

## MISTAKE AND THE SALE OF LAND.

*"If the rules of equity have become so rigid that they cannot remedy such an injustice, it is time we had a new equity, to make good the omissions of the old. But, in my view, the established rules are amply sufficient for this case."*<sup>1</sup>

In *Svanosio v. McNamara*<sup>2</sup> the High Court of Australia considered at some length the effect of common mistake upon a contract for the sale of land and the jurisdiction of equity to order a reconveyance where land had been conveyed as the result of such a mistake.

The judgments of the High Court in that case have been followed and applied by Virtue J. of the Supreme Court of Western Australia in *Cousins and Cousins v. Freeman*,<sup>3</sup> where relief was denied to plaintiff purchasers who were unaware until after conveyance that the agent of the vendors had shown them a piece of land which was not the lot of which they subsequently took a transfer. This latter case gives rise to a number of interesting and important questions concerning both the nature and effect of mistake and also the effect of the completion of such a contract by conveyance. In particular the decision illustrates some of the difficulties that can arise through the various meanings which are at times assigned to the words "common", "mutual" and "unilateral" in connexion with the topic of mistake. Therefore, before proceeding to discuss this case in detail, it would perhaps be advisable to define the sense in which these terms will be used in this article.

It is proposed, for reasons of convenience and clarity, to adopt the classification advocated by Cheshire and Fifoot<sup>4</sup> whereby "*common mistake*" is used to describe a situation where both parties make exactly the same mistake about some fact fundamental to the contract; "*mutual mistake*" is used of a situation where each party is mistaken as to the intent of the other, so that although they are both mistaken their mistakes are different; and "*unilateral mistake*" is used of a situation in which one party has made a mistake (concerning perhaps the subject-matter of the contract or the intent or identity of the other party), but the other party is under no mistake because he is aware of the mistake of the first party. It will be observed from this

1 *Per Denning L.J. in Solle v. Butcher*, [1950] 1 K.B. 671, at 695.

2 (1956) 96 Commonwealth L.R. 186.

3 (1957) 58 West. Aust. L.R. 79.

4 LAW OF CONTRACT (4th ed., 1956), at 173.

that if *A.* and *B.* enter into a contract and *A.* is mistaken as to *B.*'s intent or offer, and if *B.* knows of *A.*'s mistake, then the mistake is unilateral. But if *B.* is ignorant of *A.*'s mistake then the mistake is mutual because he too is mistaken as to *A.*'s intent. In many of the text-books and reports (including some cited in this article) these words may be used differently. Hence it is not unusual to find the description "mutual" applied to a mistake which by the above definition would be classified as "common";<sup>5</sup> and the term "unilateral" is frequently used of mistakes which by the definition adopted here might be mutual.<sup>6</sup> It is therefore of the greatest importance in reading any text-book or report to bear in mind the precise nature of the mistake which is being discussed, as the indiscriminate transposition of "labels" is the cause of a considerable measure of confusion .

The facts of *Cousins and Cousins v. Freeman* were briefly these. The vendor owned a block of land, Lot 153. He employed an agent to find a purchaser of this land and eventually the agent, on discovering that the plaintiffs were interested in purchasing land in that area, showed them Lot 87 under the mistaken impression that it was Lot 153. The plaintiffs agreed to purchase the land they were shown, paid a deposit to the agent, and subsequently signed a written contract prepared by the agent for the sale and purchase of land described as Lot 153. It was only after the transfer of Lot 153 was registered that the plaintiffs discovered that the land they had bought was not the land they had been shown. There was no evidence that at any time prior to the transfer the vendor knew of this mistake. Accordingly

<sup>5</sup> A mistaken use of the word "mutual" which appears to be "common" to many lawyers and Charles Dickens.

<sup>6</sup> The inclusion of mutual mistake in the expression "unilateral" is due, it is thought, to regarding the mistake as being a mistake not as to the intent of the other contracting party but as to the nature or identity of the subject-matter. On this basis therefore it is argued that if *A.* is offering to sell to *B.* a 1949 motor car and *B.* thinks the offer relates to a different car which is a 1959 model, only *B.* is mistaken as *A.* knows what he is selling, but *B.* is mistaken as to the property that is being offered for sale. It is suggested that this approach is illogical as, there being no contract at the stage when the offer and acceptance are still being formulated, there can be no property which is the subject-matter of the contract about which *A.*'s intent can be correct. In fact each is mistaken as to what the other intends to be the subject-matter of a contract which may come into existence if negotiations are concluded. To put it another way, one is mistaken as to the subject-matter of the offer whilst the other is mistaken as to the subject-matter to which the acceptance relates. Hence there is no real (as distinct from apparent) *consensus ad idem*. It is surely better to separate this type of mistake from a purely unilateral mistake, as in the above case where *A.* knows of *B.*'s mistake and therefore is under no misapprehension himself; for different considerations will apply in resolving each of those situations.

the plaintiffs brought this action against the vendor claiming *inter alia* rescission of the contract and repayment of the deposit.<sup>7</sup> The facts were further complicated by the fact that the balance of the purchase price was secured by a mortgage to the vendor which was subsequently transferred to a finance corporation. However, the case appears to have proceeded on the basis that if a re-transfer and repayment of the purchase price could be ordered, the Court could also direct the discharge of the mortgage.<sup>8</sup>

The plaintiffs in their statement of claim alleged the facts fully as above. The statement of defence admitted all these allegations of fact but denied that the plaintiffs were entitled to the relief sought, and therefore no evidence was tendered at the trial by either side. The agent was at one stage joined as a third party, the defendant claiming to be indemnified by him against any liability to the plaintiffs. The agent put in a defence to the third-party notice in which he alleged that the block which he showed to the plaintiffs was the block which was identified to him by the vendor's wife acting as the duly authorized representative of the vendor. However, this issue was never tried as the third-party proceedings were abandoned before trial.

Virtue J. found for the defendant. He held that although there had been an innocent misrepresentation by the vendor's agent which might have justified the plaintiffs in rescinding the contract whilst it was still executory, yet it was not open to him sitting at *Nisi Prius* to hold that rescission could be granted in such circumstances after the contract had been completed by conveyance.<sup>9</sup> However, that misrepresentation had given rise to a unilateral mistake as to the identity of the subject-matter.<sup>10</sup> But here Virtue J. held himself bound by the High Court decision in *Svanosio's Case* to ignore any question of the effect of the mistake on the contract and to consider only how far the mistake would operate to enable the conveyance to be set aside. Following *Svanosio's Case* he held that the Court had power to order a reconveyance only when the original conveyance was procured by

<sup>7</sup> It may be doubted *en passant* whether, as the contract had been executed by registration of a transfer, a claim for rescission of the *contract* was well-founded in itself. But no point was taken as to this.

<sup>8</sup> Nevertheless one may wonder whether the mortgagees should not have been made parties to the suit.

<sup>9</sup> A truly vexed question; the writer is resisting the temptation to explore it in this article.

<sup>10</sup> It is suggested that "unilateral" is here used in the sense of "mutual" according to Cheshire and Fifoot's classification (*supra*) for the judgment clearly proceeded on the basis that the vendor must be presumed to have had no knowledge of the mistake.

the fraud of the defendant or when there had been a total failure of consideration.

On the question of fraud, it was held that it had been neither alleged nor proved that the defendant was fraudulent, and that it was not possible to attribute to the defendant the knowledge of his agent as to the real intent of the purchasers.<sup>11</sup> Further, there had been no total failure of consideration as "here the plaintiffs have got a block of land of substantial value, though certainly something other and something of less value than they thought they were getting"; cases such as *Bingham v. Bingham*<sup>12</sup> and *Cooper v. Phibbs*<sup>13</sup> (which are frequently cited as authority for setting aside a conveyance on the ground of fundamental mistake) being an anomalous group in which, by reason of the purchaser having bought something which already belonged to him, there was a total failure of consideration. Accordingly the plaintiffs' claim failed.

It is acknowledged that on the basis of present authority (much of it stemming directly from the High Court) it would not have been easy for Virtue J. to treat the case otherwise than he did, and in fact *Cousins's Case* does illustrate the inevitable result of carrying some of the recent dicta of the High Court to their logical conclusion. In particular it is thought that the decision was largely determined by three propositions in *Svanosio's Case* which would bear closer scrutiny. The propositions are as follows:—

- (1) The adoption by Dixon C.J. and Fullagar J.<sup>14</sup> of a passage in the judgment of Denning L.J. in *Solle v. Butcher*<sup>15</sup> to the effect that once a contract has been made by the agreement

<sup>11</sup> On the particular facts, and assuming that "fraud" in this context means actual fraud such as would have founded an action on the case for deceit at common law, it is submitted that this conclusion is correct. But generally the question whether it is possible to add the knowledge of an agent to the knowledge of his principal in order to make out a case of fraud must still be considered open. There is considerable authority, both judicial and academic, for either view (see BOWSTEAD'S DIGEST OF THE LAW OF AGENCY (11th ed., 1951), at 217, and cases and articles therein cited), but the particular authority which in *Cousins's Case* was urged in support of such an addition (namely, *Hart v. Swaine*, (1877) 7 Ch. D. 42) is by no means a strong one as in that case the principal had actual notice of the true facts. However, it should be observed that if the knowledge of principal and agent could be combined in *Cousins's Case* there is then a case of unilateral mistake and as fraud is thereby established there is no difficulty to prevent the court ordering a reconveyance.

<sup>12</sup> (1748) 1 Ves. Sen. 126, 27 E.R. 934.

<sup>13</sup> (1867) L.R. 2 H.L. 149.

<sup>14</sup> 96 Commonwealth L.R. 186, at 195.

<sup>15</sup> [1950] 1 K.B. 671, at 691.

of the parties to all outward appearances with sufficient certainty in the same terms on the same subject-matter, then the contract is not void *ab initio* but is valid until such time as it is set aside either in law or equity; and neither party can rely on his own mistake to say that it was a nullity from the beginning.

- (2) The statement that once a contract for the sale of land has been completed by conveyance, the contract merges into the conveyance so that it is generally not necessary to consider the contract further but one should concentrate on the conveyance.<sup>16</sup>
- (3) The statement that a conveyance once executed is effective both in law and equity to transfer the estate to the purchaser and can be set aside only on the grounds of fraud or total failure of consideration.<sup>17</sup>

In this article the writer therefore proposes to put forward and consider arguments in connexion with four submissions which might have produced a different result in *Cousins's Case*. Hence it will be contended

- (1) That the contract in *Cousins's Case* was not merely a contract which might have been set aside by rescission in the old Court of Chancery, but was a contract which today is void *ab initio* both at law and in equity;
- (2) That if there was a contract which was initially valid, whilst it is true that such a contract, not having been rescinded, would merge in the subsequent conveyance so that no question concerning the enforcement or rescission of that contract could thereafter arise, yet it might still be necessary in certain circumstances to look at the contract and all the surrounding circumstances in which both contract and conveyance were made in order to determine whether an equity

<sup>16</sup> *Per* Dixon C.J. and Fullagar J. at 197; *per* McTiernan, Williams, and Webb JJ. at 206-207 and 211-212. *Cf. per* Virtue J. in *Cousins's Case* at 82, "In considering the validity of these submissions, one must start, I think, with the conveyance. . . That this is the proper approach is supported by the judgment of the High Court in *Svanosio's case*."

<sup>17</sup> *Per* Dixon C.J. and Fullagar J. at 197-198 (though their Honours did in that passage except and distinguish cases such as *Cooper v. Phibbs*, (1867) L.R. 2 H.L. 149, in which the purchaser took a conveyance of something that was in fact his own, on the ground that the conveyance in such cases was devoid of legal effect); and *per* McTiernan, Williams, and Webb JJ. at 207.

to a reconveyance did in fact arise;

- (3) That even if it is correct to say that once a conveyance has been executed a reconveyance can be ordered only on the grounds of fraud or total failure of consideration, nevertheless there was such a total failure of consideration in this case; and
- (4) That in fact the proper test for determining whether a conveyance has been effective and whether there is an equity to a reconveyance is to ask, after a consideration of all the evidence that in the circumstances may be admissible, whether the conveyance has been executed on the basis of a fundamental mistake of fact; and that in the particular case, in spite of the express and unambiguous description in the transfer of the property that is purported to be conveyed, yet having regard to the evidence that is admissible this conveyance would be liable to be set aside in equity on the ground of uncertainty as to the subject-matter induced by fundamental mistake.

As far as the contract in *Cousins's Case* is concerned, the writer would prefer to consider this as a case of mutual mistake. There can be little doubt that in the first instance the vendor intended to sell the land which was correctly described as Lot 153 and thought that the purchasers were offering to buy that lot, whilst the purchasers intended to buy that piece of land that was in fact Lot 87 and thought that that was what the vendor intended to sell. Clearly, then, each was mistaken as to the intent of the other as to the actual piece of land that was to be the subject-matter of the contract. However, before one can proceed to assess the effect of such a mistake upon their contract, it is first necessary to consider the passage in the judgment of Denning L.J. in *Solle v. Butcher* referred to above. That passage reads as follows:—

“ . . . it is necessary to remember that mistake is of two kinds: first, mistake which renders the contract void, that is, a nullity from the beginning, which is the kind of mistake which was dealt with by the courts of common law; and, secondly, mistake which renders the contract not void, but voidable, that is, liable to be set aside on such terms as the court thinks fit, which is the kind of mistake which was dealt with by the courts of equity . . . Once a contract has been made, that is to say, 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. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake. A fortiori, if the other party did not know of the mistake, but shared it."<sup>18</sup>

Now it is true that it may still be important today to distinguish between relief at common law and relief in equity and the circumstances in which each would be granted. But it is possible to construe this passage of the judgment so as to include the contract in *Cousins's Case* among those which are merely voidable in equity, although the last sentence of the passage quoted would indicate that Denning L.J. had in mind "common" rather than "mutual" mistake. However, it is submitted with the greatest respect that to do so would be to ignore the effect which the introduction of the judicature system may have had upon the topic of mistake, and moreover it is difficult to reconcile such an interpretation of the passage with the words of Lawrence J., dealing with a similar type of mutual mistake in *Scriven v. Hindley*, that "such a contract cannot arise when the person seeking to enforce it has by his own negligence or by that of those for whom he is responsible caused, or contributed to cause, the mistake."<sup>19</sup>

To ascertain what the true effect of this contract is, however, it is proposed to examine how it would have been treated at law and in equity before 1873. As far as the common law courts are concerned it is suggested that the correct approach is to assume that whilst this contract was still executory the vendor had commenced an action at law for damages for breach of contract for failure to complete, and to enquire whether the purchasers might have set up their mistake as a defence in such an action. It is submitted that the answer to this question would have depended on the form of action which in turn would have depended on the form of the contract. If the contract had been under seal (which apparently it was not) the vendor would have sued in covenant and it is acknowledged that, subject to the plea of *non est factum* as instanced in *Thoroughgood's Case*,<sup>20</sup> evidence of the defendants' real intent would not have been admitted to refute the express words of the deed, as the contract was binding at law through the observance of formalities rather than the fact of agree-

<sup>18</sup> [1950] 1 K.B. 671, at 690-691.

<sup>19</sup> [1913] 3 K.B. 564, at 569.

<sup>20</sup> (1584) 2 Co. Rep. 9b, 76 E.R. 408.

ment.<sup>21</sup> One may perhaps doubt, however, as a matter of historical accuracy, the generality of the dictum of Byles J. in *Foster v. Mackinnon*<sup>22</sup> that the same considerations applied to written contracts not under seal as to deeds, for whilst it is true that parol evidence of intent was generally excluded in both cases, it was excluded on totally different grounds. Hence, if the contract was written but not under seal, the correct form of action at law would have been *assumpsit* and here the courts were concerned with intent and agreement rather than form. However, it is admitted that again the defendants might not have given evidence of their mistake and their real intent, as such evidence was generally not admitted to vary or to contradict the express terms of a written document, probably by an application of the "best evidence" rule.<sup>23</sup> Likewise if the contract was oral<sup>24</sup> the form of action would again have been *assumpsit* and here a plea of *non assumpsit* would have thrown open the general issue, particularly as to whether any contract had in fact been concluded and the defendants might have adduced evidence to show that by reason of the mistake the parties had never been *ad idem*.<sup>25</sup>

It is therefore submitted that before 1873 the validity before the courts of common law of a contract for the sale of land entered into under such a mistake would depend on the form that the contract took. If it was under seal it was valid; if it was in writing it would stand because a rule of evidence excluded parol evidence of the

<sup>21</sup> For a consideration of the manner in which a rule, starting as a rule of evidence, became in the case of deeds (but not other written contracts) a substantive rule of law, see Salmond, *The Superiority of Written Evidence*, (1890) 6 L. Q. REV. 75.

<sup>22</sup> (1869) L.R. 4 C.P. 704, 712.

<sup>23</sup> Authority on this point is sparse and hence the writer concedes that such evidence probably could not be tendered. Reference has been made to STARKIE'S LAW OF EVIDENCE (2nd ed., 1833), particularly the title "Assumpsit" in Vol. II. At page 44 appears the statement "Parol evidence is inadmissible . . . where the parties have condescended upon a written contract, for that is the best and only evidence of the intention of the parties, so long as it exists, that can be produced." However, it would appear that the common law courts might possibly receive parol evidence at any rate for the purpose of correcting a mistake—*ibid.*, at 556, note (p).

<sup>24</sup> It is agreed that if the contract had been entirely oral, the Statute of Frauds would have prevented any action being brought, but the Statute would not apply to parol evidence adduced by the defendants for the purpose of showing that no contract had ever been concluded. Even in the case of written contracts it is not the Statute of Frauds which renders such evidence inadmissible but the application of the best evidence rule as indicated above. However, for the sake of the argument the reader is asked to assume either that the Statute has not been pleaded or that the particular oral contract is not one to which the Statute applies.

<sup>25</sup> STARKIE, *op. cit. supra*, Vol. II, at 77.

mistake; but if it was oral then (even apart from the Statute of Frauds) there was no contract.

What was the position in the Court of Chancery? It is clear that parol evidence of a mistake could be given in connexion with an oral contract as there would be no reason at all for excluding it, although one may doubt whether the need frequently arose as the law itself admitted such evidence and there seems little scope in such a contract for the intervention of the Chancellor's jurisdiction. As far as written contracts and deeds are concerned (and equity, not being saddled with the forms of action, drew no distinction in this respect between the two<sup>26</sup>) equity was content to follow the law and generally excluded parol evidence to vary, contradict, add to or subtract from the express terms of the writing by analogy with the best evidence rule. However, there were certain circumstances in which, it is equally clear, equity would admit such evidence. These included not only a latent ambiguity in the writing itself, but also cases in which it was alleged that the writing had been concluded in that form through a material misrepresentation or a mistake, and the cases on mistake are not limited to those in which a common mistake is proved in order to invoke the equity of the court to rectify the instrument. So in *Bentley v. Mackay*<sup>27</sup> two sisters applied to the court for rectification of a deed in which each had covenanted to pay a younger brother, his wife, and children £200 per annum for the remainder of their lives. The ground of the application was that they had never intended such payments to last beyond the lifetime of the brother. It was held on the facts that they had not discharged the extremely onerous burden of proof which rests on parties in such cases, but on the question of the admissibility of parol evidence of mistake Turner L.J. said:—

“It was argued for the Defendants, that in order to induce the Court to rectify an instrument upon the grounds of mistake, the mistake must be the concurrent mistake of all the parties, and several cases were referred to in proof of this rule. I take this to be the rule in the ordinary case of rectifying mistakes in an instrument where it is sought to alter the instrument in any prescribed or definite mode, and for this reason, that in such cases it is necessary to prove not only that there has been a mistake, but also what was intended to be done, in order that the instrument may be set right according to what was so intended, for in such a case,

<sup>26</sup> Except that perhaps a greater feeling of awe in the presence of a deed might be reflected in a higher onus of proof.

<sup>27</sup> (1862) 4 De G. F. & J. 279, 45 E.R. 1191.

if the parties took different views of what was intended, there would be no contract between them which could be carried into effect by rectifying the instrument; but I venture to doubt whether this rule applies, or ought to be applied, to a case like the present, in which the purpose of the rectification is to be set aside the deed *pro tanto* as to the parties alleging the mistake, for in such a case no proof would be necessary as to any further agreement. It would be sufficient to prove the mistake and the circumstances entitling the party to have the mistake removed. It is obvious that unless the rule be so qualified, it would always be in the power of one of the parties to an instrument to defeat the right of another of the parties to set aside the instrument.”<sup>28</sup>

It is submitted that here Turner L.J. had in mind the practice of the Court of Chancery to admit evidence of mistake in certain circumstances, even though the instrument was wholly in writing, for the purpose of setting aside that instrument as well as of rectifying it. Similarly in *Harris v. Pepperell*<sup>29</sup> Lord Romilly M.R. considered a case where a vendor of land had mistakenly included in the conveyance a strip of land which he did not intend to sell. The conveyance was “rectified” by setting it aside *pro tanto* on evidence of the mistake being received. It is not entirely clear from the language of the report whether this mistake was “common” (as would be the case if neither party intended to include that piece of land in the conveyance, but it was included by the error of solicitors preparing the conveyance) or whether it was “mutual” (as would be the case if the purchaser thought it was intended to be included, but the vendor thought it was not). Certainly, however, at the trial the defendant denied that there had been any mistake by himself or his solicitors, and therefore it would appear in the absence of an express finding of fact against the defendant on this point that the case is authority on mutual mistake. Hence the headnote and the judgment speak of “rectification” by setting aside part of the conveyance, and the plaintiff’s bill prayed a reconveyance. Lord Romilly was prepared to go no further than to say that the purchaser knew of the mistake from the time the vendor told him of it. *Harris v. Pepperell* was followed and applied in the case of an executed lease in *Paget v. Marshall* by Bacon V.C. In delivering judgment in that case, Bacon V.C., after considering the equity to rectify an instrument on the ground of common mistake, said “The other class of cases is one of what is called unilateral mistake, and there, if the Court is satisfied that the true intention of one of the

<sup>28</sup> *Ibid.*, at 286-287 and 1194 respectively.

<sup>29</sup> (1867) L.R. 5 Eq. 1.

parties was to do one thing, and he by mistake has signed an agreement to do another, that agreement will not be enforced against him, but the parties will be restored to their original position, and the agreement will be treated as if it had never been entered into. That I take to be the clear conclusion to be drawn from the authorities.”<sup>30</sup>

That then was the position before the Judicature Acts. In the case of a written contract not under seal, parol evidence to show the instrument had been entered into under a mistake could in certain circumstances be admitted in the Court of Chancery in proceedings to set the contract aside, but in the common law courts such evidence was probably excluded by the best evidence rule. What effect did the Judicature Acts have upon that situation?

In a modern court of judicature, combining both common law and equitable jurisdiction and administering concurrently law and the principles of equity, such parol evidence of the mistake may be admissible under the equitable rule in certain circumstances. Moreover it is submitted that it must therefore follow that once such evidence is admitted its effect cannot be denied either at law or in equity. We have seen that in the old common law courts evidence of a mistake in a written contract not under seal was excluded only by a rule of evidence and that in cases where such evidence was admissible, as in oral contracts, its effect at law was to show that no contract had in fact been concluded. It is surely today not possible to say that such evidence is admissible under the equitable rule solely when equitable relief is being sought but that it must be excluded in considering the validity of the contract at law. If the evidence, once admitted, shows that the parties were never *ad idem* then a court of judicature must

<sup>30</sup> See also *Fowler v. Fowler*, (1859) 4 De G. & J. 250, 265, 45 E.R. 97, 103, *per* Lord Chelmsford; *Mortimer v. Shortall*, (1842) 2 Dr. & War. 363, 372, 59 Rev. R. 730, 736, *per* Sugden L.C.; *Garrard v. Frankel*, (1862) 30 Beav. 445, 54 E.R. 961. In *May v. Platt*, [1900] 1 Ch. 616, 623, Farwell J. expressed the opinion *obiter* (as he held that on the pleadings it was not open to him to decide this point) that *Harris v. Pepperell* and *Garrard v. Frankel* could be supported only as cases of fraud. However, it is clear from a reading of those cases that Lord Romilly deliberately abstained from finding fraud and it does not seem possible to spell a case of fraud particularly out of *Harris v. Pepperell*. See also *Devald v. Zigeuner*, (1959) 16 Dominion L.R. (2d) 285, in which the Ontario High Court followed *Harris v. Pepperell* rather than *May v. Platt* and considered that *Harris v. Pepperell* was an example of mutual mistake. The main ground of the decision of Farwell J. in *May v. Platt* (that the Court cannot in the one action rectify a written agreement and enforce it as rectified) has since been overruled by *Craddock v. Hunt*, [1923] 2 Ch. 136, and *U.S.A. v. Motor Trucks, Ltd.*, [1924] A.C. 196, on the interpretation of sec. 43 of the Judicature Act 1925 (U.K.) (*cf.* sec. 24(7) of the Supreme Court Act 1935, Western Australia).

hold that no contract had ever come into existence.<sup>31</sup> This conclusion is arrived at without any reliance having to be placed on section 24(2) of the Supreme Court Act 1935 (Western Australia) or section 38 of the Supreme Court of Judicature (Consolidation) Act 1925 (England). Those sections provide in effect that where the defendant claims relief on equitable grounds against any deed, instrument or contract, etc., or alleges any ground of equitable defence to any claim of the plaintiffs, the court shall give the same effect to such claim for relief or equitable defence by way of defence against the claim of the plaintiff, *as a court of equity ought formerly to have given*. However, evidence of a mistake of the type in *Cousins's Case*, once granted its admissibility, provided a defence at law by showing that no contract had been made; it was more than a mere ground of defence in equity. Hence, it is submitted that, if the evidence is admitted albeit under the equitable rule, it will still be effective at law to show that the purported agreement was a nullity *ab initio*.

This is not to argue that evidence, for example, of an innocent misrepresentation would since the adoption of the judicature system oblige a court to award the legal remedy of damages, for even if evidence of an innocent misrepresentation had been given in the courts of common law it was ineffective to produce any remedy. Therefore today such evidence would still entitle a party only to equitable relief under the sections referred to above.<sup>32</sup> Nor is it to argue that the Judicature Acts have abolished the distinction between void and voidable contracts. But it is submitted that the distinction is no longer material in this instance where the cause of invalidity is a fundamental mistake which prevented the parties ever being *ad idem*. Such contracts, once evidence is admitted to show that the parties were never *ad idem*, is a nullity because in law no contract was ever

<sup>31</sup> This of course would not be the result if the contract had been under seal, for in that case, as we have seen, it was not merely a rule of evidence but a substantive rule of law concerning the nature of such agreements that prevented the courts of common law from having regard to the true intent of the parties. Even if evidence of mistake had been received it would not generally have impugned the validity of a document to which the parties had put their seals. Hence in a Court of Judicature a formal contract would still be valid initially though liable subsequently to be rectified or set aside on the ground of mistake. This it is suggested is an example of the forms of action ruling from the grave which might well deserve the attention of the legislature. It is a strange anomaly that in 1959, in days of general literacy and paper seals at five shillings a hundred, we should still distinguish to such an extent between documents under hand and under seal.

<sup>32</sup> Hence the decision in *Derry v. Peek*, (1889) 14 App. Cas. 337. See particularly *per* Lord Herschell at 359, and also *per* Lord Bramwell at 347 and Lord Fitzgerald at 356.

made. To adopt any other approach would be to suggest that a court of judicature should decide a case entirely as it might have been decided in either the old courts of common law or the old Court of Chancery—a process which would largely defeat the object of the Judicature Acts. Further, it is suggested that an insistence that the Judicature Acts effected merely a fusion of the administration of law and equity leaving their substantive rules untouched is to ignore in many cases the practical and necessary consequences of the fusion.

With this background it is now possible to consider the validity of the contract in *Cousins's Case* and to ask whether, if the plaintiffs had sought to avoid the contract whilst it was still executory, they would have been able to do so, apart from the possibility of rescission for innocent misrepresentation. This involves two separate questions. Firstly, are the circumstances such that the Court will admit parol evidence of the mistake to contradict the express terms of the written contract? Secondly, if such evidence is admissible, what is its effect?

The first problem therefore is to decide whether the description of the land the subject-matter of the sale in the written contract as Lot 153 will bind the purchasers to take that Lot or whether it will still be open to them to prove the mistake in spite of that express and unambiguous description of the subject-matter of the contract. Most of the text-books on Contract and Evidence assert that parol evidence may always be given to show that a written contract was entered into as the result of a mistake, on the basis that the rule which excludes oral evidence of written contracts applies when the object of the evidence is to add to, to vary or to contradict the express terms of the writing and not when the object of such evidence is to prove the invalidity of the contract as such. However, most of the cases cited in support of this proposition concern cases of common mistake as a result of which the writing does not accurately express the true agreement of the parties and the remedy sought is rectification. It is conceded that the object of such evidence in *Cousins's Case* would be to contradict the express terms of the contract by showing that the plaintiffs never agreed to purchase the land described as Lot 153, or to put it another way, that the parties intended different things by the description "Lot 153." Can such evidence nevertheless be admitted?<sup>33</sup> *Raffles v. Wichelhaus*<sup>34</sup> is authority for the proposition that

<sup>33</sup> To turn once more to the pleadings in the case, it is interesting to note that the statement of claim alleged the mistake of fact and that the statement of defence admitted all the allegations in the statement of claim but denied the relief sought. The advantage of a statement of defence in that form is obviously that it prevents any evidence being tendered from which the

parol evidence may be admitted whenever there is a latent ambiguity in the express terms of the contract. But is this exclusive or are there any other circumstances which would let in such evidence of the real intent of the parties?<sup>35</sup> In fact there is considerable authority that other circumstances might also admit parol evidence and for present purposes it is sufficient to refer to *Wilding v. Sanderson*<sup>36</sup> (and other cases cited therein), and particularly to the judgment of Lindley L.J.<sup>37</sup> In his judgment Lindley L.J. approved the general rule excluding such evidence where the object was solely to impeach the written contract on the ground that one of the parties put an erroneous construction on the express words of the contract. But he continued: "But a mistake by one of the parties as to the meaning of words used may be induced by the other party, and, if so induced, the above principle ceases to be applicable. . . . Again, a mistake as to the meaning of words used may be accompanied by another mistake as to the subject-matter of the contract; and, if the parties are not *ad idem* as to the subject-matter about which they are negotiating, there is no real agreement between them." Chitty L.J. held a similar opinion.<sup>38</sup>

inference might arise that the vendor was or ought to have been aware of the mistake. However, the disadvantage is clearly this, that it puts the defendant in the invidious position of having to come before the Court saying, "I know the true facts are as alleged in the statement of claim, but those facts are not admissible in evidence and the Court must pay no regard to them but must decide this case on the false assumption that there was no mistake of fact and that the parties were at all times agreed on the land to be sold." Such an admission in the defence gives rise to interesting speculations as to its effect. Strictly it could be argued that it is no longer necessary to seek to adduce evidence to contradict the written contract as this has already been done by admissions on the pleadings.

<sup>34</sup> (1864) 2 H. & C. 906, 159 E.R. 375.

<sup>35</sup> It is interesting to note that in the report of *Raffles v. Wichelhaus* no reasons are given for the decision, but only the argument is reported, and the rule for which the case is so frequently cited as an authority rests solely on an interjection by Pollock C.B. Millward for the plaintiff argued that in the absence of fraud or misrepresentation a party might not by parol evidence contradict a written contract good upon the face of it, at which Pollock C.B. observed, "One vessel sailed in October and the other in December." This point was at once taken up by Mellish for the defendant who argued that parol evidence would be let in by the latent ambiguity. In these circumstances it is difficult to ascertain the precise *ratio decidendi* of the case, but it is submitted that it is no wider than that a latent ambiguity is one factor which will let in parol evidence of the parties' real intent. It will be observed that counsel for the plaintiff was prepared to concede "fraud or misrepresentation" as other factors having the same effect.

<sup>36</sup> [1897] 2 Ch. 534, and see WIGMORE ON EVIDENCE (2nd ed., 1923), § 2416 (3).

<sup>37</sup> *Ibid.*, at 550.

<sup>38</sup> *Ibid.*, at 552.

Now clearly in *Cousins's Case* the mistake of the plaintiffs as to the meaning of the words "Lot 153" was induced by the vendor's agent and equally clearly that brought about a mistake as to the subject-matter of the contract so that the parties were never *ad idem*. It is therefore submitted that under both exceptions put forward by Lindley L.J. parol evidence would be admissible of the mistake, to show that the plaintiffs never intended to purchase Lot 153.

Once granted that evidence of the mistake is admissible, what is the effect of such evidence? It is conceded that evidence that the parties have misunderstood one another's intent relating to the subject-matter of the contract is not of itself a ground for holding the contract void. The task of the Court in such a case is to construe the contract from an objective standpoint, to determine in what sense it should be understood. Normally in a contract for the sale of land the rule should be *caveat emptor*; if the vendor says he is selling Lot 153 the responsibility is the purchaser's to discover what is included in that description and he can not be heard to complain later that he thought it referred to other property.

"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."<sup>39</sup>

However, it is submitted that this case is on all fours with the leading case of *Scriven v. Hindley*,<sup>40</sup> where a mutual mistake by parties at an auction sale as to the identity of the property which was being sold prevented any contract being concluded, the mistake being induced by misleading and ambiguous statements in the catalogue. So in *Cousins's Case* the purchasers had been misled into thinking that "Lot 153" referred to a different plot of land, and the reasonable man, standing by and watching the agent take the purchasers to Lot 87, would have to confess that he did not know which land the parties intended to sell. In such circumstances the contract is not so much void for mistake as void for uncertainty. The Court can attach no meaning to it and is driven to the conclusion that the parties were never *ad idem* so that no contract ever came into existence at all. To quote again the words of Lawrence J., "Such a contract can not arise when the person seeking to enforce it has by his own negligence or by

<sup>39</sup> *Smith v. Hughes*, (1871) L.R. 6 Q.B. 597, 607 *per* Blackburn J.

<sup>40</sup> [1913] 3 K.B. 564.

that of those for whom he is responsible caused, or contributed to cause, the mistake.”<sup>41</sup>

It should be noted that, in considering the effect of the mutual mistake in *Raffles v. Wichelhaus*,<sup>42</sup> Kekewich J. in *Van Praagh v. Everidge*<sup>43</sup> commented: “The case of *Raffles v. Wichelhaus* was relied on as establishing that there might be a case of no contract for want of *consensus ad idem*. The ground of the decision in that case, as explained by Sir F. Pollock in his book on Contracts, was that the contract which was made was not the contract which was sued on, and therefore was not a contract which the defendant could be called upon to perform. *There was nevertheless a contract.*”<sup>44</sup>

In reply to this it may be submitted with respect:

- (1) That the passage in Pollock on Contracts does not fully bear out the learned judge’s reading of it.
- (2) That this reading seems to be based on two judicial interruptions in *Raffles v. Wichelhaus*, viz., “The defendant only bought that cotton which was to arrive by a particular ship”—*per* Pollock C.B., and “It is imposing on the defendant a contract different from that which he entered into”—*per* Martin B. It is submitted that, in view of the actual decision, what was intended by these comments was “The defendant only *intended to buy . . .*” and “. . . from that which he *intended to enter into.*”
- (3) That in the Court of Appeal,<sup>45</sup> reversing Kekewich J.’s actual decision in *Van Praagh’s Case* on the ground that there was no sufficient memorandum under the Statute of Frauds, Collins M.R. said, “Upon the supplemental point, as to whether the parties were *ad idem*, it is not clear to my mind that the parties ever were *ad idem*; I do not think they were, but it is unnecessary to say anything further about that . . .”

<sup>41</sup> *Ibid.*, at 569; and see *Fowler v. Sugden*, (1916) 115 L.T. (N.S.) 51, *per* Scrutton J. at 52-53, and in the Court of Appeal *per* Pickford L.J. at 54: “The learned judge found that the defendant did not intend to sell this debt but that the plaintiff intended to buy it, and that the parties were never *ad idem*, and so there was no agreement made”, and *per* Neville J. at 55: “But, further, I think that upon Scrutton J.’s finding of fact the parties were never *ad idem*, and that it is impossible to rectify a deed in conformity with a supposed agreement which never in fact existed.”

<sup>42</sup> (1864) 2 H. & C. 906, 159 E.R. 375.

<sup>43</sup> [1902] 2 Ch. 266, at 269 (another case of mutual mistake as to the identity of property being bought and sold at an auction sale).

<sup>44</sup> My italics.

<sup>45</sup> [1903] 1 Ch. 434.

It is therefore submitted that there was in fact no contract between the parties in *Cousins's Case* and that had the purchasers appreciated the mistake before the transfer was registered they might certainly have recovered their deposit in an action for money had and received. Rescission proceedings would not have been necessary as there was no contract to rescind. It now remains to consider how this position has been affected by the registration of the transfer, and it is proposed to do so in the first instance on the basis adopted by Virtue J., that there is an equity to order a reconveyance only on the ground of fraud or total failure of consideration. On the question of fraud, apart from observing that "fraud" in equity has a far wider meaning than at law,<sup>46</sup> it is not proposed to consider further in this article whether the knowledge of the principal and agent can be combined so as to produce a case of fraud, but it is submitted that there was on the facts of the case a total failure of consideration for the purchase price.

In order to establish a case of total failure of consideration it is obviously necessary in the first place to enquire whether parol evidence may be given to show that the parties intended different things by the unambiguous description of the consideration for the price in the transfer as "Lot 153." It is suggested that this problem is in fact the same problem as has been considered *supra* in connexion with the admission of parol evidence to contradict the written contract, with this difference only, that the transfer is "deemed to be of the same efficacy as if under seal. . ."<sup>47</sup> May a party to a deed, therefore, be allowed to adduce parol evidence, relating to the prior contract and the circumstances in which both contract and conveyance were entered into, for the purpose of showing that the parties intended different things by an unambiguous term of the deed?

Generally speaking, he may not do so. As far as the contract is concerned, it has been merged into the deed and it is the deed and not the contract which now governs the rights and liabilities of the parties. However, the effect of the doctrine of merger should not (as it commonly is) be overstated; it is in fact limited to the question of the enforcement of the rights and obligations which the parties have

<sup>46</sup> See, for example, the remarks of Richards C.B. in *Hitchcock v. Giddings*, (1817) 4 Price 135, 139-142, 146 E.R. 418, 419-420 (particularly at 140, ". . . that is certainly a fraud, although both parties should be ignorant of it at the time"); and *cf.* *Wilde v. Gibson*, (1848) 1 H.L.C. 605, 620-627, 9 E.R. 897, 903-906, *per* Lord Campbell (particularly at 627, ". . . nothing short of positive knowledge can be sufficient. . .").

<sup>47</sup> Transfer of Land Act 1893, sec. 85 (Western Australia).

created, and it may still be permissible to look at the contract to assist in the construction of the deed, particularly where there is any ambiguity in the deed itself. The complete statement of the doctrine appears in the case of *Leggott v. Barrett*<sup>48</sup> where James L.J. said, “. . . if the parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and . . . you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself.”<sup>49</sup>

Now it is true, as has been shown, that in the courts of common law a deed could not be impeached except by a plea of *non est factum* which would not avail the purchasers in *Cousins's Case*. Generally, too, equity was content to follow the common law and would refuse to admit extrinsic evidence to contradict unambiguous terms in a deed. However, the rule was never as stringently applied in Chancery as in the common law courts, and it does appear that in certain special circumstances, and subject to a particularly onerous burden of proof,<sup>50</sup> equity would admit such evidence and, if a case were made out, either rectify the deed so as to give effect to the real intent of all parties or, if that were impossible, set aside the deed either in full or *pro tanto*. Reference has already been made to the case of *Bentley v. Mackay*<sup>51</sup> (where the evidence was admitted but failed to discharge the heavy burden of proof) and to *Harris v. Pepperell*<sup>52</sup> (in which Lord Romilly set aside *pro tanto* a conveyance after extrinsic evidence of the mistake had been received). It should be noted further that in *Leggott v. Barrett* James L.J., after stating the doctrine of merger as quoted above, continued, “But you have no right for any other purpose to look at anything but the deed itself, *unless there be a suit for*

<sup>48</sup> (1880) 15 Ch. D. 306, at 309.

<sup>49</sup> And see similar remarks *per* Brett L.J. at 311. For a consideration of how the best evidence rule gave rise in the case of deeds to the doctrine of merger, see SALMOND: *op. cit.*

<sup>50</sup> *Beaumont v. Bramley*, (1822) Turn. & R. 41, 51, 37 E.R. 1009, 1012, *per* Lord Eldon: “It must be a case that leaves no reasonable doubt, a case that must satisfy the conscience of the Court.”

<sup>51</sup> (1862) 4 De G. F. & J. 279.

<sup>52</sup> (1867) L.R. 5 Eq. 1. (Note that Lord Romilly distinguished *Bradford v. Romney*, (1862) 30 Beav. 431, 54 E.R. 956, and (1860) *Sells v. Sells*, 1 Dr. & Sm. 42, 62 E.R. 294, as being cases of marriage settlements where, even if the evidence was admitted and was of sufficient weight, it would be impossible to set the deed aside and restore the parties to their original position).

*rescinding the deed on the ground of fraud, or for altering it on the ground of mistake.*"<sup>53</sup>

It is submitted therefore that under the equitable rule, evidence might have been received in *Cousins's Case* to show that the purchasers had executed the transfer under a fundamental mistake as to the very identity of the property included therein. In exceptional cases, equity would admit parol evidence that as the result of a mistake, even though it was not induced by actual fraud, the deed did not express the true intent of the parties or of either of them, and it is doubted whether a clearer case justifying the reception of the evidence could be found than this, where the mistake has been induced by the vendor's agent and relates to the identity of the whole of the property to be included in the transfer. Certainly equity admitted such evidence in the case of written contracts not under seal,<sup>54</sup> and there is no reason why any distinction should be made in the case of deeds except possibly as regards the onus of proof, and in fact there are reported cases where the evidence has been received in the case of deeds.

The Court therefore, having admitted this evidence, is entitled to look behind the deed and regard the contract in order to ascertain what the true intention of the parties was. But here, as has been shown, the Court will find that the contract was a nullity because the parties were never in fact agreed as to what the subject-matter of the sale was to be.<sup>55</sup> Accordingly the transfer has vested in the purchasers, as consideration for the price, a plot of land for which they never bargained, and the only remaining question, therefore, is to decide whether that will constitute a failure of consideration so as to justify

<sup>53</sup> (1880) 15 Ch.D. 306, at 310 (my italics); and see too *Fowler v. Sugden*, (1916) 115 L.T. (N.S.) 51. In that case the plaintiff sought rectification of a deed on the ground of mistake. On evidence of the mistake being admitted it was found to be a mutual and not a common mistake, so that rectification could not be granted. But both Scrutton J. and Pickford L.J. were of the opinion that the plaintiff could have rescinded the deed had he wished to do so instead of seeking to affirm it by rectification. Likewise on a bill for specific performance of a contract the defendant may always adduce parol evidence of mistake, although it is conceded that in such cases the object of the evidence is not so much to contradict the writing as to deny a particular discretionary remedy upon that writing. See, for example, *Clowes v. Higginson*, (1813) 1 Ves. & B. 524, 35 E.R. 204 (common mistake) and *Manser v. Back*, (1848) 6 Hare 443, 67 E.R. 1239 (mutual mistake).

<sup>54</sup> See *Wilding v. Sanderson* (*supra*).

<sup>55</sup> It is apprehended that the admission of the evidence under the equitable rule will not, as in the case of a contract not under seal, make the conveyance void at law rather than voidable in equity, as the admission of such evidence even at law would not have affected the validity of a formal contract.

the Court in ordering a reconveyance. But here, unfortunately, in deciding what is meant by the expression "total failure of consideration" in connexion with conveyances, further difficulties are encountered.

The relationship between *mistake* and *total failure of consideration* was considered by the High Court in *McRae v. Commonwealth Disposals Commission*.<sup>56</sup> In that case, in the judgment of Dixon and Fullagar JJ., appears the statement, "If there were no contract, there could be no failure of consideration"<sup>57</sup>—the reasoning being, apparently, that if there is no contract then there is no consideration which is capable of failing. If that dictum is to be taken and applied literally then it is clear that no failure of consideration can be alleged in *Cousins's Case*, because the parties had never contracted for the transfer of any land! It is submitted with great respect that the proposition has only to be stated in that form for it to be realised that the dictum is too sweeping by far. In fact it is suggested that there is here a confusion of terminology, in that the word "consideration" is used in two different senses and refers to two different situations. The dictum is true so long as the contract under review is still executory on both sides, consisting of a promise for a promise, or an obligation for an obligation. Hence in such a case if the contract is a nullity there is neither an obligation to pay the price nor is there consideration for that obligation, namely an obligation to transfer the property. The contract being a complete nullity and nothing having been done on either side to implement it, no question of failure of consideration can arise. However, the position is different once the purported contract has been performed on one side, for example by the purchaser paying the price. "Consideration" then refers not to the purely executory consideration on the contract, the promise for a promise, but to the consideration for the payment of the purchase price. Hence, even though there was no *obligation* on either side, it is still necessary to enquire whether the purchaser has received the benefit it was intended or stipulated that he should receive in return for the payment of the price; and the "intention" here must be the common intention of both parties as ascertained by the Court, and not the unilateral intention of either of them. If, therefore, the Court can find nothing which the parties jointly intended to be transferred, then, unless the intention of the purchaser was to make a gift of the money, there is a failure of consideration *for the price*. If the vendor has done nothing

<sup>56</sup> (1951) 84 Commonwealth L.R. 377.

<sup>57</sup> *Ibid.*, at 406.

at that stage then clearly there is nothing that he can be made to do to implement his bargain, because there was no bargain, and he must surely hold the price to the use of the purchaser so that it is recoverable at law in an action for money had and received. From this it must follow that it is no answer for the vendor to reply that, although there was no consideration for the price, nevertheless he has transferred something of value to the purchaser, if it was never intended by both sides that that thing should be transferred.

It is submitted that the true basis of the doctrine of failure of consideration appears a little later in their Honours' judgment in *McRae's Case*,<sup>58</sup> namely, that the essence of the common law notion of contract is that a promise supported by consideration ought to be performed. Hence if there is no consideration there is no obligation to perform it, and if it should be performed and then subsequently it is discovered that, perhaps because the parties have misunderstood one another, there is no consideration for that performance (whether because the whole transaction was a nullity or because the other party cannot or will not perform his side of the bargain), then the performance should be set aside and the parties restored so far as possible to their original position. This, it is suggested, is the true theoretical basis of the action for money had and received, and also accounts for a certain confusion in the cases as to whether the action lies on the ground of a total failure of consideration or of a fundamental mistake of fact, or both.<sup>59</sup>

Before applying this reasoning to the facts of *Cousins's Case* it is necessary to consider the comments of Virtue J. in *Cousins's Case* and of the High Court in *Svanosio's Case* on a number of reported decisions where conveyances have been set aside. Typical of these cases are *Cooper v. Phibbs*<sup>60</sup> and *Bingham v. Bingham*<sup>61</sup> (in which the purchasers took conveyances of land that already belonged to them), and *Hitchcock v. Giddings*<sup>62</sup> (in which the property conveyed had ceased to exist—i.e., a remainder in fee simple after an entail which, unknown to both parties, had been barred). In assigning these cases to their correct *ratio decidendi*, Virtue J. and the High Court appear to part company. Whilst Virtue J. considered that they were examples of total failure of consideration and “certainly not authority for the

<sup>58</sup> *Ibid.*, at 407.

<sup>59</sup> See, for example, *Cripps v. Reade*, (1796) 6 T.R. 606, 101 E.R. 728; *Price v. Neal*, (1762) 3 Burr. 1354, 97 E.R. 871.

<sup>60</sup> (1867) L.R. 2 H.L. 149.

<sup>61</sup> (1748) 1 Ves. Sen. 126, 27 E.R. 934.

<sup>62</sup> (1817) 4 Price 135, 146 E.R. 418.

general proposition that when there is fundamental mistake as to the subject-matter the general rule is abrogated",<sup>63</sup> Dixon C.J. and Fullagar J. regarded them as cases in which the conveyance was ineffective and as being in a separate category from cases of failure of consideration.<sup>64</sup> Unfortunately neither Court indicated the sort of case which, apart from these, it would regard as an example of failure of consideration.<sup>65</sup> It is submitted, however, that there is no reason in principle for confining the grounds of reconveyance other than fraud to the situation in *Cooper v. Phibbs* or that in *Hitchcock v. Giddings*. Indeed such a restrictive view of the notion of failure of consideration would be extremely difficult to reconcile with the actual decision in *Solle v. Butcher*<sup>66</sup> that a lease could be set aside on the ground of a common mistake of fact on a matter of fundamental importance. In that case, among considerable judicial disagreement on other matters, it is submitted that it was common ground among all three Lords Justices that a conveyance might be set aside on the ground of a fundamental mistake of fact. Moreover, it is submitted that, whilst it is clear that there is a total failure of the consideration for the price when either the property was already vested in the purchaser or had ceased to exist before the conveyance so that the conveyance was ineffective to transfer anything to the purchaser, yet it must be conceded that cases in which the purchaser is able to show a failure of consideration on the ground that the parties intended different things by the expressions in the parcels clause must of their very nature be rare. But the fact that they are rare should not prevent a court giving relief when such a case does arise if the principle on which relief is granted will fit the case.

The scope of the doctrine of failure of consideration at common law has been the subject of a recent article by Dr. S. J. Stoljar.<sup>67</sup> In that article Dr. Stoljar shows that a purchaser might sue at law to

<sup>63</sup> (1957) 58 West. Aust. L.R. 79, at 83.

<sup>64</sup> (1956) 96 Commonwealth L.R. 186, at 198.

<sup>65</sup> In *Svanosio's Case* it was held that there was no total failure of consideration because the premises which were the subject-matter of the contract were licensed premises and four-fifths of the purchase price was paid in consideration of the transfer of the licence which was in fact transferred. It was observed by Dixon C.J. and Fullagar J. (*ibid.*, at 200) that there was no suggestion that the licence was in jeopardy by reason only of the fact that a third of the premises stood on land not included in the conveyance. One may perhaps wonder whether the decision would have been different if there had been evidence that the licence in such circumstances was endangered.

<sup>66</sup> [1950] 1 K.B. 671; see *per* Bucknill L.J. at 686, and *per* Denning L.J. at 693 and 695.

<sup>67</sup> Stoljar, *The Doctrine of Failure of Consideration*, (1959) 75 L.Q. REV. 53.

recover the price he had paid in an action for money had and received on a failure of consideration in six cases, *viz.* :

- (1) Where the seller has failed to deliver the property sold.<sup>68</sup>
- (2) Where the sale was conditional or “on sale or return.”<sup>69</sup>
- (3) Where the consideration was a void grant (subject to a set-off in respect of benefits actually received), *e.g.*, an annuity void for want of enrolment.<sup>70</sup>
- (4) Where the seller delivered a worthless thing, *e.g.*, sawdust instead of fish.<sup>71</sup>
- (5) Where the seller delivered something different in kind from what was bargained for, *e.g.*, counters for coin,<sup>72</sup> or brass for gold.<sup>73</sup>
- (6) Where the seller delivered something materially or substantially different from what was bargained for, although here only partial recovery might be possible.<sup>74</sup>

In the light of all the available authorities it is submitted that the true test of failure of consideration is this: There will be a total failure of consideration whenever the purchaser is able to say in substance either “I have not received that for which I paid my money” or “What I have received is not what I agreed to buy.” The test must surely be whether the purchaser has received any portion of that which he bargained for,<sup>75</sup> and it is no answer to say that although he has

<sup>68</sup> *Greville v. Da Costa*, (1797) Peake Add. Cas. 113, 170 E.R. 213; *Giles v. Edwards*, (1797) 7 T.R. 181, 101 E.R. 920.

<sup>69</sup> *Towers v. Barrett*, (1786) 1 T.R. 133, 99 E.R. 1014.

<sup>70</sup> *Hicks v. Hicks*, (1802) 3 East 16, 102 E.R. 502; *Davis v. Bryan*, (1827) 6 B. & C. 651, 108 E.R. 591.

<sup>71</sup> *Fortune v. Lingham*, (1810) 2 Camp. 416, 170 E.R. 1202.

<sup>72</sup> *Young v. Cole*, (1837) 3 Bing. N.C. 724, 730, 132 E.R. 589.

<sup>73</sup> *Gompertz v. Bartlett*, (1853) 2 E. & B. 849, 854, 118 E.R. 985.

<sup>74</sup> *Cox v. Prentice*, (1815) 3 M. & S. 344, 105 E.R. 641; *Devaux v. Conolly*, (1849) 8 C.B. 640, 137 E.R. 658; *Jones v. Ryde*, (1814) 5 Taunt. 488, 128 E.R. 779. These cases are, however, subject to the limitations imposed by *Street v. Blay*, (1831) 2 B. & Ad. 456, 109 E.R. 1212, and *Hunt v. Silk*, (1804) 5 East 449, 102 E.R. 1142. But *cf.* *Rowland v. Divall*, [1923] 2 K.B. 500.

<sup>75</sup> See, for example, *Sparling v. Balharry*, (1918) 20 West. Aust. L.R. 72, where the plaintiff purchaser intended that a strip of land adjoining the property sold should be included in the conveyance, and the defendant vendor did not so intend. The plaintiff claimed not rescission but specific performance of the contract in respect of that portion of the land not included in the conveyance, or alternatively damages for misrepresentation or fraud. Held: That as he had affirmed the contract his action must be dismissed as damages were available only in the case of fraud, which was not proved. But note the language of *McMillan C.J.* at 74: “The plaintiff, who had not got that which he was bargaining for, was certainly entitled to rescission. . .”

not had what he agreed to purchase he has had something else instead. But this is precisely what was said in *Cousins's Case*—"the plaintiffs have got a block of land of substantial value, though certainly something other and of less value than they thought they were getting, and it accordingly can not be said that there was total failure of consideration."<sup>76</sup> It is submitted with respect that it is not possible to reconcile this part of the judgment with the test applied by the Court of Appeal in *Rowland v. Divall*.<sup>77</sup> The essence of all the cases which have been quoted herein on the doctrine of failure of consideration appears to be that although there may originally have been a contract between the parties, circumstances have arisen which entitle the purchaser to repudiate or to rescind the contract and to recover the price which he may have paid because he has not, or cannot in those circumstances, receive the consideration for which he bargained and in anticipation of which he paid the price.

Now it is true that had the written contract in *Cousins's Case* been valid and unimpeachable as it stood, then there was no failure of consideration, for the plaintiffs would have received precisely that for which they had contracted—namely, Lot 153. But if, as is submitted, there was no prior contract, the written document being a nullity, then not only did the purchasers not get what they contracted for, but in law they had never contracted for anything and must surely recover their purchase price on a consideration that had failed *ab initio*. If they would have been entitled to a reconveyance on the ground that they had got something different from what they had contracted for (as for example if they had contracted expressly for Lot 87 and had taken a conveyance of Lot 153), then *à fortiori* they are entitled to a reconveyance when they never contracted for anything. Accordingly it is concluded that once evidence is admitted to show that both in the transfer and in the contract the parties intended different things by the description "Lot 153", then the Court must be driven to the conclusion that there has been a total failure of consideration for the price,<sup>78</sup> and so has power to order a reconveyance.

Against this conclusion there may be cited the well-known de-

<sup>76</sup> (1957) 58 West. Aust. L.R. 79, at 82.

<sup>77</sup> [1923] 2 K.B. 500, *per* Bankes L.J. at 504, and *per* Atkin L.J. at 507.

<sup>78</sup> Even at common law a contract could be rescinded on the ground of innocent misrepresentation, if that misrepresentation produced a complete difference in substance between the thing bargained for and the thing obtained—*Kennedy v. Panama Mail Co.*, (1867) L.R. 2 Q.B. 580, *per* Blackburn J. at 587, ". . . that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration."

cision of Malins V.C. in *Allen v. Richardson*.<sup>79</sup> In that case the defendant had taken an assignment of the lease of a public house subject to a covenant against Sunday trading, but having been informed by the plaintiff vendor that the freeholder was prepared to release the covenant subject to an increased rent. Before completion, the defendant, who employed no legal assistance, discovered that the lease was in fact a sub-lease but failed to appreciate that the covenant could not be effectively released without the concurrence of the original lessee. When after completion he became aware of this fact, he stopped payment on the order he had given for the purchase price and claimed to retain the lease subject to compensation. Malins V.C. found for the plaintiff. He held that if a purchaser is to be wise, he must be wise in time and, although the purchaser in this case might have rescinded the contract before completion, after completion the conveyance could be set aside only on the ground of fraud. The rule is *caveat emptor* and it is the responsibility of the purchaser to do all that is necessary by way of investigating the title and surveying the land before he completes his contract. However, it is possible to distinguish this case from *Cousins's Case* on various grounds. Firstly, in *Allen v. Richardson* the purchaser knew all the relevant facts before completion but merely failed to appreciate their full significance, and the mistake under which he laboured did not produce a total failure of consideration as he received substantially that for which he had bargained. His mistake related only to his ability to remove the covenant. The case therefore should be regarded more as the precursor of the rule in *Angel v. Jay*,<sup>80</sup> that a contract can not be rescinded after conveyance on the ground of what was merely an innocent misrepresentation which did not produce a mistake of fact so fundamental as to amount to a total failure of consideration. Secondly, the purchaser did not claim to have the transaction set aside, but he chose to retain the lease subject to compensation. On this ground the Vice-Chancellor distinguished cases such as *Cooper v. Phibbs* which held that where a person as the result of a common mistake purchased that which was already his own, the proper remedy was to set aside the conveyance and relieve the parties from their contract as "it would be a monstrous thing to say that a man should pay rent for his own

<sup>79</sup> (1879) 13 Ch. D. 524.

<sup>80</sup> [1911] 1 K.B. 666. Similar observations must apply to *Edler v. Auerbach*, [1950] 1 K.B. 359, where the plaintiff had obtained the very property he contracted to take and his mistake related only to the benefit which he hoped to derive from the use of that property, so that it could not be said that the mistake was so fundamental as to produce a total failure of consideration.

property.”<sup>81</sup> It has already been observed in this connexion that if the jurisdiction to set aside a conveyance rests solely on fraud or on cases in which a man takes a conveyance of his own property, then it is impossible to reconcile this view with a number of cases in which the courts have set aside conveyances wholly or *pro tanto*. Finally it is submitted that although it is generally true, particularly in contracts for the sale of land, that the purchaser must investigate fully the title of the vendor to ensure that he will receive the very thing he has bargained for, nevertheless the principle of *caveat emptor* must give way when the purchaser has been misled by the conduct of the vendor or the vendor’s agent which, while falling short of actual fraud, has induced a fundamental mistake as to the very identity of the property to be sold. It would be to ignore two hundred years of progress if a rigorous application of *caveat emptor* were to be insisted upon in every case.

There the matter might rest. But it is thought that the difficulty in studying existing cases in terms of total failure of consideration is due in part to a misconception as to the basis of the equity to a reconveyance. The doctrine of failure of consideration is essentially a doctrine of the common law which developed in and about the development of *indebitatus assumpsit* and the action for money had and received. It does not therefore take too kindly to a transposition into the realms of equity where it had no direct counterpart, for it is thought that the grounds of relief in equity were never during the formative years of the seventeenth and eighteenth centuries so rigidly defined as at common law where the field was dominated by the forms of action. The principle of relief in equity, originally based purely on grounds of conscience, hardened into a principle of relief in various cases on the ground of mistake, and once it is appreciated that the result in many cases depended on the question of the admissibility of evidence of the mistake and secondly on the degree of proof required, then all existing decisions fall readily within the categories of mistake indicated at the beginning of this article. It is impossible, for example, to explain *Harris v. Pepperell* or *Paget v. Marshall* in terms of failure of consideration, if only because in those cases it was the vendor who sought to set aside the conveyance on the ground of mistake, and it could not be said that he had not received the agreed price. The application of the doctrine of failure of consideration is

<sup>81</sup> (1879) 13 Ch. D. 524, at 543 (yet another explanation of the decision in *Cooper v. Phibbs*). See too *Clayton v. Leach*, (1889) 41 Ch. D. 103, where the purchaser claimed to retain his lease subject to compensation in respect of a misdescription.

possibly a consequence of the introduction of the judicature system when common law judges, having to face questions of the grounds of equitable relief, drew parallels from the common law itself. At common law, for an innocent misrepresentation to be a ground for rescinding a contract, it had to produce a mistake of fact amounting to a total failure of consideration in the sense of a difference in substance between the thing bargained for and the thing obtained. "But where there has been an innocent misrepresentation or misapprehension, it does not authorise a rescission, unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration."<sup>82</sup> What could be more natural, and more dangerous, than that the judges, looking at the grounds for reconveyance in equity and observing that there too the error had to be substantial, should speak of it in familiar terms as a failure of consideration and thereby introduce into equity many of the restrictive technicalities of the common law doctrine derived from the forms of action?<sup>83</sup> It is thought that in none of the pre-Judicature Act cases, on the effect of mistake upon a contract or conveyance, will the expression "total failure of consideration" be found at all; instead the language is always the language of mistake and of bargains which it would be against conscience to enforce due to the operation of the mistake. The ground of relief is perhaps better expressed by Byrne J. in *Debenham v. Sawbridge*<sup>84</sup> in the words "either he must make out a case of misrepresentation and fraud, or he must prove an error in substantialibus (*sic*) sufficient to annul the whole contract"; and he continued ". . . and assuming that there need not be a total failure of consideration to justify rescission after conveyance. . ."

Now it is true that even in equity the mistake had to be fundamental and serious in order to justify a rescission or reconveyance, otherwise the transaction would be enforced or upheld subject to the possibility of compensation.<sup>85</sup> But subject to this qualification (and

<sup>82</sup> *Kennedy v. Panama Mail Co.*, (1867) L.R. 2 Q.B. 580, 587, *per* Blackburn J.

<sup>83</sup> The technicalities of *indebitatus assumpsit* for total failure of consideration were to a large extent produced by the necessity of not encroaching upon the action of *special assumpsit* for damages for breach of contract (*Stoljar, op. cit.*). This interaction was only slightly reflected in equity in the difference between setting aside a contract for fundamental mistake and enforcing it subject to compensation.

<sup>84</sup> [1901] 2 Ch. 98, at 109; and see 21 HALSBURY'S LAWS OF ENGLAND (1st ed., 1912), 19, which, although based largely on *May v. Platt* (see note 30 *supra*), makes no reference to failure of consideration.

<sup>85</sup> See the remarks of Lord Erskine in *Halsey v. Grant*, (1806) 13 Ves. Jun. 73, 77 *et seq.*, 33 E.R. 222, 223-224, and of Lord Eldon in *Drewe v. Hanson*,

those already referred to concerning the admissibility of evidence of the mistake and of the burden of proof), cases in which equity has decreed a reconveyance fall more readily into the various categories of mistake than into the language of total failure of consideration. Hence, to say that there may be a reconveyance when the conveyance itself was obtained by fraud is merely to say that there may be a reconveyance on the ground of unilateral mistake where one party laboured under a fundamental mistake which was at all material times known to the other party. Similarly, decisions such as *Cooper v. Phibbs*, *Hitchcock v. Giddings*, and *Solle v. Butcher* are clearly explicable as examples of relief on the ground of common mistake. Finally, it is submitted that *Harris v. Pepperell*, *Paget v. Marshall*, and *Savill Brothers, Ltd. v. Bethell*<sup>86</sup> (in which a reservation in a conveyance was struck out on the ground of uncertainty) are examples of relief in equity on the ground of mutual mistake. This last category, it is suggested, has frequently been confused with relief on the ground of uncertainty in the contract or conveyance,<sup>87</sup> but the true basis of the cases quoted thereon is that where, in the light of all the admissible evidence, the court is unable to say what was intended (generally because the parties intended different things) then that conveyance, or that part of the conveyance, can not stand. It is not in such cases rendered void at law because the conveyance is under seal, but nevertheless equity may give relief against it either by ordering a reconveyance where the whole deed is affected, or by "rectifying by setting aside" that part of the conveyance which is rendered meaningless due to the mistake.

Moreover, as the relief is equitable, it should be possible to dispose of the possible objection that there must be an end to the transaction once the conveyance is executed and that the time for making objections is between contract and conveyance.<sup>88</sup> For the equitable doctrine of *laches* would give adequate protection to the vendor against the possibility that remedying an injustice against one party might effect an injustice against the other.<sup>89</sup>

In conclusion, it may be regretted that there was no appeal from the decision in *Cousins's Case* which might have afforded the High Court an opportunity to reconsider the generality of some of the dicta

(1802) 6 Ves. Jun. 675, 678 *et seq.*, 31 E.R. 1253, 1254.

<sup>86</sup> [1902] 2 Ch. 523.

<sup>87</sup> See, for example, 2 HALSBURY'S LAWS OF ENGLAND (3rd ed., 1955), 418.

<sup>88</sup> As, for example, in *Allen v. Richardson*, (1879) 13 Ch. D. 524.

<sup>89</sup> As in *Leaf v. International Galleries*, [1950] 2 K.B. 86.

in earlier cases, and indeed the whole basis of the equity to a reconveyance.<sup>90</sup>

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<sup>90</sup> The writer is indebted to Mr. F. T. P. Burt, Q.C., for reading this article in the original draft and for making the following most interesting suggestion:

"The true point in this case . . . may have been both fatal (i.e., to the vendor's case) and simple. 'Lot 153' as a matter of English, and standing alone, means precisely nothing. It is a symbol only. It does nothing to identify the land, and standing alone it conveys no meaning. To become meaningful it must be related to something else.

"In a neutral context one might say that the words or the symbol does identify the piece of land when it is related to the code or key which is held by the Lands Department. The context in this particular case, however, was by no means neutral. The parties—one by his agent—had agreed that Lot 153 identified a piece of land—a particular piece of land which had been inspected. The fact that the Lands Department called that piece of land Lot 87 seems to me to be rather beside the point. The parties had made their own dictionary and as *both* used their own symbol in this peculiar way, there was no room for the application of the Lands Department key.

"On this basis there was a good contract for an identifiable piece of land. The conveyance taken was not a performance of that contract. The tendering of apples cannot be a performance of a contract to sell oranges. The vendor was quite unable to make title to the piece of land the subject-matter of the contract. There had therefore been a total failure of consideration—see *McDonald v. Dennys Lascelles Ltd.*, (1933) 48 Commonwealth L.R. 457, *per* Dixon J. at 472 *et seq.*, and *cf.* *Rowland v. Divall*, [1923] 2 K.B. 500.

"The solution that I am suggesting exhibits rather the same rule as is applied in cases of unilateral mistake. Shortly put, the objective approach is abandoned because of the peculiar knowledge known to have been possessed by both parties."

The writer would respectfully agree that this suggestion would offer a short and simple solution of the problem. It must depend upon the vendor's being bound by the representation of his agent that the block of land inspected was the land that was being offered for sale and was correctly described as "Lot 153." The vendor apparently employed the agent to find a purchaser and this would give the agent implied authority to do anything reasonably incidental to that task. It is submitted that this would normally include taking prospective purchasers to the land and identifying it to them, so that in so doing the agent would be acting within his ostensible if not his actual authority. If this is the case then the vendor would be bound by the representation of his agent at least to the extent that he could not subsequently deny that he intended to sell the block of land which was shown to the purchasers by his agent. There was therefore a contract in existence for the sale of the land shown to the purchasers and, by an error of description which must be presumed to have been common to both

parties, the land was described in the written contract as Lot 153. The proper course therefore would be for the purchasers to seek to rectify the contract to read "Lot 87" and, as the vendor can not make title to this land and has in fact transferred a different block of land, there is such a failure of consideration as must justify the purchasers' recovering the price on their tendering a reconveyance of Lot 153.

It should be observed that the case was neither pleaded nor argued in this way and, because of the form of the pleadings, no evidence could be adduced as to the precise terms of the agent's authority (particularly in respect of the identification of the land to him) or as to the terms in which the agent represented that authority to the purchasers. Such evidence, it is thought, would be essential in order to determine whether the intent of the agent might properly be attributed to the vendor, for some limit (based on the terms of his authority and the way it is represented to the purchasers) must necessarily be placed upon the power of the agent to bind a particular principal. Circumstances can readily be envisaged in which an agent, acting for various vendors in respect of several properties in scattered areas, might well purport to bind a particular vendor by a contract which that vendor could not possibly complete and which might therefore render that vendor liable in extensive damages for breach of contract, subject only to a right of indemnity against the agent. On the other hand, if the vendor is not bound by the representation of the agent then, as has been shown, there is no contract and therefore no question of damages for breach.

The issue would appear to be whether it is proper in the light of all the evidence to impute the intention of the agent to the vendor, or whether the vendor will still be entitled to proclaim his real intention. But in either case it is submitted that the purchasers should succeed in their claim for a reconveyance on repayment of the price.