchaser; and (b) where there is a mistake as to the effect or applicability of some statute or other instrument.

As to the first type of mistake, the most authoritative case is the House of Lords decision in *Cooper* v. *Phibbs*.[70] That case concerned a lease of a salmon fishery by a nephew from his uncle's heirs, in the belief that the fishery had belonged to the uncle. It was later found that the fishery in fact belonged to the nephew.

Lord Westbury rejected the contention that there had been a mistake of law:[71]

> It is said, "*Ignorantia juris haud excusat*"; but in that maxim the word "*jus*" is used in the sense of denoting general law, the ordinary law of the country. But when the word "*jus*" is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake. Now, that was the case with these parties—the Respondents believed themselves to be entitled to the property, the Petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand.

The lease was therefore set aside on terms.[72] The principle in *Cooper* v. *Phibbs* was applied in *Jones* v. *Clifford*,[73] despite the fact that the defendant had contracted on condition that he should assume that a certain person was seised in fee of the freeholds and should not investigate the prior title. The plaintiff's action for specific performance was dismissed when it was shown that, due to the common misapprehension of the parties as to the effect of an enclosure award, the parties had not realised that the purchaser in fact owned the property contracted to be sold.[74]

As to category (b), i.e., where there is a mistake as to the effect or applicability of some statute or other instrument, this can also be seen in *Cooper* v. *Phibbs*. The mistake as to ownership in that case was caused partly by the misconstruing of a recital in a private Act of Parliament. The comments of Lord Westbury (ante) are equally applicable in this situation. Perhaps the best-known application of the principle in *Cooper* v. *Phibbs* is the English Court of Appeal

[70] (1867) L.R. 2 H.L. 149.
[71] Ibid., 170.
[72] An earlier case to the same effect is *Bingham* v. *Bingham* (1784) 1 Ves. Sen. 126, where the Master of the Rolls held that equity relieves against bargains made under a misconception of rights.
[73] (1876) 3 Ch. D. 779.
[74] This case is also an example of the second category.

decision in *Solle* v. *Butcher*,[75] where both parties mistakenly believed that certain flats were not under the Rent Restriction Acts and fixed the rents accordingly. When it was later discovered that the flats were under the Acts, the lessee claimed for the recovery of rent paid over the standard rate. Denning L. J. after discussing the effect of mistake at law and in equity concluded that a contract could be set aside in equity if parties were under a common misapprehension as to their relative or respective rights, if that misapprehension was fundamental and the party seeking relief was not himself at fault.[76] Applying these conclusions to the facts of the case, he said:[77]

> There was clearly a common mistake, or, as I would prefer to describe it, a common misapprehension, which was fundamental and in no way due to any fault of the defendant; and *Cooper* v. *Phibbs* affords ample authority for saying that, by reason of the common misapprehension, this lease can be set aside on such terms as the court thinks fit.

In *Mackley* v. *Brighton*[78] both parties mistakenly thought that the land being sold carried with it the right to all minerals under the land. This mistake was based on a misapprehension as to the proper construction of the Land Laws Amendment Act 1912 and Sim J. held that it was the same type of mistake as in *Cooper* v. *Phibbs*:[79]

> The mistake in law which excludes the right to relief must be one as to the general law. A mistake as to a private right will not have that effect, although the right is the result of a matter of law. Such a mistake is treated as one of fact: *Cooper* v. *Phibbs*.

In *Mutu* v. *Michel*[80] a conveyance was executed in the mistaken belief that the land was subject to the provisions of the Native Land Act 1902 and when it was discovered that this was not so the vendor asked for rescission. Herdman J. said:[81]

> Both parties erroneously believed that the private right possessed by Mrs Mutu was a right to sell for a consideration which the Maori Land Board would, in the discharge of its duties, review and approve and settle before it became the true consideration in law. I think that the mutual mistake was one as to a private right, and that, following the principle stated by Sim J. in *Mackley* v. *Brighton*, the mistake should be treated as a matter of fact.

The conveyance was therefore set aside.

As can be seen from some of the above-cited cases, these two situations are not mutually exclusive and there may be cases where a common mistake as to the effect of a deed or legislative instrument results in ignorance of the fact that the purchaser/lessee already owns the interest contracted to be sold to him.

[75] [1950] 1 K.B. 671.
[76] Ibid., 693.
[77] Ibid., 695.
[78] (1914) 34 N.Z.L.R. 314; criticised ante, pp. 21-22.
[79] Ibid., 316.
[80] [1919] N.Z.L.R. 521.
[81] Ibid., 523.

E. Other Types of Mistake

The above four categories of mistake are neither exclusive nor exhaustive. It is clear, moreover, that equity has the power to give relief wherever there is a fundamental misapprehension as to facts.[82] *Ivanochko* v. *Syke*,[83] a decision of the Saskatchewan Court of Appeal, is an example of the exercise of this power. In that case, the appellant agreed to sell a house and chattels to the respondent and it was not until two years after the agreement had been executed that it was discovered that the monthly payments were not sufficient to pay the interest on the outstanding balance of the purchase price and that unless those instalments were increased the agreement would never be paid up.

Woods J. A. rejected the argument that the contract was void at common law and found that the parties had entered into the agreement under a common misapprehension:[84]

> There is no suggestion that either party was at fault here. The oversight was mutual. The parties clearly intended to enter into an agreement for sale but, because of a common misapprehension as to the effect of the terms agreed upon, entered into another arrangement.

Woods J. A. cited *Solle* v. *Butcher*[85] as authority for the proposition that the agreement could be set aside if it can be done without injustice to either party. The contract was therefore declared to be voidable at the instance of the appellant.

It is therefore submitted that the fact that a mistake is not as to title, quality, private rights or quantity does not preclude a court of equity from giving relief in a suitable situation.

III. Types of Relief Available

A. Before Completion

Before completion the courts have exercised the normal equitable remedies, *viz*, refusal of specific performance, rescission with or without terms, rectification with specific performance of the agreement as rectified. It is now proposed to discuss some of the aspects of these remedies with particular reference to common mistake in agreements for the sale of land. It is not possible, within the scope of this paper, to go any further into the granting of these remedies.

1. *Refusal of specific performance*

Where the party resisting a decree of specific performance has contributed to the mistake, then the general principle is that specific

[82] *Solle* v. *Butcher* [1950] 1 K.B. 671 at 693 per Denning L. J.
[83] (1967) 58 W.W.R. 633.
[84] Ibid., 635.
[85] [1950] 1 K.B. 671 at 693.

performance will be enforced unless there is considerable hardship. This rule was expressed as follows by Kay J. in *Goddard* v. *Jeffreys*:[86]

> I understand the rule to be this: the purchaser may escape from his bargain on the ground of mistake, if it was a mistake which the vendors contributed to—that is, in other words, if he was misled by any act of the vendors; but if he was not misled by any act of the vendors—if the mistake was entirely his own—then the Court ought not to let him off his bargain on the ground of a mistake made by himself solely, unless the case is one of considerable harshness and hardship.[87]

As to hardship, it was said in *Dell* v. *Beasley*[88] that excessive price does not itself amount to hardship although it is a contributing factor. And in *Nicholas* v. *Ingram*[89] Hutchison J. was of opinion that there will only be exceptional cases where hardship subsequent to the contract causes the Court to refuse specific performance[90] and His Honour did not know of any case in which it had been refused where the hardship was mere financial inability on the part of a purchaser to complete.

Refusal of specific performance appears to be the most common remedy given to defendants who have entered into agreements under a common mistake and, where that mistake has not been caused by the defendant, it appears that the court, after deciding that the mistake is one in respect of which equity may give relief, will refuse specific performance if it would be inequitable to grant a decree.[91]

2. *Rescission*

This remedy is not co-terminous with the refusal of specific performance and there are cases where a court of equity may allow a contract to stand, although refusing to enforce it. This happened in *Beyfus* v. *Lodge*[92] and *Hope* v. *Walter*.[93] In the former case, Russell J. refused to grant rescission since there had been no misrepresentation inducing the mistake and since the vendor was perfectly capable of carrying out the contract in accordance with its terms. The significance of rescission of contracts for the sale of land is, of course, that the purchaser can recover his deposit and it appears that, where the agreement is still capable of performance, the Court may decline to order this relief.

When the Court does order rescission of the contract it may direct that the setting aside of the contract be subjected to terms. This

[86] (1881) 51 L.J. Ch. 57 at 59.
[87] These comments of course apply equally well to unilateral mistake. See also the remarks of James L. J. in *Tamplin* v. *James* (1880) 15 Ch. D. 215 at 221.
[88] [1959] N.Z.L.R. 89 at 97 per McCarthy J.
[89] [1958] N.Z.L.R. 972.
[90] Ibid., 973.
[91] *Beyfus* v. *Lodge* [1925] Ch. 350 at 358 per Russell J.
[92] [1925] Ch. 350.
[93] [1900] 1 Ch. 257.

happened in *Grist* v. *Bailey*,[94] where the agreement was set aside on condition that the defendant entered into a fresh contract at a proper price for a house with vacant possession.

3. *Rectification*

Rectification is granted in cases of common mistake where there has been some error in reducing the terms of the parties' agreement to writing. There appear to be two types of case: (a) where the agreement by common mistake does not express the true intentions of the parties;[95] and (b) where there has been some minor slip in a detail of the written agreement.[96]

The fact that the prior agreement may not satisfy the requirements of section 2 of the Contracts Enforcement Act 1956 is not fatal and the Court has jurisdiction to order specific performance of the contract as rectified.[97] Clear evidence must, however, be produced to show that the deed impeached does not embody the final intention of the parties and it must be shown that the alleged intention to which the plaintiff asks that the deed be made to conform continued concurrently in the minds of both parties down to the time of its execution.[98]

B. Land Transfer Land—Relief after Completion, but before Registration

In the case of contracts for the sale of land which has been brought under the Land Transfer system, the remedies available before completion are not lost until registration. The rules as to when relief can be given after completion (which was the date of conveyance at common law) are not applicable until after registration and then govern one of the *in personam* exceptions to the principle of indefeasibility.

In *Montgomery* v. *Continental Bags*,[99] which was a case of mutual mistake although undoubtedly its principles are generally applicable, Speight J. held that the general rules of common law conveyances laid down in *Svanosio* v. *McNamara*[1] were inapplicable to cases involving Land Transfer land, because the land in *Svanosio's* case

[94] [1967] Ch. 532.
[95] *Paget* v. *Marshall* (1884) 28 Ch. D. 255.
[96] E.g., *Adams* v. *McKay* (1906) 26 N.Z.L.R. 585; *Forgione* v. *Lewis* [1920] 2 Ch. 326.
[97] *U.S.A.* v. *Motor Trucks* [1924] A.C. 196; *Samson* v. *Butt* [1927] N.Z.L.R. 119 at 122 per Ostler J.
[98] *Hart* v. *Boutilier* (1916) 56 D.L.R. 620 at 630 per Duff J.
[99] [1972] N.Z.L.R. 884.
[1] (1956) 96 C.L.R. 186.

had not been brought under the Torrens system.[2] With Land Transfer land, he said: "Registration is completion and not the payment of money and delivery of documents at any time prior."[3] Speight J. concluded:[4]

> I conclude that title of the land remains with the vendor until registration, that the commonly described practice of "settlement" viz, the exchange of memorandum to enable registration to be effected does not amount to a completion of the transaction or conveyance and the contract of sale still governs the relationship of the parties until registration.

Thus it can be seen that, in the vast number of cases concerning mistake in contracts for the sale of land in New Zealand and other Torrens system countries, the remedies which were, under the common law system of conveyancing, available only until "completion" may be granted at any time before registration. It therefore follows that the rules regarding relief after conveyance at common law will only govern Torrens system cases after registration.

C. Relief after Conveyance

1. *Rescission*

The rule as to the availability of rescission of a contract for the sale of land was applied in *Svanosio* v. *McNamara*[5] by the High Court of Australia, where Dixon C. J. and Fullagar J. said:[6]

> . . . [I]t is clearly established that equity will not undo a sale of land after conveyance unless there has been fraud or there is such a discrepancy between what has been sold and what has been conveyed that there is a total failure of consideration, or what amounts practically to a total failure of consideration.

The other judges made similar remarks and gave the example of the discovery after completion that the purchaser and not the vendor was the owner of the land.[7] This was the situation in *Bingham* v. *Bingham*,[8] where it was held that the vendor had to return the money since he had no right to the estate sold. In *Cooper* v. *Phibbs*[9] the lease was set aside for this reason, although terms were imposed on the purchaser.

In *Svanosio* v. *McNamara* it was said:[10]

> . . . [I]n the case of a completed contract of sale, rescission is only possible on the ground of common mistake where, contrary to the belief of the parties, there is nothing to contract about. . . .

[2] [1972] N.Z.L.R. 884 at 891.
[3] Ibid., 892.
[4] Ibid., 893.
[5] (1956) 96 C.L.R. 186.
[6] Ibid., 198.
[7] Ibid., 207.
[8] (1748) 1 Ves. Sen. 126.
[9] (1867) L.R. 2 H.L. 149.
[10] (1956) 96 C.L.R. 186 at 209 per McTiernan, Williams, Webb JJ.

The case of *Hudson* v. *Jope*[11] does not appear to have been cited in *Svanosio* and the remarks in it are apparently inconsistent with the decision in *Svanosio*. In the earlier case, Cullen C. J. said of the facts:[12]

> It is a case in which the parcel contracted to be sold has not been conveyed at all, but a different parcel, including part of what was contracted to be sold and something more, nevertheless excluding that which gave the principal value to what the plaintiff thought she was buying.

Despite the fact that at most there was only a partial failure of consideration, the Court would have been willing to set aside the conveyance, had it not been for certain inconsistent conduct of the plaintiff. Cullen C. J. said:[13]

> And it seems to me that where a purchaser is induced to buy a piece of land because of a house standing on it, and gets by conveyance a piece of land excluding that house, though he gets a bit more on the other side which he never thought he was buying and had no wish to buy, it is a case where the error goes substantially to the root of the transaction and is one in which the court would grant relief even after conveyance.

It is submitted that these remarks cannot be regarded as good law since the decision in *Svanosio* v. *McNamara* and that, even when they were made, they were inconsistent with these words of Cozens-Hardy J. in *Re Tyrell*:[14]

> If there is fraud, no doubt a purchase can be set aside after conveyance, but counsel have not been able to discover a single instance of setting aside a purchase after conveyance except because of fraud or total failure of consideration. . . .

The assumption of Byrne J. in *Debenham* v. *Sawbridge*[15] that there need not be a total failure of consideration to justify rescission is also, it is submitted, of dubious authority.

In *Hyrsky* v. *Smith*[16] Lieff J. cited the speech of Dixon C. J. and Fullagar J. (ante, page 36) as to total failure of consideration or what amounts practically to total failure of consideration but said, citing *Grist* v. *Bailey*,[17] that the grounds for relief were wider and rescission could be given after completion if the parties suffered from a common fundamental misapprehension as to the facts which went to the very root of the contract.[18] Lieff J. seems not to have remembered that in *Grist* v. *Bailey* the contract rescinded had not been completed; and it is submitted that *Hyrsky* v. *Smith* ought not to be

[11] (1914) 14 S.R. (N.S.W.) 351.
[12] Ibid., 357.
[13] Ibid., 359.
[14] (1900) 82 L.T. 675.
[15] [1901] 2 Ch. 98 at 109.
[16] (1969) 5 D.L.R. (3d) 385.
[17] [1967] Ch. 532.
[18] (1969) 5 D.L.R. (3d) 385 at 391.

followed. Indeed, in *Montgomery* v. *Continental Bags*[19] Speight J. appears to have accepted the principle laid down in *Svanosio* v. *McNamara.*

2. *Compensation*

In many agreements for sale and purchase of land there is a clause providing for compensation for misdescription. Often this clause is expressed to be applicable only before completion, but if this is not so it appears that a purchaser, finding that the area, e.g., has been wrongly stated in the contract can claim compensation for the defect under the clause. The principle was expressed by Jessel M. R. in *Re Turner & Skelton:*[20]

> No book can be produced to shew that it was thought to be settled law that a purchaser loses his right to compensation by taking a conveyance, and on what principle should he do so? The theory is that he has contracted to take compensation if there is any variation from the particulars. Why, then, should he lose it by taking a conveyance? The only reason that can be alleged is that everything is supposed to be settled between the parties, but why should that be an obstacle to the right of the purchaser when the defect is discovered afterwards?

In *Clayton* v. *Leech,*[21] on the other hand, the Court of Appeal decided that, in the absence of a compensation clause, a purchaser had no right to compensation for a mistake discovered after completion.

In New Zealand, the law was stated by Hosking J. in *Maroney* v. *Noble:*[22]

> If upon a sale of land without any provision for compensation the parties were labouring under some common error as to the title or the quantity or quality of the land conveyed, it is for the purchaser, if he can, to discover that error before he completes, and if he does not then his only remedy, apart from fraud or some mistake going to the whole contract, is only such as the convenants which he has taken on completion will afford.[23]

3. *Rectification of conveyance/transfer*

It appears from the authorities that a conveyance or transfer may be rectified if, by common mistake, there is an error in it. In *Humphries* v. *Horne*[24] Sir James Wigram V.-C. said:[25]

[19] [1972] N.Z.L.R. 884. *Mutu* v. *Michel* [1919] N.Z.L.R. 521 is a decision based on the unusual facts of the case.
[20] (1879) 13 Ch. D. 130 at 133. This case was followed in *Palmer* v. *Johnson* (1884) 13 Q.B.D. 351.
[21] (1889) 41 Ch. D. 103.
[22] (1914) 34 N.Z.L.R. 50 at 64.
[23] This decision was followed by Ostler J. in *Marsh* v. *Mudford* [1932] N.Z.L.R. 1143.
[24] (1843) 3 Hare 276.
[25] Ibid., 277.

> And if a conveyance be executed for the purpose of giving effect to and executing the agreement, and that conveyance, by fraud, accident or mistake, should give the purchaser less than the agreement entitled him to, I have no doubt that he may effectually call upon this Court to rectify the defective conveyance and give him all that the agreement comprehended.

In *Taitapu Gold Estates Ltd.* v. *Prouse*[26] it was argued that a transfer could not be rectified after it had been registered under the Land Transfer Act. In that case the agreement between the parties had provided for the reservation of mineral rights to the vendor, but this reservation had been inadvertently omitted from the transfer. Hosking J. referred to *Assets Co.* v. *Mere Roihi*[27] and said:[28]

> In the present case the plaintiffs rely on something more than an alleged ownership arising independently of the defendants. The plaintiffs rely on the contracts to which the defendants were parties, and on the facts which followed upon the contracts. In my opinion, by reason of the contracts and the facts, the defendants, though they are the registered proprietors, became and are constructive trustees of the minerals for the plaintiffs.

The defendants, although registered without fraud, could not equitably claim to hold something which they never bought nor paid for and which was included in the transfer by mistake:[29]

> Equity regards it as unconscientious to retain what has been given and received by mistake. Here the legal title to the minerals became vested in the defendants. But the written agreements and the fact of the mistake which the defendants refused to rectify are sufficient in equity to enable the Court to hold that the beneficial title is in the plaintiffs.

Thus the defendants were directed to re-transfer the minerals to the plaintiff.[30]

The remedy of rectifications is lost, however, once a bona fide purchaser for value acquires an interest in the subject-matter and the remedy is also subject to the equitable doctrine of laches, although time does not begin to run until after the discovery of the mistake.[31]

[26] [1916] N.Z.L.R. 825.
[27] [1905] A.C. 176.
[28] [1916] N.Z.L.R. 825 at 831.
[29] Ibid., 833.
[30] A constructive trust situation was also found in *Craddock Bros.* v. *Hunt* [1923] 2 Ch. 136, where there was a failure to transfer part of the land contracted for and this was not affected by a transfer of that piece of land to a party with notice.
[31] *Beale* v. *Kyte* [1907] 1 Ch. 564.