Start of page 421

MISTAKE IN THE CONSTRUCTION OF CONTRACTS

The need for careful use of words in discussing mistake in the law of contract is so obvious that we feel it necessary, in inflicting on the readers of this ***Review*** yet another article on the topic, to provide ourselves (and them) with a short glossary showing the meanings we attach to some of the terms about to be used. We realise that these definitions are too compressed to be entirely satisfactory but nevertheless feel that in a general discussion they are a help to the achievement of greater precision.

Common mistake. An error common to both parties as to some fundamental fact in a case where, the rules of offer and acceptance being satisfied, a contract is otherwise achieved.

Mistake as to subject-matter. An error by one or both parties as to some fundamental fact in a ease where, the rules of offer and acceptance being satisfied, a contract is otherwise achieved.

Literal contract. The terms of a contract as expressed by the parties.

Total contract. The terms of a contract as expressed by the parties plus the additional terms (if any) which the law holds to be included and less any terms used by the parties which the law holds to be excluded.

Implied term. A term of the total contract not expressed by the parties.

Inoperative obligation. An obligation under a literal contract which, on the true interpretation of the total contract, is not required to be carried out.

More will be said about these definitions in the following discussion. Meanwhile we would say that our main object is to add our

voice to those that have been raised[1]to urge that mistake should no longer be treated by textbook writers as a separate category of the law of contract, and to explore some of the consequences of dealing with mistake as to subject-matter by arriving at and then applying the total contract. We treat the total contract as including implied terms whether these are taken to be included by reference to the presumed intention of the parties or by the operation of a rule of law[2]. We refer to mistake as to subject—matter rather than common mistake because we believe the latter term to be unsatisfactory in stressing a factor which may well be irrelevant, since the parties have *ex hypothesi* reached agreement and complied with the rules of offer and acceptance. In these circumstances, where the court has the task of arriving at and then applying so much of the total contract as applies to the matters in dispute, its approach is the same whether both parties were mistaken or only one. This is illustrated by ***Harrison & Jones*** v. ***Bunten Lancaster***[3] - a case to which we will return later—where the contract concerned a sale by description of Calcutta kapok, 'Sree' brand, both parties believing it to be free from cotton when it was not. Pilcher J. said[4]:

> "*Ryder* v. *Woodley* seems to show that in this type of case a mistaken belief by the buyer as to the nature and quality of the goods bought by description is immaterial, provided that goods which answered the description were delivered. It is not easy in principle to see why the fact that the sellers also shared the mistaken belief should be material."

The learned judge went on to say firmly that[5], where the buyer was mistaken in a case of this kind, he could see no reason "why the fact that the seller may entertain the same unexpressed but erroneous belief should have any relevance when the rights of the parties come to be considered." This applies also where the contract relates to a specific object, for example, the new oats in ***Smith*** v. ***Hughes***[6] If, from an objective standpoint, the buyer did not misunderstand the offer and if the seller did not have actual knowledge of a subjective misunderstanding of the offer by the buyer (in either of which cases the mistake would fall within the realm of offer and acceptance[7]) the question of whether the buyer's mistaken belief that the oats were old was or was not shared by the seller

---

[1] *e.g.*, C. J. Slade, "The Myth of Mistake in the English law of Contract" (1954) 70 L.Q.R. 885. Mr. Blade's words seem to have fallen on deaf ears: the new editions of the two leading textbooks, Cheshire & F ifoot and Anson, each have a separate chapter on mistake. *Cf.* Atiyah, *An Introduction to the Law of Contract* (Oxford, 1961).

[2] For a discussion of the principles which guide the courts in arriving at the total contract in commercial cases not affected by mistake, see Fridman (1960) 76 L.Q.R. 521

[3] [1958] 1 Q.B. 646

[4] At p. 655

[5] At p. 660

[6] (1871) L.R. 6 Q.B. 597.

[7] On the understanding that we treat the requirement of certainty as part of the rules of offer and acceptance. On this see below

would be immaterial. If one believes that a fundamental mistake as to subject-matter vitiates a contract, one will of course insist that the mistake must be common. But if, with Lord Atkin and the majority, one believes that the question is one of construction, it is plain that the total contract must deal with the case where only one party is mistaken as well as with the case where both are. This is not to deny that the total contract may in some cases be held to differ according to whether the mistake is common or not, but merely to insist that the construction theory must find room for both types of mistake. It is a plain fallacy to say that because an implied term bearing on mistaken facts can only be read into a contract if (however notionally) it was agreed to by both parties, therefore there can be no implied term unless the parties agreed in their view of the facts.

It seems to us conclusively established[8] that what Dr. Cheshire and Mr. Fifoot refer to as mutual mistake and unilateral mistake[9] relate to offer and acceptance and we do not wish to discuss them further here. Mistake as to subject-matter, except in certain hypothetical cases where it may be said also to fall within the sphere of offer and acceptance[10], should in our view be treated as one of many factors that may need to be considered in arriving at the total contract. It belongs, in other words, to a discussion on the construction of contracts and the circumstances in which terms will be taken to be implied, as the courts have almost invariably held. The starting point is always the literal contract and not the mistake. The question is not what are the parties to be taken to have intended to happen if one or both of them were mistaken, but what are they to be taken to have intended to happen *on the facts as they actual were.*

We should perhaps make it clear at this stage that when we say that cases of mistake as to subject-matter should be treated as belonging to a discussion on the construction of contracts, we do not wish to commit ourselves (at any rate in this article) on the scope of the legal concept of "construction." We believe that a close examination of this concept would reveal problems analogous to those which underlie the controversy as to the basis of the doctrine of frustration, but to embark on this task now would take us too far afield. In any event we are satisfied that the validity of the views put forward in this article is unaffected by whichever theory of construction is adopted[11].

---

[8] As by C. J. Slade, *loc. cit.* ; *cj.* T. H. Tyler, 11 M.L.R. 262.

[9] "Unilateral" mistake is apparently given the artificially limited meaning of mistake by the offeree as to what the terms of the offer are, the mistake being known to the offeror: Cheshire & Fifoot, 5th e d., p. 175; *cf. ibid*. p. 193.

[10] See below

[11] In view of the possibility of some remarks in my *Introduction to the Law of Contract* being misunderstood, it is proper for me to add this footnote for which I alone am responsible. I adhere to the views I express ed in (1957) 73 L.Q.B. 340 subject to the same caveat as expressed in the text above, though I regret to say there are some remarks which might have been better stated. On the other hand, as is plain from my *Introduction*, I do not accept the narrow traditional view of the function of "construction" and it was owing to my belief that my article in [1957] 73 L.Q.E. 340 might be interpreted to support this view, that I inserted a word of caution about it In my book at p. 130.—P.S.A.

Start of page 424

This leads to another point. It may be said in objection to the treatment of mistake as depending on construction, that this theory would destroy all certainty in this field since a decision on the construction of one contract could not be used as a precedent in dealing with another contract. Apart from the fact that the law on this subject could hardly be in a greater state of uncertainty than it already is, we suggest that this objection is, in any event, groundless. A decision by a court as to what was in the mind of a particular person at a particular moment, or as to the meaning of certain words in a particular context, would of course be useless as a precedent in a later case. But the construction of contracts certainly goes beyond this. At least it extends to deciding what reasonable men would have intended had they been in the position of the parties, and this may well be a valuable guide to another court in dealing with parties similarly placed.

We have said above that there may be circumstances in which mistake as to subject-matter should properly be treated as falling within the sphere of offer and acceptance. This is because it is possible to envisage cases where even the total contract does not indicate any solution to the problem which has arisen. If in *Couturier* v. *Hastie*[12], for example, the parties had exchanged correspondence before the contract was concluded, in which the possibility of the cargo having been sold due to overheating had been discussed, and if the parties had disagreed about what was to happen in such a case, but, hoping that their fears were illusory, had ended by saying nothing about it in the literal contract, the court might have found it difficult to discover any term which could properly be taken to be implied. The solution here, it is submitted, lies in the realm of offer and acceptance. Treating the terms of the total contract as embodied in the offer it would be evident that the offer was uncertain as to a point that, on the facts as they actually were, was of vital importance. Under the general principle that an offer mast be certain before its acceptance can lead to a contract[13], no contract would therefore have come into existence. While we believe, therefore, that the legal analysis of mistake as to subject-matter must find room for cases where the contract is void for uncertainty, it is evident that such cases will be rare. Normally the courts have no difficulty in reaching a solution by arriving at and then applying the total contract.

It follows from what we have been saying that there is no

[12] (1856) 5 H.L.C. 673

[13] As illustrated in *Falck* v. *Williams* [1990] A.C. 176, *Scammell* v. *Ouston* [1941] AC. 251 and many other cases. The American Restatement on Contract expresses it thus: “32. An offer must be so definite in its terms, or require and performance to be rendered by each party are reasonably certain”

more reason to treat mistake as it affects the contract itself in a separate category than there is to treat mistake inducing an innocent misrepresentation[14] separately from the law relating to innocent misrepresentation, or mistake as to the existence of an illegal element[15] separately from the rules concerning the effect of illegality. This argument of course involves the rejection of the view that common mistake on a matter going to the root of the contract can of itself render the contract void. Since this theory is apparently still held in some quarters[16] we should say something about it. We do not wish to recapitulate all the well-known arguments against this theory[17] but will confine ourselves to those points which are particularly relevant to the general thesis of this article.

The principal weakness from which, it seems to us, the mistake theory suffers is that it involves concentrating on one aspect of a factual situation to the exclusion of many other relevant aspects of the same situation. The facts may, for instance, raise what appears to be a plain case of fundamental mistake as to subject-matter but it would be manifestly wrong to conclude, without further inquiry into the circumstances, that the obligations of the parties must be inoperative. Despite the existence of the mistake there may well be—in most eases, we venture to suggest, almost certainly will be—other factors such as express or implied terms or misrepresentation, which plainly show that the obligations of the parties are *not* inoperative. Alternatively, the facts may raise questions of illegality, in which case the obligations of the parties may indeed be inoperative but there may well be other, more drastic, consequences.

To take the first possibility, it is plain that, while there may be a mistake as to subject-matter in a contract for, say, the sale of goods, the seller by giving an express warranty as to the facts about which the parties are mistaken, may have assumed the risk of the facts being other than they are believed to be. Now it surely cannot be the law that despite the presence of an express warranty it remains open to the seller to allege that the contract is "void" for mistake as to one of the matters covered by the warranty. Yet a mistake may be nonetheless genuine for the existence of a warranty and if the mistake is operative, logically the whole contract should be void, including the warranty, for it is difficult to see how a term in a contract can prevent the contract being void The answer to this difficulty on the mistake theory would presumably be that if one of the parties had expressly agreed to bear the risk of the goods

---

[14] As in *Oscar Chess* v *Williams* [1957] 1 W.L.R. 870, see below.
[15] As in *Shaw* v *Shaw* [1954] 2 Q.B. 429, see below.
[16] See *e.g.*, Anson 21st ed., p. 251. and Devlin, L.J. in *Ingram* v *Little* [1960] 3 All ER. 382.
[17] Of which probably the best expression is in the judgments of the High Court of Australia in *McRae* v *Commonwealth Disposal Commission* (1951) 84 C.L.R. 377

being defective, then the absence of the defect could not be said to be the fundamental assumption or basis on which the parties had contracted. This, however, seems to be merely an unconvincing way of arriving at the result that a contract is only "void" for common mistake if, on the true construction of the contract, the parties intended that their obligations should be inoperative in the event of the facts as assumed being untrue. Naturally this construction is untenable where there is an expressed intention that one of the parties should bear the risk of the facts as assumed being untrue.

What we have been saying so far is borne out when it is recalled that the grounds on which it is usually urged that a contract may be void for a mistake of this kind are that the parties have contracted on a certain "basis" or "fundamental assumption" as to some essential fact which has proved unfounded. This kind of language slurs over the possibility that one or other of the parties may have accepted the risk that the facts as assumed would prove untrue. It thus becomes all too easy to fall into the error of saying that because the parties have contracted on a certain basis, ***therefore*** the contract is void if that basis does not exist. This is in fact a palpable ***non sequitur*** because it may well be—indeed it usually is— the responsibility of one or other of the parties to see that that basis does exist. For example, it could truly be said that in a contract of sale of goods it is a fundamental basis of the contract that the seller has a right to sell the goods, but the absence of this basis does not render the contract void, or the obligations inoperative.

These arguments are equally applicable where the facts raise a case of mistake as to subject-matter which overlaps with a misrepresentation. Indeed, every case of effective misrepresentation necessarily involves mistake on the part of the person to whom the representation is made, since it is only if he does not know that the representation is false that he is able to rely on it as grounding a legal remedy; and where the misrepresentation is innocent the mistake must also be shared by the other party. Yet it is plain that where the misrepresentation is effective no court would ignore that aspect of the case and hold the contract void as a result of the mistake[18]. We do not see how this can be explained except by saying that a mistake as to subject-matter is merely part of the total situation which a court must examine before it can decide whether the risk of the facts as assumed being untrue, is on one or other of the parties or on neither.

[18] Although this course was in effect advocated in the 4th ed of Cheshire & Fifoot (p. 246) the learned authors appear to have thought better of it because this suggestion is not to he found in the 5th ed. The same fallacy is, with respect, one of the unsatisfactory features of the judgment of Denning L.J. in *Solle* v *Butcher* [1950] 1 K.B. 671, since he decided the ease on the mistake point without expressing a concluded opinion on whether there had been a misrepresentation as alleged by the defendant. We refer to this case again below.

Start of page 427

We would add a further point to these criticisms of the traditional theory of mistake as to subject—matter. Not only is this theory difficult to reconcile with cases where express or implied terms, or misrepresentations, overlap with the mistake, but it also appears to involve an incorrect statement of the principle prima facie applicable. We suggest that even where the facts do involve a mistake as to subject—matter the general presumption is that the literal contract is to be carried out, and if it cannot be carried out the party in default will be liable to pay damages. Even if there is no express intention placing the risk of the facts as assumed being untrue on one of the parties, the court is usually able to find an implied term which does so. To hold the obligations of the parties to be inoperative is usually a last resort, a residual possibility which only comes in when all attempts by the court to allocate the risk have failed[19].

There is a further point on which we would join issue with the proponents of the mistake theory namely, the suggestion that even where a mistake of this kind is effective, it renders the contract "void." This, we believe, is inaccurate, since ***ex hypothesi*** the parties have agreed, even if the agreement is only to be carried out in the event of a certain "fundamental assumption" being correct. If the agreement cannot be carried out and neither party has accepted the risk of this state of affairs, the natural solution is to say that the obligations of the parties are inoperative, rather than that the contract is void. Moreover, if we are right in our view that mistake of this kind only operates where an express or implied term places the risk on neither party, it follows that it would be incorrect to treat the contract as void in such circumstances. The circularity of saying that a contract is void, that is to say totally ineffective, because of the effect of one of its terms, is obvious. We therefore prefer to say that in such a case the obligation dealt with by such a term is, on the true interpretation of the total contract, an inoperative obligation. Thus if on the facts in ***Couturier*** v ***Hastie***[20] the argument that there was an implied condition precedent that the goods were in existence at the time the contract was made[21], is accepted, the true analysis of the case is that the effect of the total contract, on the facts as they actually were, was to render inoperative the seller's obligation to deliver the goods and the buyer's obligation to accept them and pay the price.

It should not necessarily be assumed that the distinction between holding the contract to be void and holding the obligations of the parties to be inoperative is merely a question of terminology and has no practical importance. For one thing, the argument that at common law operative mistake as to subject-matter causes

[19] There may, of course, be statutory reversals of this presumption, as in s. 6 the Sale of Goods Act, 1883.
[20] (1856) 5 H.L.C. 673.
[21] See Atiyah (1957) 73 L.Q.R. 340

a contract to be void has recently been used to support the suggestion that there is an independent doctrine of mistake in equity[22] an argument that may lose some of its force if it is admitted that in such cases the contract is not void. For another thing if there are several distinct obligations in the contract and the mistake only affects some of them, the legal efficacy of the other obligations will depend on whether the mistake is to be treated as rendering the whole contract void or merely as rendering certain obligations inoperative.

MISTAKE AS TO NATURE OR QUALITY IN SALE OF GOODS

The field of sale of goods, with its closely worked out implied terms, is a useful one to explore with a view to demonstrating the irrelevance of concentrating on mistake as to subject-matter rather than on the rights and obligations of the parties on the facts as they actually are. As one of us has previously discussed from this point of view mistake as to the existence of the subject-matter[23], we turn now to mistake as to the nature or quality of the goods being sold.

Approaching a contract of sale of goods from any point of view it cannot surely be denied that there are three and only three basic possible ways in which the law could deal with such a mistake. First, the law may hold that the responsibility is on the seller. Whether this would give the buyer a right of rejection or merely a right to claim damages can be left aside for the moment. Secondly, the law may hold that the responsibility is on the buyer although in this case risk would be the more appropriate word. In this event there are surely no alternatives, for if the risk is on the buyer he clearly must take the goods and pay the price. Thirdly, the law may hold that the responsibility is not on the seller nor is the risk on the buyer. In this event the obligations would be inoperative, the seller would not be liable in damages, and the buyer would not be bound to take the goods or pay the price. What is apt to be misleading about this third case is that, if it arose, it would not be as impartial as it might seem when set against the other two possibilities. This is because to render the obligations inoperative would be to benefit the party against whom the contract was sought to be enforced. Thus if the buyer is suing the seller for damages in respect of the defect in the goods, the seller might find it advantageous to establish that his obligation is inoperative and to return the price in exchange for the buyer restoring the goods. This could happen if, for example, the market price of the goods has risen after the contract was made, or if there were a claim for consequential damages as a result of the defect. On the other hand, and far more frequently in practice, the buyer may be wishing to have his obligations declared inoperative because he desires to reject the goods, while the seller is seeking to enforce the contract.

---

[22] By Denning L.J. in *Solle* v *Butcher* [195O] I K.B. at p. 694.
[23] Atiyah, (1957) 73 L.Q.R. 340

Start of page 429

In this event it may serve the buyer's purpose equally well either to prove that the seller has been guilty of a breach of condition which entitles him to reject the goods, or to prove that his obligation is inoperative. In fact it will often be more advantageous to the buyer to establish that the obligation is inoperative because by doing so, although he will lose any right to damages, he will be able to evade the strict limitations on the right of rejection imposed by the Sale of Goods Act[24]. This, of course, would be a paradoxical situation because it would mean that a seller who had been guilty of a breach of contract might be better placed than a seller whose obligation was inoperative.

It may be objected to our theory that since the holding of the obligations to be inoperative is in practice likely to benefit one party more than the other, the law is in some sense still holding the risk to be on one of the parties. The answer to this difficulty, it is submitted, is that the law is not concerned about factors ***dehors*** the contract which may render a finding that an obligation is inoperative more to the advantage of one party than the other. Outside events (e.g., a rise or fall in market prices) may render the performance of a contract more to the advantage of one party than the other and it is not surprising that the same may be true of a finding that the obligation is inoperative. Either way the law is indifferent: it applies the total contract.

The three possible solutions to the problem of risk may now be examined in more detail. First, then, as we have said, the law may hold that the responsibility for the defect in the goods is on the seller. This may be because he has expressly stated the goods to be without the defect. In this event, whether the statement is innocent or fraudulent, and whether it is a term of the contract or a mere representation, the responsibility lies on the seller. It is true, of course, that if the statement is a mere innocent misrepresentation the buyer has no claim for damages against the seller, but the right of rescission, being a right at the buyer's option only, is some justification for regarding the responsibility for the defect as the seller's. It is also true that if the goods have been resold or a certain period has elapsed the responsibility will have ceased owing to the limitations on the remedy of rescission. But other legal remedies also have their limitations, and may be terminated by events subsequent to the breach. It is the state of the rights and duties of the parties at the time when the contract is made which determines where the risk lies.

If the seller has not expressly made himself responsible for

[24] It has recently been held by the C A. that the restrictions on the right of rejec tion laid down by the Sale of Goods Act are equally applicable to the right of rescission for innocent misrepresentation (*Long* v. *Lloyd* [1958]1 W.L.R. 753) but it has never been s that they can also apply where the obligations are inoperative or, as it is usually put, where the contract is totally void. This no doubt is one of the principal reasons why a buyer may seek to persuade the court that his contract is void.

the defect he may still be held liable under the terms implied by the Sale of Goods Act. Moreover, even if the seller has made a mere representation as to the quality of the goods, this would not exclude an implied term covering the same ground, thus giving the buyer more extensive remedies than those afforded for an innocent misrepresentation.

It is commonly stated that a seller is under no duty to disclose defect in the goods the buyer, or putting it the other way, silence is not a representation[25]. This, however, is a somewhat misleading proposition, and it is surprising that it is still generally accepted as an axiom of the law. For what, after all, is an implied term if it is not an implied promise either that something shall happen, or that a state of facts exists? But an implied promise that a state of facts exists is surely nothing else than an implied representation. It is not, indeed, the equivalent of a mere misrepresentation because that is not a term of the contract, and if innocent, gives the limited remedy of rescission. An implied term, however, has exactly the same effect as an express term, which is of course far more favourable to the buyer than a mere representation[26].

Thus to say baldly that there is no duty on a seller of goods to disclose defects in them is to ignore the frequent existence of implied terms under sections 12—15 of the Sale of Goods Act which impose a far heavier responsibility than would be imposed by a duty of disclosure. Quite apart from the difference in remedies, a duty of disclosure would only extend to facts known to the person under the duty, whereas the implied terms under the Sale of Goods Act extend to latent defects, even if not known and even if they could not have been discovered by the use of due care and diligence[27]. The only real significance of the so-called rule that silence is not a representation is that the mere knowledge of the seller that there is a defect in the goods is, by itself, no ground for implying a term in respect of that defect. Even this rule may not be absolute. If a defect has been caused between the inspection of the goods by the buyer and the making of the contract the court may well be reluctant to hold that the seller is absolved from responsibility. In ***Karsales (Harrow) Ltd***. v. ***Wallis***[28] W was offered a secondhand Buick car, which was in excellent condition when he inspected it. Some weeks passed before W. entered into a hire-purchase agreement in respect of the car, and when it was delivered (by towing as it would no longer go) it was in a deplorable state. The new tyres had been changed for old ones, the engine was badly damaged,

---

[25] See *e.g*., Cockburn C.J. in ***Smith*** v ***Hughes*** (1871) L.R. 6 Q.B. 597 at 605; Cheshire & Fifoot 5th ed., p. 216; Anson 2lst ed, p. 212.

[26] It may be noted in passing that the familiar distinction between an express term of a contract and a misrepresentation corresponds exactly with the less familiar distinction between an implied term of the contrac t and a breach of duty of disclosure.

[27] See *e.g*., ***Frost*** v ***Aylesbury Dairy Co***. [1905] 1 K.B. 60

[28] [1956] 1 W.L.R. 936

the radio was missing and there were other defects. Notwithstanding rigorous terms in the agreement excluding liability for defects, Denning L.J. held that where inspection had taken place in such circumstances there was an obligation to deliver the goods in substantially the same condition as when they were seen and that it was an implied term of the agreement that pending delivery the car would be kept in suitable order and repair[29]. The value of this decision in relation to sale of goods is reduced by the fact that it arose on a hire-purchase case, to which the Sale of Goods Act does not apply. (The wide interpretation placed in this case by the Court of Appeal in ***Yeoman Credit, Ltd.*** v. ***Apps***[29a] is not relevant to the question discussed here.)

Before examining cases of mistake as to quality in which the position is complicated by the provisions of the Sale of Goods Act, it is worth considering the possibility of a mistake as to the nature of the goods. The following example of a contract said to be void for mistake which is given in Anson[30] may be taken as a starting point:

> "Suppose that A agrees to buy and B agrees to sell certain bales which both parties believe to contain hemp; they in fact contain tow."

Now it must be said at the outset that it is most improbable that such facts could occur without the seller stating either orally or in writing (***e.g.,*** in a catalogue at an auction sale) that the bales contain hemp, and in this event there can surely be no question of the contract being void for mistake. The seller will be liable to the buyer for breach of the condition that the goods should correspond to their description[31] or the contract will be liable to be set aside for misrepresentation. If, on the other hand, the bales have been sold without the word "hemp" being used the most natural interpretation of the parties' conduct would be that the buyer had agreed to buy the bales, whatever they might contain, ***i.e.***, it would be a classic case of ***caveat emptor***. It may be true that the third possibility—the risk of the bales containing tow is on neither party—cannot be entirely ruled out. For example, if at an auction sale S bought some bales which were stated to contain hemp although in fact they contained tow, and immediately after the goods had been knocked down to him, B were to offer to buy "those bales which you have just bought" it is possible that an acceptance by S would result in an inoperative contract. But this would be so not just because the parties had made a fundamental mistake but because it would be difficult in such circumstances for the court to

---

[29] At p. 940.
[29a] [1961] 2 All E.R. 281
[30] At p. 251
[31] Even an exemption clause would not protect the seller because this would plainly be a fundamental breach.

imply a term that either party accepted the risk of the bales containing something other than hemp. The seller could hardly be taken to be warranting the nature of the contents of the bales when he had had no chance of examining them, and the buyer could not be assumed to be buying whatever the bales might contain when he had just heard the bales described as containing hemp. It need hardly be stressed that this is a most improbable case, and that normally the court would have no difficulty in holding that the total contract placed the risk on one or other of the parties.

The position under the Sale of Goods Act is complicated by the opening lines of section 14, which preserve the rule of caveat emptor subject to the exceptions there referred to:

> "Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows . . .'

If these words mean anything they surely mean that there are no implications of any kind as to quality or fitness except those expressly laid down in the Act or some other statute. Generally speaking this accords with the view that we have put forward to the effect that in the vast majority of cases the risk of a mistake as to quality is on one party or the other. Either the seller is liable for breach of an express or implied term, or for misrepresentation, or it is a case of *caveat emptor*. But the effect of section 14 appears to be to exclude altogether the third possibility, namely, that the risk is on neither party and the obligations are inoperative. It is possible to imagine circumstances in which this could lead to difficulty. Suppose, for example, the following facts: B calls at S's antique shop and inspects a porcelain figure which he finds to be flawless. He leaves, saying "he will think it over," and shortly afterwards a careless assistant drops the figure which suffers unobtrusive cracks sufficient to make it almost worthless. B returns the same day, and mistakenly believing the figure to be as it was when he inspected it, buys it without further examination at the price originally asked. If S is ignorant of what has happened it is submitted that *caveat emptor* applies and the risk is on B. On the other hand if S knows of the defect this would obviously be an unfair result, yet it is difficult at first sight to see how it could be avoided consistently with section 14 of the Sale of Goods Act. It may be possible, however, to infer an implied condition in such circumstances to the effect that the seller does not know of any change in the condition of the goods since they were inspected. ***Karsales, Ltd.*** v. ***Walls***, to which we have referred above, may possibly lend some help to this conclusion.

The significance of the principle embodied in section 14 of the Sale of Goods Act thus becomes apparent. If the first of the possibilities referred to above does not operate, then the law adopts the

second and discards the third. In the particular case of mistake as to quality—as opposed to mistake as to the existence of the goods, or mistake as to the nature of the goods, or (perhaps) mistake as to a change in the circumstances between the date of examination and the date of the contract—the irresistible inference to be drawn from the Sale of Goods Act appears to be that the risk of all defects is on the buyer, unless the seller has expressly assumed the risk, by a term of the contract or a representation, or unless there is an implied condition or warranty under sections 12—15 of the Act or under some other statute. An examination of some recent cases from this point of view may be useful.

In *Nicholson & Venn* v. *Smith Marriott*.[32] the plaintiffs agreed to buy some antique linen from the defendants. The linen was expressly stated to be Caroline, but in fact it turned out to be Georgian. The buyers claimed either that the contract was void for mistake, or alternatively that the sellers had been guilty of a breach of condition and that the buyers were entitled to damages. At the trial the buyers did not press their claim on mistake and they were awarded damages for breach of condition. The learned judge, Hallett J., however, went on to give his opinion on the mistake point and, basing himself on Lord Atkin's judgment in *Bell* v. *Lever Bros.*,[33] he said that he thought the contract was void. It would hardly be worth citing this case merely to suggest that this dictum was wrong, because this seems generally agreed. The really interesting thing about the case is that it demonstrates the danger, in sale of goods cases, of keeping the law of mistake separate from the law of express and implied terms. If this contract was really void then the sellers could have pleaded its voidness just as much as the buyers, in which case they would not have been liable to pay damages for breach of condition, although no doubt they would have had to return the price, which usually comes to the same thing. But to hold it void, or, as we prefer to say, to hold the obligation inoperative, would have been to ignore the fact that by expressly warranting the linen to be Caroline the sellers had taken the risk of the linen turning out to be other than Caroline. The proper analysis of this ease, it is submitted, is as follows: The obligation could not be held inoperative unless it was clear that the intention of the parties was that neither of them accepted the risk of the linen not being Caroline, as would have been the ease, for example, if the sellers had in effect said, "We do not warrant that This linen is Caroline, but on the other hand if it is not we will take it back and return your money." This construction of the contract was, however, entirely negatived by the express statement of the sellers that the linen was Caroline. This case differs from a number of others in that the buyers' attempt to have the contract

[32] (1947) 177 L.T. 189
[33] [1932] A.C. 161

declared void was (presumably) not inspired by a wish to extend the implied terms in the Sale of Goods Act, but to evade the inconvenient restrictions on the buyers' right of rejection. It also differs from eases such as ***Oscar Chess*** v. ***Williams***[34] in that the description of the linen as Caroline was a condition and not a mere representation. In the latter case both parties, acting on information contained in a car log book (which proved to have been forged), were under the belief that a car made in 1939 was a 1943 model. This inflated the market price from £170 to £285. Although the ear was described in the contract as a "l948 Morris" a divided Court of Appeal held that this was not a term of the contract but a mere misrepresentation. The buyer having already disposed of the car was not in a position to ask for rescission of the contract, but this does not alter the fact that at the time when the contract was made the risk of the car not being a "1945 Morris" was, as a result of the legal rules relating to misrepresentation, on the seller.

A recent ease where the risk was held to be on the buyer was ***Harrison & Jones*** v. ***Bunten & Lancaster***[35], the facts of which have already been given. It was clear that the sellers had never stated that the brand of kapok in question contained no cotton, and it was also clear that the buyers could get no assistance from the implied terms in the Sale of Goods Act. No suggestion was made that the goods did not correspond with their description or that they were unmerchantable. The buyers' sole complaint was that the goods were not suitable for their purposes. Unfortunately for them, however, they could not rely on section 14 (1) of the Act, and claim that there was an implied promise that the goods were fit for the purpose for which they were sold, because they were caught by the proviso to section 14 (1). This proviso, it will be recalled, excludes the implied condition where the goods are ordered under a patent or trade name. Manifestly, a person who orders goods under a patent or trade name, must be taken, unless there are special circumstances to the contrary[36], to have accepted the risk that the goods may not prove suitable for his purpose. This being so it is not surprising that Pilcher J. rejected the buyers' contention that the contract was void. Its acceptance would, in effect, have meant adding a new implied condition to those laid down in the Sale of Goods Act, although it would have been an implied condition rendering the contract void, not placing a liability on the sellers.

MISTAKE AND IMPOSSIBILITY

Where the parties have contracted for the performance of an act which cannot be carried out because of some deficiency in the subject-matter at the time the contract was made, the

[34] [1957] 1 W.L.R. 870
[35] [1953] 1 Q.B. 646
[36] See, ***e.g.***, the hypothetical example, given by Bankes L.J. in ***Baldry*** v ***Marshal*** [1925] 1 LB. at 266.

approach of the courts has again been to arrive at and apply the total contract with the same basic possibilities in view, namely, does the total contract place the risk that performance would be impossible on one or other of the parties or on neither? This approach, and the development in the courts' willingness to read implied terms into the literal contract, are illustrated by two cases concerning mistake as to the mineral content of land.

In ***Butt*** v. ***Thompson***[37] the plaintiff had leased a coal mine to the defendant, who agreed to pay a royalty of 8d. for each ton of coal extracted. The defendant also covenanted to extract at least 13,000 tons of coal per year, and further undertook to pay the royalty on 13,000 tons "whether the coals shall be worked or not." On these facts it was held by the Court of Exchequer that it was no defence that there were not 13,000 tons of coal in the whole mine. The arguments of the defence were dismissed by Pollock C.B. as follows—

> "We are of opinion that this stipulation for a fixed rent, coupled with a covenant that coal should be wrought to that extent . . . does not carry with it, by any implication, a condition that there shall be coals to that amount capable of being wrought. It appears to us to be a stipulation on the part of the defendants that they would work and get that quantity, and that if they did not get it, they would pay a fixed rent to the landlord; and we cannot import into that covenant a condition that there should be coals to that extent. If that was the intention of the parties they should have so expressed it".[38]

In ***Clifford*** v. ***Watts***[39] the facts were on all fours with those in ***Butt*** v. ***Thompson***[40] but the court took a very different view. The plaintiff had leased a claypit to the defendant, who undertook to dig at least 1,000 tons of clay per year, and to pay a royalty of 2s 6d. per ton to the plaintiff. The defendant alleged that there was insufficient clay to produce even the first year's quota of 1,000 tons, and it was held that if this were the case, the defendant was not liable for the royalty, although it is not quite clear whether the whole contract was held inoperative. What is clear, however, is that the court treated the question as depending simply on the construction of the contract.

The court distinguished ***Butt*** v. ***Thompson*** on the ground that there the lease was intended to secure the lessor a minimum rent whether or not coal was worked or was there to be worked, or in other words that the risk of the coal proving insufficient had in that case been assumed by the lessee. The distinction is however unconvincing since the covenant to pay the rent whether the coal was worked or not, was probably intended merely to reinforce the covenant to extract the coal—it is most unlikely that it was

---

[37] (1844) 13 M. & W. 487.
[38] At pp. 408-494.
[39] (1870) L.R. 5 C.P. 577.
[40] (1844) 13 M. & W. 487

inserted to take account of the possibility that the coal would prove insufficient. The real distinction between the two cases is that by the time ***Clifford*** v. ***Watts*** was decided a change had taken place in the attitude of the courts towards reading implied terms into the literal contract[41].

Thus it is clear that when the court is free to approach mistake as to subject-matter involving impossibility of performance from the viewpoint of interpreting the contract it will do so. The contrast is very marked between these two cases and ***Sheikh Bros.*** v. ***Qchsner***[42], where the court was not free to adopt this approach. This was a Privy Council appeal from Kenya, and was governed by the Indian Contracts Act, section 20 of which provides—

> "Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void."

This appears to be a statement of the orthodox English view as to common mistake, and it was so treated by the Privy Council. The appellants, who were landowners in Kenya, had given a licence to the respondents to cut and process all the sisal grown on certain lands owned by the appellants. The respondents agreed to produce an average of at least fifty tons of sisal fibre per month, and to deliver it to the appellants. After a while it transpired that the land in question produced insufficient sisal to enable the respondents to manufacture fifty tons of fibre per month. The Privy Council held that the contract was void for mistake under section 20 of the Indian Contracts Act.

It has been observed on a number of occasions, in particular by Lord Aitkin in ***Bell*** v. ***Lever Bros.***[43], that there is a close relationship between some cases of mistake and cases of frustration. If the contract proves impossible of performance ***ab initio*** one of the parties may plead that it was void for mistake; if it proves impossible of performance through subsequent events it may be pleaded that the contract is frustrated. Despite the controversy as to the true basis of the doctrine of frustration, it is clear that ultimately cases of frustration, like cases of initial impossibility, turn on the question whether the risk of the impossibility is held to be on one or other of the parties, or on neither. Why then is it that there are so many cases of frustration, and so few cases of contracts being held "void" for initial impossibility?

There are, it is thought, at least three reasons why this should be the case. In the first place, in the nature of things, parties are less likely to enter into contracts which are impossible of performance ***ab initio*** than into contracts which subsequently

---

[41] It may be recalled that ***Taylor*** v ***Caldwell*** (1863) 3 B. 8. 826, the ***fons et origo*** of the doctrine of frustration, had been decided some seven years previously. Although not referred to in the judgments it was relie d on by counsel.

[42] [1957] A.C. 136

[43] [1932] A.C. at pp. 226-227

become impossible. In the second place, to hold a contract which may have been in operation for some time before the mistake is discovered, to be void ***ab initio*** is apt to give rise to such practical inconvenience that the courts are reluctant to do it whenever there is any reasonable alternative. In the third place, and to some extent this follows from the previous reasons, a court will much more readily place the risk of initial impossibility on one or other of the parties, than it will the risk of subsequent impossibility[44]. It is in line with what is said above as to the presumption that the promises set out in the literal contract are to be performed, and also accords with common sense, to say that in the ordinary way a person who undertakes to do something implicitly warrants that he can do it, at least in the circumstances existing when the contract is made, or, in others words, that the risk of initial impossibility is generally accepted by each party in relation to his own promises.

"It is not competent to a defendant to say that there is no binding contract merely because he has engaged to do something which is physically impossible."[45] This is because in most cases the promisor is in a much better position than the other party to know whether his promises are performable or not, and it is surely not too severe to require that a person should be satisfied before he makes a promise that there is no impediment to its performance. There are, no doubt, exceptional cases, where the promisor has not, and could not be reasonably expected to have, possession of the facts which would show that his promise cannot be performed. There are also the cases of perished goods which are covered by section 6 of the Sale of Goods Act. This section, however, may well be an anachronism in the modern world, because in these days of speedy communications there will usually be little excuse for a seller agreeing to sell goods which have already perished. The position was, of course, different in 1856 when ***Couturier*** v. ***Hastie***[46] was decided, and it is possible that an amendment of section 6 is now required so as to place the risk in such cases on the seller.

The principle that a promisor generally warrants that he can perform his promise does not have the same force in cases of subsequent impossibility, since it may not be reasonable to insist that he impliedly undertakes that he will continue to be able to perform no matter what unforeseeable cataclysms the future may bring.

Closely allied with the cases of impossibility are those of illegality, and in the law of frustration, supervening impossibility and supervening illegality are frequently treated as indistinguishable. This, however, has never been the case with regard to initial impossibility and initial illegality which have always been

---

[44] For this reason it is submitted that it is misconceived to say, as is said in Cheshire & Fifoot (5th ed. p. 179) that If a contract may be discharged by subsequent impossibility of performance, then a ***fortiori*** its very genesis is precluded by a present impossibility."

[45] Brett J. in ***Clifford*** v ***Watts*** at p 588.

[46] (1856) 5 H.L.C. 673

looked on as raising entirely different problems. There have been, however, certain recent cases in this field, too, which confirm the growing importance of implied terms. If a person may be held to warrant, however mistakenly, that he can ***physically*** perform his promises under a contract, is there any reason why he should not be held to warrant that he can ***legally*** perform them? Until recently this possibility seems never to have occurred to anybody because it has always been uncompromisingly declared that if a contract is illegal ***per se*** the intention or knowledge of the parties is irrelevant. It now appears that this may not always be the ease, and that the severity of the law relating to illegality may be substantially mitigated by the implication of a term that the contract can be legally performed.

Thus in ***Shaw*** v. ***Shaw***[47] it was held by the Court of Appeal that a married man who bigamously "married" a woman who mistakenly believed him to be a widower was to be taken to have warranted that he was legally able to marry her. Although the contract to go through a ceremony of marriage could not be legally performed, and was therefore illegal ***per se***, the defendant had contracted that it could be legally performed. As Penning L.J. said: "Every man who proposes marriage to a woman impliedly warrants that he is in a position to marry her."[48]

In this case the promisor himself was not mistaken, being well aware that his real wife was still alive. But should the result have been any different if he had shared the plaintiff's mistake? There are many cases where a man has mistakenly believed that his wife was dead, or that he has secured an effective divorce, and in this belief entered into a marriage that turned out to be bigamous. If the dictum cited above is correct, and it is respectfully submitted that it is, it applies in these eases also. Yet on the orthodox mistake theory the contract to marry would be void, and with it would fall this implied warranty.

OTHER CASES OF MISTAKE AS TO SUBJECT-MATTER

If the principles we have been advocating are correct there should be no difficulty in applying them to any other kind of mistake as to subject-matter. There are probably few such cases which do not fall into one or other of the categories already examined, but the most famous and controversial of all, ***Bell*** v. ***Lever Bros.***[49],

---

[47] [1954] 2 Q.B. 429

[48] At p. 440. *Cf. Strongmam (1945), Ltd.* v *Sincock* [1952] 2 Q.B. 525, in which an architect owner contracted with a builder for some work, and undertook that he would obtain the necessary licences. When these were not obtained (without the knowledge of the builder) it was clear that the work itself was illegal, and that no action could be brought on the main contract. Nonetheless, the Court of Appeal held that the builder could sue on the express warranty that the architect would get the licences. See also *Archbolds (Freightage) Ltd*. v *Spanglett, Ltd*. [1961] 2 W.L.R. 170, especially the judgment of Devlin, L.J. which contains an interesting passage supporting our thesis.

[49] [1932] A.C. 161

remains to be briefly discussed. Again it is submitted that there were three basic possibilities:

1. The literal contract providing for compensation for loss of office was to be applied as it stood, the interpretation being that the risk that the service agreement would turn out to be voidable was assumed by Lever Bros.
2. A term was to be implied to the effect that Bell warranted that the service agreement was not voidable by reason of any default of his.
3. A term was to be implied to the effect that Lever Bros.' obligation to pay compensation was inoperative on the facts as they actually were, namely, that the service agreement was voidable.

The second or third of these possibilities would have led to a decision for Lever Bros., but in deciding that Bell was not liable to refund the compensation the House of Lords in effect adopted the first. The presumption that the literal contract was to be carried out had not been displaced, a powerful factor being that the future salary thought to be payable under the service agreement accounted for only a small proportion of the figure of £30,000 fixed as compensation. As Lord Blanesburgh pointed out[50], on the basis of salary to be lost the maximum figure in prospect for Bell was about £17,000 although even this was far in excess of the value to him of the service agreement on the footing that it was not voidable. He would have had to wait more than two years before getting this full sum in salary, and on termination of his employment was free to take other work at a comparable remuneration, so that his actual loss on the termination of his employment with Lever Bros. amounted to very little indeed. The real inducement for the payment of compensation by Lever Bros. was "the desire tangibly to recognise the exceptional services rendered to Niger by each appellant acknowledged in each letter and even now affirmed: still more perhaps to enlist their support of the amalgamation and to have their assistance in carrying it through in all its details to completion: above all, to secure on May 1 following, the voluntary resignation by each appellant of all his offices, results of value, it may have been of infinite value, to the prospects of a delicate negotiation in the success of which millions of pounds were involved."[51]

EQUITABLE REMEDIES

Thus far our analysis of mistake as to subject-matter has been in terms of common law and statutory rules. We now suggest that there is no sufficient authority for saying that the basic rules as to the effect of such mistake are any different in equity. The difference in remedies should not be allowed to cause misconception on this.

---

[50] At pp 180, 181

[51] *Per* Lord Blanesburgh at P. 181.

Start of page 440

Equity may set aside a contract where the common law would hold it void or inoperative, and in addition possesses such useful remedies as the power to rectify a written agreement and the power to make a declaration of legal rights. But the principles on which relief will be given or denied are, it is submitted, the same under both systems. Here it is necessary to refer to ***Solle*** v. ***Butcher***.[52] The facts were that L granted to T a seven years' lease of a flat for £250 per annum, both parties sharing the mistaken belief that the standard rent of £140 per annum had ceased to apply on the ground that alterations to the flat had changed its identity. If L had served on T a notice under the Rent Acts before executing the lease the standard rent would have risen to £250, but no such notice could be served during the currency of the lease. T, whose mistaken views had been relied on by L, now sued for a declaration that the standard rent was £140 and for the return of his excess rent payments. The Court of Appeal (Jenkins L.J. dissenting) held that the lease should be set aside provided that L undertook, after serving the statutory notice that would then be open to him, to execute another lease on the same terms. The case is referred to here because of Penning L.J.'s novel suggestion, based on a reading of ***Cooper*** v. ***Phibbs,***[53] that a contract which is not void for mistake at law may be voidable for mistake in equity—

> "The mistake there as to the title to the fishery did not render the tenancy agreement a nullity. If it had done, the contract would have been void at law from the beginning and equity would have had to follow the law. There would have been no contract to set aside and no terms to impose, The House of Lords, however, held that the mistake—was only such as to make it voidable, or, in Lord Westbury's words, 'liable to be set aside' on such terms as the court thought fit to impose; and it was so set aside.
> "The principle so established by ***Cooper*** v. ***Phibbs*** has been repeatedly acted on; see, for instance, ***Earl Beauchamp*** v. ***Winn***,[54] and ***Huddersfield Banking Co., Ltd***. v. ***Lister***.[55] It is in no way impaired by ***Bell*** v. ***Lever Bros.,Ltd***.[56] which was treated in the House of Lords as a case at law depending on whether the contract was a nullity or not. If it had been considered on equitable grounds, the result might have been different. In any case, the principle of ***Cooper*** v. ***Phibbs*** has been fully restored by ***Norwich Union Fire Insurance Society, Ltd.*** v. ***William H. Price, Ltd.***[57]

This reasoning has been severely criticised.[58] We limit

---

[52] [1950] 1 KB. 671.
[53] (1867) LB. 2 EL. 149.
[54] (1873) LB. 6 EL. 223, 234
[55] [1895] 2 Ch. 273.
[56] [1932] AC. 161.
[57] [1934] AC. 455, 462—463.
[58] Notably by Dr. Good Hart (1950) 66 L.Q.R. 169

Start of page 441

ourselves to the following comments on the points made in the above passage—

1. We can find no suggestion in the judgments in *Cooper* v. *Phibbs* or any of the other cases referred to, that contracts not void at law would be set aside in equity on grounds of mistake. On the contrary such passages as bear on the point appear to carry the opposite implication.[59]

2. "Setting aside" a contract often amounts to no more than declaring its ineffectiveness at law and making available equitable remedies. There is ample precedent for "setting aside" contracts that are totally void.[60]

3. The terms imposed by the Court in *Cooper* v. *Phibbs* related to existing rights[61] which could in any case have been enforced independently.

4. In *Bell* v. *Lever Bros*. the claim was for the equitable remedy of rescission, which was in fact granted by the Court of Appeal and disallowed by the House of Lords. It is difficult to see therefore how the House of Lords can be said not to have considered the case on equitable grounds.[62]

5. *Norwich Union Fire Insurance Ltd*. v. *William H. Price, Ltd*. was decided under the common law rule relating to the recovery of money paid under a mistake of fact. The only reference to *Cooper* v. *Phibbs* in the opinion of the Judicial Committee of the Privy Council was the following, which

---

[59] *e.g.*, Lindley L.J. in *Huddersfield Banking Co., Ltd.* v. *Lister* at p. 281: "But I take it that an agreement founded upon a common mistake, which mistake is impliedly treated as a consideration which must exist in order to bring the agreement into operation, can be set aside, formally if necessary, or treated as set aside and as invalid without any process or proceedings to do so. In point of law, the moment you have got rid of the consent order, it is quite plain that an action would lie at law. . . . On the same principle, there are cases in equity, of which *Bingham* v. *Bingham* [l Ves.Sen. 126] may be referred to as a leading example…"

[60] *Holbrook* v. *Sharpey*, 19 Ves.Jun. 131; *Hayward* v. *Dimedale*, 17 Ves.Jun. 111; *Peake* v. *Highfleld*, 1 Russ. 559; *Bishop of Winchester* v. *Fournier*, 2 Ves.Sen. 445; *Bromley* v. *Holland Tyrrell and Oakden*, 7 Ves.Jun. 3; *Jervis* v. *White*, 7 Ves.Jun. 418; *Wynne* v. *Callender*, 1 Russ. 293; *Kemp* v. *Pryor*, 7 Ves.Jnn. 237, at p. 249; *Re Cork and Voughal Ry.*, L.R. 4 Ch.App. 748 at p.762. The principle was neatly epitomised by Lord Selbome L.C. in *Hoare* v. *Bembridge*, L S ChApp. 22 at p. 27, in comparing the position of a party seeking to have a contract set aside with that of his opponent: "But what the one claims as his right in equity would constitute his defence at law; what the other claims as his right at law would constitute his defence in equity."

[61] *i.e.*, a trustee's lien for money spent on the trust property and an occupation rent for a cottage and land which the lessor was entitled to let.

[62] *Cf.* Lord Blanesburgh: "Finally the claim made by the heads of claim is for rescission of the agreements of settlement, relief properly consequent upon a case of voidability either for fraud or unilateral mistake induced by fraud. But if the allegation, even alterative, was that the agreements were entered into under mutual mistake of fact, then these agreements were not voidable but void *ab initio* (at p. 190); "Speaking only for myself I feel relieved to take a view of equity and procedure which shields the appellants from [having to repay]" (at p. 200). All the other judgments referred to the position in equity: Lord Warrington of Clyde, agreed to by Viscount Hailsham, at p. 206 (expressly stating the principle to be the same in law and equity); Lord Atkin at pp. 219—221; Lord Thankerton at p. 236.

> was immediately preceded by a discussion of the common law rules—
> "The mistake [*sc* in the instant ease] was as vital as that in *Cooper* v. *Phibbs* in respect of which Lord Westbury used these words: '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.' At common law such a contract (or simulacrum of a contract) is more correctly described as void, there being in truth no intention to contract. Their Lordships find nothing tending to contradict or overrule these established principles in *Bell* v. *Lever Bros., Ltd.*"

It is respectfully submitted therefore that if as Denning L.J. held, the mistake in *Solle* v. *Butcher* was not operative at common law[63] there was no jurisdiction to set aside the lease in equity. In the particular circumstances of the case this would no doubt have been a hard decision, but the injustice should be laid at the door of the Rent Acts, and not at the refusal of the common law to hold the contract void or inoperative for mistake. We have already suggested that it is wrong to treat mistake in isolation from questions of express and implied terms, misrepresentation and illegality. So also where a statute provides, as do the Rent Acts, that it is to apply "notwithstanding any agreement to the contrary" the conclusion follows that once the rules of offer and acceptance have been complied with, the resulting contract must be governed by the statute. The relevant statutory provisions are evaded by setting a contract aside for mistake in such a case just as much as they would be by the application of the doctrine of estoppel — which all three judges in the court agreed could not be done.[64] Similarly the rules relating to the rescission of executed leases, or of executed contracts for the sale of goods, as well as the rules restricting a buyer's right of rejection of goods, are in some ways unsatisfactory, but if the courts decline to modify these rules, or if it is not open to them to do so, it is submitted that it would be wrong to sanction their evasion by indirect means, and that the matter should be regarded as one for Parliament alone, as implied by Lord Evershed M.R. in *Leaf* v. *International Galleries*[65].

CONCLUSIONS

Having rejected the theory that mistake as to subject-matter has *ipso facto* a solvent effect on contractual obligations and should therefore be treated as a separate category in the law of

---

[63] It is not clear from the judgment of Bucknill L.J. whether he shared this view or not. Jenkins L.J. of course did share it, but yet dissented from the majority decision.
[64] Following *Welch* v. *Nagy* [1949] 2 All E.R. 868.
[65] [1950] 2 K.B. 86 at p.95

contract, we are faced with the question of whether any rules can be formulated which embody the principles adopted by the courts when confronted with cases of such mistake in the context of a general contractual situation. To attempt to resolve this question now would be beyond our present scope, although we hope to return to it on a later occasion. Meanwhile we content ourselves with the following concluding remarks.

Mistake as to subject-matter is another name for a lack of knowledge, or for partial or incorrect knowledge, of certain relevant facts existing at the time the contract was made. In this sense it may be a factor to be considered by the court in deciding whether the presumption that the literal contract is to be applied has been displaced, or in other words a factor to be considered in arriving at the total contract. However it will have no automatic effect, and must be looked at along with such other factors as: indications that the parties were aware that their knowledge might be incomplete; negligence by the party who was in a position to discover the true facts; the usual course of dealings between the parties as to acceptance of the risk in question; trade customs and practices; intention by one party to deceive the other; degree of likelihood that the facts would not be as supposed; extent to which the mistaken party relied on the skill and judgment of the other.

Furthermore, mistake in this sense may be relevant in assessing the legal effect of a representation. Its presence or absence or degree, in the mind of the representor, may assist the court in deciding whether or not the representation is a term of the contract, and will certainly be relevant in deciding whether the representation is innocent or fraudulent. In the same way the state of mind of the representee must be looked at to see whether the misrepresentation was operative so as to confer on him the remedy of rescission (and, where fraud exists, of damages) or to negative an express term of the contract.

Again, the existence of such a mistake may influence the court in granting a remedy to a person who has entered into an illegal contract. It may affect the measure of damages for breach of contract or the court's discretion in awarding equitable remedies. It is one among the factors that may be relevant in a wide variety of contractual situations, and should accordingly be treated as such.

P.S. ATIYAH
Of the Inner Temple, Barrister-at-Law.

F.A.R. BENNION
Of the Middle Temple, Barrister-at-Law.