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AN APPROACH TO COMMON MISTAKE IN ENGLISH LAW

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I. *Introduction.*

The main purpose underlying the growth of the law of contract has been to protect the reasonable expectations created by a promise.[1] To this end the law usually places the risk of non-performance upon the promisor. However, after the courts had accepted the doctrine of the general enforceability of promises, the problem was bound to arise whether, in a few exceptional cases, the strict enforcement of a promise might not result in an obligation quite different from what was reasonably expected. Thus, in the latter half of the nineteenth century, the doctrines of common mistake[2] and frustration[3] began to emerge as limitations upon the enforceability of promises. Common mistake, like frustration, may be considered as an exception to the general rule that the promisor takes the risk of having to pay damages for

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[1] See, *e.g.*, Goodhart, English Law and the Moral Law (1953), pp. 100-101; Parry, The Sanctity of Contracts in the English Law (1959), pp. 1-18; Pound, An Introduction to the Philosophy of Law (1922), Ch. 6.

[2] The year 1867 is a landmark in the history of mistake, for in *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.* (1867), L.R. 2 Q.B. 580, and in *Cooper* v. *Phibbs* (1867), L.R. 2 H.L. 149, the first conscious efforts were made to construct a formula for common mistake.

[3] *Taylor* v. *Caldwell* (1863), 3 B. & S. 826.

non-performance. Since the law of contract seeks to achieve the realization of promissory expectations, there should be some intelligible and countervailing reason for not enforcing promises.[4] With this in mind, it is the purpose of the present article to examine the operation and juridical basis of the doctrine of common mistake.

When the variety of factual situations discussed under the heading of mistake in contract are analysed, it becomes apparent that there are several distinct types of contractual mistake and that these are not governed by the same rules. Dr. Cheshire and Mr. Fifoot have made a valuable contribution by insisting that cases involving what is properly called "common mistake" should be placed in a separate category.[5] The distinctive characteristic of a common mistake case is that, despite the fact that both parties are mistaken, there is a promise and the requirements of offer and acceptance have been satisfied. The contracting parties have agreed both objectively and subjectively on all the relevant matters, but the agreement has been made with reference to a set of facts which the parties mistakenly believed to exist.

In the older cases, the term "mutual mistake" is often used to describe what is more accurately called a "common mistake". It is submitted, however, that the term "mutual mistake" should be prudently confined to the type of situation which arose in *Raffles* v. *Wichelhaus*:[6]

> The plaintiff agreed to sell a cargo of cotton to arrive "*ex Peerless* from Bombay". In fact there were two vessels fitting that description; one sailed in October, the other in December. The buyer meant the former, the seller the latter.

The court held there was no contract. The ground for the decision is that, since each party acted in an equally reasonable manner, the court could not say what the promise was. A mutual misunderstanding, equally reasonable on the part of each party, prevented the existence of a promise.[7] But in common mistake cases there is a promise; the offer and acceptance are usually not questioned. Instead of a mistake that puts the parties at cross-purposes, the parties share the same erroneous belief that certain facts exist.

If, then, there is a promise, how can a common mistake afford

[4] See Sharp, *Pacta Sunt Servanda* (1941), 41 Col. L. Rev. 783, at p. 785.
[5] Cheshire and Fifoot, The Law of Contract (5th ed., 1960), pp. 175-176.
[6] (1864), 2 H. & C. 906. For mutual mistakes caused by the conduct of a third party, see: *Thornton* v. *Kempster* (1814), 5 Taunt. 786; *Vickery* v. *Ritchie* (1909), 202 Mass. 247, 88 N.E. 835.
[7] See Sharp, Promissory Liability (1940), 7 U. Chi. L. Rev. 250, at pp. 264-265.

a sound reason for refusing enforcement? It is submitted that the answer derives from a basic idea of the law of contract — the idea that contracts should be the result of a free choice. A contractual common mistake deprives the parties of the accurate information, and hence of the freedom of choice necessary to make a contract that accords with our notions of a healthy bargain.[8] Parties who are completely ignorant of the true state of affairs and who mistakenly assume that a specific fact certainly exists are neither informed nor free to calculate the risks involved. If the mistaken fact is an important one, the actual obligation may be something vitally different from what was reasonably contemplated. In these circumstances, the effect of enforcing the promise may be to enrich one party unjustly, to bestow upon him the benefit of an unbargained-for windfall. The difficulty, however, lies in distinguishing between a contract that is unfair because it is based upon a common mistake and a contract that is simply a "bad bargain" in the sense that the party seeking relief incorrectly estimated the risks. The formation of foolish contracts does not conflict with the ideal of free choice, and there is no reason to refuse the enforcement of contracts that are simply bad or foolish bargains.

The approach suggested is to ask whether the promisor assumed responsibility for the risk of a particular mistake. The mere quantum of gain or loss, of benefit obtained or injury inflicted, is not a safe guide. The payment of a one pound insurance premium may be calculated to shift responsibility for many risks and justifiably create weighty liabilities. The principle of "conscious ignorance" will be suggested as a useful means of identifying contracts that have a relevant speculative chance-taking character. The idea of "conscious ignorance" will be explained in the following sections, but it is submitted that this concept is the most reliable guide for determining whether the risk of a mistake is within the scope of the promissory expectations.

A focus upon the allocation of risks should clarify the problems in the law of common mistake. This approach avoids some of the deceptive catchwords that conceal the process of risk apportionment[9] and concentrates attention upon the important risk-taking functions of contract. Both courts and businessmen alike recognize the risk-taking character of contracts. Indeed, the hallmark of a promise is its dependable quality; it lends dependability to facts

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[8] *Ibid.*, at p. 266.

[9] Patterson, The Apportionment of Business Risks Through Legal Devices (1924), 24 Col. L. Rev. 335, at p. 355.

and events which otherwise seem uncertain.[10] The assurance given by a promise, the reasonable expectations induced by it, offset uncertainties in the mind of the promisee by allowing him to rely upon the promisor. Naturally, therefore, the law of contract is profoundly concerned with the scope of the uncertainties and risks embraced by a promise.

At the outset, two theories of the doctrine of common mistake merit brief consideration. The first theory advances what, for convenience, may be called the identity test.[11] By this test a common mistake is operative only if it goes to the "identity", "substance" or "essence"[12] of the contractual subject-matter. Perhaps these expressions may be useful labels for common-sense conclusions; but if the terms are thought of as philosophical categories or metaphysical entities,[13] the basis of judicial action may be obscured and confused by language that conveys the illusory impression of describing a systematic test.

The second theory is the theory of the implied term.[14] It is said that a common mistake renders a contract inoperative only if there is an implied condition precedent that the supposed facts are true. This theory, it is submitted, rests upon a legal fiction. As will be seen, in many cases where the courts have discharged an obligation based on a common mistake, the parties had apparently never considered the possibility that the assumed fact did not exist. If the possibility of a mistake never entered the minds of the contractors, it is difficult to find any intentions from which a term can be implied. The implied term theory is an attractive device,[15] but it leaves unexpressed the true basis for the implication

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[10] Holmes, The Common Law (1881), pp. 298-305.

[11] See Tylor, General Theory of Mistake in the Formation of Contract (1948), 11 Mod. L. Rev. 257, at pp. 262-268.

[12] See, for example, the language of the court in *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.*, *supra*, footnote 2; *Bell* v. *Lever Brothers, Ltd.*, [1932] A.C. 161, at pp. 218-220. See also text accompanying footnote 62, *infra*.

[13] See Glanville Williams, Mistake as to Party in the Law of Contract (1945), 23 Can. Bar Rev. 271, at pp. 271-273.

[14] See, generally, J. F. Wilson, The Law of Contract (1957), pp. 257-300; Shatwell, The Supposed Doctrine of Mistake in Contract (1955), 33 Can. Bar Rev. 164; Slade, The Myth of Mistake in the English Law of Contract (1954), 70 L.Q. Rev. 385; *McRae* v. *Commonwealth Disposals Commission* (1951), 84 C.L.R. 377; *Bell* v. *Lever Brothers, Ltd.*, *supra*, footnote 12, at pp. 224-226.

[15] See Parry, *op. cit.*, footnote 1, pp. 39-51; Glanville Williams, Language and the Law (1945), 61 L.Q. Rev. 384, at pp. 401-406. Atiyah, An Introduction to the Law of Contract (1961), correctly observes that, since frustration and common mistake are fundamentally related, it is paradoxical that, at a time when the implied term theory is recognized as an inadequate explanation of frustration, some should see the implied term as the basis of common mistake. He concludes: "The only explanation of

of a term that discharges the contract and refuses to impose the risk of a mistake.

The following sections examine the effect of a common mistake upon promissory liability. Section II deals with common mistakes of fact, Section III with common mistakes of law. Section IV discusses the distinction between the question of promissory liability and that of the relief appropriate for an operative common mistake.

II. *Common Mistake Of Fact.*

A. *Mistake as to the existence of the subject-matter*

As indicated, in common mistake cases, the promissory words are absolute; they are unqualified and wide enough to cover the actual, as well as the supposed, state of affairs. The fundamental question is: why and when will a common misapprehension of existing facts discharge the duty to perform a promise? It is proposed to begin an analysis of this problem by considering cases involving the sale of specific but non-existent goods. Since any analysis can oversimplify the difficulties in these cases, two questions deserve attention. First, what was the subject-matter of the contract? And, secondly, who should accept responsibility for the risk that this subject-matter was in fact non-existent? The answers will depend upon the construction of the contract.

When a case arises in which the contracting parties mistakenly believed the subject-matter existed, there are at least three possible constructions that deserve consideration.

1. The buyer and seller contracted assuming the subject-matter certainly existed at the time of contracting. Neither party should be held to have taken the risk of non-existence.
2. Aware that the existence of the subject-matter was not definitely established, the buyer and seller contracted assuming some uncertainty as to its existence. The buyer took the risk and purchased an adventure.
3. The buyer and seller contracted believing the subject-matter existed but the seller warranted its existence. The seller, as promisor, took the risk.

The construction of the contract must determine the scope of the expectations reasonably attributable to the parties and whether

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this paradox is that the discussion of the theoretical basis of common mistake is about a hundred years behind the discussion of the theoretical basis of frustration." *Ibid.*, p. 130. Contrast Atiyah's earlier view: *Couturier* v. *Hastie* and the Sale of Non-Existent Goods (1957), 73 L.Q. Rev. 340.

the risk of non-existence lies within the ambit of those expectations. The construction is obviously crucial, for in each of the above situations the legitimate expectations of the parties should differ.[16] The contracts in (2) and (3) would be valid, since the risk of non-existence falls within the reasonable expectations of the parties.

The leading case on the sale of non-existent goods, *Couturier* v. *Hastie*,[17] was heard by the Court of Exchequer, by the Court of Exchequer Chamber and finally by the House of Lords:

> The parties contracted for the sale of a cargo of corn believed to be on its way from Salonica to the United Kingdom. In fact, before the contract was made, the corn had become so overheated that the master of the ship had sold it *en route*. The seller brought an action for the contract price and argued that the purchaser was liable to pay in any event.

Since the seller had not delivered the corn, the action could succeed only by establishing construction (2), that the purchaser had taken the risk and bought an adventure including the shipping documents and insurance. The agreement alleged by the seller was similar in principle to a marine insurance policy on goods "lost or not lost".[18] The purchaser advanced construction (1), that the sale was based on the assumption that the corn certainly existed, and construction (3), that the seller warranted the existence of the corn.

In each court, the judges agreed that the "whole question turns upon the construction of the contract which was entered into between the parties".[19] The House of Lords, rejecting the seller's argument, held that the purchaser was not liable to pay. Although either construction (1) or (3) could justify this result, neither the Exchequer Chamber nor the House of Lords based its decision for the purchaser upon construction (3), that is, upon a finding that the seller warranted the existence of the subject-matter. The opinions do not imply that the action failed because of an implied promise that the cargo existed, and there is no indication that the

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[16] As noted by Atiyah in (1957), 73 L.Q. Rev. 340, at p. 343, the view of Cheshire and Fifoot unduly restricts the possible constructions. Cheshire and Fifoot, *op. cit.*, footnote 5, pp. 177-184. Their statements imply that all contracts for the sale of a *res extincta* are invariably void, although paradoxically the possibility of construction (2) is nevertheless recognized. On their view, it is difficult to reconcile a case involving construction (3), such as *McRae* v. *Commonwealth Disposals Commission*, *supra*, footnote 14. Cheshire and Fifoot, *op. cit.*, *ibid.*, pp. 177, n. 2, 179, n. 6.

[17] (1852), 8 Ex. 40, rev. (1853), 9 Ex. 102; reversal affd (1856), 5 H.L.C. 673.

[18] See *Sutherland* v. *Pratt* (1843), 11 M. & W. 296.

[19] (1856), 5 H.L.C. 673, at p. 681.

seller might be held liable for damages for non-delivery. Lord Cranworth said:

> Looking to the contract itself alone, it appears to me clearly that what the parties contemplated, those who bought and those who sold, was that there was an existing something to be sold and bought . . . . The contract plainly imports that there was something which was to be sold at the time of the contract, and something to be purchased.[20]

It does not emerge from the judgments whether recovery was denied on the ground of a common mistake rendering the contract void, or for a failure of consideration. But the Exchequer Chamber and the House of Lords clearly construed the contract as type (1), based on the assumption that the goods existed. The subject-matter was a cargo of corn and not merely the chance that the cargo existed.

It may be asked why the courts have attached so much importance to ascertaining the subject-matter of a contract. It is submitted that the explanation is fairly simple. The importance of the contractual subject-matter derives from the fact that it is manifestly a factor necessary and vital to the contemplated performance. As a general proposition, it may be stated that a mistake as to the existence of a factor necessary for performance usually justifies the inference that neither party assumed the risk of the factor's non-existence.[21] Courts presume that parties contract with respect to a set of facts making performance possible.[22] Therefore, where the parties contract in the erroneous belief that specific goods exist, it follows that the presumption must be that the parties assumed that the subject-matter certainly existed, that neither one took the risk of non-existence, and that consequently their contract is *prima facie* invalid.[23] Where specific goods are mistakenly supposed to exist, the reason for invalidity is that the true state of facts completely "frustrates" the contemplated purpose of the contract. To enforce such promises would be to compel performance of a contract the parties did not make.

Section 6 of the Sale of Goods Act, 1893,[24] contains the rule

[20] *Ibid.* The language of Coleridge J. is similar: (1853), 9 Ex. 102, at p. 108. Lord Cranworth added that a "long-continued commercial usage" might have compelled a different construction.

[21] Corbin, Contracts (1960), Vol. 3, § 600.

[22] 12 Am. Jur., Contracts (1938), § 131.

[23] Anson, Law of Contract (21st ed., 1959), pp. 245, 247; Restatement, Contracts (1932), §§ 456, 460. Section 456 provides that: "Except . . . where a contrary intention is manifested, a promise imposes no duty if performance of the promise is impossible because of facts existing when the promise is made of which the promisor neither knows nor has reason to know."

[24] 56 & 57 Vict., c. 71. Section 6 of the Act provides that: "Where

of construction found in *Couturier* v. *Hastie*. Although one can reasonably say that the decision in that case simply rests on a failure of consideration, this leaves open the question of the validity or invalidity of the contract. As Professor Glanville Williams cogently observed:

> If the subsequent destruction of specific goods frustrates an agreement for the sale of those goods, as it does under *Taylor* v. *Caldwell*, 3 B. & S. 826, and section 7 of the Sale of Goods Act, it is common sense that prior destruction must have a similar vitiating effect.[25]

A mistake as to the existence of the subject-matter does not, however, invariably establish that the contract is invalid. The case of *McRae* v. *Commonwealth Disposals Commission*[26] raised situation (3), that is, where one party warranted the existence of the subject-matter. The purchaser of a wrecked "oil tanker off Jourmaund Reef" sued to recover damages for an alleged breach of contract by the Disposals Commission. At considerable expense the purchaser had fitted out a salvage expedition, but neither a "Jourmaund Reef" nor an oil tanker could be found in the locality specified. The vendors, the Disposals Commission, resisted the claim for damages on the ground that the contract was void *ab initio*. They relied upon *Couturier* v. *Hastie* for the proposition that the mistaken sale of a non-existent subject-matter was void. Thus the purchaser's action for damages directly raised the question of the validity of the contract. The High Court of Australia held that the purchaser was entitled to recover damages for breach of a contract including a promise that there was an oil tanker at the locality given. The Commission, being engaged in the disposal business, should have expected that because of their apparently superior knowledge, a purchaser would rely upon their representations that a tanker lay on a certain reef.[27] The court concluded:

> The only proper construction of the contract is that it included a promise by the Commission that there was a tanker in the position

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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 is made, the contract is void."

[25] (1954), 17 Mod. L. Rev. 154, at p. 155. Williston pointed out that the seller of specific non-existent goods may be excused by the doctrines both of mistake and impossibility. Williston, Contracts, Vol. 5 (rev. ed., 1938), § 1561.

[26] *Supra*, footnote 14.

[27] *Ibid.*, at p. 409. In *Oscar Chess, Ltd.* v. *Williams*, [1957] 1 W.L.R. 370, at p. 375, Denning J. pointed out that equality of access to knowledge may be significant. It will be recalled that in *Couturier* v. *Hastie* neither party had reason to know of the existence or condition of the goods at sea.

specified . . . . There *was* a contract, and the Commission contracted that a tanker existed . . . .[28]

Since the vendors, by their promise, assumed the risk of non-existence, the construction appropriate to *Couturier* v. *Hastie* was inapplicable. The Commission's guarantee ousted ". . . the understanding, normally implied in such a case, of '*no goods, no contract*'".[29]

According to the Australian High Court, the *McRae* case would fall outside section 6 of the English Sale of Goods Act. The section refers to goods that have "perished" so that, on the literal interpretation adopted by the High Court, the section would apply to the sale of non-existent goods that have previously perished but would not apply to the sale of goods, such as the oil tanker, that never existed.[30] Instead of otherwise raising a presumption of invalidity, the judges treated the sale as presumably valid unless a condition precedent could be implied. On the facts, the promise that the oil tanker existed justified the court's view; but to consider this as establishing a general rule would be contrary to English case law.[31] The justice of the *McRae* decision aptly demonstrates that, in mistake cases, the construction of the contract is crucial, and that the absence of the contractual subject-matter does not make an agreement inexorably void.

Where the contract is for the sale of specific goods, it is relatively easy to see that the goods were the subject-matter and hence a factor necessary to the performance, but in other mistake cases, the primary problem of construction may be to determine precisely what was the subject-matter. This difficulty becomes apparent

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[28] *McRae* v. *Commonwealth Disposals Commission, ibid.*, at p. 410, *per* Dixon and Fullagar JJ.

[29] Wedderburn, Collateral Contracts (1959), 17 Camb. L.J. 58, at p. 79, n. 26. As Wedderburn suggests, section 6 of the Sale of Goods Act, 1893, should not alter the *McRae* decision because of the saving provision contained in section 55 of the same Act. Atiyah, (1957), 73 L.Q. Rev. 340, at p. 348, agrees that when section 6 does apply, it "is merely a *prima facie* rule of construction". Compare Cheshire and Fifoot, *op. cit.*, footnote 5, p. 179, n. 6.

Section 55 provides that: "Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract." *Supra*, footnote 24.

The *McRae* case is clearly in accord with the Restatement, Contracts, § 456. See *supra*, footnote 23.

[30] *Supra*, footnote 14, at p. 410; Atiyah, *op. cit.*, footnote 29, pp. 348-349; Shatwell, *op. cit.*, footnote 14, p. 185. Compare Cheshire and Fifoot, *op. cit.*, footnote 5, p. 179, n. 6. See footnote 24, *supra*.

[31] Only Parke B. in *Couturier* v. *Hastie* (1852), 8 Ex. 40, at p. 54, intimated that, in the case of a non-existent subject-matter, a seller might be presumed to have promised that the subject-matter was in existence.

when *Galloway* v. *Galloway*[32] is compared with *Bell* v. *Lever Brothers, Ltd.*[33] In the former case, two parties, believing themselves to be husband and wife, entered into a marriage separation deed providing for the maintenance of the wife. In fact, they were not legally married. As the court construed the deed, its basic assumption was that the parties were husband and wife, and the subject-matter was the separation of a legally binding marriage.

> [L]ooking at the terms of the deed of separation, there could be no doubt that its basis was the belief of both parties that they were respectively husband and wife. As that was in fact not the case . . . the deed of separation was void . . . .[34]

In *Bell* v. *Lever Brothers, Ltd.:*

> Lever Brothers, who had a controlling interest in the Niger Company, employed Bell to be chairman of the Board of the subsidiary firm for five years at an annual salary of £8,000. While serving on the Board, Bell secretly engaged in speculative transactions in the cocoa market. This conduct would have justified his dismissal without compensation. Before the expiration of the five year employment period, the amalgamation of the Niger Company with a third company made the services of Bell redundant. As consideration for retirement within the service period, Lever Brothers agreed to pay Bell £30,000, a sum that was over £12,000 more than the maximum he could have earned. When this compensation contract was agreed upon and when payment was made, Lever Brothers did not know of the previous misconduct and Bell's own mind was not directed to his breaches of duty. Upon discovering the past misconduct, Lever Brothers sued to recover the £30,000 on the ground, *inter alia*, of common mistake.

The House of Lords denied recovery. The compensation agreement to discharge the employment contract was held valid despite the fact that, unknown to either party, Bell's previous misconduct had made the employment contract voidable. In order to have the compensation agreement held invalid, Lever Brothers had to establish that the parties assumed that the subject-matter was an indefeasible employment contract. However, it is submitted that the fact that the £30,000 payment was greatly in excess of the maximum Bell could have earned made it particularly difficult to

But the judgment of the House of Lords in that case, (1856), 5 H.L.C. 673, and cases such as *Hitchcock* v. *Giddings* (1817), 4 Price 135, and *Cochrane* v. *Willis* (1865), 1 Ch. App. 58, favour a presumption of invalidity.

Atiyah says that the rule found in *Couturier* v. *Hastie* and embodied in section 6 of the Sale of Goods Act is an "anachronism". He argues that in the twentieth century the presumption should favour construction (3) above and that the seller should take the risk that the goods were non-existent. Atiyah, *op. cit.*, footnote 15, p. 133.

[32] (1914), 30 T.L.R. 531. See also *Law* v. *Harragin* (1917), 33 T.L.R. 381.

[33] *Supra*, footnote 12.

[34] *Galloway* v. *Galloway*, *supra*, footnote 32, at p. 532, *per* Ridley J.

show that Lever Brothers merely bargained for the right to terminate the employment.[35] Lord Thankerton said:

> I do not find sufficient material to compel the inference that the appellants, at the time of the contract, regarded the indefeasibility of the service agreements as an essential and integral element in the subject-matter of the bargain.[36]

The court found the subject-matter of the compensation agreement was an employment contract rather than an indefeasible employment contract.

With regard to the equitable distribution of the risk of the mistake in *Bell* v. *Lever Brothers*, it is important to note the view taken by the House of Lords of the relationship between employer and employee as bargaining parties. The court held that contracts of employment are not *uberrimae fidei.* Consequently Bell had no duty to disclose his past breaches of contract. On this point, Lord Atkin gave an interesting example:

> If [a man] . . . gives his cook a month's wages in lieu of notice can he, on discovering that the cook has been pilfering the tea and sugar, claim the return of the month's wages? I think not. He takes the risk; if he wishes to protect himself he can question his servant, and will then be protected by the truth or otherwise of the answers.[37]

Perhaps the majority of their Lordships felt that businessmen are aware that subtle occurrences may render an employment contract legally terminable and that when Lever Brothers agreed to such a generous settlement without questioning Bell's conduct, the company assumed the risk that Bell could have been dismissed immediately without incurring liability.

The case turned on the construction of the contract in light of what the court felt were the ordinary expectations of businessmen. *Galloway* v. *Galloway* is not inconsistent with *Bell* v. *Lever Brothers*, for, in the former case, it was manifestly reasonable for the court to find that parties to a separation deed assume the marriage is binding and do not consider the risk that they were not husband and wife.

The difficulty of determining what is the contractual subject-matter may also be seen in a much discussed American case, *Sherwood* v. *Walker*:[38]

[35] Considering the voluntary aspect of the payment, Lord Blanesburgh emphasized that considerations other than existing legal rights must have influenced the settlement. He said it was "clear that, while undoubtedly the claim for unearned salary amounting at the remote outside . . . to over £17,000 . . . . was a material consideration for the payments agreed to, it was neither on the terms . . . nor in fact the sole inducing cause". *Bell* v. *Lever Brothers, Ltd., supra*, footnote 12, at pp. 181, 197.

[36] *Ibid.*, at p. 236. [37] *Ibid.*, at p. 228.

[38] (1887), 66 Mich. 568, 33 N.W. 919.

> The defendant sold the plaintiff a live cow called "Rose 2nd" for "five and one-half cents per pound, live weight, 50 pounds to be deducted for shrinkage". The agreed price came to less than $80.00, a price which the court found represented the value of the cow for beef. If the cow was a breeder, her market value was at least $750.00. In fact she was then with calf. The defendant refused to deliver the cow and purported to rescind the sale as based upon a common mistake.

The court found that this cow, sold by the pound for an insignificant sum as compared with her value as a breeder, was sold and purchased at her value for beef. As seen by the court, the parties could have made the contract only on the understanding that "Rose 2nd" was incapable of breeding and of no use as a cow. The plaintiff contended that the subject-matter was a particular animal and that there was no mistake as to the existence or identity of that animal, but the court said:

> The thing bought and sold had in fact no existence. She was sold as a beef creature would be sold; she is in fact a breeding cow, and a valuable one.[39]

Thus rescission of the contract was approved on the ground of a common mistake. The court held that the parties contracted on the assumption that the subject-matter was a sterile cow, a beef creature, rather than a specific animal or a possibly fertile cow. Sterility was the contractual assumption and this excluded the risk of fertility from the bargain struck by the parties.

These cases should make it clear that the subject-matter of a contract is not always self-evident. The subject-matter may be obvious when a physical entity is to be transferred, as in the sale of specific goods, but the subject-matter notion becomes hazy when applied to contracts dealing with intangible rights and jural relations such as the contracts in *Galloway* v. *Galloway* and *Bell* v. *Lever Brothers*. Moreover, even if the subject-matter is readily discernible, its non-existence does not inevitably make the contract inoperative. By warranting the existence of the wrecked oil tanker, the vendors in *McRae's* case took the risk of non-existence.

It is undoubtedly useful to determine what was the subject-matter and which of the parties assumed the risk of its non-existence. However, to focus on the concept of a contractual subject-matter may tend to oversimplify the problem of construction and hence to obscure the true operation and juridical basis of the doctrine of common mistake. The notion of a subject-matter may often afford valuable guidance, but it is submitted

[39] *Ibid.*, at pp. 578 (Mich.), 924 (N.W.).

that the subject-matter is simply one factor—the most obvious factor—necessary to the performance contemplated. As the following sections will show, the principle of common mistake deals not simply with the risk of a non-existent subject-matter but more fundamentally with the allocation of uncalculated risks which seriously affect contractual expectations.

B. *Common mistake and a failure of consideration*

It may be helpful to consider the relationship between the doctrines of common mistake and failure of consideration. It has previously been indicated that the final judgment in *Couturier* v. *Hastie* may reasonably be said to rest upon a total failure of consideration. Similarly, in a number of cases traditionally included under the heading of mistake, the courts simply granted restitution to a purchaser who had paid the agreed price but received none of his bargained-for "consideration",[40] but recognizing that these cases involved a failure of consideration should not obscure the fact that the construction of the contract was the essential prerequisite. The phrase "a failure of consideration" is itself somewhat misleading, for the word "consideration" has two meanings. It may be used in the law relating to the formation of contracts to describe what is technically necessary to make a promise binding, but,

> . . . when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise.[41]

The application of the doctrine of failure of consideration requires that the contract be construed to determine what was the performance expected, for instance, what was the subject-matter of or the "consideration" for the contract?

A common mistake is only one possible cause of a failure of consideration. For example, a failure may be caused by the death of a party,[42] breach of contract[43] or impossibility of performance.[44]

[40] *E.g.*, *Hitchcock* v. *Giddings*, *supra*, footnote 31; *Strickland* v. *Turner* (1852), 7 Ex. 208; *Gompertz* v. *Bartlett* (1853), 3 E. & B. 849; *Gurney* v. *Womersley* (1854), 4 E. & B. 133; *Cochrane* v. *Willis*, *supra*, footnote 31. See *McRae* v. *Commonwealth Disposals Commission*, *supra*, footnote 14, at pp. 405-406.

[41] *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32, at p. 48, *per* Viscount Simon L.C.

[42] *Knowles* v. *Bovill* (1870), 22 L.T.R. 70.

[43] *Dies* v. *British and International Mining and Finance Corp., Ltd.*, [1939] 1 K.B. 724; *Warman* v. *Southern Counties Car Finance Corp., Ltd.*, [1949] 2 K.B. 576.

[44] *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.* *supra*, footnote 41.

The irrelevance of the reason for a failure of consideration made this doctrine a flexible instrument designed to do justice when contractual expectations were completely disappointed or frustrated. Before a doctrine of common mistake evolved, the courts utilized the established doctrine to grant relief from the effects of a common mistake. It is significant that in 1867 when Blackburn J. attempted to formulate a test for common mistake, he repeatedly described the result of an operative common mistake as being a failure of consideration. To be excused, he said, a party must show:

> . . . that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration.[45]

An examination of a nineteenth century case, *Gompertz* v. *Bartlett*,[46] indicates the relationship between the doctrine of a failure of consideration and a broader rule that avoids a contract for a mistake that radically alters the expected performance. In the *Gompertz* case:

> The purchaser paid for a bill of exchange which both parties believed was a foreign bill drawn in Sierra Leone. The bill proved to be an unstamped, and therefore an unenforceable, domestic bill. The purchaser sued for money had and received by the defendant on a total failure of consideration.

Naturally the court had to determine what was the "consideration" or contemplated performance. Was the subject-matter of the contract a bill or a foreign bill? The court held that the subject-matter was a foreign bill. The plaintiff,

> . . . bought, as a foreign bill, what turns out not to be a foreign bill, and therefore valueless. Common justice requires that he should have back the price.[47]

Since the court found that the contractors assumed as certain that the bill was not a domestic one, neither party could be said to have taken the risk of this mistake. The basic contractual assumption excluded the risk of domesticity from the scope of their bargain. Of course, "if it really had been a foreign bill, any secret defect would have been at the risk of the purchaser . . .".[48] To protect the expectations of the parties, the court found that the "consideration" or subject-matter was a foreign bill and that, therefore, a purchaser who only received a domestic piece of paper was entitled to recover his money.

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[45] *Kennedy* v. *Panama, New Zealand, and Australian Royal Mail Company, Ltd.*, *supra*, footnote 2, p. 587.
[46] *Supra*, footnote 40.
[47] *Ibid.*, at p. 855.
[48] *Ibid.*, at p. 854.

The problem in *Scott* v. *Coulson*[49] reveals an important limitation on the doctrine of failure of consideration as a means of alleviating the effects of a common mistake. For a vendor who receives the agreed payment does not suffer a failure of consideration although he may be seriously injured by a common mistake:

> The plaintiff contracted to assign to the defendant a policy on the life of one A. T. Death. The contract was entered into by both parties in the belief that the assured was alive but, unknown to them, the assured had previously died. To obtain the return of the policy and the proceeds payable under it, the vendor asked that the sale of the policy be set aside on the ground of mistake.

Vaughan Williams L.J. concluded that:

> . . . both parties entered into this contract upon the basis of a common affirmative belief that the assured was alive; but as it turned out that this was a common mistake, the contract was one which cannot be enforced. This is so at law; and the plaintiffs do not require to have recourse to equity to rescind the contract, if the basis which both parties recognized as the basis is not true.[50]

It should be observed that, if the subject-matter of a contract is the object or right to be transferred, then the subject-matter in *Scott* v. *Coulson* was not destroyed. The purchaser would simply receive a matured chose in action rather than an unmatured chose. As the court found the facts, the parties contracted on an erroneous assumption concerning something necessary to the contemplated performance. An uncalculated risk, the prior death of the assured, vitally altered the bargain. In this case, the injured party, being the vendor of the policy, could not obtain relief by alleging a failure of consideration, for he had received the "consideration" for which he bargained, namely, payment for the assignment of the policy to the defendant. The vendor could obtain the return of the policy only by directly attacking the validity of the sale on the ground of a common mistake.

C. *Conscious ignorance and the assumption of risks*

Another aspect of *Scott* v. *Coulson* reveals the significance of a helpful common-sense idea, the notion of conscious ignorance. Vaughan Williams L.J. remarked that if, before contracting, the parties investigated the whereabouts of the assured and were unable to locate him, then it would be "almost impossible" to conclude that they contracted upon the basis that the assured was alive.[51] The investigation would disclose an awareness of uncertainty as to the assured's existence; and contracting while consciously ignor-

[49] [1903] 2 Ch. 249. [50] *Ibid.*, at p. 252. [51] *Ibid.*

ant of the existence of a fact tends to show an intention to assume the risk of non-existence and to be bound irrespective of that possibility. Since contracting is risk taking, when parties contract aware of an uncertainty, the natural inference is that they estimated the probabilities and fixed the price accordingly. Where the existence of a set of facts is doubtful and the parties agree on that basis, the non-existence of those facts does not constitute a mistake.[52] The inaccuracy of one party's estimate does not invalidate the contract if the bargain embraced the risk. An insurer would not be excused from payment, if minutes after executing a policy, the assured were killed by a falling sputnik.

The law of tort requires a man to be aware of his ignorance or lack of knowledge. A reasonable man should not run through an unfamiliar dark hallway; nor should he attempt to cure the mysterious headache of another person. Similarly, in the law of contract, when parties deal with common objects such as, for example, land or paintings or precious stones, it may be reasonable to expect that the ordinary contractor will be aware of his lack of knowledge and recognize that the precise characteristics of the object remain uncertain. In many situations the seller of a rock believed to be gold, or of a portrait believed to be a Constable, would not expect the buyer to assume that these qualities were certain, for often the buyer may reasonably be expected to exercise his judgment and rely upon his own opinion. Suppose that two farmers contract for the sale of a plot of agricultural land at what is approximately the market price. The subsequent discovery of oil beneath the land would hardly entitle the vendor to relief. Perhaps neither considered the possibility that the land was anything more than farm land. Still, if nothing more could be shown, common experience compels the conclusion that they must have been consciously ignorant of mineralogical conditions.

A leading American case, *Wood* v. *Boynton*,[53] provides a clear example of the principle:

> The plaintiff sold a small stone to the defendants, partners in the jewellery business. Not knowing the nature or value of the stone, the plaintiff made inquiries and concluded it was "probably" a topaz. The defendant who purchased the stone agreed it was "probably" a topaz and bought it for $1.00. In fact, it was an uncut diamond worth $700.00. Neither party had ever seen an uncut diamond. The purchasing jeweller testified that it "never entered" his mind the stone might be a diamond. The plaintiff asked rescission of the contract.

[52] Corbin, *op. cit.*, footnote 21, Vol. 3, § 598; 12 Am. Jur., *op. cit.*, footnote 22, § 132.

[53] (1885), 64 Wis. 265, 25 N.W. 42.

The court held the sale was valid. Since the character of the stone was known to be doubtful, the risk of misjudgment fell within the contractual expectations. If the plaintiff chose to sell the stone ". . . without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness . . . , she cannot repudiate the sale because it was afterwards ascertained that she made a bad bargain".[54] Where the parties are conscious of an uncertainty, the normal inference is that they expected their contract to embrace the uncertainty and to resolve the doubt.

It seems reasonable to say that the mistake in the topaz case was as to substance rather than quality; yet ultimately, the question of what is a substance as opposed to a quality must depend on the bargain struck by the parties.[55] For example, if two merchants, who deal exclusively in the diamond market, assume without question or representation that a stone is a rough diamond and set the price accordingly, the risk that the stone is a topaz should not be imposed upon the buyer.[56] Only construing the contract can determine whether the parties contracted on the assumption that the subject-matter was a diamond, a topaz or a stone. One may be led astray by failing to see that both the subject-matter and its qualities depend upon the contract made by the parties.

The principle of conscious ignorance may also be relevant where an error occurs concerning the origin of a painting or other work of art. One factor to consider is that people generally know of the uncertainties surrounding the attribution of a painting to a particular artist. In *Leaf* v. *International Galleries*,[57] the plaintiff bought a picture called "Salisbury Cathedral" which the defendant represented to have been painted by Constable. Five years later, it was discovered that the painting was not a Constable. The Court of Appeal held that, after such a lapse of time, the plaintiff was not entitled to rescission for innocent misrepresentation.[58] The implication of the court's judgment is that the common mistake as to the originality of the painting did not invalidate the contract. This appears to be a reasonable conclusion. For, in view of the uncertainties known to be associated with works of art, if the parties exercised their own judgment as to the originality of a

[54] *Ibid.*, at pp. 271 (Wis.), 44 (N.W.).

[55] See Glanville Williams, *op. cit.*, footnote 13, at pp. 271-273, and *op. cit.*, footnote 15, at p. 303.

[56] Suppose, on the other hand, the basic assumption is that the object is a topaz rather than a small stone or a diamond. Consider *Sherwood* v. *Walker*, *supra*, footnote 38.

[57] [1950] 2 K.B. 86.

[58] The plaintiff's proper remedy was probably a claim for damages but that claim was not made.

painting, it is fair to infer that their contract embraced the risk of a mistake in this respect. Since the purchaser had made a bad bargain, his mistake was "in one sense essential or fundamental",[59] but his miscalculation, without more, would not invalidate the sale. Of course, if the seller promised or warranted the originality of the painting, the seller would then assume the risk of such a mistake and the purchaser would have a remedy in damages.

Bearing in mind the principle of conscious ignorance, one may question the dictum of Hallett J. in *Nicholson and Venn* v. *Smith Marriott*.[60] The plaintiffs, who were London antique dealers, purchased Georgian table linen in the belief that it was Carolean linen worth seven times as much. Hallett J. held that they were entitled to damages for breach of warranty *ex post facto*.[61] But, as an alternative ground for his decision, the learned judge was prepared to hold that the contract was void for mistake because he found that Georgian linen was "essentially different" from a Carolean relic. The antique business, however, appears to be one in which people are particularly conscious of the uncertainties surrounding what is a "relic". It is therefore difficult to see why, in the absence of a promise, the purchaser of a relic does not take the risk of misjudgment as to its antiquity. Thinking in terms of "essential" and "substantial" differences led Hallett J. to adopt some curious reasoning:

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[59] *Supra*, footnote 57, at p. 89, *per* Denning L.J. In *Frederick E. Rose (London), Ltd.* v. *William H. Pim Jnr. & Co., Ltd.*, [1953] 2 Q.B. 450, the plaintiffs wished to purchase horsebeans known as feveroles and asked the defendants what feveroles were. After investigating, the defendants reported that feveroles were simply horsebeans. The plaintiffs then contracted to purchase horsebeans. In fact, feveroles were a particular variety of horsebeans and more valuable than those the defendants delivered. In the absence of an actionable representation or warranty that feveroles meant horsebeans, Denning L.J. said that the common mistake did not make the contract invalid. Although it may be said there was a mistake, it was not a contractual mistake for the only contractual assumption was that horsebeans would be delivered. The justice of the decision is apparent if one considers that in the absence of a representation or warranty that feveroles meant horsebeans, there is no reason to place the risk of error on the seller rather than upon the buyer. Similarly, see *Harrison & Jones, Ltd.* v. *Bunten & Lancaster, Ltd.*, [1953] 1 Q.B. 646. When a contract describes specific goods, the parties should rely upon the words of that contract and take the risk that clearly specified goods do not have the characteristics of goods believed to be similar or identical.

Denning L.J. used the term "fundamental" to describe an error that was important whether or not the parties had contractually assumed responsibility for that error. For example, he described the mistake in *McRae* v. *Commonwealth Disposals Commission* (*supra*, footnote 14) as a "fundamental mistake" as to the subject-matter that nonetheless did not render the contract void (at p. 460).

[60] (1947), 177 L.T.R. 189.

[61] The justice of the plaintiff's case undoubtedly coloured the entire opinion. If the contract was void, it seems illogical to award damages.

> I think that the absence of the crest and arms of Charles I . . . who at one time, after all, appeared in the English Prayer Book, if I am not mistaken, as a martyr, which none of the four Georgian kings did — did make the goods obtained different things in substance from those which the plaintiffs sought to buy and believed that they had bought.[62]

The learned judge's opinion indicates the difficulties inherent in the attempt to apply a rule distinguishing between "substantial" or "essential" and other differences. These words do not describe a systematic, scientific or metaphysical test; moreover, they convey an illusory sense of certainty. The test applied by the judge offered him little guidance.

In *Nicholson and Venn* v. *Smith Marriott*, it would have been helpful to inquire whether the parties were aware that some uncertainty remained concerning the antique character of the linen. Perhaps the evidence might then reveal that the sale of antiques is similar in principle to the sale of inventions and patent rights. A number of decisions uphold the sale of worthless, defeasible patent rights.[63] In these cases the courts appear to have considered that patents are incorporeal rights commonly known to be of doubtful validity.[64] Since the history of antiques is often mysterious, the purchaser of a relic—like one who buys a stone of uncertain character or an incorporeal right of doubtful validity—may exercise his own judgment, set the price accordingly, and expect to assume the risk of mistake.

The notion of conscious ignorance explains why the compromise of an honestly disputed claim will be sustained regardless of the validity of the claim. Indeed, the basic assumption of a compromise is that, whatever the parties believe, the disputed matters are uncertain. The parties intend to resolve a particular uncertainty; and, therefore, the scope of the contract clearly includes the risk of mistake as to the doubtful facts. A compromise will not be avoided merely because one party's assertions prove correct and the other's incorrect. An insurer's settlement of a claim under a policy covering "lost" articles has been upheld, although the article was later found. On the question of what constitute "lost goods", the court said that "uncertainty as to recovery of the

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[62] *Supra*, footnote 60, at p. 192.

[63] *Taylor* v. *Hare* (1805), 1 Bos. & Pul. 260 (recovery of money refused); *Lawes* v. *Purser* (1856), 6 E. & B. 930; *Smith* v. *Neale* (1857), 2 C.B. 67; *Hall* v. *Conder* (1857), 2 C.B. 22 (contract price recovered although patent invalid and worthless).

[64] See *Hall* v. *Conder*, *ibid.*, at pp. 41-42. As will be shown, awareness of uncertainty is not always conclusive. If it is shown that the contract assumed the validity of a patent, its voidness would be a ground for relief. Corbin, *op. cit.*, footnote 21, Vol. 3, § 600.

thing assured is . . . the main consideration . . ." in making such a settlement.[65] Where an assured person has disappeared for years, yet his death is doubtful, a settlement between the beneficiary and the insurer is valid, although in fact the assured is alive.[66] Although the present section is limited to common mistake of fact, it should be noted that, whatever rule may govern mistake of law, the compromise of an honestly asserted, but worthless, legal claim is also valid.[67]

However, a compromise, like other contracts, usually assumes that at least some facts certainly exist. The parties may consciously take risks concerning the disputed facts while assuming there is no risk as to other facts.[68] *Rheel* v. *Hicks*,[69] an American case, affords a clear illustration of this point. In that case, a compromise agreement between an alleged father and a county official for the support of an expected illegitimate child was held invalid since in fact there was no pregnancy. The court observed that:

> The fact as to who was the father of the child may have been waived by the compromise, but not the vital fact which gave it all its force . . . viz., the pregnancy of Louisa Hehr.[70]

Pregnancy was the basic assumption; non-pregnancy was definitely not an expected risk and such a risk was not taken by the parties. Even where the existence of some facts is admittedly compromised, relief should be granted wherever the contracting parties confidently count upon the existence of certain other facts and thereby make a mistake seriously affecting the contemplated performance.

On the same principle, the court in *Huddersfield Banking Co., Ltd.* v. *Henry Lister & Son, Ltd.*[71] set aside a consent order issued consequent upon a settlement based upon a common mistake:

> A bankrupt mortgagor went into liquidation. Representatives of the bank as mortgagee and of the official receiver inspected the mortgaged premises and concluded that thirty-three looms, appearing to be completely loose from the floor, had not been attached and, therefore, were not the mortgagee's fixtures. Assuming this to be true, the bank concurred in a consent order for the sale of the looms. In fact, the looms had been wrongfully loosened from the premises.

The court said it would set aside a consent order " . . . upon any

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[65] *Holmes* v. *Payne*, [1930] 2 K.B. 301, at p. 310 (settlement valid despite subsequent finding of the "lost" necklace in the assured's house).

[66] *Sears* v. *Grand Lodge A.O.U.W.* (1900), 163 N.Y. 374, 57 N.E. 618. See *Scott* v. *Coulson*, *supra*, footnote 49, at p. 252.

[67] *Cook* v. *Wright* (1861), 1 B. & S. 559. See text accompanying footnote 125, *infra*.

[68] See Restatement, Restitution (1937), § 11(1).

[69] (1862), 25 N.Y. 289. [70] *Ibid.*, at p. 292. [71] [1895] 2 Ch. 273.

grounds which invalidate the agreement it expresses . . .".[72] If there had been a "give-and-take" arrangement concerning the looms, the risk of mistake would have been contemplated and the result "totally different".[73] Again an erroneous basic assumption, namely, that the looms were never attached, excluded a particular risk from the expectations of the parties and rendered their agreement invalid.[74]

Recognizing the importance of the principle of *conscious* ignorance does not invariably lead to the conclusion that operative common mistake is restricted to cases involving *unconscious* ignorance. The relevance of conscious ignorance derives from what seems to be common experience. It appears likely that, when parties are aware of an uncertainty, they take the possibilities into account and adjust the compensation accordingly. The underlying idea is that where parties are aware of risks, these risks will normally come with their legitimate contractual expectations and therefore be risks of the bargain. Of course, the fact that uncertainties may be resolved by wholly unexpected events, such as the discovery of oil on farm land or the falling of a sputnik on the assured, does not affect the validity of a contract. Conscious ignorance provides a useful guide insofar as parties consciously assume risks, that is, insofar as they intend their agreement to resolve the known uncertainties. Nevertheless, it should always be open to prove a contrary intention: to show that, although aware of a particular risk, the parties consciously excluded it from their bargain. Even if the existence of some facts is known to be doubtful, if the contractors assumed these facts certainly existed, a mistake seriously affecting the contemplated performance should be ground for relief. To enforce such a contract would be to impose a risk for which neither party assumed responsibility. Or to put the matter another way, enforcement would entail compelling the parties to perform a different contract.

There is authority for the proposition that although the parties knew the existence of a set of facts was somewhat doubtful, if

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[72] *Ibid.*, at p. 280.

[73] *Ibid.*, at p. 282.

[74] *Norwich Union Fire Insurance Society, Ltd.* v. *Wm. H. Price, Ltd.*, [1934] A.C. 455, is usually considered to be a case that simply decided that money is recoverable when paid under a mistake of fact. However, in exchange for payment of the insurance, a settlement was made transferring and relinquishing all claims to the damaged goods and the proceeds of their sale. The mistaken belief that the lemons were injured by collision rendered this settlement void. Lord Wright observed that: ". . . on general principles mutual mistake will have the same effect in regard to the offer and acceptance of abandonment as in regard to any other contract." *Ibid.*, at p. 467.

they nevertheless contracted assuming the facts existed, the non-existence of these facts will impeach the validity of the contract. It is instructive to compare the cases on impossibility of performance, for the foreseeability of a risk does not invariably prevent frustration.[75] The normal presumption may be rebutted by showing that the risk was consciously excluded from the contract. Similarly, in a number of cases granting relief for common mistake, one may feel that the parties must have been aware of the uncertainty resulting in a mistake. In *Cochrane* v. *Willis*,[76] the consideration for a promise was the promisee's right to exercise a life tenant's privilege of cutting timber. Both parties knew the existence of the life tenant was not definitely established, for he was away in India. In fact, he died a month before but the news had not yet arrived. One Lord Justice concluded that:

> The mere circumstance that Joseph Willis was absent, far away, and that it could not be certainly known whether he was alive or dead, and therefore that a degree of uncertainty was unavoidable does not appear to me important. The "Plaintiff entered into the agreement on the supposition that the life was continued.[77]

The court found that the basic contractual assumption was that the life tenant was alive. Consequently the contract was invalid.

The same problem arose in *Hitchcock* v. *Giddings*.[78] The plaintiff bought a remainder in fee expectant upon an estate tail. Both he and his vendor knew at the time of the sale that the devisee in tail might have suffered a common recovery and barred the remainder. Before purchasing, the plaintiff directed a search and finally assured himself that no recovery had been suffered. But in fact the remainder was barred. The court found that:

> Both parties, at the time of the contract, treated on the supposition that a recovery had not then been suffered. The whole of the evidence shews that that was the object in contemplation of the purchaser.[79]

The contract was set aside and restitution granted. Cases such as this and *Cochrane* v. *Willis* remind us that whatever degree of conscious doubt was present, the contract, its basic assumptions and scope must be decisive.

The value of the principle of conscious ignorance lies in the accuracy with which it reflects the normal expectations of businessmen. It provides a guide, or a presumption, for determining the

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[75] *W. J. Tatem, Ltd.* v. *Gamboa*, [1939] 1 K.B. 132; *Société Franco Tunisienne D'Armement* v. *Sidermar S.P.A.*, [1960] 3 W.L.R. 701.

[76] *Supra*, footnote 31.

[77] *Ibid.*, at pp. 62-63, *per* Knight Bruce L.J.

[78] *Supra*, footnote 31.

[79] *Ibid.*, at pp. 140-141.

expectations reasonably attributable to the parties. Furthermore, the security of transactions should be adequately protected by construing a contract with the presumption that parties, who were conscious of their ignorance, took the possibilities and risks into account and intended to abide by the resolution of the uncertainty.

D. *Mistake as to the existence of a factor necessary for performance*

In analysing the possible kinds of operative common mistake, the most striking instances, those involving the non-existence of specific goods or incorporeal rights, appear to fit into one category. This has been labelled "mistake as to the existence of the subject-matter". However, the present writer feels there has been a tendency to gloss over the construction required to ascertain what is the contractual "subject-matter", and, in addition, to be preoccupied with cases involving non-existent goods. Further analysis shows that the subject-matter category is not wide enough to include all the relevant decisions. As will be seen, there are cases granting relief in which the error is more accurately described as a mistake as to the means of performance. It is illogical to consider this kind of mistake as belonging to a second category distinguishable from the first. The same reasoning which justifies discharging an obligation for the non-existence of tangible goods also justifies relief where other means of performance similarly necessary to the contemplated performance were non-existent. Finally, it will be observed that some cases of operative mistake do not fit neatly into either of these two categories.

For these reasons, it is better to avoid the hazards of narrow classification and to describe the requisite kind of mistake in some more general terms, such as a mistake as to the existence of a factor necessary for the performance contemplated. Ultimately, whatever kind of common mistake is present, the courts have to decide whether one of the parties assumed responsibility for the particular risk and, if neither party did, whether there has been a significant change in the expected obligation.

In impossibility of performance, as in mistake, the most obvious occurrence bringing the doctrine into operation is the physical destruction of a clearly described subject-matter. To illustrate this, *Taylor* v. *Caldwell*[80] may be converted into a mistake case by changing the time sequence so that, unknown to the parties, the music hall burned while they negotiated the terms of its hire. But the point that needs emphasis is that the principles of impos-

[80] *Supra*, footnote 3.

sibility and mistake have never been held to be limited to contracts *de certo corpore*, based upon the existence or continued existence of a specific thing. With impossibility, because of the number and nature of the cases that arise, it has always been easier to recognize that it is a broad doctrine dealing with uncalculated risks which radically affect contractual expectations. Cases involving serious illnesses[81] and unforeseen delays[82] serve as reminders that, even though literal performance remains possible, the intended purpose may be frustrated. The same is fundamentally true of mistake. Both impossibility and mistake are not so much concerned with the kind of event or error as with whether a state of facts exists for which neither party is responsible and which seriously alters the contemplated obligation or frustrates the purpose of the venture. Perhaps the point is best illustrated by comparing two "coronation cases", *Krell* v. *Henry*[83] and *Griffith* v. *Brymer*.[84]

First, let us consider *Krell* v. *Henry:*

> About a week before the scheduled coronation of Edward VII, the defendant agreed to hire from the plaintiff a flat along the procession route for the procession days, June 26th and 27th. Before the rent became payable, the King's illness caused the coronation to be postponed.

The Court of Appeal held that the contract was discharged at the time of postponement and that, therefore, the plaintiff could not recover the agreed rent. Vaughan Williams L.J. expressly rejected the plaintiff's argument that the principle of *Taylor* v. *Caldwell* was limited to the destruction of a specific subject-matter:

> I do not think that the principle of . . . English law is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject-matter of the contract or of some condition or state of things expressly specified as a condition of it.[85]

The general words of the hiring were wide enough to include the risk that the procession might be cancelled, yet it "cannot reasonably be supposed"[86] that the possibility of cancellation was within the expectations of the parties. Literal performance, letting the rooms and paying the rent, remained possible but the contemplated performance was "impossible". The parties had confidently count-

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[81] *E.g.*, *Robinson* v. *Davidson* (1871), L.R. 6 Ex. 269; *Poussard* v. *Spiers and Pond* (1876), L.R. 1 Q.B.D. 410.

[82] *E.g.*, *Jackson* v. *Union Marine Insurance Co., Ltd.* (1874), L.R. 10 C.P. 125.

[83] [1903] 2 K.B. 740. [84] (1903), 19 T.L.R. 434.

[85] *Krell* v. *Henry*, *supra*, footnote 83, at p. 749.

[86] *Ibid.*, at p. 750.

ed upon the future existence of a set of facts and when their assumption proved wrong, the purpose of their agreement was frustrated.

Now let us compare *Griffith* v. *Brymer*, a mistake case:

> The plaintiff agreed to hire a room from the defendant for the purpose of viewing the coronation procession of Edward VII on June 26th. The agreement was made at 11:00 a.m. on June 24th and the plaintiff paid £100 rent in advance. Unknown to the parties, the decision to operate on the King, which rendered the procession impossible, was made that morning at 10:00 a.m., an hour before the parties contracted. The plaintiff sought to recover his money.

Wright J. held that the plaintiff was entitled to recover the money that he had paid on the ground that "the principle of such cases as *Couturier* v. *Hastie* applied . . .".[87] Thus, the learned judge implicitly recognized that the doctrine of mistake, like impossibility, extends beyond the destruction of a specific subject-matter. Properly speaking, one cannot say that the error in *Griffith* v. *Brymer* was as to the subject-matter or the means of performance. Here, as in *Krell* v. *Henry*, literal performance remained possible, yet the contemplated performance was "impossible". The court concluded:

> This was a missupposition of the state of facts which went to the whole root of the matter. The contract was therefore void, and the plaintiff was entitled to recover his £100.[88]

It should be observed that in these coronation cases neither party could reasonably be found to have assumed responsibility for the risk of cancellation. In *Griffith* v. *Brymer* and *Krell* v. *Henry*, the parties confidently, but erroneously, counted upon the present and future existence of a factor necessary and vital to the contemplated performance.

To clarify the doctrine of common mistake, it is essential to recognize that its theoretical basis is the same as that of impossibility of performance. But acknowledging this must not obscure important differences in the *application* of the two doctrines. First, the type and number of risks which contractors may be reasonably supposed to assume with respect to existing circumstances are not the same as the risks assumed with respect to future events. Normally the parties will know of any uncertainties surrounding the existence of factors necessary to performance. The principle of conscious ignorance indicates why the scope for the application

[87] *Griffith* v. *Brymer*, *supra*, footnote 84, at p. 434.

[88] *Ibid.* The court expressly followed *Clark* v. *Lindsay* (1903), 19 T.L.R. 202, a closely analogous case decided several months earlier.

of the doctrine of common mistake is narrower than the scope of frustration. The future may bring many unforeseeable, unpredictable events which frustrate the purpose of an agreement; but the present may be empirically examined and its hidden risks more accurately assessed. Where men may reasonably be presumed to be aware of an uncertainty, the possibility of mistake is generally included within the expectations attributable to the parties.

Secondly, precisely because men are usually cognizant of existing conditions required for performance, common mistakes occur less frequently than do frustration problems. As it has been pointed out, by changing the time sequence, *Taylor* v. *Caldwell* may be hypothetically transformed into a mistake case; but such a mistake is less likely to arise, since only in the most unusual circumstances could the music hall have been previously burned without the knowledge of the parties. These two closely related reasons—the greater risks assumed with respect to existing conditions and the infrequency of serious common mistakes—explain why the application of the principle of mistake is narrower than impossibility and why the former doctrine has been less developed. Both doctrines operate to relieve parties from the consequences of uncalculated risks which radically alter their contractual expectations, or in effect change the obligation.[89] However different the applications may be, however different the construction of a contract with regard to present as opposed to future risks, neither doctrine has ever been held limited to contracts *de certo corpore.*

The principle and scope of operative common mistake may be

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[89] In *Bell* v. *Lever Brothers, Ltd., supra,* footnote 12, Lord Atkin (at pp. 226-227) emphasized a relationship between mistake and impossibility, whereas Lord Thankerton (at pp. 232, 237) said the doctrines were somewhat different. It is submitted that, on the above analysis, the views of the two Lords are reconcilable.

Atiyah, An Introduction to the Law of Contract (1961), pp. 127-149, has recently pointed out that the same analysis should be applied to common mistake and impossibility. J. F. Wilson, *op. cit.*, footnote 14, pp. 267-300 also emphasizes the fundamental similarity between the two doctrines, although he relates them largely on the implied term theory. Williston, *op. cit.*, footnote 25, Vol. 6, § 1937, stresses that mistake and impossibility "are substantially identical in principle, and often the same situation will involve both".

Compare Cheshire and Fifoot's chapter on "The Doctrine of Frustration" with their section on "Common Mistake" which the authors apparently consider an unrelated topic. Cheshire and Fifoot, *op. cit.*, footnote 5, pp. 176-189, 462-486.

It should be noted that, in recent cases, the House of Lords ruled that the doctrine of impossibility of performance discharges a contract only if subsequent events change the contemplated obligation or make performance radically different from that which was expected. *Davis Contractors, Ltd.* v. *Fareham U.D.C.*, [1956] A.C. 696; *Tsakiroglou & Co., Ltd.* v. *Noblee Thorl*, [1961] 2 W.L.R. 633.

further illustrated by cases, which like *Griffith* v. *Brymer*, have been either ignored or overlooked. In several instances, contracts have been set aside because one whose credit was the basis of the contract had in fact become legally insolvent. In *Emmerson's* case,[90] a man by that name purchased shares in a bank whose assets were already in the hands of a liquidator. Neither Emmerson nor the vendors knew that a winding-up petition had been filed. The court held the contract was invalid and refused to declare Emmerson a shareholder in the defunct bank. Similarly, rescission of a loan was granted where, unknown to the parties, the borrower was in fact, at the time, one day in the hands of a trustee in bankruptcy.[91] Pointing out the injustice of allowing the general creditors to benefit from this mistake, the court ordered the debtor's trustee to return the borrowed funds.

These insolvency cases certainly do not suggest that a mistake concerning one's financial position will be sufficient. The crucial fact was that the bank and the borrower were no longer legally capable of managing their assets. In the borrower's case, Atkin L.J. perceptively noted that:

> The important fact here is that the whole of the recipient's assets had been taken from his control by operation of law. The mere uncertainty that arises while a man is left with full disposing power of his available assets such as they are presents a different problem.[92]

Although a person does not take the risk that legal insolvency already exists, he may be assumed to take the risk that his borrower or investment may prove unsound. In the well-known case of *Kennedy* v. *Panama, New Zealand, and Australian Royal Mail Co.*:[93]

> The defendant mail company issued a prospectus announcing that shares would be sold in order to finance the performance of a mail carriage contract "recently entered into with the General Government of New Zealand". Relying upon this statement, the plaintiff agreed to purchase 1,600 shares. Although the defendant genuinely believed that the New Zealand Government had made such a contract, in fact it was concluded with an unauthorized agent and the Government refused to ratify. When this was revealed, the market value of the shares fell sharply, and the plaintiff sought to recover his money as paid under a mistake.

The court held that, despite the effect upon the value of the shares, the mistake did not avoid the contract. The purchaser had merely made a bad bargain: a business investor takes the risk that the company may have lost profitable contracts. The distinction be-

[90] (1866), L.R. 1 Ch. App. 433.
[91] *Re Thellusson* (1919), 122 L.T.R. 35.
[92] *Ibid.*, at pp. 43-44.
[93] *Supra*, footnote 2.

tween this proposition and the rule in *Emmerson's* case should be apparent. Where a bargain is based upon the credit of a particular entity, whether it is a person or a corporation, it is usually assumed that the entity is a going concern, managing its own resources. The risk of an existing legal insolvency is not a contemplated one, and an error in this respect substantially frustrates the purpose of the transaction.

In another relevant group of cases, a lessee has asserted the invalidity of a mining lease on the ground that it was executed under a common mistake as to the extent or existence of minerals. The question which arises is whether, given the terms and circumstances of the contract, the lessee should assume responsibility for the risk that the specified minerals prove substantially non-existent. *Clifford* v. *Watts*[94] is a particularly instructive case:

> Lord Clifford sued to recover damages for breach of a mining lease in which the lessee, Watts, promised to take out not less than 1,000 nor more than 2,000 tons of pipe or potter's clay *per* year and to pay a royalty of 2s.6d. *per* ton. The breach alleged was failure to remove the minimum tonnage. The lessee's plea was that the contract was impossible to perform since,unknown to the parties, there never had been 1,000 tons of pipe or potter's clay in the land.

As in other mineral lease cases, the provision for the payment of rent or royalties was the most important consideration affecting the construction of the lease. Normally, if a lessee agrees to a fixed minimum payment, whether it is described as a rent or royalty, the courts infer that he assumed the risk of a mistake as to the existence of mineral.[95] But, since Watts did not promise to pay a minimum rent, the court concluded that the provision for removing between 1,000 and 2,000 tons of clay was a subsidiary term to control the annual rate of work and that the lease was:

> ... based on the assumption that there was clay there. It was impossible to perform it unless there was; and the covenantor did not undertake to perform an impossibility, but merely to dig and remove such clay as should be found in the land, to the extent stipulated for.[96]

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[94] (1870), L.R. 5 C.P. 577.

[95] In *Jeffreys* v. *Fairs* (1876), L.R. 4 Ch. D. 448, the lease provided for a minimum annual rent of £100. Specific performance was granted regardless of the existence of minerals. Bacon V.C. construed the agreement as "a licence to enter and search for the vein of coal, and make what use they could of it", at p. 452; *Haywood* v. *Cope* (1858), 25 Beav. 140. Corbin, *op. cit.*, footnote 21, Vol. 3, § 600, adds that the fact that a lessee agrees to a minimum royalty is not conclusive that he intends to assume the risk of non-existence.

A mining lease may expressly provide for a minimum payment whether the minerals "shall be got or not". *Marquis of Bute* v. *Thompson* (1844), 13 M. & W. 487; *Mellers* v. *Duke of Devonshire* (1852), 16 Beav. 252.

[96] *Clifford* v. *Watts*, *supra*, footnote 94, at p. 588, *per* Montague Smith J.

The court therefore held that the non-existence of clay at the time of entering into the contract excused the defendant from performance.[97] The construction adopted by the court accords with the modern tendency to avoid imposing the risk of mistake on the lessee whenever the surrounding circumstances indicate the parties simply assumed the minerals existed as a matter of course.[98]

An analysis of the reasoning in *Clifford* v. *Watts* reveals a significant aspect of the development of the law of common mistake. Decided in 1870, the case marks an early stage in the pragmatic emergence of the doctrines of impossibility and mistake as exceptions to the general rule that a promisor takes the risk of nonperformance. Properly classified the decision belongs under the heading of common mistake, for it holds that the non-existence of a specific thing (clay) necessary for the contemplated performance renders a contract invalid. But the arguments of counsel and the opinions of the judges clearly show that the case was decided by analogy to the principle set forth seven years before in *Taylor* v. *Caldwell*. The judgments do not use the word mistake. Moreover, subsequent text and case books, which attempt to classify *Clifford* v. *Watts*, treat it as an impossibility as well as a mistake case.[99] In 1870, the court instinctively realized that *Taylor* v. *Caldwell* contained a principle supporting the discharge of a contract when its enforcement, instead of protecting reasonable expectations, would impose an uncalculated risk upon the parties and create an obligation quite different from what they anticipated. The subsequent history of the law of common mistake illustrates a cautious and spasmodic development typical of the common-law tradition. For example, when confronted with *Griffiths* v. *Brymer* in 1903, the court, without relying upon *Clifford's* case or relevant impossibility cases, looked further back to *Couturier* v. *Hastie* for authority for relieving parties from an agreement based on a common mistake.[100] However, more recently, in *McRae* v. *Commonwealth Disposals Commission*,[101] the Australian High Court relied upon *Clifford* v. *Watts* in order to support the general proposition that in frustration and mistake the fundamental problem is the construction of promises. Both the reasoning in *Clifford* v. *Watts* and the subsequent treatment of the case reflect the unsystematic manner in which impossibility and mistake emerged during the nineteenth

[97] See Restatement, Contracts (1932), § 460, Illustrations 2, 3.
[98] Williston, *op. cit.*, footnote 25, Vol. 5, § 1567.
[99] See Patterson, *op. cit.*, footnote 9, at p. 355, n. 89.
[100] In *Clark* v. *Lindsay*, *supra*, footnote 88, on facts similar to those in *Griffiths* v. *Brymer*, the court relied chiefly upon *Taylor* v. *Caldwell*.
[101] *Supra*, footnote 14, at p. 408.

century. Since frustration cases arise more frequently, that doctrine was developed more rapidly than common mistake.

When *Clifford* v. *Watts* is compared with *Sheikh Brothers, Ltd.* v. *Ochsner*,[102] the variation in factual circumstances, combined with an obvious fundamental similarity, will further demonstrate the nature and operation of the doctrine of common mistake. The latter case arose in Kenya and was taken on appeal to the Judicial Committee of the Privy Council:

> The appellant company, a lessee of certain lands in Kenya, agreed to grant the respondent a licence to cut, process and manufacture sisal grown on a particular section of leased property. The respondent deposited a sum of money and contracted to "manufacture and deliver sisal fibre in average minimum quantities of fifty tons *per* month". The licensing agreement provided for a term of five years but after nine months in operation, it appeared that the property was in fact incapable of producing enough sisal to supply the required average of fifty tons of fibre *per* month. The area's leaf potential was insufficient.

The decision turned upon the construction and application of section 20 of the Indian Contracts Act, 1872, which provides:

> Where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.[103]

Both the appellant's counsel and the Judicial Committee assumed that this section restated the English law of mistake.[104] Arguing from English authorities, the appellant unsuccessfully contended that operative common mistake was restricted to a mistake as to the "identity or existence of the subject-matter".[105] Holding the licensing agreement void, Lord Cohen said:

> . . . their Lordships think that it was the very basis of the contract that the sisal area should be capable of producing an average of 50 tons a month throughout the term of the licence. It follows that the mistake was as to a matter of fact essential to the agreement.[106]

This case is fundamentally similar to *Clifford* v. *Watts*, but it should be observed that in the latter case the mistaken assumption

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[102] [1957] A.C. 136.

[103] Consider the similar wording of the Restatement, Contracts (1932), § 461.

[104] It has been noted that, while *Sheikh Brothers, Ltd.* v. *Ochsner*, *supra*, footnote 102, "concerned the provisions of the Indian Contract Act, 1872 . . . the principles involved are all derived from the common law, and it is judged that a similar result would be arrived at here on the same facts. It will be recalled that the Indian Contract Act is the work of a man who was one of the greatest authorities on the English law of contract: Sir Frederick Pollock." (1957), 101 Sol. J. 565, at p. 565. See Anson, Law of Contract, *op. cit.*, footnote 23, p. 253. Compare the footnote on this case in Cheshire and Fifoot, *op. cit.*, footnote 5, p. 182, n. 4.

[105] *Sheikh Brothers, Ltd.* v. *Ochsner*, *ibid.*, at p. 143.

[106] *Ibid.*, at p. 147.

that the land contained clay may be said to have destroyed the subject-matter of the contract, whereas this is not true of the Kenya case. The error there, though equally vital, simply affected a factor necessary to performance, namely, the existence of a certain degree of productivity, without which the licensee could not manufacture the required amount of fibre.

There is also a relationship in principle between *Sheikh Brothers, Ltd.* v. *Ochsner* and cases involving subsequent frustration caused by an unexpected crop failure. In *Howell* v. *Coupland:*[107]

> The plaintiff sought to recover damages for the defendant's failure to deliver 200 tons of potatoes to have been grown on the defendant's land in Whalpole. The evidence revealed that in an average year the land would produce a quantity of potatoes much larger than 200 tons. Without any fault on the defendant's part, disease ruined the crop and made it impossible to deliver more than one half the required amount. The defendant pleaded that he was excused from performance.

The court held the contract was frustrated. Of course, in *Howell* v. *Coupland,* as in *Taylor* v. *Caldwell,* the frustrating event actually destroyed the subject-matter whereas in *Sheikh Brothers, Ltd.* v. *Ochsner* the sisal failure resulted from an initial error as to the productive capacity of a certain sisal area. But the same principle applies whether a specific factor is supposed to exist at the time of contracting or normal conditions are expected to continue. This, again, is not to say that the application of mistake and impossibility, or the construction of contracts to allocate existing as opposed to future risks, is the same; but the basic principle underlying both doctrines is the same, for they deal with uncalculated risks which seriously alter or disappoint contractual expectations.

The problem of construction in cases such as those above is to determine whether, in the contemplation of the parties, specific factors or conditions were regarded as necessary to the expected performance so that neither contractor can reasonably be held to have assumed the risk of mistake or frustration.

III. *Common Mistake of Law.*

A. *The general rule and its exceptions*

In this confusing and exasperating area of the law of mistake, the initial difficulty is to define what is meant by a mistake of law. No clear definition can be found in the cases,[108] many of which are irreconcilable and represent attempts to do justice by avoiding the

[107] (1876), 1 Q.B.D. 258.
[108] See Winfield, Mistake of Law (1943), 59 L.Q. Rev. 327.

often-enunciated rule that a mistake of law affords no ground for relief. Given the state of the law in this area, seeking a definition in the cases may easily lead into darkness and despair.[109] The best available definition describes a mistake of law as an "erroneous conclusion as to the legal effect of known facts".[110] This limits "mistake of law" to cases in which the parties knew all the specific operative facts but drew an erroneous conclusion as to their legal significance. It is submitted that in most instances such a definition can be applied with reasonable clarity and consistency. However, since the cases do not advance sound reasons for distinguishing a mistake of law from a mistake of fact, one may legitimately feel uneasy in making any distinction, however clear or well defined it may be.

In contract and quasi-contract cases, it is often declared that there is no relief for a mistake of law.[111] This rule places the risk of such a mistake on the promisor. Before the nineteenth century, the courts generally did not distinguish between mistakes of law and mistakes of fact; and, indeed, there are early authorities both in law[112] and in equity[113] for the allowance of relief in cases involving a mistake of law.[114] However, in 1802, in *Bilbie* v. *Lumley*,[115] Lord Ellenborough held that a mistake of law was not a ground for recovery. The combination of a poor argument by the plaintiff's counsel[116] and the misapplication of a criminal law maxim[117] led

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[109] The distinction between a mistake of law and a mistake of fact has never been clearly defined by the courts. *Clifton* v. *Cockburn* (1834), 3 My. & K. 76, at p. 99; *Daniell* v. *Sinclair* (1881), 6 App. Cas. 181, at p. 190.

[110] 12 Am. Jur., *op. cit.*, footnote 22, § 140. See Corbin, *op. cit.*, footnote 21, Vol. 3, § 616; Williston, *op. cit.*, footnote 25, Vol. 5, § 1581; Restatement, Restitution (1937), § 7.

[111] *Bilbie* v. *Lumley* (1802), 2 East 469; *Brisbane* v. *Dacres* (1813), 5 Taunt. 143; *Midland Great Western Railway of Ireland* v. *Johnson* (1858), 6 H.L.C. 798, at p. 811; *Henderson* v. *Folkestone Waterworks Co.* (1885), 1 T.L.R. 329; *Sharp Bros. & Knight* v. *Chant*, [1917] 1 K.B. 771; *Hatch* v. *Hatch*, [1919] 1 Ch. 351; *Holt* v. *Markham*, [1923] 1 K.B. 504; *Ord* v. *Ord*, [1923] 2 K.B. 432; *National Pari-Mutuel Association* v. *The King* (1930), 47 T.L.R. 110; *British Homophone* v. *Kunz and Crystallate Gramophone Record Mfg. Co., Ltd.* (1935), 152 L.T.R. 589; *Sawyer and Vincent* v. *Window Brace, Ltd.*, [1943] 1 K.B. 32.

[112] *Hewer* v. *Bartholomew* (1598), Cro. Eliz. 614; *Farmer* v. *Arundel* (1772), 2 Bl. W. 824; *Bize* v. *Dickason* (1786), 1 T.R. 285.

[113] *Turner* v. *Turner* (1680), 2 Ch. R. 154; *Lansdown* v. *Lansdown* (1730), Mosely 364, 2 Jac. & W. 205; *Bingham* v. *Bingham* (1748), 1 Ves. Sen. 126, Ves. Sen. Supp. 79.

[114] See Restatement, Restitution (1937), Topic 3, Introductory Note; Corbin, *op. cit.*, footnote 21, Vol. 3, § 616; Williston, *op. cit.*, footnote 25, Vol. 5, § 1581.

[115] *Supra*, footnote 111.

[116] When questioned by Lord Ellenborough, counsel failed to mention any cases, such as those cited in footnotes 112 and 113, *supra*, in which relief was allowed for a mistake of law. *Ibid.*, at p. 470.

[117] In observing that "every man must be taken to be cognizant of the

Lord Ellenborough to say that a different rule governed mistakes of law. His statement subsequently gained acceptance both in law and in equity.[118]

The cases approving the rule announced in *Bilbie* v. *Lumley* have never adequately stated the reasons for following that rule. The question therefore arises: why have the courts continued to declare that there is no relief for a mistake of law? Why have not mistakes of law and of fact been treated alike? When reference is made to a so-called general rule denying relief for a mistake of law, two points must be remembered. First, many cases summarily dismissed as involving a mistake of law were rightly decided but on other grounds. The mistake of law formula has frequently been used where the failure of the claim is due to a more fundamental difficulty which would likewise have prevented relief for a similar mistake of fact.[119] Secondly, as will be seen below, the recognized "exceptions", particularly the equitable "exceptions", are so numerous and extensive that little remains of the "general rule". Nonetheless, the survival of the rule despite these severe limitations suggests that there may be some unexpressed policy considerations in its favour.

It is submitted that one reason, which *to some extent* justifies the mistake of law rule, is that it denies relief where the contracting parties were more or less aware of their uncertainty about the law.[120] If the parties were conscious of uncertainty concerning the construction of a contract or a statute, then the risk of a mistake of law normally becomes a risk of their bargain and rests upon the promisor. As in the mistake of fact cases, the principle governing

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law", Lord Ellenborough was undoubtedly influenced by the maxim *ignorantia juris non excusat. Ibid.*, at p. 472. However, as early as 1730, in *Lansdown* v. *Lansdown*, *supra*, footnote 113, the Lord Chancellor had reportedly declared: "That maxim of law, *Ignorantia juris non excusat*, was in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases." (1730), Mosely 364. See the criticism of the maxim in Corbin, *op. cit.*, footnote 21, Vol. 3, § 616. But *cf.* Champness, Mistake in the Law of Contract (1933), p. 8.

[118] In 1813, in *Brisbane* v. *Dacres*, *supra*, footnote 111, earlier precedents were debated and distinguished by the majority of the court. See also the subsequent cases cited in footnote 111, *supra*.

[119] For example, the conduct of the party mistakenly conferring the benefit may estop him. *Skyring* v. *Greenwood and Cox* (1825), 4 B. & C. 281; *Holt* v. *Markham*, *supra*, footnote 111, at p. 514. The party seeking relief may have negligently acquiesced and delayed. *Stone* v. *Godfrey* (1854), 5 De G.M. & G. 76; *Rogers* v. *Ingham* (1876), 3 Ch. D. 351. The evidence of a mistake may be unconvincing. *Stone* v. *Godfrey*, *supra*. See footnotes 125-128, *infra* and accompanying text. See also: Restatement, Restitution (1937), Topic 3, Introductory Note; Corbin, *op. cit.*, footnote 21, Vol. 3, § 617; Williston, *op. cit.*, footnote 25, Vol. 5, § 1548.

[120] See Sharp, *op. cit.*, footnote 7, at p. 266; Mistake of Law: A Suggested Rationale (1931), 45 Harv. L. Rev. 336.

the allocation of risks is conscious ignorance. It has been argued[121] that the difficulties of finding reliable evidence of a mistake of law and the known uncertainties surrounding law are sound policy considerations giving the arbitrary mistake of law rule some merit:

> Too often what is said to be a mistake of law is really a mistake of judgment as to the expediency of risking the outcome of a law suit. Payment made with this chance element in mind is in the nature of a compromise or voluntary payment, and established considerations of policy prevent relief.[122]

In some cases the presence of conscious doubt about a legal issue justifies the conclusion that the risk of a mistake of law is a risk within the reasonable expectations of the parties. The disposition to make exceptions where the parties have confidently counted upon specific rights or the legal effect of their language tends to support the generalization that the mistake of law rule has been largely restricted to cases involving conscious ignorance of the law.[123]

Although it is suggested that a sound reason may often underlie a seemingly arbitrary application of the mistake of law rule, it is not contended that a single reason or criterion can reconcile all the cases in this area. It would be best to abolish the mistake of law rule, place mistakes of law and of fact on an equal footing, and recognize that with mistakes of law the principle of conscious ignorance or conscious assumption of risk will often prevent relief. The next best course — perhaps the one the courts are taking — would be to expand the exceptions and thereby deny relief for a mistake of law only where the risk legitimately belonged to the bargain.[124]

Cook v. *Wright*[125] furnishes a clear illustration of the conscious assumption of the risk of a misjudgment of law:

> The plaintiff asserted that a local Act made the defendant chargeable for certain street improvements. The defendant, who was the agent for the owner of the property, denied that the Act imposed personal liability on him. However, when threatened with the possibility of an action, the defendant entered into a compromise settlement and gave his personal notes in payment. Although the court held the Act did

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[121] Mistake of Law: A Suggested Rationale, *op. cit.*, *ibid.*

[122] *Ibid.*, at p. 340.

[123] Sharp, *op. cit.*, footnote 7, at p. 266. See the discussion of the exceptions, *infra.*

[124] In view of the existing case law, this is probably the only judicial method of improvement. Some American states have civil statutes abolishing the mistake of law-fact distinction. See Williston, *op. cit.*, footnote 25, Vol. 5, § 1582; (1958), 4 N.Y.L.F. 431.

[125] *Supra*, footnote 67.

> not make the defendant liable, his notes given in settlement were enforceable.

In truth, the plaintiff made the only mistake of law, for the assertions of the defendant were correct. Since this was particularly apparent, the main question was the existence of consideration for the settlement. The court ruled that the compromise of an honestly disputed question of law was good consideration for a promise.

The principle of conscious assumption of risk found in *Cook* v. *Wright* may have influenced other decisions. In a number of cases ostensibly applying the general mistake of law rule, the parties must have been aware of doubt surrounding the legal issue. For example, in *British Homophone* v. *Kunz and Crystallate Gramophone Record Mfg. Co. Ltd.*,[126] the defendant Kunz had entered into a new employment contract in the belief that an option clause in a previous employment contract was legally binding. The option clause was in fact void for uncertainty. The court said that such a mistake of law did not render the new employment contract invalid. However, at the time of making the new agreement, Kunz knew that at least one counsel had said the option clause was void for uncertainty. Similarly, in *Henderson* v. *Folkestone Waterworks Co.*,[127] the plaintiff, a home owner, had initially disputed the water company's legal right to charge a certain water rate. Nevertheless, he acquiesced and paid the rate requested. In truth, the company had no right to charge such a rate. When the plaintiff sued to recover his overpayments, the court refused recovery by simply declaring that there was no relief for a mistake of law.[128]

The injustice that would result from the broad application of the "general" rule refusing relief for a mistake of law has caused many limitations to be grafted upon the rule. Indeed, courts of equity have shown a strong tendency to avoid a general recognition of a distinction between mistakes of fact and mistakes of law. The equitable aversion to a broad distinction was well stated in *Allcard* v. *Walker:*[129]

> It was laid down by Turner L.J. in *Stone* v. *Godfrey*[130] that [a court of equity] has power to relieve against mistakes of law as well as against mistakes in fact, and this statement was recognized in the judgments

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[126] *Supra*, footnote 111. [127] *Ibid.*

[128] See *Sawyer and Vincent* v. *Window Brace, Ltd.*, *ibid.* (recovery of payment made under threat of legal proceedings was denied as asking relief for a mistake of law); *Stone* v. *Godfrey*, *supra*, footnote 119; *Rogers* v. *Ingham*, *supra*, footnote 119. *Cf.* Bigelow, Mistake of Law Again (1886), 2 L.Q. Rev. 78, at p. 81.

[129] [1896] 2 Ch. D. 369. [130] *Supra*, footnote 119.

> of the members of the Court of Appeal in *Rogers* v. *Ingham*,[131] and particularly by Mellish L.J., who refers to it and explains it thus: "That is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it." [132]

In view of this statement and of the existing authority, when equitable relief is sought, a court might reasonably declare that it will not simply make specific exceptions to the mistake of law rule but will frankly treat mistakes of law and fact on the same basis.

Four exceptions to the supposed rule deserve particular attention.[133]

1. A mistake of foreign law is treated as a mistake of fact.[134]
2. Money paid to a court officer under a mistake of law must be repaid. This rule applied to receivers, trustees in bankruptcy[135] and perhaps solicitors.[136]
3. Rectification may be granted where the parties were under a common mistake as to the interpretation or legal effect of the words used.[137]
4. Relief is granted for a mistake of law where the mistake is deemed to be as to "private rights" as distinguished from a mistake as to general law.[138]

When the general effect of these exceptions is analysed, it is submitted that they tend to restrict the denial of relief for mistakes of law to cases in which the parties were more or less aware of

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[131] *Ibid.*

[132] *Supra*, footnote 129, at p. 381, *per* Stirling J.

[133] The list is not intended to be exhaustive. A survey of both American and English decisions found "ten well-defined exceptions". It concluded that legislative action was needed to remove the confusion and put mistakes of fact and law on an equal footing. (1919), 32 Harv. L. Rev. 283, at pp. 284-285. The Restatement, Restitution (1937), § 45, accepts the general rule but sections 46-55 state exceptions.

[134] *Leslie* v. *Baillie* (1843), 2 Y. & C.C.C. 91.

[135] *Ex parte James* (1874), L.R. 9 Ch. App. 609; *ex parte Simmonds* (1885), 16 Q.B.D. 308. A dictum in *Sebel Products, Ltd.* v. *Commissioners of Customs and Excise*, [1949] 1 Ch. 409, 413, suggests that the principle applicable to court officers might be extended to government departments. See Hanbury, Modern Equity (7th ed., 1957), pp. 595-596.

[136] Anson, *op. cit.*, footnote 23, p. 549.

[137] *Wake* v. *Harrop* (1862), 1 H. & C. 202; *Burroughes* v. *Abbott*, [1922] 1 Ch. 86 (rectification granted where parties used the ineffectual phrase "free of tax" in the mistaken belief that it assured the wife a certain minimum net annual sum regardless of taxes); *Jervis* v. *Howle and Talke Colliery Co., Ltd.*, [1937] 1 Ch. 67; *Whiteside* v. *Whiteside*, [1950] 1 Ch. 65, at pp. 72-74; *Wilding* v. *Sanderson*, [1897] 2 Ch. 534 (mistake as to the legal meaning apparently induced by the defendant's innocent misrepresentation); *Shipley U.D.C.* v. *Bradford Corp.*, [1936] 1 Ch. 375; Snell, Principles of Equity (25th ed., 1960), pp. 567-568.

[138] *Cooper* v. *Phibbs*, *supra*, footnote 2; *Earl Beauchamp* v. *Winn* (1873), L.R. 6 H.L. 223; *Jones* v. *Clifford* (1876), 3 Ch. D. 779; *Allcard* v. *Walker*, *supra*, footnote 129; *Solle* v. *Butcher*, [1950] 1 K.B. 671.

uncertainties about the law.[139] The exception applicable to mistakes of foreign law does not support this proposition; however, the exception appears rather arbitrarily derived from the rule of evidence that foreign law must be proved as a "fact".[140] The exception concerning court officials does lend support to the proposition advanced. One who enters into a transaction with a court official may act in justifiable reliance and with complete confidence in the official's interpretation of the law. This element of justifiable reliance may often remove doubts about legal issues and thus make it unjust to find that the injured party should assume responsibility for the risk of a mistake of law.

The exceptions dealing with mistakes as to the legal effect of words and private rights reveal a clear tendency to limit the mistake of law rule in accordance with the principles governing relief for common mistakes of fact. When parties are familiar with the words of their written contract and have agreed upon the erroneous assumption that these words have a particular legal effect, their mistake is one of law, yet equity will grant rectification.[141] As a condition of relief, it should be established that conscious uncertainty did not attend the words chosen and that the desired legal result was settled. If the parties knew the words used and were certain of the assumed legal meaning, there is no reason to place the risk of mistake upon either party.

Of all the specific limitations on the mistake of law rule, undoubtedly the most important is the allowance of relief in cases said to involve a mistake as to "private rights". The distinction taken between mistakes as to private rights and as to general law is inherently vague,[142] for most mistakes of law cause some misconception of legal rights. This intrinsic vagueness makes the private rights category capable of extensive and indefinite expansion.[143] Only an examination of the actual decisions can indicate the present position of the law, and, therefore, the following section will trace in some detail the development of this important doctrine. What must be observed here is that, by granting relief for a mistake as to private rights, the courts restrict the effect of the mistake of

[139] See Sharp, *op. cit.*, footnote 7, at p. 266; Mistake of Law: A Suggested Rationale, *op. cit.*, footnote 120.

[140] Williston, *op. cit.*, footnote 25, Vol. 5, § 1592.

[141] See footnote 137, *supra.*

[142] Winfield, *op. cit.*, footnote 108, at p. 329.

[143] "It seems that the term 'antecedent private rights,' which might cover every case of mistake of law in the inducement, is a phrase to which the courts resort when they wish to avoid the strict rule of law . . . that for mistake of law in the inducement there can be no relief." Williston, *op. cit.*, footnote 25, Vol. 5, § 1589. See Corbin, *op. cit.*, footnote 21, Vol. 3, § 620.

law rule to circumstances in which the parties were more or less aware of an uncertainty surrounding a legal issue.[144] If the parties concentrated on specific legal rights and contracted on the assumption that these rights certainly existed, the risk of a mistake of law was not reasonably expected and should not be imposed as a contractual risk. Of course, where rights are doubted or disputed, a different result will obtain.[145]

Although a distinction between mistakes of general law and mistakes as to private rights is well established in equity, it is questionable whether such a distinction exists at common law. Judicial dicta on this point appear to be conflicting.[146] In any event, the authority is slight and the question may be considered as open. The better course would be to allow the private rights exception in actions for money had and received.

The recent decision in *Kiriri Cotton Co., Ltd.* v. *Dewani*[147] reveals a judicial desire to avoid the rigidity of the mistake of law rule even in actions for money had and received. The action arose in Uganda and was taken on appeal to the Judicial Committee of the Privy Council:

> In consideration of granting a sub-lease of a flat to the plaintiff, the defendants asked for and received a premium of 10,000 shillings contrary to the Uganda Rent Restriction Ordinance. Neither party thought they were doing anything illegal. The Ordinance contained no provision for the recovery of illegal premiums. The plaintiff sued to recover the premium as money had and received.

Despite the presence of a common mistake of law, the Judicial Committee approved recovery. Lord Denning said:

> It is not correct to say that everyone is presumed to know the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter. *Ignorantia*

[144] Pointing out that there is some merit in the general rule denying relief, one writer has stressed the unreliability and subjective character of most evidence intended to show a mistake of law. But, in defence of the private rights exception, he noted that "proof of a belief in the existence of private rights, such as ownership, can be found in objective evidence of conduct, while belief in the existence of a general law generally would have no such objective manifestations". Mistake of Law: A Suggested Rationale, *op. cit.*, footnote 120, p. 342, n. 1.

[145] See *Cook* v. *Wright*, *supra*, footnote 67.

[146] In *Stanley Bros., Ltd.* v. *Corporation of Nuneaton* (1913), 108 L.T.R. 986, at p. 992, a dictum by Hamilton L.J. suggests there is no private rights exception at law. But a dictum by Atkinson J. in *Anglo-Scottish Beet Sugar Corp. Ltd.* v. *Spalding U.D.C.*, [1937] 2 K.B. 607, at p. 616, implies the private rights category exists at law. Williston concluded that in England the private rights exception was not allowed in actions for money had and received. Williston, *op. cit.*, footnote 25, Vol. 5, § 1589. However, Winfield reached the opposite conclusion. See, *op. cit.*, footnote 108, at pp. 338-339.

[147] [1960] A.C. 192.

> *juris neminem excusat.* Nor is it correct to say that money paid under a mistake of law can never be recovered back. The true proposition is that money paid under a mistake of law, by itself and without more, cannot be recovered back. . . . If there is something more in addition to a mistake of law — if there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake — then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other — it being imposed on him specially for the protection of the other — then they are not *in pari delicto* and the money can be recovered back.[148]

Lord Denning emphasized that the Ordinance was intended to protect tenants and that, therefore, the plaintiff should not be treated as *in pari delicto* with his landlords. The special status of the tenant provided the "something more" necessary to grant relief for a mistake of law. If the Judicial Committee had desired, it could easily have followed an analogous case[149] and refused to allow a common-law action for money paid under a mistake concerning rent Acts.

When the assorted rules governing mistake of law are surveyed, it is submitted that the exceptions to the "general" rule denying relief furnish convincing evidence that the presence of a mistake of law is not in itself a sound reason for refusing relief. Fortunately, the courts have shown a disposition to limit the mistake of law rule to cases involving conscious ignorance or uncertainty of the law. The principles governing relief for mistakes of fact should also determine relief for mistakes of law. Reasonable expectations and the sanctity of contracts must be protected. The burden of proving an operative mistake should rest upon the complainant. But where the risk of mistake, whether of fact or law, is an uncalculated one falling outside the expectations reasonably attributable to the parties and when that mistake seriously alters the contemplated obligation, the risk of error should not be imposed upon the injured party and the other party should not be allowed to benefit unjustly from an unbargained-for windfall.

B. *Private rights and Solle* v. *Butcher*

The private rights exception depends primarily upon the intrinsically vague distinction between mistakes as to general law

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[148] *Ibid.*, at p. 204.

[149] *Sharp Bros. & Knight* v. *Chant, supra,* footnote 111. Lord Denning recognized that the defendants relied heavily upon this case but he made no further comment. *Kiriri Cotton Co., Ltd.* v. *Dewani, supra,* footnote 147, at p. 204; Webber (1960), 23 Mod. L. Rev. 322; D.E.C. Yale (1960), 18 Camb. L.J. 142.

and mistakes as to what are deemed to be private rights. Nevertheless, the development of this rule may be viewed with sympathy. The acceptance of a special category, somehow separated from mistakes of law or fact, at least minimizes the law-fact distinction. Moreover, as will be seen, the private rights rule has usually been employed to grant relief from a mistake of law where the parties contracted on the basic assumption that a particular legal situation certainly existed. The approach adopted here is first to consider the development of the private rights rule[150] and then, in light of that development, to examine the decision in *Solle* v. *Butcher*.[151]

In 1867, *Cooper* v. *Phibbs*[152] gave rise to Lord Westbury's famous statement of the private rights rule:

> The petitioner leased a salmon fishery from the defendants. Both parties erroneously believed that the defendants owned the fishery and had inherited it from their father, J. E. Cooper, who had believed that a private Act of Parliament vested the fee simple in him. In truth, the Act did not give J. E. Cooper the fee simple; and upon his death the fishery actually descended to the petitioner as tenant in tail. The petitioner filed a bill in Chancery for cancellation of the lease and for "such further relief as the nature of the case would admit of and to the Court might seem fit".

Regarding the common mistake as to the ownership of the property, Lord Westbury observed:

> It is said, "*Ignorantia juris haud excusat*" but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of a matter of law; but 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 having proceeded upon a common mistake.[153]

The House of Lords granted rescission of the lease but provided that the defendants should have a lien on the fishery to compensate for improvements to the property. Equity took into account the changes of position caused by the mistake and imposed terms to effect a *restitutio in integrum*.

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[150] *Cooper* v. *Phibbs*, *supra*, footnote 2; *Earl Beauchamp* v. *Winn*, *supra*, footnote 138, at p. 234; *Jones* v. *Clifford*, *supra*, footnote 138; *Allcard* v. *Walker*, *supra*, footnote 129; *Solle* v. *Butcher*, *supra*, footnote 138. See also: *Lansdown* v. *Lansdown*, *supra*, footnote 113; *Bingham* v. *Bingham*, *supra*, footnote 113; *Clifton* v. *Cockburn*, *supra*, footnote 109, at pp. 99-100; *Denys* v. *Shuckburgh* (1840), 4 Y. & C. Ex. 42.

[151] *Supra*, footnote 138.

[152] *Supra*, footnote 2.

[153] *Ibid.*, at p. 170. Neither Lord Westbury nor the judges in subsequent cases (see footnote 150, *supra*) considered this exercise of jurisdiction dependent upon the presence of an innocent misrepresentation. Contrast Slade, *op. cit.*, footnote 14, at p. 405.

It is important to recognize that a mistake as to private rights derives from an antecedent mistake either of law or of fact. Suppose, for example, that B agrees to buy from C an estate which both parties mistakenly assume belongs to C rather than B. This error might follow from the mistaken belief that the original owner, A, died intestate whereas in truth, unknown to B and C, A had left a will devising the property to B. The contracting parties might have had accurate knowledge of all the rules governing intestate succession and devises; yet their ignorance of a specific operative fact—that A had ever made a will—caused a mistake as to ownership. Thus an antecedent mistake of fact can lead to a mistake of private rights. On the other hand, if B and C had known a will existed but misinterpreted its provisions, the basic antecedent error would be one of law.

In most cases the mistake of private rights has been caused solely by a mistake as to the rules of law to be applied to known facts.[154] In *Cooper* v. *Phibbs*, the error stemmed from J. E. Cooper's misunderstanding of the effect of a private Act of Parliament. The Act did describe him as owner in fee simple of the fishery but, contrary to his belief, those descriptive words were not sufficient to grant him that interest. *Lansdown* v. *Lansdown*,[155] the first private rights case, also clearly involved an antecedent mistake of law.

> The eldest and youngest of four brothers both claimed the intestate property of a deceased brother. The two brothers consulted a friend, a schoolmaster who "often acted as an attorney". The friend referred to a book called *The Clerk's Remembrancer* and erroneously concluded that the property descended to the youngest brother. Relying upon this opinion,[156] the brothers agreed to divide the land and the eldest brother signed a bond and conveyances drawn up by the schoolmaster. Upon discovering the true state of the law, the eldest brother asked the Court of Chancery to cancel the bond and conveyances.

The Lord Chancellor granted rescission. Similarly, in *Bingham* v. *Bingham*,[157] relief was granted for a mistake of title that derived from a mistaken understanding of the laws of inheritance. Indeed, the bill reportedly stated that the parties had been "ignorant of the law".[158]

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[154] See Hanbury, *op. cit.*, footnote 135, pp. 602-603; Corbin, *op. cit.*, footnote 21, Vol. 3, § 620; Williston, *op. cit.*, footnote 25, Vol. 5, § 1589.

[155] *Supra*, footnote 113. The case was relied upon by Denning L.J. in *Solle* v. *Butcher*, *supra*, footnote 138, at p. 693.

[156] This case may be justifiably criticized if and insofar as, after consulting the schoolmaster, the brothers remained uncertain of their relative rights and decided to settle the matter by a compromise. See the remarks of Denning L.J. in *Solle* v. *Butcher*, *ibid.*, at p. 693.

[157] *Supra*, footnote 113.

[158] See (1748), Ves. Sen. Supp. 79.

After Lord Westbury declared that common mistakes as to "relative and respective rights" might be a basis for relief, it remained for the courts to determine whether "relative and respective rights" extended beyond the rights of private ownership and title. In *Bell* v. *Lever Brothers, Ltd.*,[159] Lord Atkin, aware of the indefinite and expansive character of the private rights category, cautioned against the application of the Westbury principle to "rights generally". However, as will be seen, *Solle* v. *Butcher*[160] definitely affirmed the inference of other cases[161] that the principle is not limited to private rights of ownership.

The expansion of the Westbury principle found in *Solle* v. *Butcher* was anticipated by *Allcard* v. *Walker*:[162]

> The plaintiff and her husband had executed a postnuptial marriage settlement in which the wife covenanted to settle all her after acquired property. The couple mistakenly believed that statutes gave a married woman the power to settle certain future interests. The marriage was later dissolved and subsequently the marriage settlement was varied by a consent order. The variation included property which the parties erroneously assumed the wife had originally settled. The ex-wife asked for a declaration that certain funds were hers absolutely.

The ex-husband objected on the ground that the mistake was one of law. Stirling J. replied that the mistake "related to the existing rights and interests under the settlement within the meaning of the law as laid down by Lord Westbury in *Cooper* v. *Phibbs* . . .".[163] The ultimate cause of this mistake as to rights under the settlement was the erroneous belief that statutes granted a married woman the power and right to convey certain future interests. The court declared that the funds in question belonged to the wife. The consent order was set aside[164] on terms restoring to the husband some of his rights prior to the order.

In 1950, when confronted with the difficulties of *Solle* v. *Butcher*,[165] the Court of Appeal decided that the Westbury principle included rights arising under general statutory law, specifically the Rent Restriction Acts.

> The defendant agreed to lease a flat to the plaintiff for seven years at

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[159] *Supra*, footnote 12, at p. 218. [160] *Supra*, footnote 138.

[161] *Denys* v. *Shuckburgh*, *supra*, footnote 150; *Earl Beauchamp* v. *Winn*, *supra*, footnote 138, at p. 234; *Allcard* v. *Walker*, *supra*, footnote 129. See Grunfield, A Study in the Relationship between Common Law and Equity in Contractual Mistake (1952), 15 Mod. L. Rev. 297, at pp. 301-302.

[162] *Ibid.* [163] *Ibid.*, at p. 381.

[164] A consent order "can be impeached . . . upon any grounds which invalidate the agreement it expresses . . . ". *Huddersfield Banking Co., Ltd.* v. *Henry Lister & Son, Ltd.*, *supra*, footnote 71, *per* Lindley L.J., at p. 280.

[165] *Supra*, footnote 138.

an annual rental of £250. Since the lessor had made extensive repairs and alterations, he would under the Rent Acts have been privileged to charge the reasonable rate of £250 *per* year *if* he had given a certain formal notice. No notice was given and, therefore, the maximum legal rent was £140 *per* year. Notice was not given because the parties mistakenly believed that the alterations made the flat a "new" flat, freeing it from the control provisions of the Rent Acts. The tenant, after being in possession for about two years, sued to recover the rent he had overpaid. Hoping to eject the tenant, the landlord claimed the lease was void for mistake and asked that the agreement be set aside.

The Court of Appeal unanimously agreed that the alterations were not sufficient to change the identity of the flat.[166] The controlled rent provision therefore did apply, and the tenant was entitled to recover rent paid above the permissible maximum of £140 *per* year. With regard to the mistake, the court held the lease was not void at common law. However, the majority of the court found that there had been a common mistake as to "relative and respective rights" rendering the contract voidable in equity. By utilizing an equitable doctrine, the court had jurisdiction to employ a flexible remedy and impose terms calculated to do practical justice. Rescission was granted on the condition that the landlord offered the tenant a new lease for the remainder of the old term at the reasonable rental of £250 *per* year.

The rule in *Solle* v. *Butcher* may be seen as a clear recognition that the Westbury principle extends beyond the private rights of title and ownership. While this interpretation is correct, it inadequately reveals two important problems raised by the case. The first problem concerns the law-fact distinction. The second concerns the relationship of common law and equity in the field of mistake. The varying opinions of the three Lords of Appeal deserve close attention.

Jenkins L.J. dissented, supporting the decision of the county court judge, on the ground that the mistake was one of law. It is submitted that Jenkins L.J. correctly analysed the character of the mistake. The parties, who were former partners in an estate agency, knew all the operative facts: they knew the nature and

[166] If the "identity" test governed the law of common mistake, there could be no relief for mistakes such as this which did not go to the identity of the subject-matter. It is also difficult to explain *Sherwood* v. *Walker*, *supra*, footnote 38, on the identity test. One writer concluded: "The attempt to reduce the question to a hard and fast rule of identity of subject-matter, while it has the advantage of ease of application, has not worked out in practice; and the injustice its strict application would cause in some cases has led to ingenious but insubstantial distinctions." Rescission of a Contract for a Mutual Mistake of Fact (1922), 35 Harv. L. Rev. 757, at p. 761. Contrast Tylor, *op. cit.*, footnote 11.

extent of the repairs and improvements, the price at which the flat was previously let and the reasonable rental value. Aware of the relevant facts, they drew an erroneous conclusion as to the applicability and effect of the Rent Acts. Jenkins L.J. said:

> That is a mistake of law of a kind which, so far as I am aware, has never yet been held to afford good ground for rescission. It is a mistake not... as to any question of private right affecting the basis of the contract entered into (see *Cooper* v. *Phibbs*) but simply a mistake as to the effect of certain public statutes on the contract made.[167]

The opinion of the learned judge implicitly contains a strong argument against the law-fact distinction. He recognized that the tenant's case was "as completely devoid of merit as any case could well be".[168] But, since the mistake was one of law, he felt compelled to conclude that:

> The consequence to the defendant must therefore be to tie him for seven years . . . to a tenant from whom he can recover only a grossly uneconomic rent, in the teeth of a fair and reasonable bargain freely made.[169]

Thus, trapped in the logic of the law-fact distinction, Jenkins L.J. "reluctantly" dissented adding kind words for his "brethren" who "found it possible to arrive at a solution which accords with . . . the merits of the case".[170]

Bucknill L.J. found the mistake was one of fact.[171] The question regarding the application of the Rent Acts "was a question of fact, and the principle applies to this case which was laid down by Lord Westbury in his speech in *Cooper* v. *Phibbs* . . .".[172] Bucknill L.J. leaves somewhat obscure the principle by which mistakes of law and fact are to be distinguished. At one point his judgment implies that the possibility of drawing different legal conclusions from the same set of known facts makes a resulting error a mistake of fact.[173] Of course, in the widest sense, all mistakes of law are mistakes of fact, but such a line of reasoning merely glosses over the difficulties of finding any basis for defining and distinguishing mistakes of law.[174]

A third position was taken by Denning L.J. He did not discuss whether the mistake was of law or of fact. He simply agreed with Bucknill L.J. that the Westbury principle applied. The mistake

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[167] *Supra*, footnote 138, at p. 705. [168] *Ibid.*, at p. 699.
[169] *Ibid.* [170] *Ibid.*, at p. 707.
[171] Grunfield, *op. cit.*, footnote 161, at p. 299, agrees with Bucknill L.J.
[172] *Supra*, footnote 138, at p. 685. [173] *Ibid.*, at p. 686.
[174] The Restatement, Restitution, (1937), § 7, first specifically defines a mistake of law and then, by exclusion, a mistake of fact "means any mistake except a mistake of law".

was as to private rights, that is, the unfettered right of the landlord to charge rent. The advantage of Denning L.J.'s approach is that nothing is made to turn on the artificiality of the law-fact distinction.

A second important problem raised by *Solle* v. *Butcher* concerns the relationship between common law and equity in the field of common mistake. Only Denning L.J. directly considered the problem. Since the landlord, desiring to eject the tenant, argued that the lease was void, the court was placed in an "awkward dilemma".[175] Denning L.J. realized that, if the common mistake rendered the contract void *ab initio* at common law with the result that the lease must be set aside *simpliciter*, the consequences would be unjust and undesirable:

> . . . it would mean that, in the many cases where the parties mistakenly think a house is outside the Rent Restriction Acts when it is really within them, the tenancy would be a nullity, and the tenant would have to go; with the result that the tenants would not dare to seek to have their rents reduced to the permitted amounts lest they should be turned out.[176]

The case thus demonstrated that, although the facts may justify granting relief from a common mistake, the application of an inflexible remedy could work as great an injustice as simply refusing relief and upholding the promises.

In dealing with the rules at common law and in equity, a primary objective of Denning L.J.'s opinion was to resolve the remedial difficulty. He attempted to do this by narrowing the doctrine of common mistake at common law and reasserting the same substantive doctrine (with some vague and questionable modifications) in equity where more flexible remedies are available to do justice as between the innocent victims of a common mistake.

One suggestion implicit in the judgment of Denning L.J. is that equity has somehow superseded common law in the field of mistake. Until *Solle* v. *Butcher*, there had been no real consideration of the relationship between equity and the common law. It is misleading to say, as Denning L.J. does, that courts of equity dealt with mistake questions "whilst presupposing that a contract was good at law".[177] Before the Judicature Act, 1873, courts of chancery existed independently and did not trouble to inquire whether a contract was void at law. To support his argument, the learned Justice asserted that, in *Cooper* v. *Phibbs*, the court of equity held the lease was voidable, not void;[178] but nothing said

[175] See Denning, The Changing Law (1953), p. 60.
[176] *Solle* v. *Butcher*, *supra*, footnote 138, at p. 692.
[177] *Ibid.*
[178] *Ibid.*, at p. 694.

by the House of Lords in that case substantiates this deduction.[179]

The statement by Denning L.J. that "all previous decisions . . . must now be read in the light of *Bell* v. *Lever Brothers, Ltd.*"[180] has an ironical quality. For after the learned Lord Justice has restated the law and given the "correct interpretation" of the cases, it seems nearer the truth to say that, if his dicta are followed, all cases should be read in the light of *Solle* v. *Butcher*.[181] The common-law doctrine of common mistake is dissolved by explanation[182] and doubt cast even upon the value as a precedent of the House of Lords decision in *Bell* v. *Lever Brothers, Ltd.*[183]

Judicial opinions do not reveal, with any certainty, a conflict in the law of common mistake between the area of intervention at common law and in equity.[184] However, it seems probable that equitable intervention has been more liberal. But, whatever view is taken on this point, one may sympathize with the desire of Denning L.J. to handle mistake questions in equity where the more suitable remedies are available. His restatement of the law of mistake is, nevertheless, unacceptable. Moreover, in an already difficult area of law, his approach invites confusion between the question of liability—that is, whether the promisor should be held to have taken the risk of a mistake—and the question of the appropriate remedy—a question that arises only after a finding that promissory liability should not be imposed.

Solle v. *Butcher* leaves two areas of indefiniteness in the law of

[179] In *Bell* v. *Lever Brothers, Ltd.*, *supra*, footnote 12, at p. 218, Lord Atkin said the contract in *Cooper* v. *Phibbs* was void. Denning L.J. relied upon *Norwich Union Fire Insurance Society, Ltd.* v. *Price, Ltd.*, *supra*, footnote 74, but in fact in that case, (*Ibid.*, at p. 463) Lord Wright, speaking of *Cooper* v. *Phibbs*, said: "At common law such a contract (or simulacrum of a contract) is more correctly described as void . . . ." See *Solle* v. *Butcher*, *ibid.*, at p. 694.

[180] *Ibid.*, at p. 691.

[181] "This case undoubtedly heralds a new approach to the whole law of mistake." Denning, *op. cit.*, footnote 175, pp. 61-62.

[182] Denning L.J. said: "[O]nce a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good *unless and until* it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground." *Supra*, footnote 138, at p. 691 (emphasis added).

The language preceding "*unless and until*" is wide enough to include all common mistakes. Denning L.J. explained that the non-existent, or previously perished, goods cases involved contracts not void for mistake but void "by reason of an implied condition precedent". *Ibid.*, at p. 691. Thus, the common-law doctrine of common mistake vanishes.

[183] *Ibid.*, at p. 694.

[184] See *Huddersfield Banking Co., Ltd.* v. *Henry Lister & Son, Ltd.*, *supra*, footnote 71, at p. 281; *Norwich Union Fire Insurance Society, Ltd.* v. *Price, Ltd.*, *supra*, footnote 74, at pp. 462-463; *Scott* v. *Coulson*, *supra*, footnote 49, at p. 252; Grunfield, *op. cit.*, footnote 161, at p. 302.

common mistake. As will be suggested in the following section, the problem caused by the conflict between the common-law rule of voidness and the equitable rule of voidability could largely be removed by appropriate legislation. The case also leaves indefinite the limits, if any, of the private rights category. But the decision does stand with the other private rights cases as convincing evidence that a mistake of law is not in itself a sound reason for refusing relief.

IV. *Remedies for Common Mistake.*

Thus far attention has been focused on the effect of common mistakes upon promissory liability. Since there is a promise in all common mistake cases, the policy favouring the sanctity of contracts requires an initial presumption that the promise is enforceable. It has been submitted that the doctrine of common mistake may rebut this presumption and release parties from their promises where release is necessary to avoid imposing upon the parties the risk of a mistake which they did not contemplate or contractually assume. However, once the question of promissory liability is settled, if it is decided that the mistake is operative and that relief should be granted, then a second question arises: what is the appropriate kind of relief?

In cases of operative mistake, the common law has long held that the contract is void, a nullity. The agreement is treated as if it never existed. Therefore, if, acting under the influence of a common mistake, the parties change their positions in reliance upon a void contract, any losses incurred must lie where they fall. Often this solution works no significant injustice, but, in some cases, a complicated readjustment between the contracting parties would be necessary to achieve a fair result. In *Cooper* v. *Phibbs*,[185] the supposed owner had improved the land and so conferred valuable benefits on the true owner. In *Solle* v. *Butcher*,[186] although the mistake had already injured the landlord, it would have been unjust to treat the lease as a nullity and allow the tenant to be ejected. Fortunately, in both cases, equity exercised its discretionary power to grant relief upon such terms as seemed just.

But suppose that in a case such as *Couturier* v. *Hastie*,[187] the buyer, knowing that the ship was soon to arrive, spent a considerable sum employing men and vehicles to accept delivery of the non-existent cargo.[188] If the parties are to be released from their

[185] *Supra*, footnote 2. [186] *Supra*, footnote 138.
[187] *Supra*, footnote 31.
[188] Or suppose that the buyer in *Sherwood* v. *Walker*, *supra*, footnote 38,

contractual obligations, should the buyer be left to bear such a loss incurred in reasonable reliance on the promise? Or should the buyer be granted restitution so that this loss is wholly shifted to the seller?

If neither party contractually assumed the risk of a common mistake and if both are equally innocent, it seems unjust to leave one party with the entire burden of a loss incurred in preparation for performance of the contract. If the law refuses to impose the risk of a common mistake on either of the contracting parties, it seems logical to suppose that the law should also refuse to impose on one party the entire risk of a change of position in reliance upon the supposedly binding agreement. The most desirable solution would be for Parliament to grant the courts powers of apportionment and provide a scheme for the division of losses incurred in preparation for, or as a result of, the performance of a contract held inoperative for common mistake.

It must be emphasized that, while the question of appropriate remedies is essentially a question separate from that of promissory liability, the remedies available may shape—or misshape—the development of the substantive doctrine of common mistake. Since this article is primarily concerned with the effect of a common mistake upon promissory liability, it is not necessary here to outline the precise form which legislative action should take, but it is necessary to point out the separate character of the remedial problem and the need for more flexible remedies. A legislative precedent for creating flexible remedies for operative common mistake may be found in the Law Reform (Frustrated Contracts) Act, 1943,[189] which dealt with the remedial problem in frustration cases. Whatever form legislative action takes, it should effectively destroy the voidness-voidability distinction. The reform should also permit the division of losses caused by common mistakes. It might further make available in common-law actions some remedies peculiar to equity, as for example, the power to give to one party the choice of having the contract set aside or accepting it in a rectified form.[190]

In the recent case of *Ingram* v. *Little*,[191] Devlin L.J. recognized

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employed a vehicle and a man to accept delivery of the cow, "Rose 2nd", but the seller, because of the common mistake, refused to perform.

[189] 6 & 7 Geo. VI, c. 40.

[190] *Solle* v. *Butcher*, *supra*, footnote 138. See: *Garrard* v. *Frankel* (1862), 30 Beav. 445; *Harris* v. *Pepperell* (1867), L.R. 5 Eq. 1; *Paget* v. *Marshall* (1884), 28 Ch. D. 255; Anson, *op. cit.*, footnote 23, pp. 272-273; Pollock, Principles of Contract (13th ed., 1950), p. 394.

[191] [1960] 3 W.L.R. 504.

that the idea of giving courts the power to apportion losses has gained acceptance in modern legislative reform. The question in that case concerned the effect upon a sale of a mistake as to the identity of a contracting party. As the law stood, the rights of two victims of a fraud had to be settled by a finding of contractual voidness or voidability. In an unusual judicial plea for legislative reform, Devlin L.J. said:

> The plain answer is that the loss should be divided between them in such proportion as is just in all the circumstances. If it be pure misfortune, the loss should be borne equally; if the fault or imprudence of either party has caused or contributed to the loss, it should be borne by that party in whole or in the greater part. In saying this, I am suggesting nothing novel, for this sort of observation has often been made. But it is only in comparatively recent times that the idea of giving to a court power to apportion loss has found a place in our law. I have in mind particularly the Law Reform Acts of 1935, 1943 and 1945, that dealt respectively with joint tortfeasors, frustrated contracts and contributory negligence. These statutes, which I believe to have worked satisfactorily, show a modern inclination towards a decision based on a just apportionment rather than one given in black or in white according to the logic of the law.[192]

Although the statement was evoked by a case involving a mistake as to the identity of a contracting party, the plea of Devlin L.J. should remind one that legislative action could be extended to make just remedies available in other areas of the law of mistake, including mutual mistake[193] as well as common mistake. Such legislation would, however, be bound to recognize that the problem in common mistake cases usually concerns the readjustment of losses between contracting parties rather than the interests of third parties.

As the law stands, equity offers more satisfactory remedies in

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[192] *Ibid.*, at p. 531. Devlin L.J. dissented from the decision of the majority of the Court of Appeal on the ground that the contract in question was voidable. Pearce L.J. held the contract was void but concluded with an expression of regret that: ". . . unfortunately, when the contract is void at common law, the court cannot (as the law now stands) by its equitable powers impose terms that would produce a fairer result." *Ibid.*, at p. 521. Commentators have called Devlin L.J.'s plea for law reform the most significant aspect of an important case. Goodhart (1961), 77 L.Q. Rev. 31, at p. 34; Hall, (1960), 18 Camb. L.J. 145, at p. 147; Hudson, (1961), 24 Mod. L. Rev. 267, at p. 271.

[193] Whereas mutual mistake cases are outside the scope of this article, it should be noted that, with respect to the question of appropriate remedies, the cases of mutual mistake present more difficult problems, since they are really cases where offer and acceptance do not coincide. Nevertheless, expenses may be incurred in reliance upon or performance of "contracts" that are void for mutual mistake, or in truth "contracts" without enforceable promises. For example, see the problem raised in *Vickery* v. *Ritchie*, *supra*, footnote 6.

cases of operative common mistake than does the common law. In view of this, it might be urged that the courts should narrow and perhaps effectively abolish the doctrine of common mistake at common law so that mistake cases could be dealt with in equity. But the process of replacing the common law with equity in order to obtain the advantages of flexible remedies might introduce great uncertainty as to the operation of the substantive doctrine of common mistake. As may be gathered from *Solle* v. *Butcher*,[194] it might cause confusion if the courts reshaped the common-law doctrine of common mistake in order to avoid the consequences of voidness. In such a difficult area of the law, it is submitted that the certainty of the rules governing promissory liability deserves priority over the need for appropriate remedies. Since the rigidity of the common-law remedy will only prove unjust in a few common mistake cases, even in the absence of legislative reform, it would be undesirable for the courts to attempt to solve the remedial problem by substituting equity for common law.

Finally, it is submitted that legislation ensuring the availability of flexible and just remedies would assist the consistent development of the substantive doctrine of common mistake. The legislation should clearly distinguish between the question of promissory liability and that of the relief appropriate for a common mistake. If legislative reform is not attainable, in the interest of certainty in the law, it would be desirable to follow the existing common-law precedents and to allow the doctrine of common mistake to develop along its present lines rather than attempt to reshape the law in order to handle all common mistake cases in equity.

V. *Conclusion.*

In a society heavily dependent upon the security of transactions, it is both natural and commendable that the courts have been cautious in developing doctrines such as common mistake which limit the enforceability of promises. The exceptional character of the common mistake doctrine must be emphasized, for it is designed to do justice in a type of case which arises infrequently. This exceptional character does not, however, justify attempts to dismiss it from our law or to define it more narrowly than is warranted by the cases.

At the beginning of this article, it was observed that promises have a dependable quality; they offset uncertainties in the mind of the promisee. In contract cases, the court must construe a contract

[194] *Supra*, footnote 138.

to determine the scope of the reasonable expectations of the parties, that is, to determine the scope of the uncertainties given reliability by the promise. With this in mind, the concept of conscious ignorance has been put forward. For, if parties contract while consciously ignorant of the existence of a fact or aware of an uncertainty concerning its existence, it is fair to infer that they intend their contract to resolve the uncertainty and that, therefore, the risk of a mistake is within their promissory expectations.

On the other hand, when there is no conscious ignorance but, instead, an unquestioning faith in the existence of a fact, a promise cannot be expected to resolve any uncertainty concerning that fact. In such circumstances, the mistaken fact may be so important to the contemplated performance that, on the actual facts, the enforcement of the promise would result in a performance significantly different from what was expected.

The notion of conscious ignorance does much to explain and clarify cases of common mistake. But the notion is a helpful common-sense guide, not a magic formula; its use should bring out and emphasize, rather than obscure, the fact that the fundamental process is one of the construction of a contract in order to allocate the risk of a mistake. The contract itself must be the ultimate reference point so that, even where conscious ignorance is present, it should remain open for a party to rebut the normal inference of validity. One who pleads mistake should be allowed to show that, although the parties were aware of a risk, they contracted on an assumption that excluded that risk from their bargain.

In analysing the doctrine of common mistake, there has been a tendency to become preoccupied with the concept of a contractual subject-matter. Perhaps this stems from the desire to have an intelligible concept which will ensure that the doctrine of common mistake does not infringe upon the sanctity of contracts. However, the apparent simplicity and certainty of the subject-matter concept are illusory, for two of the most difficult problems of construction may be, first, to determine what *was* the subject-matter and, secondly, to discover who took the risk of its non-existence. Moreover, even when the concept of a contractual subject-matter seems to be useful, a test based upon it cannot explain all the cases of operative common mistake. When the decisions are examined, it becomes clear that the doctrine of common mistake is not restricted to cases involving a non-existent subject-matter. The decisions support the proposition that a common mistake may be operative if it is as to the existence of a factor which, in the con-

templation of the parties, was necessary to the expected performance. The subject-matter is simply the most obvious factor necessary to performance.

The doctrine of common mistake will be better understood when its fundamental similarity to the doctrine of frustration is generally recognized. Both doctrines operate to discharge a promissory obligation where enforcement would unjustly impose the risk of the non-existence of a factor necessary to the contemplated performance. The same principle applies both when the parties mistakenly supposed that the factor existed at the time of contracting and when they mistakenly supposed that the factor would continue to exist in the future. Both doctrines prevent the enforcement of promises where the actual circumstances are so different from those contemplated that enforcement would in effect impose a different obligation upon the promisor.[195]

Although common mistake and frustration share the same theoretical basis, it has already been pointed out that there are important differences in the application of the two doctrines. These differences, it will be remembered, stem from two causes: first, from the distinction between the risks assumed with respect to present and future facts, and, secondly, from the greater likelihood of conscious ignorance concerning the existence of present facts. The narrower scope for the application of the common mistake doctrine and the infrequency of common mistake problems explain why the doctrine of frustration has developed more rapidly.

It has been submitted that mistakes of law and mistakes of fact should be treated alike. The difficulty in the mistake of law area is not so much to define and identify a mistake of law as to justify the application of a different rule to this kind of mistake. The exceptions to the "general" rule against relief for a mistake of law afford ample evidence that a mistake of law is not in itself a valid reason for denying relief. It is further suggested that the exceptions, particularly the private rights exception, reveal a disposition to limit the mistake of law rule to cases of conscious ignorance or conscious assumption of risk. To a significant extent, the "general" rule has been a device for refusing relief where parties contracted aware of uncertainty surrounding a legal issue; they chose to enter into the contract rather than to investigate the matter further or risk a law suit.

Finally, it should be stressed that the question of promissory

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[195] See *Davis Contractors, Ltd.* v. *Fareham U.D.C., supra*, footnote 89; *Tsakiroglou & Co., Ltd.* v. *Noblee Thorl, supra*, footnote 89.

liability must be clearly distinguished from the question of the relief appropriate for an operative common mistake. The most desirable solution to the remedial problem would be for Parliament to grant the courts power to exercise flexible remedies and divide losses caused by common mistakes. In the absence of legislative reform, it is hoped that the courts will give priority to the more important question of establishing well-defined principles relating to exemption from promissory liability for common mistake, and that the courts will not attempt to reshape the substantive law in order to solve the remedial difficulties.