

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Common Mistake ¹

Section 1. - Introduction to Mistake

Types of mistake

6-001

❗ As explained in the Introduction to Ch.3, the doctrine of mistake in the law of contract deals with two rather different situations. In the first, there is some mistake or misunderstanding in the communications between the parties which prevents there being an effective agreement (for instance, if the parties misunderstand each other) or at least means that there is no agreement on the terms apparently stated (for instance, if one party in an offer states terms which the other party knows the first party does not intend, but nonetheless the other purports to accept). This first category of mistake, which can generally be referred to as “mistake as to the terms or identity”, includes “mutual misunderstanding”, where each is mistaken as to the terms intended by the other, ² and “unilateral mistake”, where only one of the parties is mistaken over the terms of the contract ³ or the identity of the other party. ⁴ These issues are dealt with in Ch.3. In the second situation, the parties are agreed on the terms of the contract but have entered it under a shared and fundamental misapprehension as to the facts or the law. ⁵ Cases in this category are now usually referred to as “common” mistake, ⁶ ❗ for normally the mistake is legally relevant only if both parties have contracted under the same misapprehension. It is this second situation that is dealt with in this chapter.

Mistakes as to facts and mistakes as to terms

6-002

❗ In other words, the distinction between the two situations drawn in the previous paragraph is one between mistakes as to the terms and mistakes as to the facts or law. ⁷ It is common to categorise the situations in which the doctrine of mistake affects a contract ⁸ into cases of “common mistake”, “unilateral mistake” or “mutual misunderstanding”. ⁹ This is useful, but it highlights only one of the distinctions between the cases. For the purposes of the law, there is a second and vital distinction between common mistake on the one hand and unilateral mistake or mutual misunderstanding on the other. The doctrine of mistake takes account of a mistake as to the factual circumstances in which the contract is made only if the mistake was common, i.e. both parties made substantially the same mistake—for example, when an agreement was made to rent a room overlooking the route of a coronation procession, that both parties believed that the procession was scheduled to take place on the date concerned when in fact it had been cancelled. ¹⁰ Common mistake cases are ones in which:

“... both parties make the same mistake of fact or law relating to the subject-matter or the facts surrounding the formation of the contract.” ¹¹ ❗

(As will be seen, the mistake must also be fundamental. ¹²) In contrast, where only one of the parties is mistaken as to the facts—a “unilateral” mistake as to the facts—there is no basis for relief under the

doctrine of mistake.¹³ A unilateral mistake or a mutual misunderstanding will only operate where the mistake or misunderstanding is about the terms of the contract—for example, the price or the contractual description of what is being sold,¹⁴ and in cases of mistaken identity.¹⁵

Money paid under mistake of fact

6-003

Mistake may also entitle a party who has paid money under the mistake to recover it back on the basis of restitution (or unjust enrichment).¹⁶ The subject of the recovery of money paid under a mistake is principally dealt with in Ch.29 of this work.

“Mistake” implies a positive belief

6-004

⚠ It seems that relief will only be granted under the doctrine of mistake if one or both parties entered the contract under a positive belief which was incorrect, rather than merely not having thought about a particular issue.¹⁷ ⚠ Thus in all the cases in which a contract has been held to be void¹⁸ for common mistake, it seems that the parties had a positive belief that X was the case when it was not, rather than merely making no assumptions about whether X was so or not.¹⁹

Mistakes that are not legally relevant


6-005

⚠ Thus there are many situations that may loosely be called cases of “mistake” in which the contract will nonetheless be binding. One example is the case considered earlier, in which one party enters the contract under a mistake as to the facts which the other party does not share.²⁰ Suppose I buy a ring mistakenly thinking it is a gold ring. Nothing is said by the vendor as to what the ring is made of²¹; but he knows that it is not gold. Even if he knows that I think the ring to be made of gold, I cannot avoid the contract on the ground of mistake, though I would never have entered into it had I known the true position. The mistake does not relate to the terms of the contract, which are simply to sell and buy the specific ring, so neither mutual nor unilateral mistake is relevant. Nor does the doctrine of common mistake apply: though the mistake may be fundamental, it is not shared.²² ⚠ A second example of a mistake that is not legally relevant is where the mistake is shared by both parties²³ but it is not sufficiently fundamental to render the contract void.²⁴ ⚠

Underlying policy

6-006

⚠ There are, of course, in modern contract law many circumstances in which liability may be imposed on a party for the consequences of facts that are unknown to one of (or both) the parties. This may be the result of the implication of appropriate terms by statute²⁵ or at common law, or by the normal process of construction, or as the result of doctrines that have a limited application, such as misrepresentation²⁶ or the duty of disclosure that applies to insurance contracts.²⁷ But subject to this, a mistake about the facts surrounding the contract is relevant only if it is made by both parties and is fundamental. A mistake as to the facts made by party A only is legally irrelevant, even if the other party B knows of it, unless the mistake was caused by a misrepresentation by B.²⁸ Mere silence as regards a material fact which the one party is not bound to disclose to the other is not a ground of invalidity, for the principle that in relation to sale is referred to as caveat emptor (“let the buyer beware”) is still the starting point of the English law of contract.²⁹ This sets English law apart from

many of the continental systems, which not only seem to give relief in cases of shared mistake more readily than does English law but which also may allow a party who has made a unilateral mistake about the subject matter to avoid the contract provided the mistake was sufficiently serious.³⁰  The restrictive approach to mistake seems to represent a strong policy underlying English contract law. As Lord Atkin said³¹:

“It is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts—i.e. agree in the same terms on the same subject-matter—they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them”.³²

Mistake and unconscionability

6-007

A qualification must be made to the general rule that a mistake as to the facts that is not shared, and was not induced by a misrepresentation by the other party, is legally irrelevant. Facts that bring a case within the category covered by the rules on “mistake” may, in an extreme case, give one party the right to avoid the contract on the ground of unconscionability.³³ Broadly speaking, if one party is suffering from what is sometimes termed a “special disability”,³⁴ such as “poverty, or ignorance, or lack of advice”,³⁵ and the other party consciously takes advantage of the disability, the first party may be entitled to avoid the contract. In many unconscionability cases the first party was in fact making the contract under a misapprehension as to the facts, typically as to the value of the property he was selling.³⁶ There is some suggestion that the doctrine may sometimes be used more broadly to prevent one party taking unconscientious advantage of the other’s mistake. In *Bank of Credit and Commerce International SA (In Liquidation) v Ali (No.1)*³⁷ Lord Nicholls said that where the party to whom a general release was given knew that the other party has or might have a claim and knew that the other party was ignorant of this, to take the release without disclosing the existence of the claim or possible claim could be unacceptable sharp practice. The law would be defective if it did not provide a remedy, and while the case did not raise the issue, he had no doubt that the law would provide a remedy.³⁸ It is obvious that the unconscionability doctrine has the potential to undermine the principle that a mistake as to the factual circumstances is irrelevant unless it is a common mistake, and the courts will no doubt restrict it to cases of “special disability”.

Effects of mistake

6-008

The first type of mistake described in para.6-001 (termed above “mistake as to the terms or as to identity”) is sometimes said to operate so as to negative consent, the second (termed above “common mistake”) so as to nullify consent.³⁹ In other words, in the first case, the parties may not have in fact reached an agreement; in the second, the common mistake renders the agreement ineffective as a contract. In either case, if the mistake is operative the contract is said to be void ab initio. This is correct in cases of common mistake; although until very recently there was authority for the proposition that some common mistakes that would not make the contract void would nonetheless give either party the right to avoid it, the Court of Appeal has now disapproved this line of cases.⁴⁰ The proposition that in cases of unilateral mistake and of mutual misunderstanding the contract is also void ab initio must be treated with more reservation. This was explained in Ch.3.⁴¹

Common law and equity

6-009

Until recently it could be argued that what has been said above about the circumstances in which the

law takes account of a mistake by both parties to a contract represented the position at common law; and that the rules of equity “cut across this distinction”.⁴² This referred to the line of cases to the effect that in some circumstances a common mistake would give either party the right to avoid a contract that was not void for mistake at common law,⁴³ based on a rule of equity. Now that these cases have been disapproved,⁴⁴ and if the interpretation of certain cases of unilateral mistake that was offered in Ch.3⁴⁵ is accepted, it seems that there is no inconsistency between common law and equity. Equity will on occasion supplement the remedies available at common law: for example, a mistake may entitle a party to a contract that has been reduced to writing to have the document rectified if it is not expressed in accordance with the parties’ true intentions, or does not reflect the terms that the claimant intended and the other party knew him to intend.⁴⁶

6-010

The only apparent “divergence” between the treatment of mistake cases in common law and in equity is that the hardship that would be caused by granting specific performance of a contract made under either unilateral or common mistake may lead to the court refusing specific performance as a matter of discretion even though the mistake does not render the contract void or have any other effect at common law.⁴⁷ As this is merely the denial of a particular remedy, and the contract remains binding in other respects (e.g. the claimant would still be entitled to damages if the contract were not performed⁴⁸) this is not a contradiction of the common law rules.⁴⁹ Thus in cases of contractual mistake, common law and equity are consistent and equity plays only a minor role. Therefore in this edition of this work there is no separate treatment of “Mistake in Equity”.⁵⁰

Is there a separate doctrine of mistake?

6-011

Any “doctrine” of mistake in English contract law seems to have emerged only in the late nineteenth or even the twentieth century,⁵¹ and from time to time commentators have argued that the doctrine is redundant or that the cases are better explained on some other basis.⁵² Thus it has been said that cases of common mistake may be explained as resting on the construction of the contract, and in particular on an implied condition precedent⁵³; while cases of unilateral and mutual mistake may be no more than an application of the rules of offer and acceptance.⁵⁴ From a conceptual point of view there is force in these arguments, and it is certainly hard to discern a single “doctrine” of mistake when the two categories of case described above are subject to quite different rules. However in this work it is assumed that there are distinct rules on mistake dealing with each category, and in particular in the case of the “common” mistakes dealt with in this chapter. This is partly because the courts have recognised distinct rules of common mistake⁵⁵ and partly because common mistake is what may be called a “functional category”. In factual terms, a party may claim that both he and the other party made the contract under an unstated misapprehension of some kind as to some fact bearing on the contract.⁵⁶ We need to know what self-induced “mistakes” or (to use a word that does not have legal connotations) “misapprehensions” the law will take account of and what the parties’ rights will be. Whether the rules that are applied are simply applications of more general rules, such as the doctrine of implied conditions is from a functional viewpoint irrelevant; they are the rules that govern these types of mistake.

Mistake and misrepresentation

6-012

In earlier paragraphs the factual situation to which the rules on mistake apply was described as one in which one party, or both he and the other party, have entered the contract under a “self-induced” misapprehension. This is to differentiate it from a closely similar situation that the law treats in a different fashion, under the rubric of misrepresentation. If one party has entered the contract relying on a statement made by the other party about some fact that is material to the contract, and the statement was untrue, the first party will normally have a remedy for misrepresentation. At least if he acts promptly he will normally be entitled⁵⁷ to avoid the contract for misrepresentation, and this is so whether the misrepresenter, when he made the untrue statement, was acting fraudulently, negligently

or wholly innocently.⁵⁸ In one sense, all cases of misrepresentation are also cases of “misapprehension”, as at least one party, and often both the parties, entered the contract believing the facts to be different to what they were. Because one party has misled the other, the law gives relief even though the misapprehension is about the facts surrounding the contract⁵⁹ and is not of the seriousness that we will see is required for relief to be given on the ground of mistake. However, if the right to rescind has been lost, for example because of the lapse of time,⁶⁰ the misrepresentee may have an effective remedy only if he can show that the contract was void for mistake.

Misrepresentation and common mistake

6-013

Relief may be given on the ground of misrepresentation whether the resulting misapprehension was only on the part of the misrepresentee, as when he is the victim of a fraudulent misrepresentation by the other, or whether both parties were under the same misapprehension, as in cases of “innocent” misrepresentation. The misrepresentation cases are treated differently simply because one party chose to make a statement of fact on which the other party relied when he entered the contract.⁶¹ It probably happens far more frequently that one party states the facts as he believes them, and the other party enters the contract relying to some extent on that statement,⁶² than that each enters the contract relying on his own, equally mistaken view of the facts. This goes some way to explain why there are relatively few cases in which a party seeks to escape from a contract on the ground of common mistake: he will often be able to rescind the contract for misrepresentation, while it seems that the other party, the misrepresenter, will be precluded from arguing that the contract is void for common mistake.⁶³ Nonetheless, shared “self-induced” mistake over the facts does happen, and the rules that apply in this type of case form the subject matter of the present chapter.

Common mistake and construction of the contract



6-014

❗ The question of the effect of common mistake in the law of contract is basically one of the allocation of risk as to the facts being as assumed.⁶⁴ In most situations one or other of the parties will be considered to have assumed the risk of the ordinary uncertainties which exist when an agreement is concluded.⁶⁵ ❗ Where contracts of sale of goods are concerned, for example, the seller will normally be held to have assumed the risk that the goods do not correspond to their description, or, if the seller sells in the course of a business, that they may be defective, under express or implied terms, except insofar as the usual conditions are validly excluded, or may in the particular circumstances be inapplicable.⁶⁶ The risk that for other reasons the goods will be less useful than the parties envisaged will be borne by the buyer. Thus it has been said that one must first determine whether the contract itself, by express or implied condition (promissory or non-promissory) or otherwise, provides who bears the risk of the relevant mistake. Only if the contract is silent on the point is there scope for invoking the rules or “doctrine” of mistake.⁶⁷ It has been pointed out that if the enquiry whether the construction of the contract is only as to:

“whether either party has given an undertaking as to the matter at issue (i.e. if that is what is meant by a provision as to ‘who bears the risk of the relevant mistake’), and the answer is that neither has”

that does not preclude a second enquiry as to the effect of the mistake; but if it includes asking whether, if neither bears the risk, the contract is as a matter of construction subject to an implied condition precedent that the facts assumed existed, there seems to be no scope for asking whether the contract is void for mistake.⁶⁸ In other words, if it does include asking whether the contract is subject to such a condition, there is no room for an independent doctrine of common mistake.⁶⁹ Although the courts have held that there is a separate doctrine of mistake,⁷⁰ this is a formidable


argument. It will be submitted that it can really be met only by admitting that, in cases which involve the kind of facts to which the doctrine of common mistake might apply, the process of construction and the application of the rules of mistake are really merely alternative ways of formulating the same thing and reaching the same result.⁷¹ We will see later, however, that sometimes courts have held a contract to be ineffective because as a matter of construction it was subject to an implied condition which has not been fulfilled, in circumstances in which the requirements of common mistake do not seem to have been met.⁷²

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1. See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 119 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan (2003) 119 L.Q.R. 625; Macmillan, *Mistakes in Contract Law* (2010).
 2. See above, para.3-019
 3. Above, paras 3-002 and 3-022 et seq.
 4. Above, paras 3-036 et seq. The composite phrase “mistake as to terms or identity” is used as the “mistake of identity” cases do not involve a mistake over the terms of the contract; but as was seen, these cases depend on the terms of the offer or acceptance, so they are usefully considered in Ch.3 also. Chapter 3 also deals with non est factum and rectification, including rectification for common mistake, which is based on different principles to the doctrine of common mistake that is discussed in the current chapter.
 5. On mistakes as to the law, see below, para.6-052.
 6.  The 29th and earlier editions of this work used the phrase “mutual mistake”, following the terminology used by Lord Atkin in *Bell v Lever Bros* [1932] A.C. 161, and until recently some other works adhered to this usage: e.g. Beatson, *Anson’s Law of Contract*, 28th edn (2002), Ch.8. It is now more common to refer to this type of mistake as “common mistake” (e.g. Beatson, Burrows and Cartwright, *Anson’s Law of Contract*, 30th edn (2015), Ch.8; Cheshire, Fifoot and Furmston, *Law of Contract*, 16th edn (2012), Ch.8). The courts have also referred to common mistake: e.g. *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679. One reason for using the phrase “common mistake” is to reduce the risk of confusion with what is termed here “mutual misunderstanding” (where the parties are at crosspurposes as to the terms of the contract): see above, para.3-019.
 7. As to mistake of law, see below, para.6-052.
 8. Compare those cases in which the mistake is not legally relevant, below, para.6-005.
 9. Above, para.6-001.
 10. *Griffith v Brymer* (1903) 19 T.L.R. 434.
 11.  Beatson, Burrows and Cartwright, *Anson’s Law of Contract*, 30th edn (2015), p.300.
 12. Below, para.6-015.
 13. *Smith v Hughes* (1871) L.R. 6 Q.B. 597; *Statoil ASA v Louis Dreyfus Energy Services LP (The Harriette N)* [2008] EWHC 2257 (Comm), [2008] 2 Lloyd’s Rep. 685.
 14. See above, para.3-025.

15. See above, paras 3-036 et seq.
16. See below, paras 29-033 et seq.
17. **!**cf. Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.12-03. In *Pitt v Holt* [2013] UKSC 26, [2013] 2 W.L.R. 1200, a case of a mistake affecting a voluntary settlement, Lord Walker said (at [108]–[109]) that a mistake is different from ignorance, inadvertence and misprediction as to the future. A mistake encompasses two states of mind, namely an incorrect conscious belief or an incorrect tacit assumption as to a present matter of fact or law, but does not encompass mere causative ignorance but for which the claimant would not have acted as he did; *Co-operative Bank Plc v Hayes Freehold Ltd* [2017] EWHC 1820 (Ch) at [143(i)], citing this paragraph of Chitty. The nature of the mistake that must be shown for a settlor to obtain rectification of a voluntary settlement was discussed extensively: see below, para.29-052.
18. Or voidable in equity, under a line of cases no longer accepted as good law: see below, para.6-055.
19. As to cases of unilateral mistake as to the terms, see above, para.3-022.
20. See above, para.6-002.
21. Therefore there is no misrepresentation: compare below, para.6-012.
22. **!**Compare Anson's famous "Dresden china" example: Anson's Law of Contract, 28th edn, p.324 (second scenario). The example is omitted from the 30th edition by Beatson, Burrows and Cartwright (eds) (2015) but it is explained that a unilateral mistake of fact or law does not render the contract void or give rise to an equitable jurisdiction to set aside the contract: p.300. Friedmann (2003) 119 L.Q.R. 68, 79–81 argues that in such a case relief should be given, by analogy of cases of innocent misrepresentation.
23. Again it is assumed that neither party has stated what he believes to be the facts. If he had, the other might have a remedy for misrepresentation. See below, para.6-012.
24. **!**See below, para.6-015. Note that the grounds on which a voluntary settlement may be set aside because of a mistake on the part of the settlor are much wider: see *Pitt v Holt* [2013] UKSC 26; *Kennedy v Kennedy* [2014] EWHC 4129 (Ch) (rescission of self-contained and severable part of settlement); *Co-operative Bank Plc v Hayes Freehold Ltd* [2017] EWHC 1820 (Ch) at [130]–[132]; *Bainbridge v Bainbridge* [2016] EWHC 898 (Ch) at [6] (applying the remedy of rescission, as for misrepresentation, see below, para.7-126. Whether a transaction is subject to the narrower rules that apply to contracts or the wider grounds that apply to voluntary settlements depends on whether there was consideration for the transfer: *Van der Merwe v Goldman* [2016] EWHC 790 (Ch), [2016] 4 W.L.R. 71
25. For example, the terms as to fitness for purpose that are implied into a contract for the sale of goods where the goods are sold in the course of a business: see Sale of Goods Act 1979 s.14, below, Vol.II, paras 44-094–44-112.
26. See below, para.6-012 and generally Ch.7.
27. See below, paras 7-157 et seq.
28. In which case the rules on misrepresentation apply: see below, Ch.7.
29. *Bell v Lever Brothers Ltd* [1932] A.C. 161, 227; *Keates v Lord Cadogan* (1851) 10 C.B. 591; *Smith v Hughes* (1871) L.R. 6 Q.B. 597, 603; *Turner v Green* [1895] 2 Ch. 203.
30. **!**For French and German Law see Beale, Fauvarque-Cosson, Rutgers, Tallon and Vogenauer,

Casebooks on the Common Law of Europe: Contract Law, 2nd edn (2010), Ch.3, section 2; for a broader survey of the European legal systems, Sefton-Green, *Mistake, Fraud and Duties to Inform in European Contract Law*, 2nd edn (2009) and Cartwright, *Misrepresentation, Mistake and Nondisclosure*, 4th edn (2016), para.15-34. See also Friedmann (2003) 119 L.Q.R. 68, who demonstrates the links between the English doctrine of mistake and the “objective” principle in contract (on which see above, para.2-003); H. Beale, *Mistake and Non-disclosure of Facts: Models for English Contract Law* (2012).

31. *Bell v Lever Bros Ltd* [1932] A.C. 161, 224 (referring to common mistake, but the policy appears to be a general one).
32. The reasons for this narrow approach in cases of common mistake are explored in MacMillan (2003) 119 L.Q.R. 625, 657–658.
33. See below, paras 8-130 et seq.
34. A phrase used by Deane J. in *Commercial Bank of Australia v Amadio* (1983) 151 C.L.R. 447, 474; see below, para.8-135.
35. *Alec Lobb Ltd v Total Oil (Great Britain) Ltd* [1983] 1 W.L.R. 87, 94–95, per Peter Millett Q.C. sitting as a Deputy High Court Judge (reversed in part [1985] 1 W.L.R. 173); below, para.8-135.
36. e.g. *Boustany v Piggott* (1995) 69 P. & C.R. 298 (PC); below, para.8-136.
37. [2001] UKHL 8, [2002] 1 A.C. 251, in which the House of Lords held that a general release was not effective to release a claim for “stigma” damages that neither party could have known about (see above, para.4-049).
38. [2001] UKHL 8 at [32]–[33]. Lord Bingham preferred not to address this question (at [20]), and so it seems did Lord Clyde (at [87]).
39. *Bell v Lever Bros Ltd* [1932] A.C. 161, 217.
40. See below, paras 6-055 et seq.
41. See above, paras 3-029—3-035.
42. See the 28th edition of this work, para.5-001.
43. Above, para.6-001.
44. See below, paras 6-055 et seq.
45. Above, paras 3-029—3-035. These paragraphs discuss the relationship between rectification and unilateral mistake as to the terms at common law. There was very little authority to suggest that unilateral mistake as to the facts was a ground for rescission in equity, and what there was has recently been rejected.
46. See above, paras 3-057 et seq.
47. See below, para.6-061.
48. See, e.g. *Wood v Scarth* (1855) 2 K. & J. 33 (equity), (1858) 1 F. & F. 293 (law).
49. cf. cases in which specific performance may be refused because of the hardship that would result because of a subsequent change of circumstances: see below, para.6-061 and para.27-036.
50. cf. Chitty, 28th edn, paras 5-060 et seq.

- [51.](#) See below, paras 6-017 et seq.
- [52.](#) e.g. *Slade* (1954) 70 L.Q.R. 385.
- [53.](#) *Smith* (1994) 110 L.Q.R. 400. See below, para.6-016.
- [54.](#) e.g. *Slade* (1954) 70 L.Q.R. 385; Atiyah, *Essays in Contract* (1986), Ch.9.
- [55.](#) e.g. *Bell v Lever Bros* [1932] A.C. 161; *Associated Japanese Bank International Ltd v Crédit du Nord SA* [1989] 1 W.L.R. 255; *Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679.
- [56.](#) Or a “mistake” that resulted from a misrepresentation but the right to rescind for misrepresentation has been lost. See below, para.6-012.
- [57.](#) Subject in some cases to a statutory discretion in the court: see below, paras 7-104 et seq.
- [58.](#) The law on misrepresentation is described in Ch.7.
- [59.](#) One party might also make a misrepresentation as to the terms of the contract, for example as to the contents of a written contract that the other party is being asked to sign. Where the statement is that a particular term is or is not in the document, the result will normally be determined by the rules that determine the content of the contract: see Ch.13 (Express terms), in particular paras 13-099 et seq. (parol evidence rule) and Ch.15 (Exemption clauses). Where the misrepresentation is as to the meaning of a clause in the contract the courts have also fashioned a remedy: below, paras 7-020 and 15-146.
- [60.](#) See below, para.7-136.
- [61.](#) One justification given for granting a remedy even when the misrepresenter was acting wholly innocently is that the statement may put the other party off from making further enquires that might have revealed the truth: see below, para.7-042.
- [62.](#) See below, para.7-037.
- [63.](#) See below, para.6-040.
- [64.](#) *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 W.L.R. 164; McTurnan, *An Introduction to Common Mistake in English Law* (1963) 41 Can. Bar Rev. 1; Swan, *Studies in Contract Law* (1980); American Law Institute’s Restatement of Contracts (2d), para.152.
- [65.](#)  *Co-operative Bank Plc v Hayes Freehold Ltd* [2017] EWHC 1820 (Ch) at [143(ii)], citing this sentence of the paragraph.
- [66.](#) e.g. *Gloucestershire CC v Richardson* [1969] 1 A.C. 480 (normal implied term did not apply when contractor had no right to object to supplier nominated by employer and supplier would contract only on limited liability terms).
- [67.](#) *Associated Japanese Bank International Ltd v Crdit du Nord SA* [1989] 1 W.L.R. 255, 268; *Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [74]–[75]; *Butters v BBC Worldwide Ltd* [2009] EWHC 1954 (Ch) at [68]–[69], referring to this paragraph. See also *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016, 1035; *Grains & Fourriers SA v Huyton* [1997] 1 Lloyd’s Rep. 628. Thus, in *Kalsep Ltd v X-Flow BV*, *The Times*, May 3, 2001 it was held that the risk of the mistake which had been made was allocated to one party by an express clause of the agreement. In *Standard Chartered Bank v Banque Marocaine De Commerce Exterieur* [2006] EWHC 413 (Comm), [2006] All E.R. (D) 213 (Feb) the contract was held to be binding on the alternative grounds that the mistake did not make the agreement essentially different and that the risk was clearly allocated to one party.

- [68.](#) Smith (1994) 110 L.Q.R. 400, 407.
- [69.](#) Smith (1994) 110 L.Q.R. 400, 419. The court might conclude that the contract has not allocated the risk to either party, but the conditions for common mistake are not fulfilled (e.g. because the mistake is not sufficiently fundamental), so that the loss lies where it falls. But this does not demonstrate that there is a separate doctrine of mistake, as the same might occur on a “construction” approach.
- [70.](#) *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [73] and [82], discussed below, para.6-034.
- [71.](#) See below, paras 6-029 and 6-062—6-063.
- [72.](#) See *Graves v Graves* [2007] EWCA Civ 660, [2007] All E.R. (D) 32 (Jul), discussed below, para.6-063.

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Chapter 6 - Common Mistake ¹
Section 2. - Introduction to Common Mistake ⁷³

Common mistake

6-015

Where the mistake is common, that is shared by both parties, there is consensus ad idem, but the law may nullify this consent if the parties are mistaken as to some fact or point of law ⁷⁴ which lies at the basis of the contract. In summary, if: (i) the parties have entered a contract under a shared and self-induced ⁷⁵ mistake as to the facts or law ⁷⁶ affecting the contract; (ii) under the express or implied terms of the contract neither party is treated as taking the risk of the situation being as it really is ⁷⁷; (iii) neither party was responsible for or should have known of the true state of affairs ⁷⁸; and (iv) the mistake is so fundamental that it makes the “contractual adventure” impossible, or makes performance essentially different to what the parties anticipated, ⁷⁹ the contract will be void.

Different conceptual bases

6-016

While it is clear on the authorities that a doctrine of common mistake exists in English law, the situation is complicated by the fact that there are three possible conceptual routes which have been employed in considering whether a fundamental mistake has the result that a party can in effect escape from the contract and recover any payment made or other benefit transferred: (1) that there has been a total failure of consideration; (2) that the contract is subject to an express or implied condition that the facts were as the parties believed them to be, or (to use a modern formulation derived from the same argument) that it would be invalid if, on the true construction of the contract, the essence of the obligations are impossible to perform; and (3) that there is a separate doctrine of mistake. We will see that these grounds were not always kept distinct and the leading cases seem to combine the three in a way that makes it hard to state the rules in a simple form. A further issue is whether there is, or was, a separate rule for mistake in equity under which the contract would be treated as voidable rather than void. The Court of Appeal ⁸⁰ has now made it clear that no such doctrine can have survived the decision of the House of Lords in the leading case of common mistake, *Bell v Lever Bros.* ⁸¹

^{1.} See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 119 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan (2003) 119 L.Q.R. 625; Macmillan, *Mistakes in Contract Law* (2010).

^{73.} See Cheshire (1944) 60 L.Q.R. 175, 177; Tylor (1948) 11 M.L.R. 257, 262; Slade (1954) 70 L.Q.R. 385, 396; Bamford (1955) 32 S.A.L.J. 166; Atiyah (1957) 73 L.Q.R. 340; Atiyah and Bennion (1961) 24 M.L.R. 421; McTurnan (1963) 41 Can. Bar Rev. 1; Stoljar (1965) 28 M.L.R. 265, 275; Smith (1994) 110 L.Q.R. 400.

- [74.](#) On mistake of law see below, para.6-052.
- [75.](#) In other words, it is not a case where one party's mistaken belief was induced by a representation by the other party; cf. para.6-013, above. If it was, the first party will normally have a remedy for misrepresentation, see Ch.7, below.
- [76.](#) See below, para.6-052.
- [77.](#) See below, paras 6-037—6-040.
- [78.](#) In such cases the relevant party will normally be treated as bearing the risk of the mistake: see below, para.6-039.
- [79.](#) See below, paras 6-041—6-051.
- [80.](#) *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679. See below, para.6-055.
- [81.](#) [1932] A.C. 161.

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Section 3. - Different approaches before *Bell v Lever Bros*

Total failure of consideration

6-017

There are a number of early cases in which the parties had bought and sold something which, unknown to either of them, was very different to what they thought or even did not exist at all; but the seller tried to claim the price or to retain the price paid. Thus in *Strickland v Turner* ⁸² the purchaser of an annuity on the life of a man who was, unknown to both parties, already dead, was able to recover the purchase price from the vendor on the basis of total failure of consideration, as the annuity had ceased to exist at the time of the contract for sale. In *Gompertz v Bartlett* ⁸³ an unstamped bill of exchange was sold by the defendant to the plaintiff on a non-recourse basis. The parties believed that it was a foreign bill but it was shown in fact to have been drawn in England and it was therefore unenforceable for want of a stamp. The buyer sued to recover the price paid. The Court of Queen's Bench held that this was not merely a case of the bill being of poor quality, when the seller would have been liable only if he had given an express warranty or had been fraudulent. The bill did not meet the description of "a foreign bill" by which it was sold and the buyer was entitled to recover the price.

Couturier v Hastie

6-018

In *Couturier v Hastie* ⁸⁴ there was a sale of a cargo of corn which was believed to be in transit from Salonica to the United Kingdom. Unknown to either party the cargo had deteriorated and had already been sold by the master of the ship. The liability of the purchaser to pay the price depended upon the construction of the contract. If the contract was a contract for the sale of that specific cargo of corn, then the consideration for the contract had totally failed and the seller was not entitled to the price. If, however, as the seller contended, it was a contract for the sale of the adventure, the seller had performed his side of the contract by offering to deliver the shipping documents and the purchaser was liable to pay the purchase price. The House of Lords, confirming the decision of the Exchequer Chamber that had reversed a contrary decision by the Court of Exchequer, held that the contract was for the sale of a cargo and therefore the purchaser was not bound to pay.

Seller liable for non-delivery

6-019

Neither *Couturier v Hastie* nor *Gompertz v Bartlett* was decided on the ground of mistake invalidating the contract. In each case there was what would later be termed a total failure of consideration. ⁸⁵ For the purposes of the decision it did not matter whether the contract was valid or void; the purchaser could not be compelled to pay for what he had never received. It seems more likely that the court thought that the contract was valid and that the seller would have been liable, had he been sued, for damages for failure to deliver the subject matter of the contract. Certainly this seems to have been the

view of Parke B. In *Barr v Gibson*⁸⁶ the parties had bought and sold a ship that, unknown to either of them, had already become stranded on rocks in the Gulf of St Lawrence. Parke B. said that the sale as a “ship” implied a contract that the subject of the transfer did exist in the character of a ship. In *Couturier v Hastie* in the Court of Exchequer, he said that where there is a sale of a specific chattel, there is an implied undertaking that it exists.⁸⁷

Kennedy’s case

6-020

⚠ In *Kennedy v Panama, New Zealand and Australian Royal Mail Co*⁸⁸ the prospectus of a company offering shares stated that fresh capital was required in order to fulfil a lucrative mail contract with the Postmaster of New Zealand. The contract proved to be beyond the Postmaster’s authority to make and the plaintiff, who had purchased shares in reliance on the prospectus, claimed to repudiate the transaction on the ground that there had been a total failure of consideration. The Court of Queen’s Bench refused to allow him to do so. In deciding whether or not that had been a total failure of consideration so as to entitle the buyer to get his money back, Blackburn J. referred to the Roman law on mistake and its distinction between mistakes as to substance, which in Roman law would invalidate the contract,⁸⁹ and mistakes as to quality, which would not; and held that as the misunderstanding about the shares went only to quality, there was no total failure of consideration. It is easy to see how this might be interpreted as saying that a mistake as to substance might make the contract void in English law. It is not clear that this was what was meant⁹⁰; and in any event, the fact that a mistake has led to there being a total failure of consideration cannot lead straight to the conclusion that the contract is void, since it might be that the seller is liable for non-performance. In other words, total failure is not an independent ground on which a contract may be held void: rather, it is a possible basis for an action for the recovery of money when the contract is void.⁹¹ ⚠ There will equally be a total failure of consideration when one party has simply failed to perform.⁹² Even in cases in which at the time of sale the goods might have been said no longer to exist⁹³ (when in Roman law there could be no contract for want of an object⁹⁴), in English law there might be an implied promise that the thing existed, so that the seller would be liable for failing to deliver.

Development of an independent doctrine of common mistake

6-021

The cases of total failure of consideration seem to have played a central role in the development of a doctrine of mistake in English law, but one that involved their being given a rather different interpretation. The great work of Pothier was very influential.⁹⁵ His statement, derived from the Roman law, that if there was no object (because, for example, the thing sold had ceased to exist before the contract was made) there could be no contract of sale, was cited by counsel for the seller⁹⁶ in *Couturier v Hastie*⁹⁷ and may have formed the basis for s.6 of the Sale of Goods Act 1893.⁹⁸ This stated:

“Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract was made, the contract is void.”

The draftsman stated that the rule might be based on mutual mistake or impossibility of performance, and cited *Couturier v Hastie*.⁹⁹

6-022

The notion that a contract might be void for mistake may also have been influenced by the development of the idea that a contract depends upon agreement. It has been said that with the emergence of the theory of consensus ad idem, “it became possible to treat misrepresentation, undue

influence and mistake as factors vitiating consent".¹⁰⁰ At any event, in the early years of the last century there were a few cases in which contracts entered on the basis of a common mistake were held to be void.¹⁰¹

Express or implied condition

6-023

Meanwhile situations of "common mistake" were also sometimes approached on the basis of that the contract might be subject to a condition that the facts were as the parties believed them to be, just as "frustration" cases were explained on the basis that there was an implied condition that the facts would remain as they were. The foundations of the doctrine of frustration were laid in 1863 in the judgment of Blackburn J. in *Taylor v Caldwell*.¹⁰² In that case the subject-matter of the contract had been destroyed by fire after the contract had been made and before the date for its performance. The Court of Queen's Bench held that performance of the contract was excused by reason of an implied term:

"... in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."¹⁰³

The same approach was applied when subsequent events made the contract a completely different venture from that which the parties had contemplated.¹⁰⁴ The courts would later abandon the notion that the doctrine of frustration rests on an implied term.¹⁰⁵ Though in 1916 Earl Loreburn was still basing frustration on an implied condition of the contract,¹⁰⁶ in the "coronation cases" that arose out of the sudden cancellation of the coronation of King Edward VII¹⁰⁷ the question was said to be whether the parties must have contemplated a particular state of affairs as forming the foundation of the contract. If, because of some event for which neither party was responsible, the contract becomes impossible because the state of things assumed by the parties as the foundation of the contract ceases to exist, the contract will be frustrated.¹⁰⁸ In *Griffith v Brymer*¹⁰⁹ Wright J. applied the same principle to a case of common mistake, one in which the contract had been made after the announcement of the cancellation of the procession, and held that the agreement was void because it was made on a misapprehension that went to the whole root of the matter. Thus common mistake cases were sometimes dealt with by analogy to frustration, which was derived originally from the notion of an implied condition.

Cases in equity


6-024

In the eighteenth and nineteenth centuries there were many cases in the courts of equity in which it was held that relief could be given where an agreement had been made under a mistake. It is not easy to discern the basis for relief. Some cases were based on a wide notion of fraud in equity¹¹⁰ which has probably not survived the decision of the House of Lords in *Derry v Peek*.¹¹¹ Others seem to have involved undue influence.¹¹² Yet others give no real hint of the basis of relief but their facts were similar to those involving total failure of consideration.¹¹³ While some cases suggest that equity might grant rescission on the basis of a common mistake that was not induced by one of the parties, "no coherent equitable doctrine of mistake can be spelt from them".¹¹⁴

6-025

It appears that rescission was granted in *Cooper v Phibbs*.¹¹⁵ A had agreed to take a lease of a fishery in Ireland from B, though contrary to the belief of both parties at the time A was himself tenant in tail of the fishery. The proceedings were brought in equity¹¹⁶ and the House of Lords ordered that the agreement should be set aside. However the respondents had a lien on the fishery for the money they had spent on its improvement. Lord Westbury said that if parties contract under a mutual mistake

and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as proceeding upon a common mistake.¹¹⁷

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1. See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 119 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan (2003) 119 L.Q.R. 625; Macmillan, *Mistakes in Contract Law* (2010).
 82. (1852) 7 Exch. 208, 155 E.R. 919.
 83. (1853) 2 El. & Bl. 849, 118 E.R. 985.
 84. (1856) 5 H.L.C. 673, HL; (1853) 9 Exch. 102 (Ex.Ch.); (1852) 8 Exch. 40.
 85. In *Gompertz v Bartlett* (1853) 2 El. & Bl. 849, 854, 118 E.R. 985, 987 Lord Campbell C.J. said that the money paid for the bill could be recovered as it was paid in mistake of the facts. See Lord Atkin's comment in *Bell v Lever Bros* [1932] A.C. 161, 222, on *Gompertz v Bartlett* and *Gurney v Wormesley* (1854) 3 El & Bl 133: "In these cases I am inclined to think that the true analysis is that there is a contract, but that the one party is not able to supply the very thing whether goods or services that the other party contracted to take; and therefore the contract is unenforceable by the one if executory, while if executed the other can recover back money paid on the ground of failure of the consideration."
 86. (1838) 3 M. & W. 390; 150 E.R. 1196.
 87. 8 Ex. 40, 55; 155 E.R. 1250, 1257.
 88. (1867) L.R. 2 Q.B. 580.
 89. Lawson (1936) 52 L.Q.R. 79 argued that the Roman texts were not wholly clear on the effect of such a mistake. If the thing did not exist at all, there would be no object and therefore no contract; that did not depend on a doctrine of mistake but on the lack of an object.
 90. In *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [59] the Court of Appeal agreed with this comment.
 91.  Although when a contract is void for common mistake either party will be able to obtain restitution (see, e.g. Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.22-013), there is some uncertainty as to the basis of the restitutionary remedy. One possibility is that restitution is permitted simply because the contract is void: Treitel at paras 22-014—22-015. When a contract is void for mistake there will usually be a total failure of consideration, as was held to be the case in *Strickland v Turner* (1852) 7 Exch. 208, but it has been argued that this does not necessarily follow from the fact that the contract is void, as it might nonetheless have been completely executed: Burrows, *Law of Restitution*, 3rd edn (2011), p.386. But even in such a case it seems that either party would be able to recover on the basis that he had performed under a mistake: see Treitel at para.22-016. Mistake appears to have been the basis of recovery in *Pritchard v Merchant's and Tradesman's Mutual Life Assurance Society* (1858) 3 C.B.(N.S.) 622, 645. See Burrows at pp.387–388.
 92. See below, paras 29-057 et seq., which follows modern terminology by referring to "failure of basis" rather than the traditional "failure of consideration".
 93. As in *Barr v Gibson* (1838) 3 M. & W. 390, 150 E.R. 1196.
 94. See above, n.90.

- [95.](#) See Simpson (1975) 91 L.Q.R. 247, 266–269.
- [96.](#) Who argued that this was not a case of a sale of something that had ceased to exist but a sale of an expectation. Counsel for the defendant was not called upon.
- [97.](#) (1856) 5 H.L.C. 673.
- [98.](#) See now Sale of Goods Act 1979 s.6, which is identical.
- [99.](#) See Chalmers, *The Sale of Goods Act 1893* (1894), p.17, cited in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [52].
- [100.](#) Steyn J. in *Associated Japanese Bank International Ltd v Credit du Nord SA* [1989] 1 W.L.R. 255, 264.
- [101.](#) *Scott v Coulson* [1903] 2 Ch. 249 (contract for sale of life assurance policy when person whose life was assured was already dead. Vaughan Williams L.J. at p.252, said the contract was void at law); *Galloway v Galloway* (1914) 30 T.L.R. 531 (separation deed between parties who incorrectly thought they were married held void).
- [102.](#) (1863) 3 B. & S. 826, 122 E.R. 309.
- [103.](#) (1863) 3 B. & S. 826, 833–834.
- [104.](#) *Jackson v Union Marine Insurance Co Ltd* (1874) L.R. 10 C.P. 125.
- [105.](#) See below, Ch.23.
- [106.](#) *F.A. Tamplin Steamship Co Ltd v Anglo-Mexican Products Co Ltd* [1916] 2 A.C. 397, 403–404.
- [107.](#) See below, paras 23-033—23-034.
- [108.](#) See the judgments of Lord Alverstone C.J. in *Hobson v Pattenden & Co* (1903) 19 T.L.R. 186 and *Clark v Lindsay* (1903) 19 T.L.R. 202; and of Vaughan Williams L.J. in *Krell v Henry* [1903] 2 K.B. 740, 749.
- [109.](#) (1903) 19 T.L.R. 434.
- [110.](#) e.g. *Hitchcock v Giddings* (1817) 4 Price 135, 146 E.R. 418 (fraud in equity for a party to bargain and sell as if he had title to the property when he had none).
- [111.](#) (1889) 14 App. Cas. 337: below, para.7-048.
- [112.](#) e.g. *Cocking v Pratt* (1750) 1 Ves. Snr. 400; 27 E.R. 1150. On undue influence, see below, paras 8-057 et seq.
- [113.](#) e.g. *Bingham v Bingham* (1748) 1 Ves. Snr. 126; 27 E.R. 934 (purchaser bought an estate which later was found already to have belonged to him; “a plain mistake such as the court was warranted to give relief against”). In *Cochrane v Willis* (1865) L.R. 1 Ch. 58 an agreement was made on the basis that a tenant for life was alive when in fact he had died. The Court of Appeal held that it would be contrary to all the rules of equity and common law to enforce it or hold a party bound by it.
- [114.](#) *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [100], quoting Goff and Jones, *Law of Restitution*, 5th edn (1998), 288 (see more recently 7th edn (2007), para.9-044). On the “mistake” cases in equity before 1875 see Macmillan, *Mistakes in Contract Law* (2010), Ch.3.
- [115.](#) (1867) L.R. 2 H.L. 149.

- [116.](#) See Matthews (1989) 105 L.Q.R. 599.
- [117.](#) See also *Earl of Beauchamp v Winn* (1873) L.R. 6 H.L. 223, 233. Lord Westbury's suggestion that the contract is merely "liable to be set aside" has been criticised in the House of Lords: see below, para.6-056.

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Section 4. - Mistake at Common Law

(a) - Bell v Lever Bros

Bell v Lever Bros

6-026

The law on common mistake was extensively reviewed by the House of Lords in *Bell v Lever Brothers Ltd.* ¹¹⁸ There an action was brought by Lever Brothers for the recovery of money paid to the two defendants under the following circumstances. Lever Brothers had large interests in Africa and set up a subsidiary company, called the Niger Company, to control them there. The defendants were members of the board of the Niger Company and received large salaries in respect of their service agreements with Lever Brothers. One of the conditions of their service agreements was that they were not to make any private profit for themselves by doing business on their own account while serving the company. The defendants did in fact make such profits, unknown to Lever Brothers and undisclosed by the defendants. Lever Brothers, having made other arrangements for their interests in Africa, desired to terminate the service agreements with the defendants before their expiry, and accordingly entered into compensation agreements with them whereby the defendants consented to terminate their service agreements in consideration of the payment to them of large sums of money. After the money had been paid, Lever Brothers discovered the breaches of their service agreements committed by the defendants, which would have entitled the company to dismiss them summarily without notice or compensation. They therefore claimed to recover the sums which they had paid on the ground, inter alia, that they had entered into the compensation agreements under the mistaken assumption that the service contracts could only have been determined by them with the consent of the defendants.

6-027

At the trial of the action, the jury found that there was no evidence of fraud on the part of the defendants, and that when they entered into the compensation agreements they had not directed their minds to their previous breaches of duty. The case was therefore one of common (or as their Lordships described it, mutual) ¹¹⁹ mistake, as both parties had made the same mistaken assumption. Wright J. held that this assumption that a state of facts existed which entitled the defendants to compensation was essential to the agreement; consequently there could be no binding contract, and Lever Brothers were therefore entitled to recover the money paid. This decision was unanimously affirmed by the Court of Appeal. Scrutton and Greer L.JJ. both held that if the contract is made on the basis of a state of facts which is fundamental to the contract, and which turns out not to exist, the contract is void. Greer L.J. based this on an implied condition, ¹²⁰ Scrutton L.J. on either an implied term or mutual mistake as to the assumed foundation of the contract, which he regarded as "only another way of putting the proposition". ¹²¹ In the House of Lords an appeal by the defendants was allowed by a majority of three to two. Lord Blanesburgh, ¹²² one of the majority, based his opinion largely on the fact that mutual mistake had not been originally pleaded. The other two majority opinions, those of Lord Atkin ¹²³ and Lord Thankerton, ¹²⁴ both rested on the ground that the mistake was not sufficiently fundamental to avoid the contract, although they reached this conclusion by somewhat different paths. Lord Warrington of Clyffe (with whom Lord Hailsham agreed) dissented, not on the law but on its application to the facts. ¹²⁵

Lord Atkin's analysis

6-028

In his speech Lord Atkin gave a number of instances in which a common mistake would nullify the parties' consent. He accepted that there is indeed a separate doctrine of mistake that, when the mistake is shared, may "nullify consent".¹²⁶ First, he said that when there is a sale of a thing that has ceased to exist, or that already belongs to the buyer, the contract will be void. Then he stated that:

"... mistake as to quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be."¹²⁷

Applying this test to the facts of the case, Lord Atkin concluded that the contracts to terminate the defendants' service agreements were not void merely because it turned out that the agreements had already been broken and could have been terminated otherwise.

"The contract released is the identical contract in both cases, and the party paying for the release gets exactly what he bargains for."¹²⁸

6-029

Lastly, Lord Atkin turned to what he calls "an alternative way of expressing the result of a mutual mistake". He accepted a proposition formulated by counsel for the respondents:

"Whenever it is to be inferred from the terms of a contract or its surrounding circumstances that the consensus has been reached upon the basis of a particular contractual assumption, and that assumption is not true, the contract is avoided; i.e. it is void ab initio if the assumption is of present fact and it ceases to bind if the assumption is of future fact."¹²⁹

However, Lord Atkin seemed to think this alternative way of expressing the result of a mutual mistake as one that gives little guidance as to when a condition should be implied that the facts are as the parties believed them to be:

"... [if] the contract expressly or impliedly contains a term that a particular assumption is a condition of the contract, the contract is avoided if the assumption is not true. But we have not advanced far on the inquiry whether the contract does contain such a condition ... The implications to be made are to be no more than are 'necessary' for giving business efficacy to the transaction; and it appears to me that as to both existing and future facts a condition should not be implied unless the new state of facts makes the contract something different in kind from the contract in the original state of facts [Lord Atkin referred to a number of cases on frustration] ... We therefore get a common standard for mutual mistake and implied conditions, whether as to existing or as to future facts."¹³⁰

Thus it seems that Lord Atkin viewed saying that the contract was subject to an implied condition precedent and saying that it was void for mutual mistake as different ways of putting the same thing, and that he regarded the latter as having more explanatory power as to when the contract will fail.

The last sentence of the passage quoted also suggests that he thought there is a direct parallel between common mistake and frustration. Lord Thankerton, in contrast, rejected the implied term approach: the frustration cases had “no bearing on the question of error or mistake as rendering a contract void owing to failure of consideration”.¹³¹

A separate doctrine

6-030

Thus *Bell v Lever Bros* seemed to establish the existence in English law of a doctrine of common mistake which is separate from the effect of an implied condition, though often it will lead to the same results.

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1. See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 119 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan (2003) 119 L.Q.R. 625; Macmillan, *Mistakes in Contract Law* (2010).
 - ^{118.} [1932] A.C. 161. The background to the case and its progress through the courts are explored in MacMillan (2003) 119 L.Q.R. 625.
 - ^{119.} See above, para.6-001 n.7.
 - ^{120.} [1931] 1 K.B. 577, 595.
 - ^{121.} [1931] 1 K.B. 577, 585.
 - ^{122.} [1932] A.C. 161, 167. Lord Blanesburgh also held that the payments were irrecoverable as: (i) the defendants’ service contracts were made with the Niger Company and not with the plaintiffs; and (ii) the payments were in part voluntary, since they greatly exceeded in value the unexpired portion of the service agreements.
 - ^{123.} [1932] A.C. 161, 210.
 - ^{124.} [1932] A.C. 161, 229.
 - ^{125.} [1932] A.C. 161, 200. On the difference between the majority and minority views see below, n.129.
 - ^{126.} [1932] A.C. 161, 217.
 - ^{127.} [1932] A.C. 161 at 218.
 - ^{128.} [1932] A.C. 161, 223–224. In contrast, it seems the minority considered the subject-matter to be not just a contract of employment but a binding contract of employment: see [1932] A.C. 161 at 208–209.
 - ^{129.} [1932] A.C. 161, 225.
 - ^{130.} [1932] A.C. 161, 225–226.
 - ^{131.} [1932] A.C. 237.

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Section 4. - Mistake at Common Law

(b) - The Modern Doctrine

(i) - Analysis after Bell v Lever Bros

McRae's case

6-031

The notion of a doctrine of common mistake was not accepted throughout the common law world. In *McRae v Commonwealth Disposals Commission* ¹³² the defendants sold to the plaintiffs an oil tanker said to be lying on a certain reef off New Guinea. The plaintiffs thereupon fitted out a salvage expedition, but found that there was no tanker at the place indicated, nor even any such reef. They brought an action against the defendants claiming damages for breach of contract. The High Court of Australia held that the plaintiffs were entitled to succeed. The principal ground was that the Commission had promised that the tanker existed. They should have known that it had never existed, whereas the plaintiffs knew nothing except what the defendants told them. It followed that no condition could be implied into the contract that it was to be void if the tanker was not in existence. Dixon and Fullagar JJ., giving the leading judgment, doubted whether there was a doctrine of common mistake in contract. They thought that in cases such as *Couturier v Hastie*, the fundamental question is:

"What did the promisor really promise? Did he promise to perform his part in all events, or only subject to the mutually contemplated original or continued existence of a particular subject matter? ... the problem is fundamentally one of construction." ¹³³

However they said that if there is a doctrine of common mistake, a party cannot rely on a mistake consisting "of a belief which is entertained without any reasonable ground, and ... deliberately induced by him in the mind of the other party". ¹³⁴

Subsequent cases

6-032

Notwithstanding the views expressed in *McRae's* case, the doctrine was applied by the Privy Council in *Sheikh Bros Ltd v Ochsner*, ¹³⁵ where the parties' mistake had led them to make a contract that was impossible to perform. The case was decided under the Indian Contract Act 1872 s.20, which enacts that 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, but the English authorities on the law of mistake were expressly cited to the Board. The contract was for the production of a stated amount of sisal on a piece of land and was held to be void when the land turned out to be incapable of producing the quantity contracted for. In *Nicholson and Venn v Smith-Marriott* ¹³⁶ Hallett J. said that the buyers could have treated a contract for the sale of table linen which the parties believed to have been the property of Charles I

when it was in fact Georgian as not binding on them.

The Associated Japanese Bank case

6-033

In *Associated Japanese Bank International Ltd v Crédit du Nord SA* ¹³⁷ Steyn J. gave a detailed account of the doctrine. The plaintiffs had entered a sale and lease-back agreement with B and the defendants had guaranteed the performance of B's obligations under the lease. It was then discovered that the machines purportedly sold and leased back did not exist and the arrangement was a fraud perpetrated by B. Steyn J. held that the defendants were not liable on the guarantee, which was expressly or by necessary implication subject to a condition precedent that the leases related to machines that existed. ¹³⁸ He went on to say that in his view the guarantee was also void for common mistake. Steyn J. said that *Bell v Lever Bros* had decided that a mistake might render a contract void provided it rendered the subjectmatter essentially different from what the parties believed to exist. ¹³⁹ The doctrine was subsequently applied in a number of other cases. ¹⁴⁰

The Great Peace

6-034

⚠ In *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* ¹⁴¹ the principal point was the rejection of the equitable doctrine that had been developed by earlier decisions of the same court. However, the judgment contains a valuable discussion of the doctrine of mistake at common law. The Court of Appeal also were quite clear that there is a separate doctrine of common mistake, which will apply "where that which is expressly defined as the subject matter of a contract does not exist". ¹⁴² But as to mistakes in relation to the quality of the subject matter of the contract, the Court favoured a different approach to Lord Atkin's. It preferred to approach the question of common mistake as a parallel to the doctrine of frustration. Although originally frustration was based on an implied condition, and that approach was still favoured in some twentieth-century cases, ¹⁴³ it has since been rejected as unrealistic. The modern approach is to say that frustration takes place whenever a supervening event that occurs without the fault of either party and is not provided for in the contract so changes the nature of the outstanding obligations from what the parties could reasonably have contemplated that it would be unjust to hold them to the literal terms of the contract. ¹⁴⁴ Equally the Court of Appeal were quite clear that the doctrine of common mistake is a rule of law, not based on an implied term. ¹⁴⁵ However:

"... the implication of a term of the same nature as that which was applied under the doctrine of frustration, as it was then understood ... was a more solid jurisprudential basis for the test of common mistake that Lord Atkin was proposing." ¹⁴⁶

A mistake, including one as to some quality of the subject-matter, will render a contract void only if the non-existence of the state of affairs assumed by the parties rendered the contract or the contractual adventure impossible. ¹⁴⁷ ⚠

Elements of common mistake

6-035

According to the Court of Appeal:

"... the following elements must be present if common mistake is to avoid a contract: (i) there must be a common assumption as to the existence of a state of affairs; (ii) there

must be no warranty by either party that that state of affairs exists; (iii) the nonexistence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render contractual performance impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.” ¹⁴⁸

In what follows we will discuss these elements in more detail, and consider how the doctrine may apply in particular fact situations.

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1. See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 119 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan (2003) 119 L.Q.R. 625; Macmillan, *Mistakes in Contract Law* (2010).
 - ^{132.} (1951) 84 C.L.R. 377; *Tommey v Finextra* (1962) 106 S.J. 1012.
 - ^{133.} (1951) 84 C.L.R. 377, 407–408.
 - ^{134.} (1951) 84 C.L.R. 377, 408.
 - ^{135.} [1957] A.C. 136.
 - ^{136.} See (1947) 177 L.T. 189, 192. The case was said to have been wrongly decided on this point in *Solle v Butcher* [1950] 1 K.B. 671, 692, but that case itself has been disapproved: see below, para.6-058.
 - ^{137.} [1989] 1 W.L.R. 255.
 - ^{138.} [1989] 1 W.L.R. 255, 263. On this point see below, para.6-037.
 - ^{139.} [1989] 1 W.L.R. 255, 266.
 - ^{140.} In *Re Cleveland Trust Plc* [1991] B.C.L.C. 424 the common law of mistake was applied to a bonus issue of shares which was held to be void when a subsidiary’s dividend, which was to pay for the issue, was held to be ultra vires. In *Grains & Fourriers SA v Huyton* [1997] 1 Lloyd’s Rep. 628 the parties believed the results in two certificates of analysis to have been transposed. An agreement to rectify them was void when it was discovered that there had been no transposition, so the rectification would produce the very result it was supposed to avoid.
 - ^{141.} *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679; K. Low, *Exploring Contract Law* (2009) 319.
 - ^{142.} [2002] EWCA Civ 1407 at [55].
 - ^{143.} See the cases in para.23-010 n.41, below.
 - ^{144.} *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [70], quoting *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 700. See further below, para.23-013.
 - ^{145.} [2002] EWCA Civ 1407 at [73] and [82].
 - ^{146.} [2002] EWCA Civ 1407 at [61].

[147.](#)

⚠ [2002] EWCA Civ 1407 at [76]. In *Chancery Client Partners Ltd v MRC 957 Ltd* [2016] EWHC 2142 (Ch), [2016] Lloyd's Rep. F.C. 578 it was held that the contract was not void for common mistake because its performance was not impossible (at [37]). See also *National Private Air Transport Co v Kaki* [2017] EWHC 1496 (Comm) at [25(iii)].

[148.](#)

[2002] EWCA Civ 1407 at [76].

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Common Mistake ¹

Section 4. - Mistake at Common Law

(b) - The Modern Doctrine

(ii) - Conditions for Common Mistake to Render Contract Void

Common assumption as to the existence of a state of affairs

6-036

We saw earlier that mistake requires that the parties have a positive belief in something which is not in fact true ¹⁴⁹; and that where the mistake is as to the nature of the subject matter or the factual circumstances, relief on the ground of mistake is possible only where the parties made the same mistake. ¹⁵⁰ They may not have to believe precisely the same thing but they must make “substantially” the same mistake. ¹⁵¹

Risk not allocated to either party

6-037

It is evident that in order to decide whether the subject matter has turned out to be essentially different or the contractual adventure has turned out to be impossible, and therefore the contract is void for “mistake”, the court must construe the contract and, in particular, consider the contractual allocation of risk. In *The Great Peace* ¹⁵² the Court of Appeal quoted Steyn J.’s words in the *Associated Japanese Bank* case:

“Logically, before one can turn to the rules as to mistake, whether at common law or in equity, one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake. It is at this hurdle that many pleas of mistake will either fail or prove to have been unnecessary. Only if the contract is silent on the point, is there scope for invoking mistake.” ¹⁵³

In the summary of the rules of mistake from *The Great Peace* quoted above, ¹⁵⁴ the court refers to a warranty by one party or the other that the state of affairs exists. That may be the case either because the law allocates a particular risk to one party (e.g. where the goods do not conform to the contract) ¹⁵⁵ or because that is the correct interpretation on the facts. ¹⁵⁶ But the Court points out that relief on the ground of mistake may also be precluded because the risk is allocated under the contract in other ways than by a warranty, for example when the correct interpretation is that the buyer takes the risk that the property sold is less valuable than the parties suppose, or that each party takes the risk that the facts will turn out to be less favourable than he hopes. ¹⁵⁷ We will see a particular application of an allocation of the risk of this kind when we come to consider compromise agreements which turn out to have been made on a mistaken assumption about the law. ¹⁵⁸

Non-existence of the state of affairs must not be attributable to the fault of either party

6-038

⚠ The most obvious meaning of this is that the contract will not be void if one party should have known the truth, since he could have prevented the parties from making the mistake they did. ¹⁵⁹ ⚠ The rule that a party who should have known the truth cannot rely on common mistake at common law was first stated by Steyn J. in the *Associated Japanese Bank* case ¹⁶⁰ ⚠: he derived it from *McRae's* case, in which the High Court of Australia had said that a party cannot rely on a mistake consisting:

“... of a belief which is entertained without any reasonable ground, and ... deliberately induced by him in the mind of the other party.” ¹⁶¹

⚠ Steyn J. also referred to a similar requirement stated in *Solle v Butcher*, ¹⁶² one of the “equitable mistake cases which is no longer treated as good law”. ¹⁶³ It has been pointed out that Steyn J.’s principle goes further than what is stated in *McRae's* case, since the latter refers only to cases in which one party should have known the truth and (by a promise or representation) induced the other party to share the same mistaken belief. ¹⁶⁴ ⚠ In those circumstances the party who induced the other's belief will almost invariably have committed at least a negligent misstatement if not (as in *McRae's* case) a breach of warranty, and he should not be permitted to avoid liability by arguing that the resulting contract was void. But it is submitted that relief on the ground of mistake should be denied in at least two further cases. ¹⁶⁵

One party in better position to discover the truth

6-039

The first is the situation encompassed by Steyn J.’s wider principle. If a party entered the contract relying on his own self-induced mistake rather than any misrepresentation by the other, he will only wish to argue that the contract is void for common mistake if otherwise he would bear the risk of the facts being as in truth they are. Thus in *Griffith v Brymer*, ¹⁶⁶ had the contract not been void the hirer would have had to pay the agreed fee even though there would be no procession to watch. If he could have discovered the true situation and have prevented either party from being mistaken, it seems appropriate to place the risk on him by preventing him from arguing that the contract was void. The rule will give parties who have reasonable means to discover the truth an incentive to do so. It is submitted that Steyn J.’s wider principle should be followed.

Misrepresentor cannot rely on common mistake

6-040

The second situation is where the party who is claiming that the contract is void induced the other party's mistake, and the other party to enter the contract, by an innocent, non-negligent misrepresentation. Although the issue is unlikely to arise in practice, it is submitted that in principle the misrepresentor should not be able to raise common mistake as a defence to a claim for remedies for misrepresentation—for example, if the other party were to seek an indemnity for costs or liabilities incurred as part of the process of rescission. ¹⁶⁷

Non-existence of the state of affairs must render contractual performance impossible

6-041

In *The Great Peace* the Court of Appeal appears to assume that where the subject matter of the contract does not exist, the contract will necessarily be one that cannot be performed.¹⁶⁸ In other cases, even if performance in a literal sense is possible, the mistake may be such that the contractual venture is impossible and the contract will again be void. Each of these propositions needs examination. We will consider first cases in which it turns out that property “sold” no longer exists, or already belongs to the buyer.¹⁶⁹ We will then turn to cases in which the subject matter differs in quality from what the parties believed and the Court of Appeal’s preferred explanation in terms of the impossibility of the contractual venture.¹⁷⁰

Sale of thing that has ceased to exist

6-042

Lord Atkin said ¹⁷¹:

“So the agreement of A and B to purchase a specific article is void if in fact the article had perished before the date of sale. In this case, though the parties in fact were agreed about the subject-matter, yet a consent to transfer or take delivery of something not existent is deemed useless, the consent is nullified. As codified in the Sale of Goods Act the contract is expressed to be void if the seller was in ignorance of the destruction of the specific chattel. I apprehend that if the seller with knowledge that a chattel was destroyed purported to sell it to a purchaser, the latter might sue for damages for non-delivery though the former could not sue for non-acceptance, though I know of no case where the seller has so committed himself.”

Although we have seen that the nineteenth century cases of sales of a non-existent thing were unclear as to whether the contract was void or merely not enforceable by the seller,¹⁷² there are cases that apply s.6 and hold the contract to be void.¹⁷³ There are two questions that remain unclear, however. One is posed by the fact that Lord Atkin’s statement and s.6 refer strictly to those cases where the subject matter of the contract has once been in existence, but has subsequently perished before the contract is made. The question is whether the same principles apply where the subject matter of the contract has never been in existence at all. The second is whether the fact that the subject matter of the contract has perished always renders the contract void, particularly if the seller should have known the truth. These questions will be considered in the following paragraphs.

Sale of goods that have never existed

6-043

Although such a case is outside both s.6 of the Sale of Goods Act 1979 and Lord Atkin’s dictum, there seems no reason why in an appropriate case the same principle should not apply, with the result that (subject to what is said in the next paragraph) the contract will be void. Such facts did arise in the Australian case of *McRae v Commonwealth Disposals Commission*¹⁷⁴ though, as we have seen, the High Court held that the contract was not void for other reasons.¹⁷⁵

Seller responsible if should have known that goods have ceased to exist

6-044

Although Lord Atkin appears to refer to an absolute rule that if the subject matter has ceased to exist, the sale must be void, it is submitted that this is not the case except perhaps in cases to which s.6 of

the Sale of Goods Act applies. ¹⁷⁶ We have seen that earlier cases sometimes based the doctrine of common mistake on an implied condition, in parallel with the doctrine of frustration. This made it clear that the condition would not occur, and thus the contract would not be void, unless the mistake came about without the fault of either party. In other words, the court may refuse to imply such a condition where it would be inappropriate, and it would normally be inappropriate to do so when one of the parties should have known the true situation and therefore could have prevented the mistake. ¹⁷⁷ Lord Atkin's acceptance of the "alternative way of formulating the effect of a mutual mistake" seems to accept that whether the contract will be nullified will depend on its construction. This is reflected also in the summary found in the judgment in *The Great Peace*. ¹⁷⁸ If the seller should have known that the goods no longer exist, he will be treated as warranting that the goods do exist and this will exclude the doctrine of common mistake.

Section 6 cases

6-045

⚠ Where, however, the case is one of the sale of goods which have perished before the contract was made, s.6 of the Sale of Goods Act 1979 may preclude such a result, since it provides that the contract will be void. ¹⁷⁹ It is possible that the parties are unable to vary this rule by contrary agreement. ¹⁸⁰ ⚠ In the light of *McRae's* case and the fact that under s.6 a seller who knows that the goods no longer exist may nonetheless commit himself to deliver, it seems unlikely that a modern court would accept that s.6 necessarily has the effect that a seller who ought to have known that the goods no longer exist will escape liability. It is submitted that even though s.6 is not expressly stated to apply only if the parties have not agreed otherwise, it is a statement of the "default position" which will apply unless in the circumstances the contract should be construed otherwise. ¹⁸¹ ⚠

Sale of non-existent goods: a question of construction

6-046

In reliance upon the *McRae* decision, it has been suggested that a contract concerning non-existent subject-matter is always valid and binding unless a condition can be implied to the contrary. ¹⁸² It is submitted that the question is really one of the construction of the contract. Normally, the parties will be taken to have contracted on the basis that the subject-matter of their agreement was in existence: the inference is that neither party assumed the risk of such mischance. ¹⁸³ Prima facie, therefore, the contract will be void. But if (as was argued in *Couturier v Hastie* ¹⁸⁴) one of the parties contracts to purchase an adventure, he binds himself to pay in any event. Conversely, if the seller either expressly or impliedly assumes responsibility that the subject-matter of the contract is in existence, he will be liable in damages if in fact it is non-existent. As we have seen, a seller will be normally be taken to have assumed responsibility for facts about which he should have known.

Sale of property already belonging to the buyer

6-047

Lord Atkin said:

"Corresponding to mistake as to the existence of the subject-matter is mistake as to title in cases where, unknown to the parties, the buyer is already the owner of that which the seller purports to sell to him. The parties intend to effect a transfer of ownership; such a transfer is impossible; the stipulation is *naturali ratione inutilis*." ¹⁸⁵

In support, he cited the case of *Cooper v Phibbs* ¹⁸⁶ and Lord Westbury's statement that if parties

contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as proceeding upon a common mistake. Lord Atkin said that the only criticism that could be made of this statement was that the agreement "would appear to be void rather than voidable". We will consider the last point below. ¹⁸⁷ It is submitted that the position with sales of property that belong to the buyer is directly parallel to that of sales of goods that do not exist. The question is again one of the construction of the contract. Normally the parties will be taken to have contracted on the basis that the subject-matter did not already belong to the buyer. Prima facie, therefore, if that turns out to be the case the contract will be void. However, if one party should have known the truth the contract will be binding on him; he will be taken to have assumed responsibility. ¹⁸⁸

Mistakes as to quality of subject matter

6-048

On mistakes as to the quality of the subject matter, Lord Atkin said:

"... mistake as to quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be." ¹⁸⁹

Lord Thankerton, though phrasing his view in a negative sense, seems to have agreed with Lord Atkin: he said that a common mistake would not avoid the contract unless it related "to something which both must necessarily have accepted in their minds as an essential and integral part of the subject matter". ¹⁹⁰ Lord Blanesburgh, who would not have allowed the plea of mistake to be put forward at such a late stage, nonetheless said that he was in "entire accord" with what Lord Atkin said. ¹⁹¹

6-049

In the light of Lord Atkin's statement it has been suggested that a distinction should be drawn between a mistake as to the substance of the thing contracted for, which will avoid the contract, and mistake as to its qualities, which will be without effect. ¹⁹² Moreover, all the examples given by Lord Atkin were aimed at supporting his conclusion that the contracts in question in *Bell v Lever Bros* were not void, and are ones in which he said that the contract would not be void because the mistake did not make the thing essentially different:

"A buys B's horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known as the fact is that the horse is unsound. If B has made no representation as to soundness and has not contracted that the horse is sound, A is bound and cannot recover back the price. A buys a picture from B; both A and B believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A has no remedy in the absence of representation or warranty. A agrees to take on lease or to buy from B an unfurnished dwelling-house. The house is in fact uninhabitable. A would never have entered into the bargain if he had known the fact. A has no remedy." ¹⁹³

There is thus some doubt whether a common mistake as to the quality of the subject matter will ever render a contract void for mistake.

Impossibility of the contractual venture

6-050

❗ In *The Great Peace* the Court said that the cases cited by Lord Atkin in support of his statement “form an insubstantial basis for his formulation”.¹⁹⁴ One was *Kennedy v Panama, New Zealand and Australian Royal Mail Co*,¹⁹⁵ in which, as we saw earlier, it is not clear that Blackburn J. was intending to say that a mistake as to substance would make a contract void at English law. The other was *Smith v Hughes*,¹⁹⁶ which does not appear to be relevant.¹⁹⁷ However, the Court said that just as a contract may be frustrated if subsequent events make the contractual adventure impossible, so a contract may be void for common mistake if the mistake is as to:

“... the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.”¹⁹⁸

Where it is possible to perform the letter of the contract but it is alleged that there was a common mistake in relation to a fundamental assumption which renders performance of the essence of the obligation impossible it is a matter of construction to decide whether this is the case.¹⁹⁹

“... it is necessary to identify what it is that the parties agreed would be performed. This involves looking not only at the express terms, but at any implications that may arise out of the surrounding circumstances. In some cases it will be possible to identify details of the ‘contractual adventure’ which go beyond the terms that are expressly spelt out, in others it will not.”²⁰⁰ ❗

What mistakes may frustrate contractual venture?




6-051



❗ Clearly a contract which turns out to be literally impossible to perform may be void for mistake, provided the other conditions set out above are met. But what other kinds of case may fall within the phrase, “frustration of the contractual venture”—or, for that matter, following Lord Atkin’s formulation, make the subject matter “essentially different from the thing it was believed to be”?²⁰¹ The cases give examples: a contract for “a room with a view” when in fact there was no procession to look at²⁰²; a guarantee of a lease of machines when in fact no machines existed²⁰³; possibly the sale of a life insurance policy on someone the parties did not know was already dead.²⁰⁴ Beyond this it is not easy to generalise. However it has been argued that an appropriate test for determining whether a mistake is fundamental is to ask the parties “what are you contracting about”? If they would both identify the subject matter in terms that are correct (e.g. in *Bell v Lever Bros* they would have answered, “[w]e are contracting about a service agreement”) the mistake is not fundamental. If they would identify the subject matter in terms that in fact are not correct, the mistake is fundamental.²⁰⁵ ❗ This argument is attractive but it presupposes that the correct test is one of the identity of the subject matter. That fits Lord Atkin’s analysis²⁰⁶ ❗ but not necessarily that in *The Great Peace*.




1. See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 119 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan (2003) 119 L.Q.R. 625; Macmillan, *Mistakes in Contract Law* (2010).

¹⁴⁹. Above, para.6-004.

¹⁵⁰. Above, para.6-005.

- [151.](#) *Associated Japanese Bank (International) Ltd v Crédit du Nord* [1989] 1 W.L.R. 255, 268.
- [152.](#) [2002] EWCA Civ 1407, [2003] Q.B. 679 at [80].
- [153.](#) *Associated Japanese Bank (International) Ltd v Crédit du Nord* [1989] 1 W.L.R. 255, 268.
- [154.](#) See para.6-035.
- [155.](#) See above, para.6-014.
- [156.](#) In *Standard Chartered Bank v Banque Marocaine De Commerce Extérieur* [2006] EWHC 413 (Comm), [2006] All E.R. (D) 213 (Feb) the contract was held to be binding on the alternative grounds that the mistake did not make the agreement essentially different and that the risk was clearly allocated to one party. See also *Butters v BBC Worldwide Ltd* [2009] EWHC 1954 (Ch) at [68]–[69].
- [157.](#) See [2002] EWCA Civ 1407 at [81], referring to the judgment of Hoffmann L.J. in *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016 at 1035, that: “Such allocation of risk can come about by rules of general law applicable to contract, such as ‘caveat emptor’ in the law of sale of goods or the rule that a lessor or vendor of land does not impliedly warrant that the premises are fit for any particular purpose, so that this risk is allocated by the contract to the lessee or purchaser.”
- [158.](#) Below, para.6-053.
- [159.](#)  It is possible that there is an exception to this when s.6 of the Sale of Goods Act 1979 applies, since that section seems at first sight to state an absolute rule that the contract is void: but it will be submitted that this is not the correct interpretation of the section, which should be interpreted as stating the prima facie position. See below, para.6-045. In *National Private Air Transport Co v Kaki* [2017] EWHC 1496 (Comm) the state of affairs was attributable to the claimant’s fault because it resulted from the claimant’s non-performance of another contract (see at [25(ii)]).
- [160.](#)  *Associated Japanese Bank (International) Ltd v Crédit du Nord* [1989] 1 W.L.R. 255, 268. Steyn L.J.’s dictum was applied in *National Private Air Transport Co v Kaki* [2017] EWHC 1496 (Comm) at [25(i)].
- [161.](#) (1951) 84 C.L.R. 377, 408.
- [162.](#) [1950] 1 K.B. 671, 693. Steyn J. also noted that the civilian doctrine of error in substantia is qualified by the principles governing culpa in contrahendo: [1989] 1 W.L.R. 255, 269.
- [163.](#) See below, para.6-058.
- [164.](#)  Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.15-22; Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.8-005.
- [165.](#) The second is considered in para.6-040.
- [166.](#) (1903) 19 T.L.R. 434. See above, para.6-023.
- [167.](#) See below, para.7-129.
- [168.](#) [2002] EWCA Civ 1407 at [55].
- [169.](#) Below, paras 6-042—6-047.
- [170.](#) Below, para.6-0448.

- [171.](#) *Bell v Lever Bros Ltd* [1932] A.C. 161, 217.
- [172.](#) Above, paras 6-017—6-019.
- [173.](#) e.g. *Turnbull v Rendell* (1908) 27 N.Z.L.R. 1067; *Barrow, Lane & Ballard Ltd v Phillip Phillips & Co* [1929] 1 K.B. 574, in which A agreed to buy and B to sell 700 specific bags of nuts lying in a particular warehouse. Unknown to both parties, 109 bags had been stolen prior to the sale. The contract was held void. However, it should be noted that the surviving bags were delivered and paid for; the action was brought by the sellers for the price of the missing bags.
- [174.](#) (1950) 84 C.L.R. 377.
- [175.](#) Above, para.6-031.
- [176.](#) On this point see below, para.6-045.
- [177.](#) cf. *The Great Peace* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [84] (“... whether ... one or other party has taken responsibility ... is another way of asking whether one or other party has taken the risk ... and the answer to this question may well be the same as the answer to the question of whether the impossibility of performance is attributable to the fault of one party or the other”).
- [178.](#) See above, para.6-035.
- [179.](#) cf. Atiyah (1957) 83 L.Q.R. 340, 348; Sale of Goods Act 1979 s.55. An extensive discussion of the meaning of “perish”, in the context of the New Zealand equivalent of s.7, can be found in *Oldfields Asphalts v Govedale Coolstores (1994) Ltd* [1998] 3 N.Z.L.R. 479.
- [180.](#)  See Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.8-010.
- [181.](#)  cf. Adams and MacQueen, *Atiyah and Adams' Sale of Goods*, 13th edn (2016), p.80; Benjamin's *Sale of Goods*, 9th edn (2014), para.1-132. Alternatively, it might be held that the seller was liable for breach of a collateral warranty (see below, para.13-004, though there might be problems over consideration, see Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.8-010) or in tort for damages for negligent misstatement, if such should exist, under the principle stated in *Hedley Byrne & Co v Heller & Partners* [1964] A.C. 465. It is doubtful whether he could be liable under Misrepresentation Act 1967 s.2(1), as that subsection applies “where a person has entered a contract” and thus may not apply when the contract is void for mistake.
- [182.](#) *Svanosio v McNamara* (1956) 96 C.L.R. 186; Slade (1954) 70 L.Q.R. 385; Shatwell (1955) 33 Can. Bar Rev. 164; Atiyah (1957) 73 L.Q.R. 340.
- [183.](#) *Couturier v Hastie* (1856) 5 H.L.C. 673, 681; *Barrow, Lane & Ballard Ltd v Phillip Phillips & Co* [1929] 1 K.B. 574, 582; Corbin, *Contracts* (1960) Vol.3, para.600; American Law Institute's Restatement of Contracts (1932), paras 456, 460 and Restatement of Contracts (2d), para.263; Uniform Commercial Code s.2-613.
- [184.](#) (1856) 5 H.L.C. 673; see above, para.6-018.
- [185.](#) *Bell v Lever Bros* [1932] A.C. 161, 218. In *Lictor Anstalt v MIR Steel UK Ltd* [2014] EWHC 3316 (Ch) the parties thought that a piece of plant was a chattel belonging to one of them when in fact it was annexed to land belonging to the other. It was argued that a contract to rent the plant to the second party was void for common mistake, but it was held that the agreement was not void, as aspects of the agreement were still capable of performance (at [210]–[216]).
- [186.](#) (1867) L.R. 2 H.L. 149. See above, para.6-025.
- [187.](#) Below, para.6-056.

- [188.](#) If the seller should have known, the practical difference will be slight or nil, as the buyer will recover the money he has paid on either supposition; and by definition he has the property. It is conceivable that the buyer might be held to have agreed to pay in any event (compare the argument in *Couturier v Hastie* (1856) 5 H.L.C. 673, above, para.6-018) but this seems very unlikely. The buyer might have to pay anyway if he and not the seller should have known.
- [189.](#) [1932] A.C. 161, 218.
- [190.](#) *Bell v Lever Bros* [1932] A.C. 161, 236.
- [191.](#) [1932] A.C. 161, 198–199.
- [192.](#) Tylor (1948) 11 M.L.R. 257.
- [193.](#) [1932] A.C. 161, 224.
- [194.](#) *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [61].
- [195.](#) (1867) L.R. 2 Q.B. 580.
- [196.](#) (1871) L.R. 6 Q.B. 597. See above, para.3-025.
- [197.](#) See *The Great Peace* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [59]–[60].
- [198.](#) [2002] EWCA Civ 1407 at [76].
- [199.](#) [2002] EWCA Civ 1407 at [82].
- [200.](#)  [2002] EWCA Civ 1407 at [74]. Thus the test now seems to be whether performance of the contract or the contractual venture has turned out to be impossible. See also *Co-operative Bank Plc v Hayes Freehold Ltd* [2017] EWHC 1820 (Ch) at [143(iii)]. In *Dana Gas PJSC v Dan Gas Sukuk Ltd* [2017] EWHC 1896 (Comm) H.H. Judge Waksman QC said (at [65]) that common mistake is not confined to cases where the contract is impossible to perform, but he cited the headnote to *The Great Peace* [2003] Q.B. 679 (which speaks of the contract performance being essentially different from the performance the parties had contemplated) rather than what was said by the Court of Appeal itself (at [76], quoted in Main Work, Vol.I, para.6-035); and in any event it seems to have been arguable in the *Dana Gas* case that the contractual venture was impossible, see at [68].
- [201.](#) See above, para.6-048.
- [202.](#) *Griffiths v Brymer* (1903) 19 T.L.R. 434, above, para.6-023.
- [203.](#) *Associated Japanese Bank (International) Ltd v Crédit du Nord* [1989] 1 W.L.R. 255, cited with apparent approval in *The Great Peace* [2002] EWCA Civ 1407 at [93].
- [204.](#) *Scott v Coulson* [1903] 2 Ch. 249. In *The Great Peace* [2002] EWCA Civ 1407 the Court seems to have had some difficulty in explaining this decision but did not say it was wrong (at [87]–[88]).
- [205.](#)  Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.8-019.
- [206.](#)  But not his example of the picture thought to be an Old Master, where the parties would presumably have said they were buying and selling “a Rembrandt” rather than just “a picture”: see Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.8-020.

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Chapter 6 - Common Mistake ¹

Section 5. - Mistakes of Law

Mistakes as to law

6-052

Until recently, it was established that, for a common mistake to be operative at common law, ²⁰⁷ and (when it was thought that there might be a separate equitable right to rescind) ²⁰⁸ in equity, ²⁰⁹ it must be a mistake as to fact and not one as to law. This did not apply when an error as to the meaning of a document resulted in a mistake as to private rights which led to a party attempting to buy his own property. ²¹⁰ Moreover, a question of foreign law is a question of fact. ²¹¹ The rule that a mistake of pure law could not invalidate a contract seems to have been based on the rule that only a mistake of fact would entitle a party to claim restitution on the grounds of mistake. ²¹² In *Kleinwort Benson Ltd v Lincoln City Council* the House of Lords held that the latter rule is not part of English law. ²¹³ It was not immediately clear whether this would affect the law of common mistake. The grounds on which a payment made by mistake may be recovered are wider than those on which a contract may be void for common mistake. ²¹⁴ This is said to be because of the policy favouring finality of contracts. ²¹⁵ Thus a mistaken payment may be recovered without showing that the mistake was fundamental or that the recipient shared the payer's mistake. ²¹⁶ However, it has been accepted by the Court of Appeal that in principle a fundamental common mistake as to law may render a contract void; the principle underlying the decision in the *Kleinwort Benson* case ²¹⁷ is not confined to restitution. However, on the facts (which involved a compromise agreement) the agreement was not void for common mistake. ²¹⁸

Mistake of law and compromise agreements

6-053

In *Brennan v Bolt Burdon* ²¹⁹ the Court of Appeal accepted that a mistake of law may render a contract void. However, there is not a mistake of law if the relevant law was merely in doubt, as the majority held it was in this case; the parties could have discovered that the relevant decision was under appeal. In addition, when combined with the "declaratory theory of law" espoused in the *Kleinwort Benson* case, that when a decision is overturned the previous view of the law was mistaken, ²²⁰ the mistake of law rule would threaten the finality of compromise agreements. In the view of Maurice Kay L.J. and Bodey J., a compromise agreement is one under which each party should be treated as accepting the risk that their view of the law might subsequently turn out to be mistaken. ²²¹ The court left open the question whether a mistake of law could ever invalidate a compromise agreement if, as a matter of construction, the compromise applies. ²²² To exempt compromises altogether from the mistake of law rule might not be inconsistent with the *Kleinwort* case, as Lord Goff ²²³ and Lord Hope ²²⁴ had suggested that in a restitution case there might be a defence of "settlement of an honest claim". Maurice Kay L.J. doubted if a mistake of law would ever render performance impossible. ²²⁵ Sedley L.J. considered that in mistake of law cases the test of impossibility was too narrow; he would apply a test of whether the mistake destroyed the subject matter. ²²⁶ Subsequently the Court of Appeal ²²⁷ has said that in practice it makes little difference which approach is followed: on Sedley L.J.'s approach the contract would be void only if the mistake renders "the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist". ²²⁸ On the facts before the court, this test was not satisfied. However, Lord Hoffmann has suggested that a party who pays a sum demanded when he is doubtful

whether or not he is liable should not always be treated as taking the risk. ²²⁹

Mistake of law and consent orders

6-054

In *S v S* ²³⁰ it was held that a mistake of law was not a sufficient ground to set aside a consent order ²³¹ made in ancillary relief proceedings, though there was no such mistake on the facts. One ground for the decision, that the *Kleinwort* principle was confined to restitution cases, was later rejected in *Brennan v Bolt Burdon* ²³² but Maurice Kay L.J. expressed sympathy with the other ground, that public policy favouring an end to litigation must prevail. ²³³

1. See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 119 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan (2003) 119 L.Q.R. 625; Macmillan, *Mistakes in Contract Law* (2010).

^{207.} *Beesley v Hallwood Estates Ltd* [1960] 1 W.L.R. 549, 563, affirmed [1961] Ch. 105.

^{208.} See above, para.6-009.

^{209.} *Stone v Godfrey* (1854) 5 De G.M. & G. 76, 90; *Rogers v Ingham* (1876) 3 Ch. D. 351, 357; *Alcard v Walker* [1896] 2 Ch. 369, 375; *Re Diplock* [1948] Ch. 465 (affirmed sub nom. *Ministry of Health v Simpson* [1951] A.C. 251); *Whiteside v Whiteside* [1950] Ch. 65, 74; see below, para. 29-044. However in *Solle v Butcher* [1950] 1 K.B. 671 the Court of Appeal assumed that no relief could be given where the mistake was purely one of law.

^{210.} *Cooper v Phibbs* (1867) L.R. 2 H.L. 149. As we have seen, on the facts of this case the contract would now to be regarded as void: above, para.6-047.

^{211.} *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd (The Amazonia)* [1990] 1 Lloyd's Rep. 236.

^{212.} *Bilbie v Lumley* (1802) 2 East 469: see below, paras 29-044 et seq.

^{213.} *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349; below, para.29-046.

^{214.} Below, para.29-035.

^{215.} See the authors cited in para.29-035 n.193.

^{216.} See below, para.29-035.

^{217.} [1999] 2 A.C. 349.

^{218.} *Brennan v Bolt Burdon* [2004] EWCA Civ 1017, [2005] Q.B. 303.

^{219.} [2004] EWCA Civ 1017, [2005] Q.B. 303.

^{220.} [1999] 2 A.C. 349, e.g. 378–379 (Lord Goff), 399 (Lord Hoffmann), cf. 410 (Lord Hope).

^{221.} [2004] EWCA Civ 1017 at [31] and [39]; cf. above, para.6-037. Bodey J. would imply a term to that effect (at [42]). Sedley L.J. reached the same result by considering the agreement in its factual matrix (at [64]).

- [222.](#) cf. *Bank of Credit and Commerce International SA (In Liquidation) v Ali (No.1)* [2001] UKHL 8, [2002] 1 A.C. 251, in which the House of Lords held that a general release was not effective to release a claim for “stigma” damages that neither party could have known about.
- [223.](#) [1999] 2 A.C. 349, 382G.
- [224.](#) [1999] 2 A.C. 349, 412F–G.
- [225.](#) [2004] EWCA Civ 1017 at [22].
- [226.](#) [2004] EWCA Civ 1017 at [60].
- [227.](#) *Kyle Bay Ltd (t/a Astons Nightclub) v Underwriters Subscribing under Policy No.019057/08/01* [2007] EWCA Civ 57, [2007] 1 C.L.C. 164 at [24]–[26].
- [228.](#) Steyn J. in *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1989] 1 W.L.R. 255, 268.
- [229.](#) *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 A.C. 558 at [27]; see below, para.29-038.
- [230.](#) [2003] Fam. 1.
- [231.](#) On consent orders see below, para.6-060 n.276.
- [232.](#) [2004] EWCA Civ 1017, [2005] Q.B. 303.
- [233.](#) [2004] EWCA Civ 1017 at [12].

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Section 6. - No Separate Rule in Equity

No separate doctrine of common mistake in equity

6-055

In *The Great Peace* ²³⁴ the Court of Appeal held that there is no separate jurisdiction in equity to set aside a contract on the ground of common mistake if the contract is not void at common law. This decision, it is to be hoped, ends years of uncertainty following the earlier decision of the Court of Appeal in *Solle v Butcher*. ²³⁵ The Supreme Court has accepted, obiter, that *Solle v Butcher* has been effectively overruled by *The Great Peace*. ²³⁶

Previous authority on common mistake in equity ²³⁷

6-056

We saw earlier that before *Bell v Lever Bros Ltd* ²³⁸ no coherent equitable doctrine of mistake had developed. ²³⁹ In that case Lord Atkin did not advert to a separate equitable doctrine; he approved Lord Westbury's words in *Cooper v Phibbs* ²⁴⁰ subject to the remark that "the agreement would appear to be void rather than voidable". ²⁴¹ At least so far as common mistake is concerned, the modern equitable principle of rescission was developed by the Court of Appeal in the case of *Solle v Butcher*. ²⁴² Drawing upon the various cases in which contracts have been set aside on the ground of mistake, together with those in which the defendant has been given the option to rescind or accept rectification, ²⁴³ the Court of Appeal enunciated a new doctrine of mistake in equity: that the courts have a discretionary jurisdiction to grant such relief as in the circumstances seems just, including setting aside the contract on terms. In that case, the defendant leased to the plaintiff a dwelling-house which both parties erroneously believed to have been so altered in structure that it had become a "new" dwelling-house and fell outside the restrictions imposed by the Rent Acts. The controlled rent of the house was £140 per annum, but the rent inserted in the lease was £250 per annum. The plaintiff claimed to recover the money overpaid, and, in his defence, the defendant counter-claimed for rescission of the lease on the ground of mutual mistake. The majority of the Court of Appeal ²⁴⁴ considered that there had been a mutual mistake of fact. They ordered that the lease should be rescinded, but on the terms that the plaintiff should choose whether to accept the rescission or claim a new lease at the full rent of £250 per annum. In his judgment Denning L.J. said ²⁴⁵:

"It is now clear that a contract will be set aside if the mistake of one party has been induced by the material misrepresentation of the other, even though it was not fraudulent or fundamental; or if one party, knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and concludes a contract on the mistaken terms instead of pointing out the mistake ... A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative or respective rights, provided that the misapprehension was fundamental, and that the party seeking to set it aside was not himself at fault."

Denning L.J said that the correct interpretation of *Bell v Lever Bros* was that:

“... if the parties have agreed in the same terms on the same subject matter, 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.”²⁴⁶

Lord Denning M.R. (as he by then was) applied this doctrine again in the Court of Appeal case of *Magee v Pennine Insurance*.²⁴⁷ In this case the court held by a majority²⁴⁸ that an agreement by an insurance company to pay £385 on the occurrence of the risk insured against was invalidated because the policy was voidable, though this was only discovered later, but the second member of the majority, Fenton Atkinson L.J., did not make it clear whether he regarded the contract as void or voidable.²⁴⁹ The supposed equitable rule was applied in a number of cases at first instance.²⁵⁰ In *Associated Japanese Bank International Ltd v Crédit du Nord SA* Steyn J. said that he would have been prepared to set the contract aside even if he had not found it to be void at common law.²⁵¹ And in *West Sussex Properties Ltd v Chichester DC*²⁵² the Court of Appeal had considered itself bound by the decision, but apparently without argument because counsel had accepted that it was good law unless and until overturned by the House of Lords.²⁵³

Scope of supposed equitable jurisdiction

6-057

Even if it was accepted that there was an equitable jurisdiction to set aside a contract on terms on the ground of a mutual mistake, there remained doubt about how the jurisdiction was to be exercised. First, it was suggested above that the common law doctrine will not apply if the risk is one which the contract expressly or by implication puts on one of the parties.²⁵⁴ Given the general importance of upholding agreements and the agreed allocation of risk,²⁵⁵ it would have been surprising if relief were given in equity in these circumstances. However, the only explicit limitation upon the equitable doctrine was that the party seeking relief should not be at fault, and it has to be said that relief was sometimes given when the normal allocation of risk would suggest that it should be denied. In *Grist v Bailey*²⁵⁶ a vendor sold property subject to an existing tenancy which both parties thought was protected, when in fact both the protected tenant and her husband were dead. Although neither the vendor nor her solicitor were personally at fault, it seems more natural to put the risk of this kind of mistake occurring on the vendor; yet the contract was set aside.²⁵⁷ Perhaps it was relevant that if it had been upheld the purchaser would have received a considerable windfall at the vendor's expense. Secondly, it seemed that there must be some difference between common law and equity in the seriousness of the mistake which was necessary for the doctrine to operate, or it would be hard to see why the contract in *Solle v Butcher* was not void at common law. However, it is not easy to see the difference between a mistake rendering the thing contracted for essentially different from what it was believed to be (or rendering the contractual adventure impossible) and a fundamental mistake (the supposed test in equity).²⁵⁸ In the *Associated Japanese Bank* case²⁵⁹ Steyn J. merely remarked that the equitable doctrine “will give relief against mistake in cases where the common law will not”. In *William Sindall Plc v Cambridgeshire CC*²⁶⁰ Evans L.J. said:

“... the difference may be that the common law rule is limited to mistakes with regard to the subject matter, whilst equity can have regard to a wider and perhaps unlimited category of ‘fundamental’ mistake.”

Rejection of the equitable doctrine

6-058

In *The Great Peace* case, the contract for salvage services to be provided by *The Great Peace* to *The*

Cape Providence was made on a shared assumption that *The Great Peace* was the nearest available ship to *The Cape Providence*, being some 35 miles away. It was then discovered that in fact she was 410 miles away and the defendants, after finding a nearer vessel that could render assistance, purported to cancel the contract. At first instance, ²⁶¹ Toulson J. rejected the argument that the contract was void for mistake at common law. The contract did involve the necessary implication that *The Great Peace* was capable of providing the services contracted for. Had she been far away from *The Cape Providence*, there would have been a failure of an implied condition precedent. As *The Great Peace*, though not as the parties thought the nearest vessel, could have reached *The Cape Providence* within 22 hours, the mistake did not turn the contract into something essentially different from that for which the parties bargained. ²⁶² The contract was therefore not void at law. ²⁶³ He then turned to the supposed equitable doctrine, noting the unanswered problems, the small number of decided cases and the unsatisfactory nature of them. He held, first, that there is no *right* to rescind in equity on grounds of common mistake a contract which is valid and enforceable at common law. ²⁶⁴ Secondly, to hold that the court has a *discretion* to set aside a contract entered into under a fundamental mistake if the court considers that the general justice of the case merits it “puts palm tree justice in place of party autonomy”. ²⁶⁵ He appeared to favour a third view, that Lord Denning’s statement in *Solle v Butcher* that the court has jurisdiction to set aside a contract on grounds of mutual mistake was “over broad”. ²⁶⁶

6-059

In the Court of Appeal, both the judge’s decision on the facts and his view that there is no separate equitable jurisdiction were upheld. Delivering the judgment of the court, Lord Phillips M.R. examined at length the decision in *Cooper v Phibbs*, ²⁶⁷ and concluded that though “the House of Lords ... approached the case on the basis that in equity alone did the agreement fail”, and the speeches did not define the nature of the mistake that would justify the intervention of equity, there was nothing to indicate that the House intended to go beyond those cases in which a party agrees to purchase a title he already owns. ²⁶⁸ He then turned to *Bell v Lever Bros* and pointed out that counsel for the appellants had cited *Cooper v Phibbs*, but in support of the submission, not that equity might provide relief where the common law would not, but that a common mistake had to be as to the subject matter of the contract if it was to render the contract void. ²⁶⁹ He concluded that the House did not overlook a separate right to rescind; they considered that the intervention of equity “took place in circumstances where the common law would have ruled the contract void for mistake”. ²⁷⁰ There is no separate right in equity to set aside a contract on the ground of common mistake if the contract is not void at common law. None of the cases that follow *Solle v Butcher*:

“... defines the test of mistake that gives rise to the [supposed] equitable jurisdiction to rescind in a manner that distinguishes this from a test of mistake that renders a contract void in law.” ²⁷¹

Nor is it possible “to define satisfactorily two different qualities of mistake, one operating in law and one in equity”. ²⁷² Coherence can be restored only:

“... by declaring that there is no jurisdiction to grant rescission of a contract on the ground of common mistake where the contract is valid and enforceable on ordinary principles of contract law.” ²⁷³

As this was the first occasion on which the Court of Appeal had heard full argument on the relation between *Bell v Lever Bros* and *Solle v Butcher*, it was open to the court to hold that *Solle v Butcher* cannot stand with the earlier decision of the House of Lords. ²⁷⁴

Mistake and equity after *The Great Peace*

6-060

❗ The decision of the Court of Appeal rejects emphatically the notion that there is any separate equitable jurisdiction to rescind a contract on the ground of common mistake: the contract will be either fully binding or void. ²⁷⁵ ❗ If it is void there is no scope for the court to impose terms on either party, as the previous decisions of the Court of Appeal had done. ²⁷⁶ This does not prevent the court requiring a party to make payments to the other on general principles of restitution. This happened in *Cooper v Phibbs*, ²⁷⁷ where payments were ordered in respect of improvements.

Refusal of specific performance

6-061

The decision in *The Great Peace* does not prevent a common mistake that is not sufficient to make the contract void being used as a defence to an action for specific performance. Specific performance is a discretionary remedy, and, in the exercise of its discretion, a court may refuse an order for specific performance on the ground of a mistake by the defendant. ²⁷⁸ Although the cases are nearly all ones in which the defendant unilaterally misunderstood the terms, ²⁷⁹ it is submitted that the same approach should apply in a case in which the contract has been made under a common mistake that was not sufficient to invalidate the contract at common law, if to enforce the contract specifically would cause particular hardship to the defendant. ²⁸⁰

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1. See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 119 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan (2003) 119 L.Q.R. 625; Macmillan, *Mistakes in Contract Law* (2010).
 - ²³⁴. *The Great Peace* [2002] EWCA Civ 1407, [2003] Q.B. 679.
 - ²³⁵. [1950] 1 K.B. 671. The Court of Appeal in Singapore has hinted that it might not follow *The Great Peace* [2002] EWCA Civ 1407. See *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] SGCA 2, [2005] 1 S.L.R. 502 at [66]–[73]. The case was one of unilateral mistake. It is noted by Yeo in (2005) 121 L.Q.R. 393.
 - ²³⁶. *Pitt v Holt* [2013] UKSC 26, [2013] 2 W.L.R. 1200 at [115]. The case involved rectification of a voluntary settlement.
 - ²³⁷. See Cartwright (1987) 103 L.Q.R. 594; Slade (1954) 70 L.Q.R. 385.
 - ²³⁸. [1932] A.C. 161.
 - ²³⁹. See above, paras 6-024–6-025.
 - ²⁴⁰. (1867) L.R. 2 H.L. 149, quoted above, para.6-025.
 - ²⁴¹. [1932] A.C. 161, 218.
 - ²⁴². [1950] 1 K.B. 671.
 - ²⁴³. See above, paras 3-049 et seq.
 - ²⁴⁴. Denning and Bucknill L.J.J. (Jenkins L.J. dissenting).
 - ²⁴⁵. [1950] 1 K.B. 671, 692.
 - ²⁴⁶. [1950] 1 K.B. 571, 691. In *Associated Japanese Bank International Ltd v Crédit du Nord SA*

[1989] 1 W.L.R. 255, 267 Steyn J. said that Lord Denning's "interpretation of *Bell v Lever Bros Ltd* does not do justice to the speeches of the majority".

[247.](#) [1969] 2 Q.B. 507.

[248.](#) Winn L.J. dissented on the ground that the case was indistinguishable from *Bell v Lever Bros Ltd* [1932] A.C. 161.

[249.](#) [1969] 2 Q.B. 507, 517; see *The Great Peace* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [139]–[140]. The equitable doctrine seems to have been applied by the Court of Appeal in *Nutt v Read* (2000) 32 H.L.R. 761, but "the proceedings had been beset by muddle and confusion" (see *The Great Peace* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [148]; *Islington London BC v UCKAC* [2006] EWCA Civ 340, [2006] 1 W.L.R. 1303 at [19]–[21]) and it seems that the point was not argued.

[250.](#) See *Peters v Batchelor* (1950) 100 L.J. News. 718; *Grist v Bailey* [1967] Ch. 532; *Laurence v Lexcourt Holdings Ltd* [1978] 1 W.L.R. 1128; *London Borough of Redbridge v Robinson Rentals* (1969) 211 E.G. 1125. (Contrast *Svanosio v McNamara* (1956) 96 C.L.R. 186; *Slade* (1954) 70 L.Q.R. 385, 407; *Shatwell* (1955) 33 Can. Bar Rev. 164; *Atiyah and Bennion* (1961) 24 M.L.R. 421, 439.) In *Clarion Ltd v National Provident Institution* [2000] 1 W.L.R. 1888 Rimer J. held that the grounds for rescission were not made out.

[251.](#) [1989] 1 W.L.R. 255, 270. See above, para.6-033.

[252.](#) [2000] All E.R. (D) 887.

[253.](#) In the court below junior counsel had sought to challenge the correctness of *Solle v Butcher*: see *The Great Peace* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [160].

[254.](#) See above, para.6-037.

[255.](#) See above, para.6-006.

[256.](#) [1967] Ch. 532.

[257.](#) In *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016, 1035, Hoffmann L.J. suggested that this case and *Laurence v Lexcourt Holdings Ltd* [1978] 1 W.L.R. 1128 might have been decided differently if the judges at first instance had adverted to the question of the contractual allocation of risk. *Magee v Pennine Insurance* [1969] 2 Q.B. 507 was also criticised on this ground: *Atiyah, Introduction to the Law of Contract*, 6th edn (2006), p.181.

[258.](#) See above, para.6-056.

[259.](#) [1989] 1 W.L.R. 255, 270.

[260.](#) [1994] 1 W.L.R. 1016, 1035.

[261.](#) (2001) 151 N.L.J. 1696, [2001] All E.R. (D) 152 (Nov).

[262.](#) [2001] All E.R. (D) 152 (Nov) at [56].

[263.](#) [2001] All E.R. (D) 152 (Nov) at [62].

[264.](#) [2001] All E.R. (D) 152 (Nov) at [118]. He added that, if he was wrong, that he did not know what is the test for determining the nature of the fundamental mistake necessary to give birth to such a right.

[265.](#) [2001] All E.R. (D) 152 (Nov) at [119]–[120].

[266.](#) [2001] All E.R. (D) 152 (Nov) at [121]. Toulson J. continued that, if he was wrong and there

were a discretion to set aside for common mistake which is valid on ordinary principles of contract law, he declined to exercise the discretion on the facts of the case (at [123]).

[267.](#) (1867) L.R. 7 H.L. 149.

[268.](#) [2002] EWCA Civ 1407, [2003] Q.B. 679 at [110].

[269.](#) [2002] EWCA Civ 1407 at [113].


[270.](#) [2002] EWCA Civ 1407 at [118].

[271.](#) [2002] EWCA Civ 1407 at [153].

[272.](#) [2002] EWCA Civ 1407.

[273.](#) [2002] EWCA Civ 1407 at [157].

[274.](#) [2002] EWCA Civ 1407 at [160]. cf. Midwinter (2003) 119 L.Q.R. 180.

[275.](#)  This does not appear to affect the jurisdiction to set aside a consent order. Except in matrimonial cases (as to which see *de Lasala v de Lasala* [1980] A.C. 546, 560 and *Thwaite v Thwaite* [1982] Fam. 1, 7–8), a judgment given or an order made by consent, being founded on the agreement of the parties, may be set aside if it was entered into under a mutual mistake of fact or in ignorance of a material fact if the mistake would justify the setting aside of an agreement on the same grounds (*Att-Gen v Tomline* (1877) 7 Ch. D. 388. See also *Hickman v Berens* [1895] 2 Ch. 638; *Allcard v Walker* [1896] 2 Ch. 369; *Wilding v Sanderson* [1897] 2 Ch. 534). In *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch. 273 the mortgagees of certain factory premises allowed the defendants to sell, under a consent order, trade machinery on the premises in the belief, shared by both parties, that the machinery was affixed to the realty. It subsequently appeared that it had been unlawfully detached, and so properly belonged to the mortgagees. The order was set aside. (See also *Furnival v Bogle* (1827) 4 Russ. 142; *Wilding v Sanderson* [1897] 2 Ch. 534; *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170; *Walker v Lundborg* [2008] UKPC 17; *British Red Cross v Werry* [2017] EWHC 875 (Ch), [2017] W.T.L.R. 441.) But a consent order cannot be set aside on the ground of a mistake where the mistake would not suffice to impeach the agreement on which the order was based: *Purcell v F.C. Trigell Ltd* [1971] 1 Q.B. 358; cf. *Chanel Ltd v F.W. Woolworth & Co Ltd* [1981] 1 W.L.R. 485.

[276.](#) See above, para.6-056. In *The Great Peace* [2002] EWCA Civ 1407, at [161], Lord Phillips, M.R. said: “Just as the Law Reform (Frustrated Contracts) Act 1943 was needed to temper the effect of the common law doctrine of frustration, so there is scope for legislation to give greater flexibility to our law of mistake than the common law allows.”

[277.](#) (1867) L.R. 7 H.L. 149.

[278.](#) *Townshend v Stangroom* (1801) 6 Ves. 328.

[279.](#) See above, para.3-026.

[280.](#) “It would be dangerous to attempt an exhaustive definition of the cases in which the court will refuse specific performance”: Brett L.J. in *Tamplin v James* (1879) 15 Ch. D. 215, 221. For a recent case, in which it appears that both parties were mistaken as to the facts, see *Heath v Heath* [2009] EWHC 1908 (Ch), [2009] 2 P. & C.R. DG21 at [26] (“specific performance is a discretionary remedy and mistake may ... still be a relevant factor in refusing equitable relief, at all events where the mistake has been induced by the words or conduct of the person seeking specific performance. In such a case ... the mistake may also amount to, or be practically indistinguishable from, a misrepresentation”).

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 6 - Common Mistake ¹

Section 7. - Mistake and Construction

Construction: an alternative route

6-062

It must now be taken as established that there is at common law a doctrine of common mistake, a rule of law distinct from any question of implying a condition on the facts of the case. However, as was suggested earlier, ²⁸¹ construction of the contract, without reference to “mistake”, remains an alternative route by which the courts may reach its conclusion. ²⁸² This is likely to cause some confusion unless the courts accept that when they apply the process of construction to a case in which, factually speaking, the parties have entered the contract under a shared misapprehension as to the surrounding facts, they are normally merely applying “an alternative formulation” of the doctrine of common mistake. Normally the outcome will be the same whichever approach is applied. ²⁸³

Contract void as a matter of construction where no common mistake

6-063

⚠ In exceptional circumstances the outcomes may differ according to whether the case is analysed in terms of common mistake or as a matter of construction. On occasion the courts have held that a contract is ineffective because on the facts it was subject to an implied condition precedent which has failed, even though the conditions for common mistake were not met—in particular because the contract or contractual venture may not have been impossible to perform. One example is *Financings Ltd v Stimson*. ²⁸⁴ The defendant offered to take a car on hire-purchase, his offer acknowledging that he had examined the car and had satisfied himself that it was in good condition. Before his offer had been accepted the car was stolen and damaged. It was held that his offer was subject to the implied condition that the car remained in substantially the same condition as when he saw it, so that the offer could no longer be accepted. ²⁸⁵ In that case the court emphasised that the condition was as to the offer, rather than the contract once formed. ²⁸⁶ ⚠ The same does not apply however to *Graves v Graves*. ²⁸⁷ In that case divorcees had agreed that the wife would rent a property from the husband; they had assumed that the wife would be eligible for housing benefit which would pay 90 per cent of the rent. It turned out that the wife was not eligible. Thomas L.J., delivering the only full judgment, referred to Steyn J.’s words in the *Associated Japanese Bank* case that one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake. ²⁸⁸ Following this approach, he held that it was necessary to imply a condition in the agreement that if housing benefit was not payable, the tenancy would come to an end, and it was not necessary to consider either mistake or frustration. ²⁸⁹

^{1.} See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 119 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan (2003)

119 L.Q.R. 625; Macmillan, *Mistakes in Contract Law* (2010).

[281.](#) Above, para.6-014.

[282.](#) See, e.g. *Associated Japanese Bank International Ltd v Crédit du Nord SA* [1989] 1 W.L.R. 255 . Chandler, Deveney and Poole [2004] J.B.L. 34 argue that as the result of the abolition of the equitable jurisdiction, courts may resort more frequently to the construction technique, which may give them more flexibility.

[283.](#) e.g. in *Standard Chartered Bank v Banque Marocaine De Commerce Extérieur* [2006] EWHC 413 (Comm), [2006] All E.R. (D) 213 (Feb) the contract was held to be binding on the alternative grounds that the mistake did not make the agreement essentially different and that the risk was clearly allocated to one party. See also *Butters v BBC Worldwide Ltd* [2009] EWHC 1954 (Ch) at [68]–[69].

[284.](#) [1962] 1 W.L.R. 1184, CA.

[285.](#) See further Atiyah, *Essays in Contract* (1986), Ch.10.

[286.](#)  Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.2-066.

[287.](#) [2007] EWCA Civ 660, [2008] H.L.R. 10.

[288.](#) *Associated Japanese Bank (International) Ltd v Crédit du Nord* [1989] 1 W.L.R. 255, 268, quoted above, para.6-037.

[289.](#) [2007] EWCA Civ 660 at [38]–[42].