

ERROR IN SUBSTANTIALIBUS A CANADIAN COMEDY OF ERRORS

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There exists in Canadian jurisprudence a catena of authority which expounds and supports the idea that when, in the formation of a contract, one or other party has been labouring under what is called "error in *substantialibus*", it is possible for such party to obtain rescission of the contract, whether or not the contract is executed, whatever be its subject-matter, irrespective of fraud, and even though the contract would not be invalidated under the common law doctrine of mistake.¹ In such cases the plaintiff complained that what he obtained was not quite as good as what he had hoped and intended to get by the contract in question. In other words, the party seeking rescission of the transaction had made a mistake as to the *quality* of the subject-matter of the contract, in consequence of some innocent misrepresentation from the other party. Thus *both* parties were labouring under the same mistake; hence it was, in the terminology of Cheshire and Fifoot,² a common mistake, akin to those situations in which, at common law, a contract would be void on the ground that it concerned something which was believed by both parties to be in existence—but was extinct at the time of contracting—or was believed by both parties to be the property of the vendor—when it was in fact the property of the purchaser. The importance of this may become clearer in due course. For the moment, it should be noted that, although the appellation of common mistake is probably the most apposite, some judges³ have referred to these situations as involving a mutual mistake (which, to refer again to the language of Cheshire and Fifoot,⁴ really appertains to situations in which both parties are mistaken, but in different ways, and with respect to different aspects of the contract or its subject-matter). What should also be emphasized, at this stage of the argument, is that the "error" that resulted in rescission in these cases was not one that related to the existence of the subject matter: nor to its availability for purchase (as in the cases when the buyer was buying *res sua*): nor to the

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¹ For recent examples, see *Hyrsky v. Smith* (1969), 5 D.L.R. (3d) 385; *Alessio v. Jovica* (1974), 42 D.L.R. (3d) 242; *Gronau v. Schlamp Investments Ltd* (1975), 52 D.L.R. (3d) 631; *Northern & Central Gas Ltd v. Hillcrest Collieries Limited* (1976), 51 D.L.R. (3d) 533.

² Law of Contract (9th ed. by Furmston, 1976), pp. 206, 208-214.

³ E.g. Lief J. in *Hyrsky v. Smith*, *supra*, footnote 1, at p. 388.

⁴ *Op. cit.*, footnote 2, pp. 206-207, 225-227, 235-236.

identity or nature of the subject matter: all of which would bring into operation the common law doctrine of mistake, thereby rendering the transaction void at law.⁵ The "error" was one as to some attribute of the subject-matter, the absence or lack of which made the bargain less attractive, useful, or desirable from the point of view of the mistaken party who subsequently sought relief from the transaction. If he had expressly bargained for the possession of such attribute by the subject-matter, for instance, by obtaining an express warranty or condition from the vendor, there would have been no problem. Depending upon the status of the term obtained as part of the contract, the innocent, and unsuccessful purchaser could have rescinded the contract or sued for damages, or both.⁶ In all these cases the real point was that the buyer had not stipulated in the contract that the subject-matter should possess, or be qualified by the appropriate attribute. Hence he was thrown back on the attempt to have the transaction rescinded on some other ground. This, then, is the practical or pragmatic basis of the doctrine of error *in substantialibus*.

What, however, is its theoretical or juridical basis? How does it accord with the common law notion of mistake? Is the jurisdiction of the court to rescind on this ground an equitable jurisdiction, or one emanating from the common law? When may it be invoked? How may it be justified? These questions, I would suggest, ought to be exercising the minds of those Canadian judges who have blithely and indulgently accepted and applied the notion of error *in substantialibus*. Although some discussion of the doctrine is to be found upon occasion, by and large, I would respectfully suggest, the judges have been content merely to acknowledge that such a doctrine exists, and to seize upon it gratefully as a means of upsetting transactions which they consider might perpetrate injustice upon an innocent party if they were upheld (ignoring the possibly legitimate claims by the other party—also *ex hypothesi* innocent—that not to uphold the transaction might wreak injustice upon him). They have not delved very far into the origins, meaning and scope of the doctrine. When a judge has made some attempt to do so, what has emerged is the lack of any clear understanding of what is involved and what is being invoked, as well as an unhealthy confusion of principles, concepts, doctrines and ideas.

The phrase itself is interesting and indicative of confusion. The expression "error *in substantialibus*" is not one that betokens a common law origin. The English courts never spoke of "error": nor do they to this day. The common lawyers preferred, and still prefer,

⁵ Fridman, *Law of Contract* (1976), pp. 93-102.

⁶ *Ibid.*, pp. 278-286; Fridman, *Sale of Goods in Canada* (1973), pp. 154-157.

to discuss the relevant issues and principles in terms of "mistake". It is to Scotland; which derived its legal system from Roman law, that we must look to find use of the term "error" in this context. The Romans distinguished between various different types of "error", and considered that some instances of "error" might vitiate a contract, while others had no such consequence. In this respect, the Romans differentiated between error *in substantia* and error *in qualitate* or error *in causa*. The basis of this difference, it would seem, was the distinction between a mistake as to the precise subject-matter of the contract or transaction and a mistake as to some quality, qualification, or attribute of that subject-matter which really went to a party's *motive* for contracting.⁷ The Scots lawyers accepted and utilized this distinction. To them an error was relevant to the validity of a contract if it was an error in substantialis.⁸ This was also expressed, in Bell's *Principles*, as error *in substantialibus*.⁹ Indeed the book and the expression are both quoted in the speech of Lord Selborne in a leading *Scottish* (not English) case, *Brownlie v. Campbell*,¹⁰ in 1880. Thus, the origin of the phrase is to be sought not in the common law cases of the nineteenth century—whence comes the modern common law of mistake—but in a Scots case which was stating, and applying Scots law (even though Lord Selborne also suggests that Irish, and possibly English cases are to the like effect).¹¹ It is instructive to note that the expression is almost nowhere to be found in any English case, of that, or any later period. It seems to be entirely Scots in its ancestry and its use. The one case in which the phrase appears in the English reports would seem to be the case of *Debenham v. Sawbridge*,¹² in 1901, in which the passage from the speech of Lord Selborne, to which reference has been made, was cited. Apart from this one instance, the expression seems to be found only in Canadian cases, in which it is used as though it

⁷ On the Continent the doctrine of *error in substantia* appears to have been broadened to include these other kinds of *error*: Lawson, *Error in Substantia* (1936), 52 L.Q.Rev. 79. See also as to Roman law and its later history, Feenstra, *The Dutch Kantharos Case and the History of Error in Substantia* (1974), 48 Tul. L.Rev. 846.

⁸ See, e.g., Gloag & Henderson, *Introduction to the Law of Scotland* (7th ed., 1968), pp. 76-77; Smith, *Scotland: The Development of Its Laws and Constitution* (1962), pp. 811, 820. Cf. the reference to the institutional writings of Stair & Erskine, cited in Gow, *Mistake and Error* (1952), 1 Int. & Comp. L.Q. 472, at p. 475.

⁹ Gow, *op. cit.*, *ibid.*, at pp. 475-477. See also Stein, *Fault in the Formation of Contract in Roman Law and Scots Law* (1958), pp. 183-185.

¹⁰ (1880), 5 A.C. 925, at p. 937.

¹¹ Note, however, that in later Scots cases in the House of Lords, *Stewart v. Kennedy* (1890), 17 R. (H.L.) 25, and *Menzies v. Menzies* (1893), 20 R. (H.L.) 108, Lord Watson appears to have revolutionized the Scots law of error in substance and given it greater breadth, Gow, *op. cit.*, footnote 8, at pp. 480-481.

¹² [1901] 2 Ch. 98.

was an accepted part of the common law, and had a clear and obvious meaning. Perhaps its most famous and possibly earliest appearance is in the judgment of Duff J., as he then was, in the leading case of *Redican v. Nesbitt*.¹³ Since then it has been frequently cited and applied. In this way, it is suggested, an expression, and an idea, which emanate in the law of Scotland, have been incorporated into the law of contract in the common law provinces of Canada.

The nineteenth century cases in which the question of error or mistake with respect to the subject-matter of the contract was raised as a ground for justifying rescission of an otherwise valid contract¹⁴ appear to have involved either the purchase of a *res extincta* or a *res sua*. In other words, the purchaser was either buying something that did not exist at the moment of the contract (a fact that was unknown to both parties), or was buying something that was already his own (again where the parties believed that the seller owned the property in question). It was on this basis, that is, that the property was no longer available for sale on the part of the vendor, that a Canadian case, *Cole v. Pope*,¹⁵ in which the purchaser recovered his money, was decided. At this time, it must be remembered, the common law gave no remedy for an innocent misrepresentation, while equity would permit rescission, though would not grant damages (allowing, instead, some indemnification or compensation of the representee, insofar as his purchase of the property under the mistake so innocently induced had caused him to pay more than the property was worth, or to incur expense in consequence of a contract that was ultimately invalidated).¹⁶ Thus, even at that stage in the development of the law, it was possible to identify and distinguish two separate strands, two distinct bases upon which an apparently valid contract could be upset. At common law there was mistake. In equity there could be rescission, that is, *ex post facto* invalidation, or, at the very least, some qualification of the rights of the vendor, such as diminution of the price, or enforcement of the contract on terms that took into account the worsened position of the purchaser in view of the mistake produced by the innocent misrepresentation. Under the common law there was no contract. In equity there might not be a contract, or there might be some alteration of the contract (quite

¹³ [1924] S.C.R. 135. See also *Frear v. Gilders* (1921), 64 D.L.R. 274; *Shortt v. MacLennan*, [1959] S.C.R. 3; *Podoivin v. Grant* (1965), 50 D.L.R. (2d) 565.

¹⁴ *I.e.* one that was neither entered into as a result of fraud, nor produced as a consequence of a conflict of beliefs as between the parties, *e.g.* as to the precise subject matter of the contract, as in *e.g. Raffles v. Wickelhaus* (1864), 2 H. & C. 906—recently rejected by an Ontario court in *Staiman Steel Limited v. Commercial & House Builders Limited* (1977), 13 O.R. (2d) 318—and *Smith v. Hughes* (1871), L.R. 6 Q.B. 597.

¹⁵ (1898), 29 S.C.R. 291.

¹⁶ *Fridman, op. cit.*, footnote 5, pp. 118-121, 611-613.

apart from any question of rectification—which involved other considerations and a different remedy), depending upon (a) the applicability of the doctrine of misrepresentation and (b) whether there were grounds for exercising the discretion of the court in favour of the party alleging the misrepresentation.

At the same time there was another common law development, that may be traced to the leading case of *Kennedy v. Panama Royal Mail Co.*¹⁷ Here it was stated that, at common law, for an innocent, as opposed to a fraudulent misrepresentation to permit rescission of the contract, there had to be such a difference between what the purchaser actually obtained and what he had imagined he was going to obtain by the bargain, as to amount to a total failure of consideration. Now, although the court in that case used the expression “rescission”, it may be suggested that what was involved, in a case of non-fraudulent misrepresentation at common law, was not truly rescission at all but something else, as the context of that case reveals. What the plaintiff in that action was seeking was the recovery of money paid in part settlement of the price of shares which he was buying. The issue was whether the shares he obtained were fundamentally different from the shares he thought he was buying when he offered to purchase them. Since they were the very same shares, although they were not as valuable as he had thought they were going to be, because the representation in the prospectus, on the faith of which he was induced to subscribe for the shares, turned out to be untrue, though there was no fraud on the part of the promoters of the company involved, the plaintiff was not entitled to argue that there had been a total failure of consideration.

It is useful and relevant to observe that this was one of the cases relied upon by Lord Atkin in *Bell v. Lever Bros.*,¹⁸ the source of the modern law of mistake in English law (at least until the more recent efforts of Lord Denning¹⁹), as the basis of his reasoning and his exposition of the doctrine of fundamental mistake justifying the treatment of a contract as void *ab initio* at common law. In other words, to the instances of mistaken purchase of *res extincta* and *res sua*, there was to be added, at common law, the case of a purchase under a fundamental mistake of some other kind, resulting in the purchase of a *totally different thing* from that which the purchaser thought he was buying, as an example of operative mistake entitling a party, and a court, to regard the contract as a legal nullity, without even requiring the exercise of any discretion for the purpose of

¹⁷ (1867), L.R. 2 Q.B. 580; on which see Lawson, *op. cit.*, footnote 7, at pp. 88-91.

¹⁸ [1932] A.C. 161, at pp. 219-220; the other being *Smith v. Hughes*, *supra*, footnote 14.

¹⁹ See below.

declaring it to be invalid. It is vital, for the purposes of this discussion to say the least, to emphasize the difference between a mistake which rendered a contract void *ab initio* and one which, in appropriate circumstances, might justify invalidating a contract, or, at least, modifying its terms in accordance with what was just and equitable, having regard to the mistake on the part of the purchaser and the fact that such mistake was the consequence of an innocent misrepresentation on the part of the seller.

What I would suggest, on the basis of the foregoing, is that, insofar as the common law received and accepted anything approximating to the Scots (and Roman) notion of error *in substantia* (which, magically, became transformed into the doctrine of error *in substantialibus*, as will later appear), it was the doctrine that the three types of mistake already mentioned permitted the invalidation of a contract. The Roman, Scots, and English doctrines of error or mistake, at least originally²⁰ were all much alike. They required evidence of some fundamental, underlying erroneous assumption of fact, on the basis of which the contract was made, even though no fraud had occurred to induce such assumption, before the contract in question could be upset. Now this doctrine is neither revolutionary nor unacceptable. Nor, indeed, does it have anything to do with the doctrine of rescission of a contract for innocent misrepresentation. That, I suggest, is something totally different. The equitable doctrine of rescission for such misrepresentation did not demand for its invocation that the mistaken party was labouring under a "fundamental underlying, erroneous assumption of fact". It only required that he be induced by some *material*, albeit innocent misrepresentation that affected his judgment and powers of decision, to enter into the contract in issue. Once that could be established, then, depending upon such matters as the possibility of *restitutio in integrum*, laches, the position *vis-à-vis* third parties and the general nature of the plaintiff's conduct, rescission was a distinct possibility.²¹ What I wish to stress is that the equitable doctrine of rescission for innocent misrepresentation, while it may appear to resemble the common law doctrine of invalidity on the ground of mistake, is not at all the same. It is much more general in nature, and flexible in application. It based not upon the notion of true and valid consent, that is, whether or not the parties were in substantial agreement about something that could be the subject-matter of a transaction between them, but upon the idea that, where it would be inequitable to hold a party to his bargain, even though no inequitable conduct had been perpetrated by the other party, and even though they were

²⁰ For changes in the Roman and Scots law see the discussion in the articles by Lawson, Gow and Feenstra, *op. cit.*, footnotes 7 and 8.

²¹ Fridman, *op. cit.*, footnote 5, pp. 617-621.

not in real disagreement about the subject-matter of the contract, a court of equity was empowered to upset the transaction, if need be by imposing suitable terms of compromise upon the parties, as a result of which more or less substantial justice could be effected without doing too much harm to the basic concepts of agreement and upholding the sanctity of contract.

Thus, there might never have been any need for a doctrine of error in *substantialibus*, if certain other developments had not occurred. Such a doctrine would either never have materialized as something distinct from the common law doctrine of mistake, or would have been understood as only another form of such doctrine. What happened was that the courts decided that where a contract concerned land, and was subsequently executed, for instance, by the payment of the purchase-price, it then became too late to ask for, and obtain rescission on the ground of an innocent misrepresentation. The doctrine that was confirmed in *Seddon v. North-Eastern Co.*²² and *Angel v. Jay*,²³ though it antedates these cases, as *Cole v. Pope*²⁴ shows, a doctrine that caused great difficulty in the law of England until it was eradicated by the Misrepresentation Act, 1967,²⁵ became the source of this new growth in Canada, where, thus far, no equivalent legislation to the English statute of 1967 has yet been enacted. Perhaps it is because of the doctrine of error in *substantialibus* that any need for it has not been felt. This indeed was suggested, but from a different standpoint, by Lieberman J., as he then was, in the *Hillcrest Collieries* case.²⁶ The learned judge was there referring to the radical views expressed by Lord Denning, then a Lord Justice of Appeal, in *Solle v. Butcher*,²⁷ suggesting that the transformation of the law of mistake that was necessitated by the law before the Act of 1967 in England, had been achieved in Canada by the use, if not indeed the invention of the notion of error in *substantialibus*.

What appears to have happened is this. In the absence of fraud, only mistake would invalidate a contract. Equity would permit rescission: but this could not be done, after the *Seddon* and *Angel* cases, where the contract had been executed. Mistake was confined to cases of *res extincta*, *res sua*, and "fundamental erroneous assumption". Any *other* mistakes would not suffice. So, somehow, the law had to enlarge upon the scope and content of operative

²² [1905] 1 Ch. 326; see *Wilde v. Gibson* (1848), 1 H.L.C. 605.

²³ [1911] 1 K.B. 666.

²⁴ *Supra*, footnote 15.

²⁵ 1967, c. 7.

²⁶ (1976), 51 D.L.R. (3d) 533, at p. 600.

²⁷ [1950] 1 K.B. 671.

mistake, so as to allow rescission of an executed contract, on the basis of mistake, where the mistake did not come within the original scope of the doctrine. Thus, the notion of error *in substantialibus* was conceived. At some point of time, which I would suggest was when Duff J. wrote his judgment in *Redican v. Nesbitt*, although it might have been earlier, the original Scots doctrine of error in substances or substantials, also called error *in substantialibus* by Lord Selborne, as seen earlier, became pressed into service as the instrument by which this enlargement of the common law doctrine of mistake could be effected, so as to bring about the desired result with respect to the equitable power to rescind contracts.

In the *Redican* case,²⁸ where the point did not arise for decision since the case was sent back for retrial on the issue of fraud, which would always have justified rescission, whether or not the contract was executed, Duff J. stated categorically that where a contract was executed there was no power to provide a mistaken party with a remedy unless he could show fraud, or a covenant in the conveyance, or that he had bought his own property, or there had been error *in substantialibus*. It is to be noted that Duff J. did not explain what this meant. As suggested earlier, he enunciated this with the air of one who states the obvious and does not need to explain to himself or anyone else what he is discussing and what he was intending to convey. He purported to state an elementary proposition of law, so self-evident that it required neither authority for its support nor illustration for its enlightenment. On the contrary, however, as manifested in subsequent decisions, notably the judgment of Lief J. in *Hyrsky v. Smith*,²⁹ more than forty years later, Duff J.'s purported doctrine of error *in substantialibus* was not as simple or obvious as the learned judge would have had us all believe. The question that next arises for discussion, therefore, is this: how did Canadian courts interpret and apply the notion of error *in substantialibus*? From an examination of this, it is suggested, will emerge the way in which the old common law of mistake became completely confused and even overturned by an infusion of notions that would never have been accepted by the nineteenth century English common law judges, and indeed may have bedevilled later judges, both in England and Canada, with the result that the law of mistake, in modern times, is in such a state of complexity and disarray.

A preliminary point, already touched upon, deserves mention at the outset. The cases in which relief was given to a mistaken party, who had been the victim of an innocent misrepresentation, with the result that he had paid for something and then not obtained what he

²⁸ *Supra*, footnote 13, at p. 144.

²⁹ *Supra*, footnote 1.

believed he was going to get by the bargain, appear to have involved some "equity". What happened in such cases was that the court would permit the party who had paid over money to recover it from the other, equally innocent party, on the ground that if such recovery were not possible, the latter would be unjustly enriched at the expense of the former, that is, the party who had paid. What this indicates, I suggest, is first of all that the jurisdiction of the court was equitable not common law: secondly, that it was justified not on the basis of rescission strictly speaking, but on the basis of what would now be termed the doctrine of restitution. In other words, the origins of this jurisdiction are to be found not in the law of contract, but in the law of what was then quasi-contract, and what is now unjust enrichment or restitution. I think that this is important to establish. While there is much in common between the common law doctrine of the invalidity of contracts for mistake and the quasi-contractual, or restitutionary, doctrine of the recovery of money paid under mistake, the two are distinct, and are not always the same, in principle or in their approach.³⁰ Secondly, while an element of mistake is to be seen in these cases, just as there is an element of misrepresentation, I would suggest that more important than either mistake or misrepresentation is the idea of total failure of consideration. Under the law of quasi-contract, quite apart from any form of contractual recovery that might be relevant in a given instance, there was always the possibility of recovery of money paid where the consideration for such payment had totally failed to materialize, and such recovery did not depend upon contractual factors, for instance, the existence of a valid contract and the possibility of an action based upon such contract, but upon extrinsic facts, such as the payment, the lack of consideration coming from the payee.³¹

So, I suggest, the doctrine of recovery on the basis of error *in substantialibus* seems to stem, or at least to have an affinity with, an equitable doctrine of recovery of money paid where the consideration for such payment had totally failed, an equitable doctrine that is more a part of the law of quasi-contract, or in modern parlance, unjust enrichment or restitution, than a part of the law of contract. *A fortiori*, it seems, it belongs more to restitution than to the law of mistake in relation to formation of contracts, with which the common law was originally concerned, and remains concerned even today.

Put that aside. Accept, for other purposes, that the idea of error *in substantialibus*, that is, the granting of a remedy when neither the law of mistake nor the law of misrepresentation would permit one to

³⁰ Goff & Jones, *Law of Restitution* (1966), pp. 61-90.

³¹ *Ibid.*, pp. 31-33, 339-356.

be given, is not extra-contractual in nature, but is an integral part of the law of contract. On that basis, as seen earlier, a court might avoid a transaction, even after it had been executed, where the purchaser obtained something entirely different from what he imagined, and intended to be the subject-matter of the contract. In *Redican v. Nesbitt*, as stated previously, Duff J. did not elucidate as to the nature, or kind of error that would have this effect. Earlier cases, both in England and Canada, suggest that what had to occur was a *total* failure of consideration. That is to say, what the purchaser got, or looked like getting, for his money, must have been something utterly different from what he had originally bargained to obtain. In most, if not all the cases what he appears to have obtained was, in fact, *nothing*: because it did not exist, could not be sold, or was already his own! Later decisions suggest that, perhaps, his position did not have to be so catastrophic, or his loss so unmitigated. There are many cases which illustrate the working of this doctrine, even when there is no specific reference to it in the judgments. I would like to cite only three, comparatively recent cases, both by way of illustration, and as possibly throwing some light upon the present-day meaning of this curious expression error *in substantialibus*.

In *O'Flaherty v. McKinlay*³² the contract was for the sale of a Hillman car which both parties believed was a 1950 model. In fact it turned out to be a 1949 model. The purchaser drove it some 7,000 miles before he discovered the truth about the car, and then claimed to rescind the contract and obtain the return of his purchase-price. It should be noted that he was not suing for rescission nor for damages on the ground of breach of condition (either express or implied under the provisions of the Sale of Goods Act³³ relating to sales by description and correspondence with such description). Nor was he suing for fundamental breach or breach of a fundamental term. There are other cases in which actions have been brought on such basis, and the question has sometimes been, apart from the nature of the term and the issue of breach, whether it was too late for the purchaser to rescind, whether his "acceptance" of the contract now denied him a remedy, or at least the remedy of rescission. In such instances, there is no denial of the validity of the contract: the dispute is as to its proper *performance*. It might be noted, however, that there is much in common between rescission for faulty performance and rescission or avoidance of the transaction on the ground that it was never a valid, operative contract.

³² [1953] 2 D.L.R. 514. Contrast *Hudson v. Watson Motor Co.*, [1931] 3 W.W.R. 621 denying a remedy for breach of warranty in similar circumstances.

³³ R.S.O., 1950, c. 345, s. 14.

Returning to the *O'Flaherty* case, it was held therein that the purchaser was entitled to a remedy, on the basis of the doctrine of error in *substantialibus*. In the words of Dunfield J.:³⁴

A contract to supply a 1950 model cannot be considered to be satisfied by the supply of a 1949 model. I think this is what is considered an error in *substantialibus*.

In coming to this conclusion, the learned judge relied on cases to which reference has been made earlier, notably the remarks of Lord Selborne in *Brownlie v. Campbell*. This language, it is suggested, raises the question whether there is any, or any significant difference between such "error" and the failure to deliver goods that correspond with description as required under the operative provision of the Sale of Goods Act. Indeed, would it be possible to exclude liability for such an error, by an appropriate clause in the contract, in those jurisdictions in which, under recent legislation, the exclusion of the operative sections of the Sale of Goods Act is prohibited? Leaving that particular conundrum aside, it must still be asked how an error in *substantialibus* occurs when the parties are mistaken as to the year of the model, even though they are not mistaken as to the kind of car that is being sold. We are back again in the confused, and confusing area of identity and attributes, subject-matter and description, substance and quality.³⁵ Surely if what is involved is some aspect of the subject-matter of the contract that is not at its very root, it should be a question of applying the express or implied terms of the contract if the purchaser is complaining that he did not receive precisely what he bargained for. Unless he can show some specific provision or promise in the contract, he should not have a remedy (in the absence of fraud, of course). If there is a fundamental difference between what he contracted for and what he obtained, then either there is an operative mistake, at common law, or there has been a fundamental breach, a non-performance of the promise in fact, that, in accordance with modern thinking, transcends the existence of a condition or warranty, or the inclusion or otherwise of an exemption or exclusionary clause in the contract.³⁶ What is the scope of error in *substantialibus*? Where does it fit in? At least, where does it enter in cases of sale of goods (there being no equivalent possibilities, vis-à-vis conditions, warranties, fundamental terms, or fundamental breach in cases involving land—at least none of which the present author is aware from the cases)?

³⁴ *Supra*, footnote 32, at p. 528.

³⁵ Fridman, *op. cit.*, footnote 5, pp. 89, 93.

³⁶ *Ibid.*, pp. 286-289, 298-309, 535-540.

In the judgment of Walsh C.J. of Newfoundland,³⁷ although no specific reference to the doctrine is made, there is a hint that the place of error *in substantialibus* in the scheme of the law is to enshrine some equitable doctrine of rescission that operates in different situations and on a different basis from the common law doctrine of mistake. Such a doctrine would permit the avoidance of a contract, and the recovery of the purchase-price when there might not be a remedy on the ground of fraud: when there might not be a remedy founded upon an express or implied term of the contract: or when such a remedy might not suffice for the injured party. But what is the result? In that case, after the purchaser had used the vehicle for some time, he was able to recover his money (without any compensation to the innocent seller), when, if he were to sue for breach of the condition as to description, treating that as a warranty in view of his "acceptance" of the goods or the passing of property therein, he would only get some diminution of the price calculated on the basis of the difference between a 1950 and a 1949 car (if any). And if he were to attempt to sue on the basis of fundamental breach—in the light of modern cases—it might be impossible to establish that the difference between a 1950 and a 1949 car of the same make was sufficiently important to constitute such a breach, remembering that, normally, there has to be a "congeries of defects" about the goods to render the contract substantially unperformed, or some other complete and utter deviation from the precise terms of the contract such as to involve the conclusion that the contract had not been performed at all, as contrasted with its being performed in an improper or unsatisfactory manner. All this, it would appear, is outflanked by the invocation of the mysterious doctrine or idea of error *in substantialibus*: by considering what went wrong as a fundamental mistake that led to payment for a consideration that wholly failed, rather than as a misperformance of the promise contained in the contract, or a failure to provide goods that conformed to their contractual description.

Now cases in which the idea of error *in substantialibus* has been applied to sales of goods are few and far between. More often the case involves a transaction concerning land or an interest in land. It must be stated that the doctrine appears to have been cultivated, a word that is chosen deliberately, for the purpose of coping with *such* situations, rather than with contracts generally. It seems that it has been utilized in such other contracts by judges who were seeking a way to provide a party with a remedy when, by a strict application of other contractual doctrines appertaining to mistake, misrepresentation, breach, and so on, no remedy was truly forthcoming. The same may be said with respect to contracts relating to land: but from a

³⁷ [1953] 2 D.L.R. 514, at pp. 522-523.

different standpoint, that is, the impossibility of permitting rescission on normal equitable grounds when the contract had been executed. The other two cases to be discussed illustrate this.

In the more recent of the two, *Alessio v. Jovica*,³⁸ the three members of the Appellate Division of the Supreme Court of Alberta all agreed that there was a doctrine of error in *substantialibus*, and that it could permit the purchaser to rescind from his contract in appropriate circumstances, even if it had been executed, and even if there was no fraud. Where the dissent arose, however, was with respect to the applicability of the doctrine on the facts before the court. What was involved was a sale of land which the purchaser mistakenly thought had been provided with appropriate drainage service. He alleged fraud; but it seems that this was not clearly made out. Two members of the court thought that this mistake was a sufficiently fundamental one to entitle the purchaser to plead error in *substantialibus*. The land purchased was different from the land the purchaser wanted to purchase and believed he was purchasing. Allen J.A. disagreed. Unfortunately, there is lacking in the judgments any deep analysis of the doctrine or the facts, such as would indicate the basis for the opinions of the opposing sides. It may be suggested, however, that to hold that a purchaser can upset a transaction freely entered upon—assuming that there was no evidence of fraud—where he laboured under a mistake that was innocently induced by the other party, if indeed it was, and where he could not establish any express promise, in the form of a condition or warranty relating to the state of the land with respect to drainage, after the transaction has been completed, seems to be stretching the equitable jurisdiction of the court a long way. It may be true that the maxim *caveat emptor* has been greatly affected by common law and statutory developments. These, it is suggested, have largely been in relation to transactions relating to goods, not transactions concerned with land. Other forms of protection for the purchaser of land have been developed by the law. Some of them relate to forms of conveyancing and land registration. Some relate to the doctrine of warranties and implied terms. In addition the emergence of the law of negligent misrepresentation in recent years may have helped to provide a purchaser of land with a remedy in the event that he was induced to buy land, or an interest in land, by some misstatement that was made innocently, in the sense of without fraud, albeit carelessly.³⁹ Cases such as *Esso*

³⁸ *Supra*, footnote 1. Cf. *Gronau v. Schlamp Investments Ltd*, *supra*, footnote 1 (building with a latent defect not the same as contracted for). Reliance was placed on *Plight v. Booth* (1834), 1 Bing (N.C.) 370. But the facts of that case, and the way it was treated in the *Alessio* case show that it was really an early example of *fundamental breach* ousting the operation of an exclusion clause.

³⁹ On this see Fridman, *Negligent Misrepresentation* (1976), 22 McGill L.J. 1, 649.

Petroleum Co. v. Mardon,⁴⁰ in England, illustrate very graphically and explicitly the workings of this new principle. Given these developments, what is the place, role, or scope of this doctrine of error in *substantialibus* in relation to contracts involving a sale of land?

The third, and last case to be examined is of even greater interest, and perhaps throws more light (or perhaps causes more confusion) than the others already discussed. This is the case of *Hyrsky v. Smith*,⁴¹ in which may be found some attempt, at long last, to explain and expound the meaning and content of the notion of error in *substantialibus*. The contract in question was for the purchase of some land. It emerged that the amount of land that belonged to the vendor—and so could be conveyed to the purchaser—was only about half the amount described in the contract. Both parties had mistakenly, and innocently believed that the larger amount could be sold. The purchaser claimed rescission on the ground of error in *substantialibus*. The problem that was raised by the case was this: the vendor owned part, at least of the land contracted to be sold. Therefore he could convey good title to such part. Hence, it could not be said that there was a total failure of consideration. Did the doctrine of error in *substantialibus* depend upon there being a *total* failure of consideration? In previous cases (even in the *O'Flaherty* case, insofar as the fact that the purchaser obtained a 1949 instead of a 1950 model could be said to result in the subject-matter of the contract being totally different from what it was thought to be) such a total failure had occurred. The situation in the *Hyrsky* case resembled, it is suggested, the situations in those cases in which a contracting party had performed *part*, but not all of his contract, and then claimed payment for the part he performed. As is well known, in such circumstances no recovery is permitted unless (a) the contract is severable, not entire, or (b) what has occurred has been substantial performance (a modern development which needs no further discussion here.)⁴² In the *Hyrsky* case the vendor could provide partial performance of his undertaking to convey the land denoted in the contract. While this might amount to a breach of contract (for which there might be a remedy in damages if an express or implied term of the contract could be prayed in aid, or might not involve any liability in view of well-known doctrines of the law of conveyancing), did it justify complete rescission of the transaction? Lief J. held that it did. In order to do so, I would suggest, Lief J.

⁴⁰ [1976] 2 All E.R. 5.

⁴¹ *Supra*, footnote 1; cf. with this the case of *R. v. Ontario Flue Cured Tobacco Growers' Marketing Board* (1965), 51 D.L.R. (2d) 7, which applied the common law doctrine of mistake.

⁴² Fridman, *op. cit.*, footnote 5, pp. 465-469.

had to interpret, or re-interpret the doctrine of error in *substantialibus*.

The learned judge begins quite naturally, with the judgment of Duff J. in *Redican v. Nesbitt*, which is the modern source of the law in Canada, as already seen. There Duff J. had given, as an example of error in *substantialibus*, the case of a purchase of a *res sua*. This would certainly have involved a total failure of consideration: and Lief J. refers to the suggestion that, in the early cases, in England certainly, the courts used the expression "total failure of consideration" rather than error in *substantialibus*. He then refers to the Roman doctrine of error in *substantia*—as expounded by Blackburn J. in the *Kennedy* case⁴³—under which a contract might be void for mistake. He suggests that under this doctrine contracts were rendered void "where there existed mistakes as to quality which related to the substance of the subject-matter of the contract". After referring to the judgment of Blackburn J. (presumably cited to support the sentence just cited—of which more in a moment), the learned judge concludes thus:⁴⁴

Consequently, for a contract to be rescinded for mutual mistake, the mistake must go to the root of the contract. In order to constitute an error in *substantialibus*, there must be a mutual fundamental mistake as to the quality of the subject-matter.

Now, from this passage in the judgment it would appear that (i) the Roman doctrine of mistake was based upon the possibility of mistakes as to quality permitting avoidance of a contract: (ii) the English doctrine of voidness for mutual mistake depends upon there being a mistake that goes to the root of the contract: (iii) mistakes as to quality can amount to mistakes that go to the root of a contract: (iv) error in *substantialibus* is like the Roman doctrine of error in *substantia*—it depends upon mistakes as to quality, as long as they are fundamental enough; it is not like the common law doctrine of mutual mistake.

I am not sure that these propositions do correctly state the gist of the thinking of Lief J. (the passage he cites from Treitel's book on the law of contract,⁴⁵ which relates to mistake as to quality which amounts to mistake as to identity of this subject matter rather than to error in *substantialibus*—which, as already argued, is *not* an English doctrine—suggests that he has confused a number of different

⁴³ *Supra*, footnote 17, at pp. 587-588. Commenting on the judge's reference to the Roman texts, Lawson, *loc. cit. supra* footnote 7, at p. 89, says: "Characteristically enough, they are misapplied, or perhaps it would be fair to say that the confused application is due to the confusion in the original."

⁴⁴ *Supra*, footnote 1, at p. 388.

⁴⁵ Treitel, *Law of Contract* (2nd ed., 1966), p. 179; see (4th ed., 1976), pp. 173-174.

matters). If they do, however, then they reveal the muddle that exists in regard to this area of the law. The Roman doctrine of *error in substantia* went beyond mere mistakes as to quality (as, indeed the extracts from the *Digest* of Justinian, quoted by Blackburn J. in the passage from the *Kennedy* case cited by Lief J. abundantly reveal).⁴⁶ The English common law doctrine of mistake is not the same thing as *error in substantialibus*. It does not turn upon mistakes as to quality. The Roman and English doctrines of mistake are very similar. And the Roman *error in substantia* is not the equivalent, nor the origin of the doctrine of *error in substantialibus*. All that Lief J. succeeded in achieving in this passage of his judgment was to give the impression that (a) there was a respectable Roman ancestry for this doctrine; (b) it was a well-accepted, but distinct doctrine of the law relating to mistake generally. This is borne out by his reference, *à propos* whether the mistake was an *error in substantialibus*, rather than what the doctrine involved, to the Albertan case of *De Clerval v. Jones*,⁴⁷ in which Beck J. (who was a sound judge) said:⁴⁸

Where there is a mutual mistake going not necessarily to an essential but to a material, substantial, and important element of the contract, it seems to me that the Court will ordinarily order rescission, even though the contract has been completely executed, if it can do so on equitable terms.

What is a material, substantial or important element of a contract but is not, at the same time an essential element? Therein lies the mystery. There, too, is concealed the fallacy of the doctrine. If the mistake is so material, and so on, that it justifies upsetting a concluded, executed contract, in the absence of fraud or an express condition in the contract, why is this not mistake which, at common law, would nullify a contract? And if it is not so material as to qualify as a mistake at common law, why should it qualify as a mistake that justifies such an attitude towards a contract that is otherwise validly, and innocently concluded?

Possibly this could be supported on the basis of a total failure of consideration, in other words, the prevention of an unjust enrichment, by permitting the purchaser to recover his purchase money, notwithstanding the completion of the contract, in an appropriate case. We have already seen what are appropriate cases, for instance sale of *res extincta*, sale of *res sua*. There have been others. But here Lief J. makes the law take a new turn, and gives it a novel direction.

⁴⁶ See also the articles by Lawson, Gow and Feenstra, *op. cit.*, footnotes 7 and 8. For another example of criticism of the use by Blackburn J. of Roman law and ideas to achieve a certain end or purpose on the part of the common law, see Nicholas, Rules and Terms—Civil Law and Common Law (1974), 48 Tul. L. Rev. 946, at pp. 965-966—*à propos* frustration in the case of *Taylor v. Caldwell* (1863), 3 B. & S. 826.

⁴⁷ (1908), 8 W.L.R. 300.

⁴⁸ *Ibid.*, at pp. 306-307.

He alters the whole nature of the doctrine, and in so doing, I suggest, removes whatever justification it might have had, as a rule of restitution, not one of rescission of contracts for mistake, by finding that a "total" failure of consideration is not an essential ingredient of the doctrine.

Despite the authorities to the contrary, Lief J. concludes⁴⁹ that:

. . . this aspect of the law in Ontario has broadened in scope with the use of the phrase "error in substantialibus" to include not only the aforesaid restricted examples of a total failure of consideration but also what may be said to be a virtual failure of consideration.

The "aforesaid examples" were, of course, *res extincta* and *res sua*. The Australian case cited by Lief J.⁵⁰ denied the very point he was making. And even though Dixon C.J. and Fullagar J.⁵¹ used the expression "what amounts practically to a total failure of consideration", that, surely, cannot substantiate the conclusion of Lief J. that as long as there is a "virtual" failure of consideration all will be well. Perhaps more valid was the learned judge's appeal⁵² to another principle, which he says was enunciated by him earlier in the judgment, but, with all respect, is not included in the authorities he cited. This principle is as follows: "In equity, a contract is subject to rescission if the parties suffered from a common fundamental misapprehension as to the facts which went to the very root of the contract". For this the judge cites by way of support the decision of Goff J. in the English case of *Grist v. Bailey*,⁵³ which, in fact, was founded upon the earlier opinion of Lord Denning in *Solle v. Butcher*.⁵⁴ I would suggest that by referring to this doctrine, albeit that the learned judge says that this is the meaning attributable to the phrase "error in substantialibus", Lief J. was abandoning the earlier idea contained in this expression and was embracing the novel views of Lord Denning on mistake, of which more will be said shortly.

Before discussing that, however, it is pertinent to refer to the fact that the learned judge⁵⁵ adverted to the conflict between this approach and his decision and the doctrine of *caveat emptor*, which has been elaborated by modern doctrines of conveyancing, with a view to giving protection to the buyer. As already noted, the error in *substantialibus* notion seems to upset the very foundations of the law

⁴⁹ *Supra*, footnote 1, at p. 391.

⁵⁰ *Svanosio v. McNamara* (1956), 96 C.L.R. 186.

⁵¹ *Ibid.*, at pp. 198-199.

⁵² *Supra*, footnote 1, at p. 391.

⁵³ [1967] Ch. 532.

⁵⁴ *Supra*, footnote 27.

⁵⁵ *Supra*, footnote 1, at pp. 391-392.

in this respect. It should also be pointed out that both in this case and in the later decision in *Alessio v. Jovica*⁵⁶ (in which no reference was made to the judgment of Lief J.), the net effect of the doctrine was to permit rescission of a contract for a mistake as to quality which, at best, ought to have been dealt with, if at all, by an appropriate warranty or similar undertaking by the vendor. Surely, as suggested previously in this article to allow a buyer such a remedy is to subvert basic propositions of the law. Lief J. said⁵⁷ that "notwithstanding the need for certainty and permanence in the law of conveyancing, these policy considerations must yield to the desirability of doing equity where there has been an error *in substantialibus*". This puts the point very sharply, indeed crudely. Should this uniquely Canadian doctrine of error *in substantialibus* be permitted to exist if its effect is to render contracts more uncertain than ever? If so, is it truly founded upon some notion of failure of consideration, whether total, virtually total or something else? Or is it more of an equitable doctrine along the lines suggested by Lief J. and, earlier, Lord Denning? In short, therefore, is there a valid equitable approach to mistake which virtually renders the common law unnecessary (unless there is no merit, equitably speaking, in the position of the buyer or other complainant)? If so, does it only apply to contracts involving land—where equity was very much involved, historically speaking, and had a legitimate basis for intervention? Or does it apply to contracts generally, as would appear from both Canadian cases of error *in substantialibus* and English ones in which that phrase is not to be found? To these issues, in conclusion, we must turn.

Prior to 1950, when the English Court of Appeal decided the case of *Solle v. Butcher*,⁵⁸ the common law respecting mistake, and its effect upon a contract, in so far as such mistake appertained to the subject-matter of the contract, was to be found in the speeches in the House of Lords in *Bell v. Lever Bros.*⁵⁹ Other kinds of mistake, for instance, *à propos* the identity of a contracting party, or with respect to the nature of the transaction, were regulated by judgments in other authorities.⁶⁰ What was decided in the *Bell* case was, and perhaps still is, a matter of some controversy. I would venture to repeat here the suggestion I have made elsewhere⁶¹ that the *Bell* case in general, and the important speech of Lord Atkin in particular, make the point that no mistake as regards the subject-matter of the contract can have any effect at common law, that is, can not render a purported

⁵⁶ *Supra*, footnote 1.

⁵⁷ *Supra*, footnote 1, at p. 392.

⁵⁸ *Supra*, footnote 27.

⁵⁹ *Supra*, footnote 18.

⁶⁰ See Fridman, *op. cit.*, footnote 5, pp. 89-93, 102-110.

⁶¹ *Ibid.*, pp. 82-83.

contract a nullity, unless it is a mistake that is fundamental to the whole contractual relationship. It must be a mistake which makes a party believe that he is contracting for something totally different from that about which he is actually contracting. The difference must not be one that is collateral or relates to the motive of the party in making the contract. It must be one that significantly alters the true nature of the subject matter, in terms of what the mistaken party believes he is "buying" under the contract. In situations like that, just as in situations in which one party is mistaken as to the true identity of the other contracting party—when that is a vitally relevant aspect of the whole contract—or in which one party is mistaken as to the kind of legal transaction that is involved, such that he becomes a party to something utterly different in legal character from that which he conceived he was contracting, the common law says there is no contract. There never was any valid consent on the part of the mistaken party. Hence there could not be a legal nexus between the parties. It is not a question of avoiding a transaction for some valid reason: nor of fraud (since fraud might well be absent): nor even of innocent misrepresentation (since the mistaken party may have brought about his own mistake). It is a question of absence of informed, true consent.

This view of *Bell v. Lever Bros.* was subjected to revision by Lord Denning (when still a Lord Justice of Appeal) in *Solle v. Butcher*.⁶² Apparent agreement of the parties would render a contract valid and enforceable unless and until it could be set aside on one of three grounds. The first was the "failure of some condition on which the existence of the contract depends". The second was fraud. The third was the possibility of some equitable ground on which the contract could be upset. Fraud, of course, needs no discussion. What is meant by the failure of some condition on which the contract depends? The subsequent language of Lord Denning indicates that he had in mind cases of a *res extincta*, in which a contract is not void for mistake but "void by reason of an implied condition precedent, because the contract proceeded on the basic assumption that it was possible of performance".⁶³ What emerges from this passage in his judgment suggests that his Lordship was putting forward an approach to common law mistake that is at variance with previously held opinions. Instead of the earlier differentiation between substantial mistake, on the one hand, and mistake as to some quality or attribute of the subject-matter of the contract (or the other party thereto, or the transaction involved), he purports to substitute a doctrine of "fundamental condition". Language of this kind, it is suggested, would bring the approach of the common law with respect

⁶² *Supra*, footnote 27, at p. 691.

⁶³ *Ibid.*

to mistake closer to its approach to such issues as frustration and breach of contract, especially in the light of developments later than *Solle v. Butcher* (which do not fall to be considered here). It may well be that, ultimately, the common law might be prepared to assimilate even more than it has done its attitude towards these various ways in which or grounds upon which a contract may be declared to be invalid, discharged, or unfulfilled (though, inevitably, there will remain important differences between the nature of the act or event that makes such a conclusion possible and the consequences of any such finding). At the moment, however, it would seem premature, at least in the present writer's opinion, to attempt any final abolition of the distinctions between these different possibilities. Lord Denning's approach, so far as the common law is concerned, is not acceptable.

It might have the consequence of rendering unnecessary the doctrine of error *in substantialibus* that has previously been described. Much more likely to have such a result, however, is Lord Denning's approach to the avoidance, or voidability, of a contract on equitable grounds. Broadly speaking, the power to set aside a contract could be exercised by a court of equity "whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained".⁶⁴ His later language makes it clear that he has in mind, by way of example, cases of innocent misrepresentation when the party guilty of such misrepresentation knows it has affected the other party's mind in making the contract: and cases of "common misapprehension" of facts or rights, where both parties were mistaken, as long as this was fundamental. In this regard the crucial and leading equity case is *Cooper v. Phibbs*⁶⁵ (which involved the purchase by the buyer of a *res sua*). Both these examples resemble cases in which Canadian courts have invoked the doctrine of error *in substantialibus*. The language of Lord Denning seems very apposite to describe precisely what is happening when a Canadian court applies that doctrine and upsets an otherwise valid transaction on that basis. The important difference between Lord Denning's approach and that of the Canadian courts, I suggest, is that the former is founded upon *equitable* principles: the latter would seem to be, or to be viewed as an emanation of the *common law* (insofar as it may be said to have any antecedents).

The approach of Lord Denning was adopted and applied by Goff J., as he then was, in *Grist v. Bailey*.⁶⁶ While it is not absolutely

⁶⁴ *Ibid.*, at p. 692. *I.e.* in cases of unilateral mistake such as *Stepps Investments Ltd v. Security Capital Corp. Ltd.* (1977), 73 D.L.R. (3d) 251.

⁶⁵ (1867), L.R. 2 H.L. 149.

⁶⁶ *Supra*, footnote 53.

clear whether the learned judge was utilizing the common law doctrine of mistake, as re-interpreted by Lord Denning, or the equitable approach, the latter would seem to be the more likely, since Goff J., at the end of his judgment,⁶⁷ finds it necessary to ask whether the party seeking to take advantage of the mistake was at fault. Even on Lord Denning's view, this would be an irrelevant question if mistake at law was involved: whereas it would be material if an equitable remedy, or the invocation of equitable principles, was being sought. This was a case where the parties were agreed about the property that was subject to the sale, but it was alleged that the true value of the property was greater than the actual sale price, and the seller had only agreed to sell at that price because he was mistaken about the status of some tenants. He thought that they were unassailable, being protected under the legislation protecting certain classes of tenants: in fact that legislation did not apply. Hence, according to the learned trial judge, this mistake was sufficiently fundamental to justify granting rescission of the contract of sale. It looks very much like the sort of case in which a Canadian court would apply the doctrine of error *in substantialibus*. It does not look like a case in which the strict, that is, the pre-Lord Denning view of *Bell v. Lever Bros.* would give rise to the same result.

In a later case, *Magee v. Pennine Insurance Co. Ltd*⁶⁸ Lord Denning returned to this matter and applied the notion that a common mistake which was fundamental, albeit that it did not affect the nature and substance of the subject-matter of the contract, that is, its identity, would permit avoidance of the contract in equity, even though it might have no effect at law. It is interesting to note that Winn L. J. dissented,⁶⁹ preferring to adopt and apply the stricter interpretation of *Bell v. Lever Bros.* that had been repudiated by Lord Denning in *Solle v. Butcher*; as well as rejecting the "equitable" approach to mistake that Lord Denning had enunciated in that case. More recently still,⁷⁰ the English Court of Appeal referred to the views of Lord Denning in *Solle v. Butcher*, suggested that they were in conflict with the common law and the case of *Bell v. Lever Bros.*, but declined to make any positive decision one way or the other, in view of the fact that the case before them did not involve any operative mistake, since the change in the character or quality of the subject-matter occurred *after* the contract had been concluded, and there was no misapprehension, either common or unilateral, at the time when the contract was made.

⁶⁷ *Ibid.*, at p. 542.

⁶⁸ [1969] 2 Q.B. 507.

⁶⁹ *Ibid.*, at pp. 515-517.

⁷⁰ *Amalgamated Investment & Property Co. Limited v. John Walker & Sons Ltd*, [1976] 3 All E.R. 509, at pp. 516, 519.

These cases leave the English law of mistake in a parlous state. If Lord Denning's approach is ultimately accepted by English courts generally, then, it may well be, there will be no need for any doctrine of mistake at common law. In any event, the passage of the Misrepresentation Act, 1967,⁷¹ under which there may be a claim in damages for merely innocent misrepresentations, even when they are not terms of the contract, may have made any further developments by the courts otiose. That statute does not apply in Canada. Hence it may be important to determine whether the kinds of mistakes which Lord Denning suggests provide a possible remedy in equity should have the same effect in Canada. If they do, then, I would suggest, it is not because of any equitable doctrine (which could not achieve such a result in cases of executed contracts for the sale of land), but by reason of the doctrine of error *in substantialibus*. Lord Denning, it is to be noted, threw doubt on the idea that there could be no rescission of such a contract for innocent misrepresentation.⁷² In this respect the learned judge must have been incorrect: else why would it have been necessary to change the law by statute. Moreover, what would have been the purpose of or need for the doctrine of error *in substantialibus*?

The "equity" invoked, or created by Lord Denning in *Solle v. Butcher*, therefore is of very general application. So, too, would appear to be the doctrine of error *in substantialibus*. But it does not rest upon any notion of failure of consideration, whether total or virtually total. Ultimately, however, it has the same root: namely, the desire of some courts to provide a remedy where it might be unconscionable to hold a contracting party bound by a contract which he has entered into freely, without fraud, such that, under the common law, he is conclusively obliged.⁷³ Whether or not Lord Denning's approach is questionable, it at least has the merit of being overtly equitable in nature. It recognizes that it is a qualification of the common law. It may be accepted as such, as a limitation upon the strictness of the common law's attitude to mistake, even if Lord Denning's views of *Bell v. Lever Bros.* are rejected. The Canadian doctrine of error *in substantialibus*, however, is at variance with the common law: it is not an equitable doctrine, or at least, is not stated to be such. Since it purports to be a doctrine of the common law, and

⁷¹ *Supra*, footnote 25.

⁷² *Solle v. Butcher*, *supra*, footnote 27, at pp. 695-696.

⁷³ It is to be noted that, in recent years, much has occurred to reveal the way in which the courts approach many issues of the law of contract in terms of whether or not the conduct of a party is unconscionable, so as to deprive him of the right to rely on the contract itself or any particular term of it: see, e.g. Waddams, *Unconscionability in Contracts* (1976), 39 *Mod. L.Rev.* 369, and cases therein cited. See also *Tilden Rent-a-Car Co. v. Clendenning* (1978), 83 *D.L.R.* (3d) 400.

not one owing its origins and scope to the more flexible and liberal notions of equity, it falls to be assessed in terms of its consistency with the common law of mistake, its validity at common law, and its justification in the light of settled principles of the common law. My submission in this respect is that, while it may be capable of approbation and acceptance if it is viewed as a proleptic promulgation of the later views of Lord Denning, to the extent to which such views are themselves acceptable, it is not valid as a part of the common law approach to problems of mistake in the formation of contracts. Especially it is invalid if it is to be formulated in the terms expressed by Lief J. in the *Hyrsky* case.

Where Canadian courts went wrong, if I may respectfully make such a suggestion, is when they adopted an approach to certain problems of mistake that was not supported by the common law, but purported to express that approach as a part of the common law. To do this, Canadian courts were compelled to engage in certain illogical "leaps" in their reasoning: and to apply concepts and ideas out of context. There may be good reasons for seeking to qualify the strict common law of mistake. There may be good reasons for wanting to mitigate the rigours of the law by some more gentle, amenable equitable doctrine that would permit a court to relieve a party from an unconscionable, unprofitable bargain, entered into under a misapprehension, and to release him from a situation which would otherwise prove to be to his detriment.⁷⁴ It is unfortunate that this should have been achieved by the invention of an anomalous doctrine such as that of error *in substantialibus*.

⁷⁴ In this regard it is worth pointing out that the House of Lords has recently discussed and elaborated the relationship of common law and equity, and the rules produced by each, in respect to the law of contract, specifically in relation to the issue of time as being essential in contracts, but not to the exclusion of other aspects of the law of contract: *United Scientific Holdings Limited v. Burnley B.C.*, [1977] 2 All E.R. 62, at pp. 68-69, per Lord Diplock, 80-84, per Lord Simon of Glaisdale.