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Common mistake in English law: the proposed merger of common law and equity

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I. INTRODUCTION

Although the law relating to common mistake[1] has engendered a plethora of conundrums, many problem areas have in fact been well-traversed in the literature.[2] The present article does not seek to re-cover such well-trodden ground, but attempts, instead, to suggest a different and more systematic approach that would effect a merger of the common law and equitable[3] branches of common mistake into one coherent doctrine.

1. The terminology here is variable; both the terms 'common mistake' as well as 'mutual mistake' have been utilised. For the purposes of this article, the term 'common mistake' will be used. This obviates any confusion with that other category or classification dealing with the lack of coincidence between offer and acceptance which at least one writer has designated as 'mutual mistake'. By 'common mistake', I refer to a situation where offer and acceptance are properly effected, but where, however, both parties are mistaken as to the basis upon which they contracted. The definition set out here is rather rough, but will be elaborated upon in due course.

2. See, eg, and in the areas of both equity as well as the common law, T.H. Tylor, 'General Theory of Mistake in the Formation of Contract' (1948) 11 MLR 257; C.J. Slade, 'The Myth of Mistake in the English Law of Contract' (1954) 70 LQR 385; R.A. Blackburn, 'The Equitable Approach to Mistake in Contract' (1955) 7 Res Judicatae 43; K.O. Shatwell, 'The Supposed Doctrine of Mistake in Contract: A Comedy of Errors' (1955) 33 Can Bar Rev 164; P.S. Atiyah, 'Couturier v Hastie and The Sale of Non-Existent Goods' (1957) 73 LQR 340; P.S. Atiyah and F.A.R. Bennion, 'Mistake in the Construction of Contracts' (1961) 24 MLR 421; Lee B. McTurnan, 'An Approach to Common Mistake in English Law' (1963) 41 Can Bar Rev 1; and John Cartwright, '*Solle v Butcher* and the Doctrine of Mistake in Contract' (1987) 103 LQR 594.

3. The law relating to common mistake in equity has developed apace, particularly since the leading decision was rendered by the Court of Appeal in *Solle v Butcher* [1950] 1 KB 671, in 1949; however, even in this rather more flexible sphere, development has, perhaps, been rather less spirited than might have been expected (see, eg, Atiyah, 'Contract and Tort' in *Lord Denning: the Judge and the Law* (Edited by J.L. Jowell and J.P.W.B. McAuslan, 1984) at 49, where the learned writer states thus: 'The subsequent fate of Lord Denning's doctrine has been muted.'); all this notwithstanding the presence of some reported precedents: see, eg, *Grist v Bailey* [1967] 1 Ch 532; *Magee v Penine Insurance Co Ltd* [1969] 2 QB 507; and *Laurence v Lexcourt Holdings Ltd* [1978] 1 WLR 1128; and see, in the Australian context, *Svanosio v McNamara* (1956) 96 CLR 186, and, more recently, *Taylor v Johnson* (1983) 151 CLR 422, which accepts a more expansive view of equitable relief, endorsing the approach of Denning LJ in *Solle v Butcher, supra*. There is, however, not inconsiderable academic opinion that finds the premises of the equitable jurisdiction somewhat unsatisfactory: see, eg, Atiyah and Bennion, *supra*, note 2, at 439 to 442; Goff and Jones, *The Law of Restitution* (3rd edn, 1986), at 186 to 187 (although the authors do, in fact, endorse the *flexibility* of the equitable principles); Peter Birks, *An Introduction to the Law of Restitution* (1985) at 163 to 164; Meagher, Gummow, and Lehane, *Equity – Doctrines and Remedies* (2nd edn, 1984), especially at 362; and R.J. Sutton, 'Reform of the Law of Mistake in Contract' (1976) 7 NZULR 40 at

It will be one of the central arguments of this piece that there is very little *de facto* difference between both these branches, any difference constituting one of *degree* only in general and degree of *application* of the law in particular. I will attempt to demonstrate this proposition by analysis of the main precedents. If this argument be accepted, then the way would seem clear for the courts to effect the merger referred to in the preceding paragraph. There will, however, remain a few problems, both practical and theoretical, that may militate against such an approach, and these will be considered in the concluding part of the article.

II. THE *DE FACTO* MERGER BETWEEN COMMON LAW AND EQUITY

The principles of the common law on the one hand and equity on the other are so similar as to be identical in substance. This point is borne out by the precedents right to the present.[4] A comparison of the common law as well as equitable authorities from both linguistic as well as (perhaps more indirectly) result-oriented perspectives will, it is hoped, aid in supporting this proposition. It ought, however, to be noted that the argument now proffered is not excessively radical. There is some (albeit arguably somewhat ambivalent) judicial authority.[5] In addition, and more importantly, in a little cited but perceptive article Cyril Grunfeld does mention that, in what he terms the situation of a 'bilateral mistake', there being no difference between the equitable and common law rules (apart from the remedy), the former should therefore displace the latter.[6] His observation was, however, part of a wider proposal for the general displacement of the common law by equity in the sphere of contractual mistake generally and he did not therefore elaborate upon this more specific observation itself. The present piece is,

44 to 45. But *cf* Blackburn, *supra*, note 2. There have also been interesting applications of *Solle* by Commonwealth courts: see, *supra*, in the context of Australia; in the New Zealand context, see, eg, *Waring v S.J. Brentnall Ltd* [1975] 2 NZLR 401 (and *cf Dell v Beasley* [1959] NZLR 89; and *Fawcett v Star Car Sales Ltd* [1960] NZLR 406); and, in the Canadian context, see, eg, *Ivanochko v Sych* (1967) 60 DLR (2d) 474; and *Schonekess v Bach* (1968) 66 DLR (2d) 415.

4. I refer, in particular, to the recent judgment by Steyn J in *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255. This case is interesting for many points relating to the law of common mistake (especially at common law) which are, however, outside the purview of the present piece. Of especial interest is the learned judge's express endorsement of a 'larger' doctrine of mistake, which point figures in later discussion; this view is, incidentally, approved by Professor Treitel: see G.H. Treitel, 'Mistake in Contract' (1988) 104 LQR 501 at 503. For other comments on the instant case, see John Cartwright, 'Mistake in Contract' [1988] LMCQ 300; and Dimity Kingsford-Smith, 'Two Cases on Common Mistake: Effect on Formation of Contract and Scope of Contract Terms' [1988] 4 JIBL 176.

5. See *Schonekess v Bach* (1968) 66 DLR (2d) 415 at 422 (*per* Seaton J).

6. See C. Grunfeld, 'A Study in the Relationship between Common Law and Equity in Contractual Mistake' (1952) 15 MLR 297, especially at 300, 302, and 310. See, also, by the same author, 'Reform in the Law of Contract' (1961) 24 MLR 62 at 83. *Contra*, McTurnan, *supra*, note 2, especially at 49 to 50, who argues (at 50) that '. . . the certainty of rules governing promissory liability deserves priority over the need for appropriate remedies'.

of course, more modest in scope, and for that reason will, it is hoped, elaborate upon this general proposition in a more specific manner.

Linguistic analysis

1. The common law formulation

Turning first to the prior decisions in general and the linguistic aspect in particular, we can begin by analysing the formulations at common law – specifically with the leading decision of *Bell v Lever Bros.*[7] Whether or not the doctrine of common mistake at common law ought merely to be confined to the narrower categories of *res extincta* and *res sua* is a controversy which, although not settled definitively, has been interestingly dealt with by Steyn J in the recent case of *Associated Japanese Bank (International) Ltd v Credit du Nord SA.*[8] In that decision, the learned judge argued for a 'larger' doctrine of mistake[9] – an approach that has received fairly weighty academic endorsement.[10] It is not proposed that we discuss this controversy in any detail, save to observe that Steyn J's approach does have much to commend itself, not least because a close textual analysis of the judgments of both Lord Atkin and Lord Thankerton in *Bell* will reveal that there are indeed concrete theoretical formulations of a broader category of common mistake.[11] Furthermore, if an operative common mistake at common law is constrained to either the perishing or non-existence of the subject matter of the contract, the real bite of the doctrine must, it is submitted, be admitted to have been taken away in practice, simply because the real advantage of the doctrine is to be found precisely in those fact situations which do not fall within these narrower categories. A simple example would be where parties contract for a certain item on the common basis or understanding that a certain context exists in order to render the contract a highly profitable business venture for all concerned. Such a context is, however, either non-existent or ceases to exist at or before the time of making of the contract. Arguably, if the item concerned still exists, it would be highly improbable than an argument based upon the doctrine of *res extincta* would succeed. On the other hand, it would seem quite pointless to hold the

7. [1932] AC 161.

8. [1989] 1 WLR 255.

9. The term 'false and fundamental assumption' is coined in *Anson's Law of Contract* (26th edn, 1984) by A.G. Guest at 263. In another text, this 'larger' doctrine is simply termed either 'an independent doctrine of common mistake' or a 'general doctrine of mistake', *viz*, one that extends beyond the categories of *res extincta* and *res sua* referred to above: see Cheshire, Fifoot and Furmston's *Law of Contract* (11th edn, 1986) by M.P. Furmston at 223 and 225, respectively.

10. See Treitel, *supra*, note 4.

11. There are, however, difficulties which have to do with the actual illustrations and authorities cited – which do not, it is submitted, give a sufficiently clear idea as to what in practice might constitute an operative mistake at common law; most of the illustrations, in fact, focus upon categories that could have been subsumed in any event under the narrower categories of either *res extincta* or *res sua*: see, eg, [1932] AC 161 at 217 and 218.

parties to an agreement whose fundamental business basis has been rendered nugatory.[12]

Enough has been said to set, as it were, the linguistic stage for the common law. If there is a 'larger' doctrine of common mistake at common law, the following statements by Lord Atkin and Lord Thankerton in *Bell* must be accepted as the generally accepted formulations of this broader doctrine. It might be added that both statements were in fact cited and applied by Steyn J himself in the *Associated Japanese Bank* case.[13]

Lord Atkin observed thus:[14]

'. . . a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality *essentially different* from the thing as it was believed to be.'

Lord Thankerton's formulation was, as Steyn J himself pertinently pointed out,[15] substantially identical to that of Lord Atkin; the learned Law Lord remarked that common mistake 'can only properly relate to something which both must necessarily have accepted in their minds as *an essential and integral part* of the subject-matter'.[16] Both formulations bear an uncanny resemblance to, and affinity with, the doctrine of frustration – a point that will be further developed below.

2. The equitable formulation

It is generally accepted that the following statement of the law by Denning LJ in *Solle v Butcher*[17] constitutes the law relating to common

12. And *cf* the judgment of Wright J in *Lever Bros Ltd v Bell* [1931] 1 KB 557, especially at 564. See, also, *per* Scrutton LJ at 584 to 585; *per* Lawrence LJ at 589 to 590; and *per* Greer LJ at 594 to 597. And the formulations by Lord Atkin and Lord Thankerton in the House of Lords (as to which see, *infra*, notes 14 to 16, and the accompanying main text, and also *per* Lord Thankerton in [1932] AC 161 at 236) do, as mentioned in this very paragraph, support the broader doctrine of common mistake, despite some possible reservations as to the illustrations utilised (see, *supra*, note 11); the language used is not, however, always consistent; see, eg, *per* Lord Atkin [1932] AC 161 at 223 to 224, although this might arguably be interpreted as *strict application* of a *broader* principle. See, also, *Scott v Coulson* [1903] 2 Ch 249, which, although not strictly speaking a situation of *res extincta* as such, was one in which the contract was held void for common mistake. The facts are, however, somewhat difficult to rationalise on the basis of common mistake, having regard to the fact that before the actual completion of the contract, one party had reason to believe that the assured was dead, but did not disclose this fact to the other party – a situation that might, it is suggested, fall more appropriately within the scope of unilateral mistake instead. The reader is also referred to the interesting discussion in McTurnan, *supra*, note 2, especially at 12 to 13, and 23 to 25.

13. See [1989] 1 WLR 255 at 265 to 266.

14. [1932] AC 161 at 218 (emphasis added).

15. [1989] 1 WLR 255 at 266.

16. [1932] AC 161 at 235 (emphasis mine). And see Birks, *supra*, note 2, at 162: '. . . in the formation of contract, the test of operative mistake is not "but for": a "causative mistake" is not enough. The mistake must be "fundamental". Imprecise as that word is, it signifies something very serious as opposed to something merely causative, and it takes its meaning precisely from the contract between the two words: whatever else it is, fundamental mistake is something more than a caustive mistake.'

17. [1950] 1 KB 671.

mistake in equity (in order to set out the context as fully as possible, an extended extract is cited):[18]

'The court, it was said, had power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained . . . It is now clear that a contract will be set aside if the mistake of the one party has been induced by a material misrepresentation of the other, even though it was not fraudulent or fundamental; or if one party, knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and conclude a contract on the mistaken terms instead of pointing out the mistake . . . A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their respective rights, *provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault.*'

3. The common law and equitable formulations compared

It is submitted that a close scrutiny of the formulations just quoted will demonstrate that the formulations at common law and in equity are, in essence, the same. It is admitted that somewhat different language is used; Lord Atkin, for example, utilises the phrase 'essentially different', whilst Denning LJ uses the concept of a 'fundamental misapprehension'. The effect, however, is, it is respectfully submitted, the same. I would go so far as to argue that even from a linguistic point of view, the phrases utilised are substantially similar.[19] This submission is buttressed precedentially by Blackburn J's judgment in *Kennedy v Panama, New Zealand, and Australian Royal Mail Company (Limited)*, a leading case at *common law*, where the learned judge also referred to a 'misapprehension'.[20]

The reader might, however, point to one ostensibly significant difference between the formulations, *viz*, the 'sub-proposition' by Denning LJ to the effect that the party seeking to rely upon the doctrine of common mistake in equity to set aside the contract concerned must not himself be at fault. It is, however, submitted that the common law itself has an equivalent concept that (although missing from *Bell v Lever Bros*[21]) may be found in the Australian High Court decision of *McRae v Commonwealth Disposals Commission.*[22] Steyn J summarises this proposition in *McRae* as follows:[23]

18. [1950] 1 KB 671 at 692 to 693 (emphasis added).

19. And *cf* Cartwright, *supra*, note 2, at 612.

20. (1867) LR 2 QB 580 at 587. It should be noted that Blackburn J delivered the judgment of the Court.

21. [1932] AC 161; and a point stressed by Steyn J in the *Associated Japanese Bank* case: see [1989] 1 WLR 255 at 268.

22. (1951) 84 CLR 377.

23. [1989] 1 WLR 255 at 268 to 269 (emphasis mine). Steyn J cites the *McRae* case, *supra*, note 22, at 408. He gives an illustration (at 268): 'An extreme example is that of the man who makes a contract with minimal knowledge of the facts to which the mistake relates but is content that it is a good speculative risk.'

'. . . there is a requirement which was *not specifically discussed* in *Bell v Lever Bros Ltd*. . . . In my judgment a party cannot be allowed to rely on a common mistake where the mistake consists of a belief which is entertained by him *without any reasonable grounds* for such belief. . . That is not because principles such as estoppel or negligence require it, but simply because *policy and good sense* dictate that the positive rules regarding common mistake should be so qualified. Curiously enough this qualification is similar to the civilian concept where the doctrine of error in substantia is tempered by the principles governing culpa in contrahendo. *More importantly*, a recognition of this qualification is *consistent* with the approach in *equity* where fault on the part of the party adversely affected will generally preclude the granting of equitable relief.'

If the proposition just quoted is accepted, there is (as Steyn J himself points out) a common law counterpart of Denning LJ's 'no fault' criterion in equity. One ought, in this regard, to note the phrase 'policy and good sense' italicised in the quotation above which brings, it is submitted, the common law closer to the equitable 'no fault' criterion in so far as the rationale of both appear to be the same, being rooted in notions of justice and fairplay. The only problem, however, is that the common law proposition will take on the rather amorphous[24] character of its equitable counterpart.

One writer has plausibly argued that[25] Steyn J has, in the above quotation, stated a proposition that is actually wider than the passage the learned judge relies upon in *McRae* itself. The relevant passage in *McRae* is as follows:[26]

'. . . a party cannot rely on mutual mistake where the mistake consists of a belief which is, on the one hand, entertained by him without any reasonable ground, *and*, on the other hand, deliberately *induced* by him in the mind of the other party.'

This point is persuasive, based upon a literal reading of this passage as just cited – which suggests that not only must the mistake have been entertained by the party seeking to rely upon it on reasonable grounds (ie, Steyn J's formulation) but also that he must not have deliberately induced the mistake in the mind of the other party (which qualifies the broader, former proposition). Might it not, however, be argued that the

24. See, eg, *per* Goff J in *Grist v Bailey* [1967] 1 Ch 532 at 542 ('There remains one other point, and that is the condition laid down by Denning LJ that the party seeking to take advantage of the mistake must not be at fault. Denning LJ did not develop that at all and is not, I think, with respect, absolutely clear what it comprehends. Clearly, there must be some degree of blameworthiness beyond the mere fault of having made a mistake, but the question is, how much, or in what way? I think each case must depend on its own facts . . .'). And see, generally, Cartwright, *supra*, note 2, at 612 to 614, where another decision, *Laurence v Lexcourt Holdings Ltd* [1978] 1 WLR 1128, is also discussed. An interesting decision in the New Zealand context is by Chilwell J in *Waring v S.J. Brentnall Ltd* [1975] 2 NZLR 401, where the learned judge reformulates (at 409) this requirement in terms of unconscionability.

25. See Cartwright, *supra*, note 4, at 301.

26. (1951) 84 CLR 377 at 408 (emphasis added).

latter portion of the passage in *McRae* that the writer utilises to qualify the broader proposition embodied in the quotation above is really addressed to the facts of *McRae* itself? In other words, these 'qualifying' words occurring in the joint judgment of Dixon and Fullagar JJ in *McRae* were not intended to be treated as forming part of a wider composite proposition for future general application but constituted, rather, a reference to the specific facts of the case itself. Admittedly, the word 'and' in the material passage (as italicised above), if read literally, weighs heavily against such an interpretation – a point already conceded above. It is, however, submitted that the point just made is at least arguable having regard especially to the context and tenor of subsequent passages in the judgment;[27] all these passages appear to suggest that whilst the defendant Commission in *McRae* did in fact induce the mistake, this was but a consequence of the more important point, *viz*, that the defendant could not, on the facts, have had any reasonable grounds for entertaining the belief which constituted the mistake because it ought to have verified the subject matter of the contract itself. In any event, it is respectfully submitted that, even if Steyn J has cited a proposition that cannot be strictly supported by any prior precedent, such a broader proposition makes for good sense and justice, simply because it would be inappropriate, to say the least, to allow a party who had himself been negligent in making the mistake to rely upon it, provided that he had not also been at fault in inducing the mistake in the mind of the other party. It might be added that it is more likely than not that where a party has been negligent in making the mistake, the element of inducement would follow in the normal course of events, usually as a result of the initial negligence, thus rendering the controversy presently considered a rather academic one.

Even if the arguments just made are not accepted, ie, that the party seeking to rely upon the doctrine of common mistake cannot seek to rely upon his mistake if he has no reasonable grounds for such reliance and if he has himself deliberately induced the mistake in the mind of the other party,[28] it is submitted that that although the equitable criterion of 'no fault' appears rather broader and more amorphous than its common law counterpart, there is an at least approximate correlation.

Let us now turn to a consideration of the difference in results between the decisions at common law and those in equity.

An analysis of the results of the leading cases

1. Introduction

It will be seen that the courts appear far more liberal in allowing the doctrine of common mistake in equity to be successfully pleaded. And it will be my contention that the reason for this difference cannot be attributed to any difference in the substance between the doctrines at common law and in equity but is due, rather, to a difference in the degree

27. See (1951) 84 CLR 377 at 408 to 409, and 410.

28. Which is Cartwright's argument: see, *supra*, note 25.

or strictness in application of the respective doctrines. A preliminary *caveat* is in order. It is admitted that a mere difference in results is not conclusive of liberality or otherwise. It is submitted, however, that the difference, being as consistent as it has been (in so far at least as the reported cases are concerned), must be *prima facie* evidence of a trend toward liberality.

2. The results at common law

Turning first to the cases at common law, apart from a few decisions that have been either confined to their context[29] or heavily criticised,[30] the leading decision to date is *Bell v Lever Bros.*[31] This was a decision where the House of Lords refused to allow the argument of mistake to succeed – a result which prompted the authors of a leading textbook to pronounce upon what they considered to be the draconian nature of the doctrine which was perceived, in fact, to be so strict as to be of no practical use to a party seeking to rely upon it.[32] Steyn J has attempted to refute this construction in the *Associated Japanese Bank* case, although there are problems with this approach that cannot be considered in any detail here.[33] What is important to note is the fact that it was not until the *Associated Japanese Bank* case itself that the broader doctrine of common mistake at common law was clearly and successfully pleaded.

It might be pertinent at this juncture to note that there is probably a very good reason which contributes, in part at least, toward the strictness in the application of the common law doctrine, which reason lies in the very close analogy and rationale between the doctrine of common mistake at common law on the one hand and the doctrine of frustration on the other. This parallel, long present but little discussed, was recently highlighted by Steyn J in the *Associated Japanese Bank* case where the learned judge stated that both these doctrines 'are designed to cope with the impact of unexpected and wholly exceptional circumstances on apparent[34] contracts'.[35] Steyn J, in fact, summarises the basic proposition in *Bell v Lever Bros* (with regard to the test for common mistake at common law) as follows:[36]

29. Eg, *Sheikh Bros Ltd v Arnold Julius Ochsner* [1957] AC 136 (which dealt with the Indian Contract Act).

30. Eg, *Nicholson and Venn v Smith Marriott* (1947) 177 LT 189: see criticisms by Atiyah and Bennion, *supra*, note 2, at 433; as well as by McTurnan, *supra*, note 2, at 18 to 19.

31. [1932] AC 161.

32. *Cf* the comments by Cheshire, Fifoot and Furmston, supra, note 9, at 225 to 226.

33. See the rationalisation of the actual decision in *Bell* by Steyn J in the *Associated Japanese Bank* case via a detailed consideration of the merits of the case by way of an equally detailed analysis of the factual matrix concerned: see [1989] 1 WLR 255 at 267 – a re-interpretation that does indeed have support from the very judgments in *Bell* itself (see, eg, [1932] AC 161 at 199, *per* Lord Blanesburgh); as well as from Professor Treitel: see Treitel, *supra*, note 4, at 505. It is, however, suggested, with respect, that Steyn J's approach should be modified to take into account only the relevant merits of the case, thus minimising uncertainty in an area that is, by its very nature, fraught with uncertainty.

34. *Cf* the point made with regard to Atiyah and Bennion's argument at, *infra*, note 48.

35. [1989] 1 WLR 255 at 268.

36. [1989] 1 WLR 255 at 268 (emphasis mine).

'. . . the mistake must render the subject matter of the contract *essentially and radically different* from the subject matter which the parties believed to exist.'

The words italicised in the passage just quoted are highly significant, for a review of the principal authorities in the law of frustration[37] would reveal that, whatever its difficulty in application, the abovementioned formulation is (with, in the nature of things, some disagreement possible, of course) equally applicable as a test for the doctrine of frustration itself.[38] If this be the case, then the only significant distinction between the doctrines would be the timing of the event in question, the vital dividing-line being the time that the contract is made.[39]

At least four consequences follow from the relationship just described. First, it would be but in relatively rare cases that the doctrine of common mistake at common law could be actually pleaded successfully; this is in accordance with the present, rather strict, judicial attitude toward allowing the doctrine of frustration to be successfully pleaded.[40] This consequence, of course, accords with, and explains (in part at least) the strictness of application in the sphere of mistake as described above. In so far as the justification of such a strict attitude is concerned, one reason might be that in a situation of frustration, the catastrophic consequences are the result of some external factor, with neither party to blame. Having regard to the parallel between the doctrines of frustration and mistake, such reasoning applies equally to the situation of common mistake at common law, for the consequences similarly do not occur as a result of the fault of either party.

The second consequence is rather less relevant for our present purposes; it is to the effect that the rather nebulous rationale underlying the doctrine of frustration[41] would apply equally to the doctrine of common mistake at common law.

37. See, generally, G.H. Treitel, *The Law of Contract* (7th edn, 1987), Chapter 20; *Anson's Law of Contract, supra*, note 9, Chapter XIV; Cheshire, Fifoot and Furmston's Law of Contract, *supra*, note 9, Chapter 20; and *Chitty on Contracts*, Vol I (25th edn, 1983), Chapter 23, for an overview of the doctrine itself.

38. This point is hinted at in Cartwright, *supra*, note 4, at 301, note 8, and is somewhat more clearly stated (by way of analogy only) by the same author in his article cited at note 2, *supra*, at 603. See, also, *per* Scrutton LJ in *Lever Bros Ltd v Bell* [1931] 1 KB 557 at 584 to 585; and Lord Atkin's brief reference to the frustration cases in *Bell v Lever Bros* itself: see [1932] AC 161, especially at 226. McTurnan points out, however, that despite the similarity in theoretical basis, the application of the doctrines of frustration and common mistake is quite different: *see*, supra, note 2, at 25 to 26.

39. See, eg, *Amalgamated Investment and Property Co Ltd v John Walker and Sons Ltd* [1977] 1 WLR 164. See, also, the observations of Lord Thankerton in *Bell v Lever Bros* [1932] AC 161 at 237; the rather interesting decision of Wright J in *Griffith v Brymer* (1903) 19 TLR 434; and McTurnan, *supra*, note 2, at 23.

40. Though *cf* Atiyah and Bennion, *supra*, note 2, at 436 to 437; Cartwright, *supra*, note 2, at 604, note 48; and McTurnan, *supra*, note 2, at 25 to 26. It is, however, submitted that the strictness of application for both doctrines is incontrovertible, although these writers probably differ in so far as their perceptions of *relative* strictness are concerned.

41. Which has generated much discussion, a good judicial example of which may be found in the relatively recent House of Lords decision of *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675. And see, generally, the academic writings cited at note 37, *supra*.

Thirdly, having regard to the above parallel, it is unclear as to whether the application of the doctrine of common mistake will result in the rather factual and unpredictable *ad hoc* balancing that is so characteristic of decisions where the doctrine of frustration is applied. Or will the courts, despite the similarity of approach and (apparently) rationale, nevertheless develop alternative and somewhat more concrete general principles? As things now stand, it would seem, especially having regard to the express linkage established by Steyn J between the doctrines of common mistake and frustration referred to above, that such alternative principles are unlikely to be developed – at least in the near future. The following suggestion by Treitel may, however, provide some grist for the juristic mill insofar as the concretisation of a viable general principle of common mistake is concerned; although (and this is a fair point) some might argue that even this suggestion is fraught with uncertainty:[42]

'A thing has many qualities . . . For any particular purpose one or more of these qualities may be uppermost in the minds of the persons dealing with the thing. Some particular quality may be so important to them that they actually use it to *identify* the thing. If the thing lacks that quality, it is suggested that the parties have made a fundamental mistake, even though they have not mistaken the one thing for another, or made a mistake as to the existence of the thing.'

If, however, the realisation of alternative general principles is impractical at present, this would support the rather strict attitude of the courts *vis-a-vis* the doctrine of common mistake at common law, for the courts would understandably be wary of creating unnecessary uncertainty by generally allowing the doctrine to be successfully pleaded. Whether, however, the *Associated Japanese Bank* case establishes a strong case in the opposite direction is a factor that we shall consider in the concluding Part of this article.

The discussion of the fourth consequence with regard to the possibility for legislative reform will also be deferred in view of its relevance to the propositions for reform proposed in the final Part below.

3. The results in equity

It is interesting to note that all the leading decisions since (and including) *Solle v Butcher*[43] have resulted in the doctrine of common mistake in equity being successfully pleaded.[44] And it is of no small significance to

42. See Treitel, *The Law of Contract, supra*, note 37, at 218. See, also, Tylor, *supra*, note 2. And for some apparent judicial support, see *per* Blackburn J in *Kennedy v Panama, New Zealand, and Australian Royal Mail Company (Ltd)* (1867) LR 2 QB 580, especially at 587 to 588.

43. [1950] 1 KB 671.

44. These include decisions already cited in the present article, *viz*, *Grist v Bailey* [1967] 1 Ch 532; *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507; and *Laurence v Lexcourt Holdings Ltd* [1978] 1 WLR 1128; and, not forgetting the *Associated Japanese Bank* case itself where, however, Steyn J dealt with the point rather briefly (see [1989] 1 WLR 255 at 270). This point does not, of course, take into account unreported cases where the argument of common mistake in equity might have failed. In the absence, however, of further evidence, this query must, unfortunately, remain unanswered.

note that one precedent, *viz, Magee v Pennine Insurance Co Ltd*,[45] has, in fact, been described by one writer as being based 'on facts analytically indistinguishable from *Bell v Lever Brothers*'.[46]

4. The results at common law and in equity compared

As has already been submitted above, the rather striking difference in the rate of success at common law on the one hand and in equity on the other cannot be attributed to any substantive difference as such between the two spheres. But, if this be the case, then what accounts for the relative liberality in the equitable sphere? As has also been submitted above, the difference lies in the area of application and attitude of the courts. The reason for this is relatively simple; it lies in the effects resulting from the successful pleading of each doctrine. If the broader doctrine of common mistake at common law is successfully pleaded, the contract is rendered *void*, thus adversely affecting (where they are present) third party rights. A successful pleading of the doctrine of common mistake in equity, on the other hand, results in the contract being rendered *voidable* – a much less drastic result, at least in so far as innocent third parties are concerned.[47] This (ie, the sphere of impact or effect) is thus the only area where a real or significant difference exists. In all other respects, therefore, there has been a *de facto* merger between the common law and equitable principles.

III. *DE JURE* MERGER PROPOSED

If there has, indeed, been a *de facto* merger of the principles of common law and equity as argued, one very important question remains: 'whither goes the doctrine of common mistake?' If the law remains in its present form, it is clear that the doctrine of common mistake at common law will, given its relatively poor ability to provide a remedy, gradually become moribund. Optimists might point to the recent *Associated Japanese Bank* case as signalling a revival in the common law doctrine. However, one ought to remember that the decision is only one at first instance and, more importantly, given the fact that the doctrine of common mistake at common law renders the contract void (a most drastic consequence with regard to third parties as pointed out earlier on), it is highly unlikely that the courts would risk a liberal extension of the common law principles. If this be the case, litigants will continue to focus upon the equitable as opposed to the common law principles, at least in so far as third party rights are not involved. In any event, and harking back to arguments

45. [1969] 2 QB 507.

46. Cartwright, *supra*, note 2, at 609. See, also, *ibid*, at 610. See, further, a judicial expression of this sentiment by Chilwell J in the New Zealand decision of *Waring v S.J. Brentnall Ltd* [1975] 2 NZLR 401 at 407.

47. This argument is clearly supported by at least one article that, however, focuses upon the comparative sphere: see E. Sabbath, 'Effects of Mistake in Contracts – A Study in Comparative Law' (1964) 13 ICLQ 798, especially at 798 and 811. *Cf*, also, Shatwell, *supra*, note 2, especially at 171 to 172, and 184, note 72; McTurnan, *supra*, note 2, especially at 45 to 46; Cartwright, *supra*, note 2, at 612; and Sutton, *supra*, note 3, at 49, 54, and 62.

made previously, the principles at common law and in equity are the same in substance, the only difference lying in the degree of strictness in application of each set of principles which, in turn, is dependent upon their effects (especially with regard to third party rights), as argued above.

It is therefore submitted that the *de facto* merger ought to be rationalised into a *de jure* one by formally combining the common law and equitable principles. Given the fusion of the administration of common law and equity (that has existed since the Judicature Acts of 1873–75), the courts ought to encounter no procedural problems in this regard. A few substantive objections do, however, remain.

It may, first, be argued that equity may, and indeed has, granted relief where the common law would not. This is undoubtedly true as a proposition of law. It is, however, submitted that if the underlying principles of both branches are in effect the same, there should be no reason why they should not be amalgamated.

Secondly, an argument may be made out to the effect that the theoretical underpinnings of the common law and equitable doctrines are different. The common law proceeds upon the basis of interpretation, while equity bases itself upon the notion of inequitability, despite the fact that a contract otherwise exists. Several comments are in order. While this argument is persuasive, the fact remains that the tests formulated by both branches are in substance the same. Further – and this is a related point – even in the equitable sphere, the terms of reference necessarily entail interpretation. Finally, there may be an at least arguable alternative theoretical underpinning for the doctrine of common mistake. It might, it is submitted, be argued that, in a situation of common mistake, there is a mere rebuttable presumption that the contract concerned has complied with the rules relating to offer and acceptance, which presumption has been rebutted as a result of the common mistake. The effect of the common mistake, in other words, is effectively to vitiate the substance of the agreement (and, therefore, the agreement iself); and this is so despite the fact that all the formal requirements of offer and acceptance have *prima facie* given rise to a presumption that the parties concerned (not being at cross-purposes) have simultaneously attained agreement with regard to the very same substance as well.[48]

Thirdly, it might be argued that Lord Denning has, in any event, already advocated a similar approach. It is respectfully submitted that Lord Denning's approach implies an instrumentality and expediency insofar as it advocates a severing of the Gordion Knot without any logical outgrowth or development from the existing precedents. The point sought to be made in the present article, however, is that a general rule for both common law and equity is desirable and that, if one examines the relevant cases, a common formulation is, in fact, viable. If this point is accepted, then Lord Denning's approach, which consists in doing away with the common law rules altogether, short circuits the

48. This would also explain the distinction Devlin LJ draws in *Ingram v Little* [1961] 1 QB 31. *Contra*, Atiyah and Bennion, *supra*, note 2, at 422. *Cf*, also, McTurnan, *supra*, note 2, at 2.

proper method of legal development by avoiding a reasoned consideration of the relevant legal materials.

Fourthly, since the common law doctrine renders the contract void and the equitable doctrine, on the other hand, renders the contract concerned only voidable, what effect ought to accompany a successful pleading of his new merged doctrine? It is suggested that the contract concerned only be rendered voidable – the result which obtains in equity. This poses no great problems and, in fact, makes no difference to a party who merely desires to rescind the contract in any event. As already alluded to above, given the present dichotomy and trend of results of cases, such a party would have been (until the *Associated Japanese Bank* case at least) better off relying, wholly or in the main, upon the equitable doctrine which is rather more liberal. Adoption of the above suggestion would raise problems *vis-a-vis* third party rights. It might, further, be argued that adoption of the principle of voidability would result in too lax an attitude on the part of the courts who would then have relatively little hesitation in holding contracts voidable for common mistake.[49] The following responses may be made to these problems.

First, while there will be problems with regard to third party rights, they may not be as acute as appears at first blush. If the equitable (as opposed to the common law) approach is adopted, the court could indirectly adjust the rights of the third party via the adjustment of rights between the contracting parties. In fact, the rather more flexible attitude of equity toward the position between the contracting parties themselves (evidence, for example, the final order made in *Solle v Butcher*) is itself an additional reason why the equitable approach ought to prevail.[50] A more acceptable solution, however, might be to leave the propounding of a framework for the delegation of powers for the adjustment of third party rights to the legislature.[51] Quite apart from arguments of logic and legal tradition, there is an indirect legislative precedent for this suggestion. It may be recalled that we found that the doctrines of common mistake and frustration are highly similar in approach. In so far as the law relating to frustration is concerned, the legislature has, via the Law Reform (Frustrated Contracts) Act 1943,[52] propounded a legislative mechanism by which the burden of loss could be equitably[53] distributed as between two parties who are of necessity equally blameless. One wonders therefore whether the legislature could enact similar legislation not only to put the existing equitable situation (see, for example, again, the order made in

49. *Cf* the argument of McTurnan at, *supra*, note 6.

50. See Grunfeld, 'A Study in the Relationship between Common Law and Equity in Contractual Mistake', *supra*, note 6, especially at 319; and Sabbath, *supra*, note 47, at 828 to 829.

51. See both articles by Grunfeld, *supra*, note 6, at 315 to 318, and 83, respectively; and also McTurnan, *supra*, note 3, at 57 to 65.

52. 6 & 7 Geo 6, c 40.

53. Or, to be more precise, on a restitutionary basis. See, in particular, *B.P. Exploration Co (Libya) Ltd v Hunt* [1979] 1 WLR 783; affirmed (for the most part) in [1981] 1 WLR 236 and [1983] 2 AC 352.

Solle v Butcher) on a regular footing along the lines of what the 1943 Act effected in the law relating to frustration[54] but also to extend the discretion of the court to cover third party rights as well. What form such legislative reform might take is, at bottom, an issue of legislative policy. One extreme might be to allow the court *carte blanche* in so far as the award to the third party is concerned. The legislature might, on the other hand, designate a stipulated percentage to be contributed by both parties to the contract, one half of what each party would otherwise receive, for example. Further modifications are, of course, possible. There could, for example, be, by analogy with the approach of the 1943 Act, a limit on the award to the third party which could be constituted by a fixed percentage as just described.

Turning to the critique pertaining to 'judicial hyperactivity', one must trust that the courts will utilise their powers in accordance with precedent and principle. If the sceptic persists in arguing that one can never be too sure, then he or she raises an argument that would be equally applicable to most areas of both common law as well as statutory interpretation. Such scepticism would be what Ronald Dworkin has recently termed 'external' (as opposed to 'internal') scepticism,[55] which provides no common ground whatsoever for reasonable disagreement, relegating all questions to the status of being neither true nor false, their truth depending upon the subjective perception of the individual concerned. To be sure, the concept of 'external scepticism' is not without current (and rather more trendy) support, especially amongst the Criticial Legal Scholars.[56] A resolution of such difficult jurisprudential issues is, of course, outside the purview of the instant article, and may well be beyond the intellectual reach of present jurisprudential thought. What is, however, clear is that the courts would be given an opportunity to effect substantive justice from a practical point of view. And as case law develops as a matter of course, the court would be afforded some guidance, at least, having regard, in particular, to the doctrine of *stare decisis*. A start in such circumstances has always to be made from both policy as well as logical points of view.

It might, in fact, be added that the argument from excessive liberality considered in the preceding paragraph would apply with an even greater vengeance if the approach toward common mistake at common law in the *Associated Japanese Bank* case were extended or even merely maintained, for it appears that the approach in the case itself was rather liberal. And the effects in this regard would be exacerbated in so far as the doctrine of common mistake at common law renders the contract not merely voidable, but void. It was precisely for this reason, amongst others, that it was argued above that the present approach toward

54. See, also, *per* Devlin LJ (albeit in a somewhat different context) in *Ingram v Little* [1961] 1 QB 31 at 73 to 74; and McTurnan, *supra*, note 2, especially at 48 to 49.

55. See Ronald Dworkin, *Law's Empire* (1986) at 76 to 86.

56. For general overviews of the Critical Legal Studies Movement, see, eg, *The Politics of Law* (edited by David Kairys, 1982); Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (1986); and Mark Kelman, *A Guide to Critical Legal Studies* (1987). See, also, Dworkin, *supra*, note 55, at 271 to 274.

common mistake at common law ought not to be extended and liberalised.

One final substantive problem that might arise as a result of an attempt to effect a *de jure* merger between the common law and equitable doctrines is the argument that the two branches have to be kept separate and distinct. It is, indeed, a fact little controverted nowadays that the Judicature Acts did not effect a fusion of the substance of the principles of common law and equity but, rather, merely fused the administration of the same.[57] Indeed, attempts to utilise what is now s 49(1) of the Supreme Court Act 1981 (which states that where there is a conflict between law and equity, the rules of equity are to prevail) in order to create completely new legal principles has met with little success and much resistance.[58] Yet, it ought to be pointed out that there has been some fusion in substance – a move deprecated by some writers as the 'fusion fallacy'.[59] Furthermore, the relatively recent House of Lords decision of *United Scientific Holdings Ltd v Burnley Borough Council*[60] has, in fact, held that both equity and the common law have become fused in a substantive sense. This decision has, however, come under not inconsiderable criticism, not least because none of the Law Lords concerned was an equity lawyer. What is one to make of this controversy? Is the *de jure* merger suggested in the present article faced by an insurmountable obstacle? It is respectfully submitted that one is not forced to accept either extreme, ie, either a rigid separation between the rules and principles of law and equity or a thorough intermingling, as it were, of the two into an entirely new legal creature. The ideal, and the truth, lies somewhere in the middle, as always.[61] Whichever view one takes of the instant controversy, it is submitted that where we have a situation such as the present, ie, one where because the common law and equitable principles are so similar as to be identical in substance such that any fusion is a merely technical one, then merger of both branches of the law ought, in principle, to be effected. It might be pointed out, in any event, that if the proposed merger is still perceived as too radical a reform to be undertaken by the courts for the reasons just mentioned, then the legislature could effect the proposal instead – a point already alluded to

57. See, eg, *Snell's Principles of Equity* (28th edn, 1982, by P.V. Baker and P.St.J. Langan) at 12 to 13, and 17; Meagher, Gummow, and Lehane, *supra*, note 3, at 43 and 45 to 47; and *Hanbury and Maudsley – Modern Equity* (12th edn, 1985, by Jill E. Martin) at 16 (though *cf, infra*, note 61).

58. See, eg, Evershed, 'Equity after Fusion: Federal or Confederate' (1948) 1 JSPTL 171; 'Reflections on the Fusion of Law and Equity after 75 Years' (1954) 70 LQR 326; and 'Equity is Not to be Presumed to be Past the Age of Child-Bearing' (1953) 1 Sydney L Rev 1.

59. See Meagher, Gummow, and Lehane, *supra*, note 3, especially at 46 to 47.

60. [1978] AC 904.

61. And *cf* the ostensibly moderate compromise positions adopted in *Hanbury and Maudsley – Modern Equity, supra*, note 57, at 22 to 26; L.A. Sheridan and George W. Keeton, *The Nature of Equity* (1984) especially at 35 to 37; and P.V. Baker, 'The Future of Equity' (1977) 93 LQR 529, especially at 536 to 540. It should be noted that although Baker raises many interesting and persuasive arguments against the creation of entirely novel legal principles that are neither common law nor equitable principles, his approach acknowledges that both the common law and equity can and do, in fact, influence each other.

above. Legislative intervention in the law of mistake is not without precedent (as, for example, the New Zealand Contractual Mistakes Act 1977), although careful drafting is imperative in order to obviate actual as well as potential problems.[62]

One thing, however, is certain: whatever the terminology accorded to rules arising out of the merger of the common law and equitable doctrines of common mistake proposed in the present article, such a *de jure* merger ought to be effected. To persist in separating what are, in substance at least, two very similar, if not identical, doctrines that differ only in the strictness of their application, is to persist in an artificiality that does no credit to the development of the common law. The doctrine of common mistake is sufficiently amorphous and difficult in its present form. The way forward is toward systematic simplification. It is hoped that this article has provided some tenable suggestions in this regard.[63]

62. See, in the New Zealand context (and in a general, albeit critical, vein), Francis Dawson, 'The New Zealand Contract Statutes' [1985] LMCQ 42, especially at 43 to 44, and 48 to 51; and, by the same author, 'The Contractual Mistakes Act 1977: *Conlon v Ozolins*', (1985) 11 NZULR 282. But *cf* on balance, J.F. Burrows, 'Contract Statutes: The New Zealand Experience' [1983] Stat LR 76.

63. I am grateful to Professor F.M.B. Reynolds, Professor J.A. Andrews, and an anonymous assessor for their very helpful comments on an earlier draft of this article. I am responsible, of course, for all errors as well as infelicities in style and language.