> It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods for any loss . . . of whatsoever kind arising or resulting directly or indirectly from any act neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier . . . shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading.

Though this clause takes account of existing learning as to the means whereby third parties may be protected under contracts granting benefits to them, a few comments may be made, lest it be thought that this clause is proof against litigiously minded plaintiffs. Even if one contracts as agent for another, consideration must be furnished by the principal, though it has been suggested that if the agent also contracts on his own behalf as well as on the principal's behalf in the same contract, the agent furnishing consideration (as was the case in *Wilson's Case*), the principal can rely on the consideration provided by the agent.[88] It should also be noted that for the contracting party to be "deemed to be an agent" for his servant, is not sufficient to protect the servant relying on the exclusion clause, since the principal must be found to have been an agent in fact, before the servant may rely on the exclusion clause.[89] Similar difficulties will arise in attempting to rely on the fertile field of the law of trusts.[90] Nevertheless it is believed that the questions left unanswered by Mr. P. Gerber in his article on *Jus Quaesitum Tertio*[91] may still prove to be soluble.

A. LANG, Case Editor — Fourth Year Student.

COMMON MISAPPREHENSION IN THE LAW OF PROPERTY

SVANOSIO v. *McNAMARA*

The "classical" statement of the attitude of courts of Equity[1] by Lord

---

[88] *McEvoy* v. *Belfast Banking Co.* (1935) A.C. 24, 43 (*per* Lord Atkin) but *contra Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* (1915) A.C. 847, 854 (*per* Viscount Haldane).

[89] *Taddy & Co.* v. *Sterious & Co.* (1904) 1 Ch. 355.

[90] If a trust is created in favour of all agents and independent contractors, not holding them responsible for negligence in performing the particular contract, the shipowner being the trustee of the benefit of the consignee's promise, the difficulty still arises that the trust is uncertain unless the beneficiaries under the trust are expressly named. H. G. Hanbury, *Modern Equity* (6 ed., 1952) 124.

[91] (1956) 30 *A.L.J.* 241, in which the view was expressed that no definite principle may yet be formulated covering the problems raised in *Wilson's Case*.

[1] *Svanosio* v. *McNamara* (1957) 30 *A.L.J.* 372, 375 *per* Dixon, C.J., Fullagar, J.

Campbell that, "where the conveyance has been executed . . . a court of Equity will set aside the conveyance only on the ground of actual fraud",[2] enunciates a principle which has been followed consistently for one hundred years save that the exception has been recognised to extend to a limited class of case in which the transaction has been set aside for the reason that there has been total failure of consideration.[3] It is not surprising, therefore, to find this established principle being accorded unanimous endorsement by the High Court of Australia in *Svanosio* v. *McNamara*,[4] indicating that so far as completed contracts for the sale of land, perfected by conveyance, are concerned the principle remains unaffected by recent trends in Court of Appeal decisions on the subject of mistake in contract, or by modern developments in the approach of writers to this subject.

The present case was an appeal from the decision of Martin, J. in the Supreme Court of Victoria dismissing a suit brought by the purchaser of a hotel property and licence against the vendors, the personal representatives of the former owner and licensee of the hotel.

The respondents had entered into a written contract to sell to the appellant the certain land "together with the licensed premises known as Bulls Head Hotel erected thereon, the victuallers licence issued for and in respect of the said hotel and the good-will thereof", the consideration of £5,000 being apportioned at £4,200 for the licence and goodwill and £800 for the freehold property.

The contract of sale provided, *inter alia*, that the conditions in the Fourth Schedule to the Victorian Property Law Act, 1928 should apply thereto (with certain modifications) — condition 3 thereof providing for the making of requisitions and objections in writing to the muniments and abstracts of title within certain specified times, and that all requisitions and objections not included in such writing shall be deemed to be waived by the purchaser so that, in default of, or subject only to such as are delivered, the purchaser should be deemed to have accepted title, and Condition 5 stating that no mistake in the description, measurements or area of the land in or omission from the particulars should invalidate the sale, unless the vendor rescinds upon the purchaser making such requisitions or objections with which the vendor shall be unable or unwilling to remove or comply, but if made within certain specified periods prior to completion the same shall be the subject of compensation.

The purchaser did not make any objection or requisition as to the title of the freehold, nor did he have a survey made prior to completion, the licence was transferred to him, the land conveyed, he entered into possession of the property and paid to the respondents the whole of the purchase money.

Discovering afterwards, by means of a survey, that a substantial part of the hotel building was erected on adjoining Crown land, the purchaser brought a suit claiming:—

1. A declaration that the agreement and the conveyance were entered into and executed under a common mistake as to the existence of a fact accepted by all parties as a condition fundamental to the transaction — namely that the vendors were the owners of the whole of the land on which the hotel was erected.
2. A declaration that the transactions were void.
3. An order setting the agreement and conveyance aside.
4. An order for the repayment of the sum of £5,000 by the respondents to the appellant.

---

[2] *Wilde* v. *Gibson* (1848) 1 H. L. C. 605, at 632, 633.

[3] See *Cooper* v. *Phibbs* (1867) L.R. 2 H.L. 149 following *Bingham* v. *Bingham* (1748) 1 Ves. Sen. 126. In these cases the purchaser himself was the owner — in *Cooper* v. *Phibbs* the life tenant — of the property in issue, and the transaction was such that there was really nothing for a court of Equity to set aside.

[4] (1957) 30 *A.L.J.* 372.

Dixon, C.J. and Fullagar, J., in a joint judgment, cited with approval the contention of Professor K. O. Shatwell[5] that it is difficult to conceive any circumstances in which Equity could properly give relief by setting aside the contract because of "mistake", unless there has been fraud or misrepresentation, or a condition can be found expressed or implied in the contract, and their Honours held that there had been no fraud or misrepresentation, nor could it be said that there had been a total failure of consideration, even had the contract been one merely for the sale of land.

The position must, therefore, depend upon the terms of the contract. Those terms would not have precluded the appellant, before conveyance, from rescinding the contract[6] or from effectively resisting a suit by the respondents for specific performance of the contract or even from claiming damages at law in respect of the respondents' failure to make title.[7] However, the appellant, having neglected to ascertain the true position by having a survey made and to take the opportunity which those terms gave him to lodge objection, and having taken a conveyance, Equity would not interfere and the appeal should be dismissed.

McTiernan, Williams and Webb, JJ. held that there had been a representation, at most an innocent one, to the effect that the hotel premises stood wholly on the land conveyed, but that a contract for the sale of land could not be set aside after completion had taken place on the ground that the purchaser had been induced to enter into it by an innocent material misrepresentation or that the vendor had innocently concealed some defect in his title. Their Honours confirmed that, in such cases, actual fraud must be proved and that, whilst otherwise it may be possible — in exceptional cases — to obtain relief on the ground of common mistake after completion of the contract, these exceptional cases should be restricted to cases in which there has been a total failure of consideration, such as where the purchaser himself is the owner of the property concerned.[8] The fact that the parties would conceivably not have entered into the contract at all but for such a common misapprehension, as in the present case, does not avoid the contract, but a misdescription such as this is an "objection" to title,[9] which, if taken by the purchaser in good time, gives to the vendor, according to the terms of the contract, the right to rescind if he is unable or reasonably[10] unwilling to remove it. As the contract contemplated and made provision for such misdescription of the land sold how could it be said that it was void for common mistake? The purchaser had neglected to object to the title as he could have done and had proceeded blindly to complete the contract,[11] so he had no remedy at law or in equity with respect to any defect either in the title to or in the quality and quantity of the estate.

Both judgments stress the significance of the fact that the contract and conveyance had been completed so that the legal or equitable remedies which might have been available to the appellant prior to completion were thereafter denied him. They stress also the special nature and features of contracts for the sale of land wherein the purchaser is given the opportunity, and has imposed on him the obligation, to investigate thoroughly the title of his vendor and the details of the property before completing the purchase. There is little doubt that thereon may be said to rest the reasonableness (if such it be regarded) of the settled principle that only in the two exceptional cases of fraud and/or total failure of consideration will such completed

[5] "The Supposed Doctrine of Mistake in Contract" (1955) 33 *Can. Bar Rev.* 164.
[6] *Flight* v. *Booth* (1834) 1 Bing N.C. 370; *Horning* v. *Pink* (1913) 13 S.R. (N.S.W.) 529; *Torr* v. *Harpur* (1940) 57 W.N. (N.S.W.) 195.
[7] Subject to the Rule in *Flureau* v. *Thornhill* (1776) 2 Wm. Bl. 1078; *Bain* v. *Fothergill* (1874) L.R. 7 H.L. 158.
[8] *Bingham* v. *Bingham, supra; Hart* v. *Swaine* (1877) 7 Ch.D 42.
[9] *Cf. Gardiner* v. *Orchard* (1910) 10 C.L.R. 722.
[10] *Fisher* v. *Bennett* (1911) 11 S.R. (N.S.W.) 399.
[11] *Brett* v. *Clowser* (1880) 5 C.P.D. 376, 386.

transaction be set aside.

It is equally apparent, however, that so far as other types of contract are concerned there exists some conflict of authority, the discussion upon which in both judgments indicates that the controversial decision of the Court of Appeal in *Solle* v. *Butcher*[12] by no means enjoys the unqualified approval of the High Court. Dixon, C.J. and Fullagar, J., whilst they cite the adoption by the High Court in *McRae* v. *Commonwealth Disposals Commission*[13] of a passage in the judgment of Denning, L.J. on the subject generally of mistake in contracts,[14] and note his expression of the same opinion[15] in *Rose* v. *Pim*,[16] point out that the High Court on that occasion said "nothing as to the actual decision" (in *Solle* v. *Butcher*).[17] Moreover, in referring to a number of cases in support of their acceptance of the *Wilde* v. *Gibson*[18] principle, (these cases[19] supporting *Angel* v. *Jay*),[20] their Honours content themselves with observing that *Angel* v. *Jay* was accepted by Jenkins, L.J. in *Solle* v. *Butcher*[21] despite the fact that Denning, L.J. expressed disapproval of that decision insofar as it related to an agreement for a lease.[22]

Although not necessary to their decision the majority in the High Court reviewed in detail the authorities on the setting aside of an executed lease on the ground of innocent misrepresentation or mistake and observed that the decision of the majority in *Solle* v. *Butcher* seemed to be in conflict with that of Lord Manners in *Legge* v. *Croker*[23] which was followed in *Angel* v. *Jay* and had been cited with approval by Lord Selbourne, L.C. in *Brownlie* v. *Campbell*.[24]

In an examination of the judgment of Denning, L.J. their Honours dismissed the Privy Council case of *Mackenzie* v. *Royal Bank of Canada*[25] as involving the setting aside of a mere contract of guarantee on the ground of material misrepresentation of fact and explain *Cooper* v. *Phibbs*[26] (upon which Denning, L.J. largely based his judgment) correctly, it is submitted as falling within the *Bingham* v. *Bingham*[27] class of very exceptional cases where there has been what amounts to a total failure of consideration due to there being no title at all in the vendor, it being at all material times vested in the supposed purchaser himself. It may, in this connection be relevant respectfully to observe that Bucknill, L.J., whose concurrence with the decision of Denning, L.J. in *Solle* v. *Butcher* provided the majority in the Court of Appeal, appeared to rely also mainly upon *Cooper* v. *Phibbs* (with emphasis on the question of whether the mistake in question was one of law or of fact) and refrained from any attempt to overcome the contrary authority of *Angel* v. *Jay*.[29] The pressing need in *Solle* v.*Butcher* to grant equitable relief to the lessor, in a situation where the intricacies of the Rent Restriction Acts would have operated unjustly to benefit the party of whose conduct the Court

---

[12] (1950) 1 K.B. 671.

[13] (1951) 84 C.L.R. 377, 407.

[14] (1950) 1 K.B. 671, 693 "Once a contract has been made . . . *A fortiori* if the other party did not know of the mistake, but shared it".

[15] That he was clearly of opinion that the contract was not a nullity although both parties were under a mistake and the mistake was of a fundamental character with regard to the subject matter.

[16] (1953) 2 Q.B. 450, 459.

[17] *Supra* n. 12.

[18] (1848) 1 H.L.C. 605.

[19] *Legge* v. *Croker* (1811) 1 Ball and B. 506; *Brownlie* v. *Campbell* (1880) 5 App. Cas. 925, *per* Lord Selbourne, L.C.; *Re Tyrell; Tyrell* v. *Woodhouse* (1900) 82 L.T. 675.

[20] (1911) 1 K.B. 666.

[21] *Supra* n. 12.

[22] Whilst their Honours gathered "that Denning, L.J. was prepared to accept the general principle as applicable in cases where equitable relief is sought after conveyance on the ground of a defect in the title of a vendor under a contract for the sale of land".

[23] *Supra* n. 19.

[24] *Supra*, at 937.

[25] (1934) A.C. 478 — upon which Denning, L.J. had relied.

[26] (1867) L.R. 2 H.L. 149.

[27] *Supra* n. 4.

[29] See also *Edler* v. *Auerbach* (1950) 1 K.B. 359 — where it was held by Devlin, J. that an executed lease could not be set aside for innocent misrepresentation. In this case there was a restriction on the use of the premises in question for other than residential purposes which was not revealed to the lessee before his executing the lease and entering into possession. Devlin, J. held that the mistake here was not a mutual mistake.

disapproved, explains, it is submitted, the interpretation placed on the authorities by the majority in that case — as Denning, L.J. admits.[30] Whilst Jenkins, L.J. — with some regret — was not disposed to allow the claim of justice and equity to outweigh binding authority (as he regarded the cases he cited) Denning, L.J. contrived, with characteristic boldness of spirit, to devise an appropriate solution to the problem. The solution, however, when one considers the terms of the order made, amounted virtually to a type of rectification of the agreement between the parties, to be adjusted in the end result by recourse to the machinery of the statutory application for increase in rental. Admittedly the cases of *Garrard* v. *Frankel*[31] and *Paget* v. *Marshall*[32] in which equitable relief was granted where the agreements had been executed, do provide support for *Solle* v. *Butcher* and were so adopted by Denning, L.J. *Paget* v. *Marshall*, however, on its facts and in the light of the order made, was substantially a case of rectification of a lease document which, because of a mistake, failed to give effect properly to the agreement of the contracting parties, and it would seem that the line of cases, culminating in *Angel* v. *Jay*[33] present much stronger authority to support the contrary position. *Seddon* v. *North Eastern Salt Co.*[34] on which Joyce, J. held that rescission of an executed contract for the sale of a chattel or chose in action will not be granted on the ground of innocent misrepresentation was said by Denning L.J. to have lost all authority.[35] The majority in the High Court declined to condemn *Seddon's Case* as incorrect on this score, the more so in view of the House of Lords reversal on appeal of *Lever Bros. Ltd.* v. *Bell*.[36] The majority noted also that in *Leaf* v. *International Galleries*[37] both Evershed M.R. and Jenkins L.J. reserved their opinions on *Seddon's Case*, as all the Judges of the High Court did, on the ground that the point did not arise directly for decision in the present case.

It is, therefore, not open to read from the High Court judgments either firm support or clear disapproval of *Seddon's Case*, although the majority appear to go further than some present day courts in support of that much discussed but never overruled decision in their critical examination of *Solle* v. *Butcher*. Again *Angel* v. *Jay*[38] which, as it concerns real property, is closer to *Wilde* v. *Gibson*[39] and *Legge* v. *Croker*,[40] than is *Seddon's Case*, appears to have received a degree of support in the judgments of the High Court sufficient to suggest that, despite the persuasive effect of Court of Appeal decisions in Australian courts, it may prevail against *Solle* v. *Butcher* in the High Court if the question of rescission of an executed lease for misrepresentation or common mistake is there in issue. A recent decision of McLelland, J. in the Supreme Court of New South Wales[41] lends weight to this contention.

---

[30] (1950) 1 K.B. 671, 693. "If the rules of Equity have become so rigid that they cannot remedy such an injustice it is time we had a new equity to make good the omissions of the old".

[31] (1862) 30 Beav. 445 — a plain case of rectification with the option given to the defendant to reject the lease.

[32] (1885) 28 Ch.D. 255, at 267. Here Bacon, V.C. could not decide that there had been a common mistake, but probably only a mutual or unilateral mistake, on the part of the plaintiff. Bacon, V.C. in his judgment, which appears to be framed on considerations of "right and justice" (p. 266), does not cite any authority to support his decision.

[33] *Supra* n. 20.

[34] (1905) 1 Ch. 326. Where a contract for the sale of shares in a business had been perfected by the purchaser entering and operating the business.

[35] Because Scrutton, L.J. in *Lever Bros. Ltd.* v. *Bell* (1931) 1 K.B. 557 had "reserved liberty to consider the decision insofar as it decides that executed contracts cannot be rescinded for innocent and material misrepresentation".

[36] *Bell* v. *Lever Bros. Ltd.* (1932) A.C. 161 — but it should fairly be said that the grounds for reversal were not squarely upon the point raised by Scrutton, L.J.

[37] (1950) 2 K.B. 86.

[38] *Supra* n. 20.

[39] *Supra* n. 2.

[40] *Supra* n. 19.

[41] *Kramer* v. *Duggan* 55 S.R. (N.S.W.) 385 — but in this case the question was one

Solle v. *Butcher*, therefore, rather than establishing a clear precedent, would appear to have had the effect, both here and in England, of unsettling the law on the question it decides and certainly has not altered the *Wilde* v. *Gibson* principle with regard to the general rule of unassailability of executed contracts for the sale of land. It may, perhaps, be regarded as an exceptional case explained by the particular circumstances there applying, involving a peculiar disability imposed by Statute, which required the Court to apply a liberal equitable remedy rather than permit injustice through rigidity of the settled rules of Equity. In fact, Bucknill, L.J. found "no merits in this case" and Jenkins, L.J., although dissenting, expressed his satisfaction at the solution afforded by the judgments of his brethren. In any event, the High Court regards as beyond question the binding authority of Lord Campbell's pronouncement[42] with regard to contracts for the sale of land and would except therefrom only cases involving a total failure of consideration, or (*per* Dixon, C.J. and Fullagar, J.)[43] where a condition can be found expressed or implied in the contract that it may be set aside for common mistake.

Svanosio v. *McNamara*, whilst it presents an interesting review of the decisions on the effect of mistake and misrepresentation on an executed contract, is only authority supporting the conclusiveness of real property transactions completed by conveyance. It illustrates for conveyancers, if illustration were required, the protection that can be afforded both parties in such transactions by insertion in contracts of the usual special conditions relating to objections and requisitions on title, and the importance of strict compliance therewith.

The judgments sound a warning on the hazard of completing a purchase of property without obtaining proper identification of the land and appurtenances by survey and one feels that, even could the court have overcome the fatal defects in the appellant's case presented by the terms of the contract and by the completion of the conveyance, it must have held that the appellant's delay and acquiescence in this respect would have been sufficient to debar him from equitable relief. In effect they reflect the continued life of the maxim *caveat emptor* even in equity.

The decision and the enunciation of principle are thus undoubtedly in accordance with the weight of authority and the rules of equity, but that is not to say the general principle that equitable remedies available to a disappointed party to an executory contract are lost to him upon the contract being executed and upon conveyance is consistent with good sense and logic, or that the ends of justice and equity would not better be served by allowing relief to be obtained by parties injured by mistake or innocent misrepresentation, where they are not at fault and where the interests of third parties are not affected.

It is pertinent to question the reasonableness of a complete denial of relief in such cases for the reason only that the contract is executed; the more so in cases where *restitutio in integrum* is possible and justice to the parties would thereby be better achieved, bearing in mind that, in many cases, the defect may not be discoverable until possession has been obtained.

The particular character of real property transactions here, as in other aspects of law and equity, has traditionally imposed strict limitations upon the extent to which equity can review the effect of completed agreements, and only legislative intervention or the highest judicial authority can alter the existing principles with regard to contracts generally or even decisively

---

of innocent misrepresentation and not of common mistake. However, Denning, L.J. in *Solle* v. *Butcher* (at 695, 696) contends that no distinction (with regard to whether the lease was executed or not) can be taken between common misapprehension and innocent misrepresentation. Here the representation alleged was that the flood level reached only to a certain height in the property sold — it was alleged that this representation was false and fraudulent, but McLelland, J. held that it was at most an innocent misrepresentation.

[42] *Wilde* v. *Gibson supra.* [43] 30 *A.L.J.* 372, 373, 374.

restrict the general principle to completed conveyances of real property.
P. H. HUMPHREYS, Case Editor — Fourth Year Student.

COMPANY LAW

SHEARER TRANSPORT CO. PTY. LTD. v. *McGRATH*

The increase in the birth rate of companies in New South Wales coupled with the tightening of funds available for investment is making problems connected with finance of shares of very good general relevance. By s. 148(1) of the New South Wales Companies Act, 1936[1] it is provided, subject to certain exceptions, that

> it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company.

The section imposes a penalty for breach of the provision.

The provision is designed to prevent unauthorised reductions of capital and to protect creditors against a weakening of the company's resources by indirect means. Although it is clear that prevention is intended, the actual effect of the prohibition was for some time doubtful. In view of the fact that the Act imposed a penalty without expressly stating that any transaction falling within its ambit was invalid the question arose whether such a transaction was permitted on payment of the penalty or whether it was forbidden altogether and consequently void. The question first came before our Courts in 1951 in *Dressy Frocks Pty. Ltd.* v. *Bock*[2] and the decision of the Full Court of the Supreme Court of New South Wales in that case was followed in a recent Victorian case, *Shearer Transport Co. Pty. Ltd.* v. *McGrath*.[3] These cases have established that a transaction which falls within the section does not only invoke the penalty but that the effect of the words "it shall not be lawful" is to render void any such transaction.

Shearer's Case involved two propositions:

(1) that a payment by a company on the basis that it is a loan by the company to another person to enable that person to buy shares in the company held by a third party is void, being both illegal and *ultra vires* (even where the payment is made to the third party direct and not to the person getting the loan) and

(2) that such a payment is recoverable by the company from the third party.

The facts of the case were as follows: The Shearer Transport Co. Pty. Ltd. brought an action against McGrath to recover moneys paid to him by the company following a decision made by McGrath and one Connors, both then being directors of the Company, that the payment should be made as a loan to Connors to assist him in the purchase of McGrath's shares in the company.

It was not disputed that the transaction fell within s. 45 of the Companies Act 1938 (Vic.)[4] (which is identical with s. 148 of the New South Wales Act). What was contended on behalf of the plaintiff was that the transaction, though unlawful, was not avoided nor was it *ultra vires* the company as the company had power to lend. Before dealing with *Dressy Frocks Pty. Ltd.* v. *Bock*,[5] which was directly in point, O'Bryan, J. disposed of the cases relied on by the plaintiff. The first of these was

---

[1] Act No. 33, 1936 — Act. No. 2, 1955.
[2] (1951) 51 S.R. (N.S.W.) 390.
[3] (1956) A.L.R. 840.
[4] No. 4602 (1938).
[5] (1951) 51 S.R. 390 (N.S.W.).