

THE EQUITABLE APPROACH TO MISTAKE IN CONTRACT

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The Scope of the Subject :

THE cases in which equity has concerned itself with mistake in contract are those in which mistake is relied on

- (a) as a ground for rescinding the contract;
- (b) as a defence to a claim for specific performance;
- (c) as a ground for rectification.

The third of these is obviously a special kind of mistake, and is not dealt with in this paper. The outline of this paper is as follows:

- (a) the relation between equity and common law
- (b) the relation between misrepresentation and mistake
- (c) rescission for mistake
- (d) defences to a claim for rescission
- (e) mistake as a defence to a claim for specific performance
- (f) mistake of fact and mistake of law
- (g) summary of conclusions.

The Relation between Equity and Common Law:

At common law, mistake in contract, whatever be the proper way to formulate the rules concerning it, operates so as to strike at the existence of the obligation between the parties. This inevitably entails the destruction of any dependent right of a third party; the typical case is that of the person who buys from the buyer in a contract of sale which is void, as in *Cundy v. Lindsay*.¹

Equity follows the law, but does not trespass on its preserves. Equity will have nothing to say on the existence of the obligation at law between the parties, but, in the appropriate cases it will

- (a) refuse specific performance—i.e. refuse to recognize an obligation in equity.
- (b) rescind the contract. This is a portmanteau phrase which before the Judicature Act meant
 - (i) a refusal to allow the contract to be relied on in equity either by way of claim or defence, and
 - (ii) an implied announcement that the Court would halt, by injunction, an action at law on the contract, and

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¹ (1878) 3 A.C. 459.

(iii) an order that the parties carry out *restitutio in integrum*. Clearly this does not affect the claim of any third party.

So much is elementary: but what has been sometimes overlooked is the independence of the common law and equitable rules. Whether a case is decided on common law or equitable grounds is an accident depending on the plaintiff's relation to the contract and the nature of the relief he seeks. On the same facts, the aid of either common law or equity may be invoked; the results may be the same or they may be different. It is submitted that Denning L.J.'s view that there is an essential inconsistency between the common law and the equitable approaches, is wrong. The learned judge made this view quite explicit in *Solle v. Butcher*,² and he implied that the equitable approach is more reasonable and the common law approach obsolescent. The writer disagrees. The purposes of the common law and equitable rules are different.

Even less defensible is the inference that a contract would have been void at common law because in fact it was set aside in equity—which, in effect, is the view taken of *Cooper v. Phibbs*³ by Lord Atkin in *Bell v. Lever*⁴ and by Tylor in his well-known article.⁵

It is confidently submitted that any of the following situations is possible:

1. The contract is valid at common law but will be rescinded in equity, e.g. *Solle v. Butcher*, or, had the plaintiff so desired it, *McRae v. Commonwealth Disposals Commission*.⁶
2. The contract is valid at common law and will not be rescinded in equity, e.g. *Leaf v. International Galleries*.⁷
3. The contract is void at common law but will not be rescinded in equity, e.g. where the plaintiff has not "clean hands".

The fourth proposition—

4. The contract is void at common law and will be rescinded in equity—

is, it is submitted, possible in principle, but in practice it is not easy to imagine how it could arise.

In proposition (1) we can substitute "but specific performance will be refused"; in (2) we can substitute "and specific performance will be decreed"; in (4) we can substitute "and specific performance will be refused". Examples are unnecessary. The only substitution which is impossible is in (3). A decree of specific performance necessarily depends on the validity of the contract at law.

² [1950] 1 K.B. 671.

³ (1867) L.R. 2 H.L. 149. ⁴ [1932] A.C. 161.

⁵ (1948) 11 Modern Law Review 257.

⁶ (1951) 84 C.L.R. 377.

⁷ [1950] 2 K.B. 86.

It follows that there is no inconsistency between common law and equity, and no inference as to the attitude of either system can be drawn from a decision of the other, except that specific performance will be refused of a contract void at law.

This is not an anachronistic assertion of the value of the historical distinction between common law and equity. The writer is as anxious as anyone to abolish mumbo-jumbo, break down watertight compartments, and substitute a rational or flexible rule for an irrational or mechanical one. The terms "equity" and "common law" are used merely as arbitrary but convenient methods of reference to groups of rules which, together, make up the whole *corpus* of the law of mistake in contract.

The relation between misrepresentation and mistake :

It is elementary that a contract will be set aside on the ground of a misrepresentation, made to a party to the contract, inducing that party to enter into it. It is clear that the misrepresentation need not be fraudulent in the sense in which that word is used at common law—i.e. false to the knowledge of its maker. Equity will, in truth, rescind for misrepresentation, and it is not necessary to prove that the misrepresentation was fraudulent in the common law sense.

It is submitted that "innocent" misrepresentation, and mistake, raise the same problem. In such a case, it is clear that the representor and the representee are both mistaken. Why should the intervention of equity, in cases where both parties are mistaken, be limited to those cases in which the mistaken state of mind of one party is brought about by that of the other? It will be submitted that such is not the law, and that the same mistake made by both parties is a ground for rescission even though there is no misrepresentation.

It should be noticed that equity judges sometimes loosely refer to "misrepresentation" when they do not mean the misrepresentation of a party to the contract, which is a ground for rescission, but the misrepresentation of another person, which has no legal effect, but may be a cause, in fact, of the mistake of a party to the contract. Examples are to be found in *Lansdown v. Lansdown*⁸ and in *Cooper v. Phibbs*, both cited later.

Rescission for Mistake :

As a preliminary, it should be pointed out that the distinction between "common" mistake (where both parties are in the same error) and "mutual" mistake (where each is mistaken vis-à-vis the

⁸ (1730) 2 Jac. and W. 205; Mos. 364.

other) does not seem to be of any importance in equity. Indeed the judges use the terms indiscriminately. In fact, most of the cases are concerned with "common" mistake.

It is surprising to find Goodhart⁹ suggesting that the doctrine of rescission in equity in cases of common mistake is a new and undesirable one. The writer has not searched for anything earlier than the earliest years of the eighteenth century; but from that time the chain of authority seems to be as follows.

Lansdown v. Lansdown. The plaintiff was the heir of the eldest of four brothers; the defendant the heir of the youngest of the four. The plaintiff had discussed with the defendant's father (the youngest brother) the question of the rightful succession to the lands of the third brother, who had died intestate without issue. They consulted H, who after referring to a law book, gave his opinion that the youngest brother was the heir of the third. The plaintiff thereupon gave bond to divide the lands, and afterwards executed a conveyance. The suit was brought for cancellation of the bond and indentures, and was successful. One report says:

"The decree declared, that it appeared that the bond and indentures were obtained by a mistake, and misrepresentation of the law, and ordered them to be given up to be cancelled."¹⁰

The other report says:

"And the Lord Chancellor decreed, that the bond, and deeds of lease and release, should be delivered up to the plaintiff, the eldest brother (*sic*) being obtained by mistake and misrepresentation, and that the defendant, the infant, when he came of age, should convey *nisi*, etc, and his lordship said, That maxim of law, *Ignorantia juris non excusat*, was in regard to the public, and ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases."¹¹

The only point to be made, at present, about this case is that it was clearly a case of common mistake. The misrepresentation was not that of one of the parties to the contract.

*Bingham v. Bingham.*¹² A bill for the rescission of a contract for the sale of freehold land, and for repayment of the purchase money. J. B. devised an estate tail to D. with remainder in fee simple to his own heirs. D. devised his interest to the plaintiff in fee. The defendant apparently claimed under the will of J.B., and brought ejectment against the plaintiff, whereupon the plaintiff agreed to buy

⁹ (1950) 66 L.Q.R. 169.

¹⁰ (1730) 2 Jac. and W. 205, 206.

¹¹ (1730) Mos. 364.

¹² (1748) 1 Ves. Sen. 126.

the defendant's estate. According to one report the plaintiff's grounds for rescission were that he was

"ignorant of the law, and persuaded by the defendant, and his scrivener, and being also subjected to an action of ejectment."¹³

The other report, shorter on the arguments, is fuller on the judgment, which it reports in these words

"for though no fraud appeared, and the defendant apprehended he had a right, yet there was a plain mistake such as the Court was warranted to relieve against, and not suffer the defendant to run away with the money in consideration of the sale of an estate, to which he had no right."¹²

It appears fairly clearly from this case that the question whether there was misrepresentation, or merely mistake without misrepresentation, was unimportant in 1748; it is submitted that this is still so.

Griffith v. Frapwell.¹⁴ An intestate left two sisters, the plaintiff's wife and the defendant's wife. By the first agreement between the wives, the plaintiff's wife agreed to an amount as her share. By the second agreement, her share was increased, it being recited that she was intended to have half. When it was afterwards discovered that the estate was even larger, this second agreement, and (apparently) a decree of the Court confirming it, were set aside.

Cocking v. Pratt.¹⁵ An agreement between the widow and the daughter of an intestate provided that the daughter should take certain named sums in full satisfaction of her rights. The agreement was set aside. The judgment of Strange M.R. is interesting. It appears that the grounds of the daughter's claim were two

(a) mistake, (*not* misrepresentation) as to her rights. This could not, it is submitted, have been effective of itself (being the mistake of one party only) unless there had been the element of undue influence arising from the parental relationship. Strange M.R. recognized this.

"The question is what was in view on each side. The daughter clearly did not intend at the time of the agreement to take less than what by law she was entitled to, her two-thirds of the value: though what that was did not clearly appear to her; but she then thought what was stipulated for her was her full share. Though there is no very great evidence of undue influence, yet the Court will always look with a jealous eye upon a transaction between a parent and a child just come of age, and interpose if any advan-

¹³ (1748) Ves. Sen. Supp. 79.

¹⁵ (1750) 1 Ves. Sen. 400.

¹⁴ (1732) 2 Coop. t. Cott. 425.

tage is taken. The mother plainly knew more than the daughter; and only says in general, she believes she concealed nothing from her. Whether there has been *suppressio veri* is not clear upon the evidence."¹⁶

The last sentence makes it abundantly clear that there was no question of misrepresentation in the case. The M.R. then passes to what, for our purposes, is the interesting part of the case:

"But there is another foundation to interpose, viz. that it appeared afterward that the personal estate amounted to more; and the party suffering will be permitted to come here to avail himself of that want of knowledge . . ."¹⁷

In other words, there was a common mistake as to the total value of the estate which was ground for setting aside the contract.

Ramsden v. Hylton.¹⁷ This case is an example of the rescission of a contract set up in defence. In 1694 a father settled his estate (inter alia) raising portions for his daughters. After his death a son and daughter (both being ignorant of the settlement) entered into an agreement whereby the son mortgaged part of the settled estate in favour of his sister to secure the payment of a debt to her. He had entered into a bond for the debt and interest, and in the mortgage deed she released to him all claims . . . "by reason of any other matter and thing except the recited bond in this release." She later brought a bill to enforce the portion secured to her by the settlement of 1694, and to this claim the release was pleaded as a defence.

Lord Hardwicke L.C. set aside the release and made the decree prayed, saying:

"But there is no occasion to rely on the law for this; for it is clear, that it would not in a Court of equity (*sic*),¹⁸ it being admitted on all hands, and it must be so taken, that this settlement was unknown to all the parties: nor did the daughters know of this contingent provision, beside which they had no other provision out of this estate; and all they could be entitled to must arise out of the personal estate of their father or other relations. It is impossible then to imply within the general release that which neither party could have under consideration, and which it is admitted neither side knew of; and as this release cannot have its effect to bar this demand, so it cannot be set up against them in a Court of equity."¹⁹

A clear case of the rescission of a contract for common mistake.

In the nineteenth century the cases proliferate, and I mention

¹⁶ (1750) 1 Ves. Sen. 400, 401.

¹⁷ (1751) 2 Ves. Sen. 304.

¹⁸ Some words such as "be withheld" have apparently been lost after "would not".

¹⁹ (1751) 2 Ves. Sen. 304, 310.

only the most important. It should be made clear that in many of the cases there were other elements besides that of mistake; misrepresentation and undue influence often affect the decision. Equity judges, with their deeply ingrained tradition of acting as a Court of conscience, very often do not analyse precisely the grounds for their decisions. Where the facts reveal, say, an element of mistake, an element of misrepresentation, and an element of undue influence, the contract may be set aside with no precise analysis of the grounds for doing so. The case may thereafter be cited in any of the three contexts. An example is *re Garnett*.²⁰ In this paper the writer tries to deal only with the cases of "pure" mistake.

Cooper v. Phibbs.³ E.S.C. was the brother, heir presumptive, and committee, of a lunatic. The lunatic was seised of a fishery in fee. E.S.C. and his two sons E.J.C. and R.W.C. in 1827 entered into a deed of settlement on E.J.C.'s marriage, whereby all three covenanted that within six months after the lunatic's death, each would bring into settlement any lands descending to or vesting in him by any title from the lunatic. In 1830, E.S.C. died, and E.J.C. became the lunatic's committee. E.J.C. in 1837 sought a private Act to permit the diversion of the rivers so as to improve the fishery. The Bill was drawn so as to confer the right upon the lunatic, as the owner in fee; but during its passage the lunatic died, and the name of E.J.C. (who was the lunatic's heir) was substituted, and the Bill was duly passed. Thereafter E.J.C. believed that the Act conferred on him the fee simple of the fishery without the obligations imposed by the settlement, and he spent money on improving it. If, however, the fishery was still within the settlement, (as, in law, it was), the rightful owner at the time of the action was the appellant as heir of R.W.C. The respondent was the trustee of the settlement, who believed that E.J.C.'s daughters were entitled, on the basis that E.J.C.'s interest had been unfettered by the obligation to bring the fishery into settlement. The appellant agreed to lease the fishery from the trustee, and then discovered his error, and sought to have the lease set aside. The House of Lords set it aside on terms which compensated E.J.C.'s estate for the money he had spent on improving it.

The case was clearly one of common mistake. Lord Cranworth did indeed also mention misrepresentation, but he meant the misrepresentation of E.J.C., who was not a party to the contract.

Beauchamp v. Winn.²¹ The action was to rescind a contract of exchange between two parties, each of whom believed that B had a right of warren over an estate, and that W owned the soil. The

²⁰ (1886) 31 Ch. D. 1.

²¹ (1873) L.R. 6 H.L. 223.

House of Lords dealt with the case by considering the general principles upon which equity will rescind contracts for mistake (Lord Chelmsford particularly considered the discretionary grounds for refusing rescission) and then considering whether there was in fact a mistake in the case before them. They held that there was not, as the belief of both parties was correct, and not mistaken at all. Rescission was of course refused on this ground, but it is submitted that the authority of the case, on the topic of rescission for common mistake, is equal to that of *Cooper v. Phibbs*.

It should be sufficient to mention, finally, the recent and well-known case of *Solle v. Butcher*. The defendant leased a flat to the plaintiff for a term of seven years at a rent of £250 a year. Both believed that owing to alterations which had recently been made, the "standard rent" fixed by legislation, did not apply. In fact it did apply, with the result that the £250 rent would be lawful only if the landlord served a statutory notice on the tenant. The tenant afterwards brought an action for the fixing of the rent at the standard rate of £140 and repayment of the excess. This of course involved the rescission of the lease as it stood. The Court of Appeal rescinded the lease on terms that the tenant could either give up possession, or stay in as a licensee until the landlord could give the necessary notice and thereafter take a lease at £250.

It is submitted that the cases described, which are by no means all those in the books, amply demonstrate the existence of the equitable doctrine of rescission of a contract on the ground of common mistake, and that Goodhart's doubts are unfounded.

But there is extraordinarily little authority on the question what kind of mistake suffices for rescission. There are dicta to the effect that the mistake must be "fundamental" or "essential" but the writer can find no case in which rescission was refused on the precise and sole ground that the mistake was not sufficiently important to justify rescission. It also appears to be true that nowhere is there any extensive judicial discussion of the kinds of mistake which are operative in equity; that, in fact, there is nothing resembling the elaborate apparatus of rules which most authorities lay down for mistake at common law. (The authorities do not, of course, agree as to the precise formulation of these rules). It is submitted that this difference is the natural result of the rationality and flexibility of equity. The Court will, broadly speaking, rescind a contract when justice requires it. The indeterminateness of the doctrine is not to be deplored, but is probably a blessing, for is it not probable that any attempt to formulate a rule would result in one of those mean-

ingless formulae which give a false assurance of certainty and are likely to produce a tangle of split hairs?

Goodhart fastens on this very point as a ground for attacking the doctrine.

"X" (he says) "agrees to sell Whiteacre to Y. Both parties are under the mistaken belief that Whiteacre contains a valuable oil well, but no reference to the oil well is made in the agreement, and there is nothing in the course of the negotiations which entitles Y to assume that X is promising that there is oil on the land. It is submitted that Y cannot repudiate the agreement if thereafter it is discovered that Whiteacre contains no oil."²²

It is submitted that this reasoning evades a distinction which, admittedly, the Courts have never clearly made. What *kind* of a mistake was it, and in what circumstances was it made? If the belief that there was oil on the land was the reason for *both* parties' entry into the contract—e.g. if the sale was part of a commercial enterprise by the two parties to exploit the oil—it is submitted that there is every reason why the contract should be rescinded. The case is well within the equitable doctrine described above. On the other hand, if the seller's belief that there was oil on the land affected only the price; if the seller simply wanted to sell at the highest price he could get; if the seller's attitude was "it is no concern of mine if the buyer's venture turns out to be unprofitable"—then, it is submitted, Goodhart's result would be the proper one. Equity in the first case would rescind the contract relying on the authority of the cases described above, and in the second case would simply say that equity is not to be used to enable a disappointed buyer to recoup himself for a bad bargain.

Defences to a claim for rescission :

It is not proposed to discuss here those defences to an action for rescission which may be termed "general equitable defences", beyond saying that they unquestionably apply. Laches, want of fair dealing, undue influence, all may be grounds for refusing rescission.

One possible defence does not seem to have received much attention. What if the claim for rescission is, in effect, a bare money claim—i.e. the order of the Court, if the plaintiff succeeds, would be limited to an order to the defendant to pay a sum of money? It is suggested that rescission would not be granted in such a case. *Rogers v. Ingham*,²³ though perhaps doubtfully a case of contract, suggests this. An executor paid a sum of money in certain propor-

²² (1950) 66 L.Q.R. 169, 170.

²³ (1876) 3 Ch. D. 351.

tions between two legatees, acting on the independent advice of two counsel, in view of the fact that one legatee was dissatisfied with the proposed proportions. The dissatisfied legatee consented to the payment, and then filed a bill praying that the other legatee might be ordered to repay. The Court of Appeal refused to make the decree, pointing out that the payment by the executor was, in effect, payment of the plaintiff's money on the orders of the plaintiff, and that, that being so, the plaintiff was making a bare money claim based on a mistake of law, and to allow the suit to succeed would be to contradict the common law.

The point may appear irrelevant to the main theme of this paper, except that it may provide the answer to a question which can be asked about *Bell v. Lever*. What if the plaintiff in that case had sought to have the contract rescinded in equity? It is submitted that the same result would have been reached. The claim was one for money had and received. The money was a large sum paid under a contract of release of a service agreement. The plaintiff claimed (inter alia) that the contract of release was void for mistake, as both parties were ignorant of past events which would have enabled the plaintiff to terminate the service agreement without paying anything. The House of Lords held that the mistake did not avoid the contract at law; but what would have happened if the plaintiffs had claimed rescission of the contract in equity and consequent repayment? It is submitted that this would have been refused on the ground that the claim was a bare money claim—i.e. that in rescinding the contract the Court would not have been setting the plaintiff free from any obligation, nor ordering him to restore anything to the defendant, but merely ordering the payment of a sum of money by the defendant to the plaintiff.

The situation is, of course, different where the rescission involves the release of the plaintiff from an obligation—as where the plaintiff claims rescission of an agreement to purchase, and repayment of a deposit; or where the plaintiff offers reconveyance and claims repayment of the purchase money. Neither of these is a “bare money claim.”

Mistake as a Defence to a Claim for Specific Performance :

Very similar considerations apply to mistake as a defence to a claim for specific performance. The equitable doctrine has not been crystallized into precise rules; and other elements, such as misrepresentation and undue influence, often enter into the decisions without precise analysis.

Mistake which prevents a decree of specific performance is usually the common mistake of both parties, as, e.g. in *Cochrane v. Willis*,²⁴ where a tenant *pur autre vie* made an agreement with the remaindermen concerning the right to cut timber. None of the parties knew that the *cestui que vie* had died. Specific performance was refused, on the ground that the contract was entered in the belief that the tenant had *some* interest in the timber, though not the right to cut it, when actually he had no interest at all.

Again, in *Durham v. Legard*²⁵ both parties to a contract for the sale of land were under the impression that the area of the land was over 21,000 acres: in fact it was of the order of 11,000 acres. The purchaser's claim for specific performance with an allowance on the purchase price was dismissed.

In a class by themselves (though often treated under the general topic of "mistake") are the many cases where the parties have honestly held different opinions as to the meaning of a written contract, and specific performance has been refused on this ground *inter alia*. These cases stem from *Calverley v. Williams*²⁶ and it is not proposed to examine them in detail. What is instructive is the difference between the common law and equitable approaches in this kind of case. Broadly speaking, the common law will try to fix the sense of the contract according to the contention of one party or the other. This it will do by means of such devices as the objective determination of the parties' intention (i.e. the ascription to each party of the intention which a reasonable man would ascribe to him by reason of his acts and words), and the *contra proferentem* rule. Equity is more likely to regard the quest for a construction of the contract as irrelevant. If the defendant proves that he did not in fact intend the sense contended for the plaintiff, specific performance will probably be refused—unless of course the defendant's contention is a very unreasonable one; Equity does not forget that specific performance is a discretionary remedy, and that the right to damages is something to be considered in exercising the discretion.

The result is that many cases of the *Calverley v. Williams* type which, by some writers, are lumped together under the loose category of "mistake", would not, at common law, be regarded as cases of mistake at all, but as turning on construction. It is submitted that no good purpose is served by treating them as "mistake" cases.

It is said in the books that in special cases the mistake of one party only will be operative as a ground for refusing specific performance. If this is true, the cases are in the greatest confusion, and

²⁴ (1865) 1 Ch. App. 58. ²⁵ (1865) 34 Beav. 611. ²⁶ (1790) 1 Ves. Jun. 210.

the writer has abandoned the attempt to formulate a rule for the operation of this kind of mistake. For example, take the cases of *Malins v. Freeman*²⁷ and *Tamplin v. James*.²⁸ In each case a purchaser of land was sued for specific performance. In the former he had bid for the wrong lot at an auction; and in the latter he had bid for a lot which (without inspecting the plans) he wrongly believed to include a certain area. Specific performance was refused in the first case and decreed in the second. The writer can see no possible distinction between these cases except that in the second there may have been evidence, not mentioned in the report except as a hint in the judgment of Brett L.J., that damages would be an unsatisfactory remedy.

But it is submitted that the proposition that the mistake of *one* party can be operative in cases of specific performance is not, in fact, correct. The truth which this proposition attempts to express is that the mistake of one party may be one ground for the refusal of specific performance, when there are other grounds. The writer has not found a single case in which the refusal of specific performance was put squarely and solely on the ground of the mistake of the defendant alone. The most common of the other grounds are that, on the facts, damages are an adequate remedy (this explains, e.g. *Malins v. Freeman*, *supra*) and that there are terms of compensation in the contract itself.

Mistake of Fact and Mistake of Law :

This is a notoriously uncertain topic. It is well known that equity takes a laxer view of the distinction between mistakes of law and mistakes of fact than does the common law: but there is no agreement as to how the rules of equity should be expressed. The indubitable truth that equity has allowed some mistakes which were clearly mistakes of law to be operative, has been explained by saying either that equity pays regard to *some kinds* of mistake of law, or that some mistakes of law are, or are to be treated as, mistakes of fact. Thus in *Cooper v. Phibbs* Lord Westbury declared that mistakes as to private rights, as distinct from matters of general law, are mistakes of fact. The writer does not cavil at the result, but deplores the inelegance and suspects that the distinction is ultimately a false one.

Further confusion has arisen from the failure to analyse the real nature of the mistake; for example, in *Ramsden v. Hylton* where the existence of a settlement had been forgotten, it is true in a sense

²⁷ (1837) 2 Keen 25.

²⁸ (1880) 15 Ch.D. 215.

to say that the parties were mistaken as to their legal rights, and that such a mistake is one of law. But the true analysis of the situation is that they were mistaken as to a matter of pure fact, namely that a certain document had been executed at a certain time. The opposite kind of incorrect analysis is exemplified by that of Bucknill L.J. in *Solle v. Butcher*, who thought that the parties' mistake was as to whether the alterations to the flat had left it the "same" flat or not, and that this was a mistake of fact. But surely the "sameness" of an object before and after it has been altered is an utterly meaningless concept except within some special frame of reference, which here was clearly a legal frame of reference. The "sameness" of the flat was either a question of law or it was nonsense; the mistake must therefore have been a mistake of law.

It is open to question whether there is any clearly established doctrine that equity will not allow mistakes of law to be operative. In the eighteenth century it appears there was not; thus in *Lansdown v. Lansdown* the Lord Chancellor said that the maxim *ignorantia juris non excusat* did not apply to civil cases at all. At the other end of the scale we have a definite refusal by Jenkins L.J. in *Solle v. Butcher* to rescind the contract, on the ground that the mistake was one of law.

There are innumerable dicta, but the writer has not found a case in which a mistake of law had been made by both parties, and rescission was refused, or specific performance decreed, on the ground that the mistake was one of law. The case which comes closest to establishing this proposition is *Clifton v. Cockburn*²⁹ where both parties had acted upon a mistaken view of the proper construction of a settlement. The case is probably to be regarded as a claim for the repayment of money improperly paid by a trustee, since rescission of the settlement was not claimed; but even if it was a case of rescission, the real ground on which the House of Lords refused to grant the plaintiff's claim was that the mistaken view had been acted on for so many years that it would be unjust, and harmful to the family for whose benefit the settlement was intended, to enforce the proper construction; and Lord Brougham L.C. expressed himself as quite willing, in the proper case, to grant relief in cases of mistakes of law.

There are, it is true, several cases where *one* party was mistaken as to the legal effect of a contract, and the Court has refused to relieve him from liability; but this is clearly a very different situation. There could be no security of contract if parties were allowed to put

²⁹ (1834) 3 My. and K. 76.

their own construction on their contracts. This is, it is submitted, the real explanation of these cases, though they are often cited in support of the proposition that equity will not relieve against mistakes of law.

What authority is there that equity *will* relieve for mistakes of law? Taking some of the cases earlier cited, we find in *Lansdown v. Lansdown* a mistake as to general rules of law (succession on intestacy); a similar mistake in *Bingham v. Bingham*—effect of an estate tail; *Cooper v. Phibbs*—effect of a private Act of Parliament; *Beauchamp v. Winn*—misunderstanding of the effect of technical words of a grant; *Solle v. Butcher*—ignorance of, and misunderstanding of, the effect of a public Act of Parliament.

These cases leave it difficult, not only to say what the scope of the rule against mistakes of law really is, but also to be sure that in equity there is any such rule. Jenkins L.J. might be surprised to be told that his dissenting judgment in *Solle v. Butcher* is the weightiest single judicial decision in favour of the existence of the rule: but the writer believes this to be so. The only other way in which the rule might be established is by inference from the fact that so many decisions are expressed to be departures from it; it is a rule proved by many exceptions. The writer believes that to describe a doctrine as a rule inferred from the existence of many exceptions, none clearly explained, and apparently conflicting *inter se*, is a very poor method of legal analysis. Let us be realists, and put it that there is no such rule. This does not, of course, entail that equity will always grant relief where both parties are mistaken as to the law. There is ample room for considerations of public policy and of the justice of the particular case.

The correctness of this view is fortified by the attitude of the Court of Appeal and House of Lords towards mistakes of law in connection with the recovery of property in equity, as shown in *re Diplock*³⁰ and in *Ministry of Health v. Simpson*.³¹

Summary

The following conclusions are suggested by this paper:

1. There is no consistency between the common law and equitable rules about mistake in contract, and no inference as to the attitude of either system can be drawn from a decision of the other, except that specific performance will be refused of a contract void at law.

³⁰ [1948] Ch. 465.

³¹ [1951] A.C. 251.

2. Misrepresentation, (apart from fraud), and mistake, raise the same problems in equity.

3. Rescission can probably not be granted for the mistake of *one* party.

4. There is a well-established doctrine of rescission for common mistake.

5. The nature of the mistake required, and its relative importance, have never been precisely formulated, and it is not desirable that they should be. It follows that attempts to trace principles of mistake running through both law and equity are misguided.

6. Where the claim for rescission amounts to a "bare money claim" it will not succeed.

7. Specific performance may be refused on the ground of common mistake.

8. Specific performance may be refused on the ground that the parties' interpretations of the contract differed, but such cases are not truly cases of mistake.

9. The mistake of *one* party may be a ground for the refusal of specific performance, when there are other grounds.

10. There is no rule that equity will not grant relief for mistakes of law.