[HIGH COURT OF AUSTRALIA.]

SVANOSIO . . . . . APPELLANT;
PLAINTIFF,

AND

McNAMARA AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 11, 12, 13; *Sept.* 14.

Dixon C.J., McTiernan, Williams, Webb and Fullagar JJ.

Vendor and Purchaser—Contract—Sale of land, victualler's licence etc.—Mistaken belief of parties that licensed premises stood wholly on land sold—Not induced by fraud of vendors—No total failure of consideration—Completion by conveyance and transfer of licence etc.—Position of parties thereafter.

By a contract in writing entered into in pursuance of an oral agreement the defendants agreed to sell to the plaintiff the land described therein "together with the licensed premises known as the 'Bull's Head Hotel' erected thereon", the victualler's licence in respect of the hotel and the goodwill thereof. The contract provided for the production of the muniments of title in respect of the land sold, for an abstract of title and for the making of requisitions and objections thereto in writing within certain specified times. It further provided that all requisitions or objections not included in such writing should be deemed to be waived by the purchaser and that "in default of such requisitions (if none) and subject to such (if any) as are so delivered the purchaser shall be deemed to have accepted title". The plaintiff made no requisitions or objections to title and did not have any survey made of the land. After completion it was discovered that the hotel stood partly only on the land conveyed and partly on adjoining Crown land. The plaintiff claimed: (a) A declaration that the oral agreement and/or the agreement in writing and/or the conveyance was entered into and executed by the plaintiff and the defendants under a common mistake as to the existence of a fact accepted by all parties as a basis or condition fundamental to the transactions, namely that the defendants were the owners of the whole of the land upon which the hotel was erected or which was used or occupied in conjunction with the hotel. (b) A declaration that each of the transactions is and was at all material times void. (c) An order setting aside the agreements and the conveyance. (d) Repayment of the purchase price.

' *Held*: (1) the fact of such a mistake did not render the contract void; (2) as the transfer of the licence was the principal part of the consideration the contract was not discharged for want of consideration; (3) the conveyance was not void and was effective to vest in the plaintiff the legal and beneficial interest in the land conveyed; (4) in the absence of fraud or misrepresentation the plaintiff was not entitled to the equitable relief he sought.

Decision of the Supreme Court of Victoria (*Martin* J.), affirmed.

APPEAL from the Supreme Court of Victoria.

On 14th December 1955 John Allen Svanosio commenced an action in the Supreme Court of Victoria against Kilian Gregory McNamara and Kathleen O'Connor as executor and executrix of the will of Louisa McNamara, deceased.

The material portion of the statement of claim was as follows:

1. By an oral agreement made on 2nd March 1955 the defendant Kilian Gregory McNamara as agent for himself and the defendant Kathleen O'Connor as legal representatives of Louisa McNamara, deceased, sold to the plaintiff and the plaintiff agreed to buy from the said defendants for the sum of £5,000 the hotel known as the "Bull's Head" Hotel at McIvor Road, Bendigo and the land whereon the said hotel was erected and the land used or occupied in conjunction with the said hotel together with the victualler's licence issued for and in respect of the said hotel and the goodwill thereof.

2. On 2nd March 1955 the plaintiff and the defendants entered into an agreement in writing dated 2nd March 1955 whereby the defendants agreed to sell to the plaintiff and the plaintiff agreed to buy from the defendants for the sum of £5,000 the property described in the particulars of the said agreement in writing.

3. By the particulars contained in the said agreement in writing the property sold was described as follows:—" 1. All that piece of land being Crown allotment fifteen section O ' Grassy Flat ' parish of Sandhurst county of Bendigo being the land comprised in conveyance No. 176 book 221 together with the licensed premises known as the ' Bull's Head ' erected thereon subject to all registered appurtenant easements (if any). 2. The victualler's licence issued for and in respect of the said hotel and the goodwill thereof. 3. Also all the vendors' right title and interest (if any) in and to the adjoining land containing half an acre or thereabouts held under permissive occupancy No. W56412."

4. The following were terms and conditions of the said oral agreement and/or of the said agreement in writing:—

(i) That the plaintiff should pay a deposit of ten per cent of the amount of purchase money and should pay the balance of the purchase money as provided in the next succeeding clause.

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(ii) That the plaintiff should pay the said balance of the purchase money into the hands of the defendants' solicitors at least three days prior to the hearing by the Licensing Court of an application for the transfer of the said victualler's licence to the plaintiff which sum should be held by the said solicitors in trust pending the transfer of the said licence to the plaintiff which sum should be held by the said solicitors in trust pending the transfer of the said licence to the purchaser.

(iii) That vacant possession should be given and taken upon the granting of such transfer.

(iv) That the obligation of the defendants to convey the said freehold premises and transfer the said victualler's licence to the plaintiff was simultaneous with the obligation of the plaintiff to pay the whole of the money agreed to be paid by him.

(v) That the said contract was subject to the transfer of the said victualler's licence of the said hotel being granted to the plaintiff.

(vi) That the defendants and the plaintiff should do everything necessary to facilitate in every way and obtain the transfer of the said victualler's licence to the plaintiff.

(vii) That the purchase price of £5,000 should be allocated as follows :—

The victualler's licence and goodwill	£4,200
For the freehold premises	800
	£5,000

5. The said agreement in writing was entered into by the plaintiff and the defendants with the object of recording and effectuating the terms of the said oral agreement.

6. In pursuance of the said oral agreement and/or of the said agreement in writing the plaintiff paid the deposit of £500 on or about 2nd March 1955. On 20th June 1955 the application by the plaintiff and the defendants for the transfer of the victualler's licence of the said hotel from the defendants to the plaintiff was approved by the Licensing Court and on or about 24th June 1955 the plaintiff paid the final balance of purchase money to the defendants and entered into possession of the said hotel and the land whereon the same is erected and of the land used or occupied in conjunction with the said hotel.

7. On or about 24th June 1955 the defendants as legal personal representatives of the said Louisa McNamara deceased conveyed to the plaintiff all that piece of land, containing by admeasurement one rood more or less, being Crown allotment 15 section O of " Grassy

Flat", parish of Sandhurst, county of Bendigo and bounded on the north by a road one chain fifty links wide bearing north eighty-four degrees fifty minutes east one chain on the east by a line bearing east eighty-four degrees fifty minutes south two chains fifty links on the south by a line bearing south eighty-four degrees fifty minutes west one chain and on the west by a line bearing west eighty-four degrees fifty minutes north two chains fifty links (all the foregoing bearings being magnetic compass bearings) being the land comprised in conveyance No. 176 book 221 to hold the same to and to the use of the plaintiff and his heirs in fee simple.

8. The plaintiff and the defendants entered into the said oral agreement and executed the said agreement in writing on 2nd March 1955 and the said conveyance and each of the said documents upon the common basis and/or implied condition which all parties accepted as fundamental to each of the said transactions that the premises known as the "Bull's Head Hotel" were erected wholly upon the land described in par. 1 of the particulars of the said agreements in writing and expressed to be conveyed by the said conveyance namely Crown allotment 15 section O "Grassy Flat", parish of Sandhurst, county of Bendigo being the land comprised in conveyance No. 176 book 221.

9. In so contracting both the plaintiff and the defendants were under a common mistake of fact in that only portion of the said hotel is or was erected upon and situate upon the land referred to in the last preceding paragraph, the remainder of the said hotel being erected on land not the property of the defendants but being on the contrary unalienated land of the Crown.

10. The portion of the said hotel erected and situate as aforesaid upon unalienated land of the Crown is essential to the proper and lawful operation of the premises as a hotel and such portion of the hotel premises as is erected on the land referred to in par. 8 hereof is inadequate to comply with the requirements of the *Licensing Act* 1928 or to constitute a building capable either physically or lawfully of being operated as a hotel.

12. By reason of the said mistake and/or of the non-existence of the said fact accepted by all parties as fundamental to the said transactions and each of them, each of the transactions is and was at all material times void and the consideration for the payment by the plaintiff of the said £5,000 and for the said execution by the plaintiff of the said conveyance has wholly failed. And the plaintiff claims: (a) A declaration that the said oral agreement and/or the said agreement in writing and/or the said conveyance was entered into and executed by the plaintiff and the defendants under a

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common mistake as to the existence of a fact accepted by all parties as a basis or condition fundamental to the said transactions, namely that the defendants were the owners of the whole of the land upon which the said hotel was erected or which was used or occupied in conjunction with the said hotel. (b) A declaration that each of the said transactions is and was at all material times void. (c) An order setting aside the said agreements and the said conveyance. (d) Repayment of the said sum of £5,000 by the defendants to the plaintiff.

By their defence the defendants admitted the allegations contained in pars. 2, 3, 4, 6 and 7, of the statement of claim, did not admit those contained in pars. 1, 5 and 10 thereof, denied those contained in pars. 8 and 11 thereof and pleaded as follows :

10. Save they admit that only portion of the said hotel is or was erected upon and situate upon the land referred to in par. 8 of the statement of claim and that the remainder of the said hotel was erected on land not the property of the defendants but on unalienated land of the Crown, they deny each and every allegation contained in par. 9 thereof.

14. The plaintiff accepted the title shown and made by the defendants to the land and premises contracted to be sold and accepted the conveyance of the land referred to in par. 7 of the statement of claim as constituting full performance by the defendants of all their duties and obligations under the said agreement in writing.

15. Upon the execution of the said conveyance the plaintiff paid to the defendants the full purchase price for the land thereby conveyed and completed the agreement in writing in the statement of claim mentioned.

16. By the said conveyance the defendants conveyed the said land as legal personal representatives of Louisa McNamara deceased and not otherwise.

17. The defendants will contend that by reason of the matters alleged in pars. 14, 15 and 16 hereof the plaintiff is not entitled to any of the relief sought in his statement of claim.

The action was heard before *Martin* J. who, on 20th March 1956, in a written judgment, held that the plaintiff was not entitled to relief and ordered that the action be dismissed.

From this decision the plaintiff appealed to the High Court of Australia.

Murray V. McInerney, for the appellant. There is jurisdiction to relieve from a contract even after conveyance where the contract and the conveyance were executed under a common mistake which

is fundamental to the transaction. A mistake is fundamental if it makes what is conveyed different from that about which the parties thought they were negotiating. In *Wilde* v. *Gibson* (1) fraud had been charged but not proved. What was proved would not have entitled the purchaser to relief. Lord *Campbell* (2) states that relief after conveyance is confined to cases of fraud. It is submitted that this is not accurate. Jurisdiction to relieve after conveyance has been recognised in many cases. [He referred to *Munro* v. *Perry* (3); *Phillips* v. *Hutchinson* (4); *Brownlie* v. *Campbell* (5); *Jones* v. *Clifford* (6); *Debenham* v. *Sawbridge* (7); *Re Tyrell*; *Tyrell* v. *Woodhouse* (8).] A contract may be rescinded because it was executed under a mistake as to a fundamental matter so long as rights of third parties have not intervened and *restitutio in integrum* is possible. [He referred to *Hitchcock* v. *Giddings* (9); *Strickland* v. *Turner* (10); *Broughton* v. *Hutt* (11); *Scott* v. *Coulson* (12); *Huddersfield Banking Co. Ltd.* v. *Henry Lister & Son Ltd.* (13); *Allcard* v. *Walker* (14); *In re Roberts*; *Roberts* v. *Roberts* (15); *Colyer* v. *Clay* (16).] The nature of a contract executed under a fundamental common mistake is discussed in *Bell* v. *Lever Bros. Ltd.* (17). *Bruce* v. *Sturt* (18) is distinguishable from the present case on the facts. *Christie* v. *Whittles* (19) in so far as it decides that there is no jurisdiction to rescind a contract executed under a fundamental common mistake is wrongly decided. There was here a mistake as to a fundamental matter. The parties regarded the ownership and transfer of the land on which the whole of the hotel stood, so as to enable it to be transferred as a going concern, as the necessary basis of their contract.

L. Voumard Q.C. (with him *J. Minogue*), for the respondent. A contract for the sale of land is in a special position in that prior to conveyance the purchaser has the opportunity to investigate the vendor's title. [He referred to *Clare* v. *Lamb* (20); *Joliffe* v. *Baker* (21); *Allen* v. *Richardson* (22); *Soper* v. *Arnold* (23); *Public*

(1) (1848) 1 H.L.C. 605 [9 E.R. 897].
(2) (1848) 1 H.L.C., at pp. 632, 633 [9 E.R., at pp. 908, 909].
(3) (1874) 5 A.J.R. 20, at pp. 46, 47.
(4) (1946) V.L.R. 270.
(5) (1880) 5 App. Cas. 925, at pp. 936, 937, 949.
(6) (1876) 3 Ch. D. 779, at p. 792.
(7) (1901) 2 Ch. 98, at p. 109.
(8) (1900) 82 L.T. 675.
(9) (1817) 4 Price 135 [146 E.R. 418].
(10) (1852) 7 Ex. 208 [155 E.R. 919].
(11) (1858) 3 DeG. & J. 501 [44 E.R. 1361].
(12) (1903) 1 Ch. 453; (1903) 2 Ch. 249, at p. 252.
(13) (1895) 2 Ch. 273, at pp. 280, 281.
(14) (1896) 2 Ch. 369, at p. 381.
(15) (1905) 1 Ch. 704.
(16) (1843) 7 Beav. 188 [49 E.R. 1036].
(17) (1932) A.C. 161, at pp. 206, 207, 224, 225, 235, 236.
(18) (1889) 15 V.L.R. 370.
(19) (1892) 18 V.L.R. 733.
(20) (1875) L.R. 10 C.P. 334, at pp. 338, 339.
(21) (1883) 11 Q.B.D. 255, at pp. 265, 267, 272, 273.
(22) (1879) 13 Ch. D. 524, at pp. 539-543.
(23) (1887) 37 Ch. D. 96, at pp. 101, 102.

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Trustee v. *Duchy of Lancaster* (1); *Clayton* v. *Leech* (2); *Solle* v. *Butcher* (3).] In the case of land not under the Torrens System the purchaser's rights under the contract are merged in the conveyance. [He referred to *Knight Sugar Co. Ltd.* v. *Alberta Railway & Irrigation Co.* (4); *Hawkins* v. *Gaden* (5); *Greswolde-Williams* v. *Barneby* (6).] The decisions on mistake go no further than that, putting fraud and total failure of consideration aside, the purchaser cannot have the transaction set aside after conveyance except where the mistake is in thinking that the property belongs to the vendor whereas in fact it belongs to the purchaser. [He referred to *Re Tyrell*; *Tyrell* v. *Woodhouse* (7).] It is clear from the reference to *Bingham* v. *Bingham* (8) in *Debenham* v. *Sawbridge* (9) that *Byrne* J. was not endeavouring to extend the principle of that case. Assuming that the conveyance here contained covenants of title the purchaser's only action would be for damages. [He referred to *Halsbury's Laws of England*, 2nd ed., vol. 29, p. 454, par. 661.] *Solle* v. *Butcher* (10) has no application to completed contracts for the sale of land.

Murray V. McInerney, in reply.

Cur adv. vult.

Sept. 11.

The following written judgments were delivered :—

DIXON C.J. AND FULLAGAR J. This is an appeal against a judgment of the Supreme Court of Victoria (*Martin* J.) in an action in which the appellant was plaintiff and the respondents were defendants.

The respondents are the executors of the will of Louisa McNamara, who died in November 1954. Included in her estate was a piece of land at Grassy Flat, near Bendigo, on which stood (or was believed to stand) a hotel known as the Bull's Head Hotel. Attached to the hotel was a victualler's licence under the *Licensing Acts* of Victoria. The title to the land is a general law title : it has not been brought under the Torrens System. By a contract dated 2nd March 1955 the respondents agreed to sell, and the appellant agreed to buy : " 1. All that piece of land being Crown allotment fifteen of section O ' Grassy Flat ' Parish of Sandhurst County of Bendigo being the land comprised in conveyance No. 176 book 221 together with the licensed premises known as the ' Bull's Head Hotel ' erected thereon

(1) (1927) 1 K.B. 516, at pp. 528, 529.
(2) (1889) 41 Ch. D. 103.
(3) (1950) 1 K.B. 671, at p. 696.
(4) (1938) 1 All E.R. 266, at p. 269.
(5) (1925) 37 C.L.R. 183, at pp. 207, 208.
(6) (1901) 83 L.T. 708, at p. 711.
(7) (1900) 82 L.T. 675.
(8) (1748) 1 Ves. Sen. 126 [27 E.R. 934].
(9) (1901) 2 Ch. 98, at p. 109.
(10) (1950) 1 K.B. 671.

subject to all registered appurtenant easements (if any). 2. The victualler's licence issued for and in respect of the said hotel and the goodwill thereof." The contract also included an area of adjoining land held on " permissive occupancy " under the *Land Acts* of Victoria, but this is of no importance. The purchase price was £5,000, of which £500 was to be paid as a deposit. The balance was to be paid to the vendors, and possession was to be given and taken, on the granting of the approval of the Licensing Court to the transfer of the licence to the purchaser. Of the total purchase money, the sum of £800 was apportioned to the freehold premises, and the balance of £4,200 to the licence and goodwill. The contract incorporated the conditions contained in the fourth schedule to the *Property Law Act* 1928 (Vict.). To these it will be necessary to refer later.

The deposit was paid on the signing of the contract. What *Martin* J. called " only a cursory examination " of the title to the freehold land seems to have been made on the appellant's behalf. Certain requisitions were delivered and answers made, but these were not put in evidence. No survey of the land was made. On 22nd June 1955 the Licensing Court approved of the transfer of the licence, and on 24th June the appellant paid the balance of purchase money and entered into possession. The conveyance of the land, though (for some reason not clearly explained) it bears the date 31st December 1955, was executed on or about 29th June 1955. The respondents convey " as legal personal representatives of Louisa McNamara ". The description of the land conveyed is the same as that contained in a Crown Grant dated 14th October 1859 to one Benjamin Roper, from which the title is traced in the recitals. That description is as follows :—" All that piece or parcel of land in the State of Victoria containing by admeasurement one rood be the same more or less situated in the County of Bendigo Parish of Sandhurst being allotment fifteen of section O Grassy Flat bounded on the north by a road one chain fifty links wide bearing north eighty four degrees fifty minutes east one chain on the east by a line bearing east eighty four degrees fifty minutes south two chains fifty links on the south by a line bearing south eighty four degrees fifty minutes west one chain and on the west by a line bearing west eighty four degrees fifty minutes north two chains fifty links ".

The Licensing Court, when it approved of the transfer of the licence, appears to have indicated that, when the licence came up for renewal in November, the licensee would be in difficulties unless substantial repairs and improvements were effected. Questions arising as to the location of improvements required by the licensing

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inspector, the appellant, soon after going into possession, thought it desirable to ascertain the exact boundaries of the freehold land which he had bought. For this purpose he engaged Mr. Pritchard, a licensed surveyor. Mr. Pritchard appears to have found considerable difficulty in his task, for, although the land is described in the Crown Grant by metes and bounds, no commencing point is given, and, if we have understood the position aright, it became a matter of identifying, by reference to the Lands Department, " allotment 15 of section O Grassy Flat ". Be this as it may, it is common ground that there is a discrepancy between the area fenced and occupied and the area described in the title, and it is admitted on the pleadings that only a portion of the hotel building stands on the land described in the Crown Grant, and that the rest of it stands on unalienated Crown land. The discrepancy is substantial: it would appear from the plan, which is exhibit K, that something like one third of the hotel building stands on Crown land. The bar, two bar parlours, two bedrooms, and the kitchen, are within the title. The whole of two bedrooms, part of another bedroom, and part of a " lounge ", are outside it. The fact that it is on Crown land that the latter portion stands is a fact of practical importance. If it were not Crown land, a possessory title could almost certainly be established. But s. 275 of the *Property Law Act* 1928 (Vict.) provides that the title of the Crown to any land shall not be, and shall be deemed not to have been, in any way affected by possession adverse to the Crown.

The appellant applied to the Licensing Court for a renewal of the licence in November 1955 when the application was adjourned pending determination of the questions raised by these proceedings. The appellant's action was commenced on 14th December 1955. By his statement of claim he alleged that the contract and the conveyance were executed " upon the common basis and/or implied condition, which all parties accepted as fundamental ", that the hotel was erected wholly on the land described, and that the parties entered into the contract under a common mistake of fact. He also alleged that the portion of the hotel standing on unalienated Crown land was essential to the " proper and lawful operation of the premises as a hotel ". This last allegation does not seem to be established by evidence. The building is very old and in bad repair and it is a fair inference that the licence is in jeopardy unless substantial improvements are effected, but it is quite consistent with the evidence that the requirements of the Licensing Court could be met by work done on land comprised within the paper title. The appellant claimed (a) a declaration that the contract and the conveyance

were executed " under a common mistake as to the existence of a fact accepted by all parties as a basis or condition fundamental to the transaction ", (b) a declaration that the contract and the conveyance " are and were at all material times void ", (c) an order setting aside the contract and the conveyance, and (d) repayment of the sum of £5,000.

Martin J. dismissed the action. After considering a number of decisions, he came to the conclusion, in effect, that a purchase of land could not be set aside after conveyance except because of fraud or total failure of consideration. No suggestion of fraud has ever been made against the respondents. No relevant representation of any kind, innocent or fraudulent, was ever made by them. And it is obviously impossible to say that there has been a total failure of consideration for the payment of the sum of £5,000. More than four-fifths of that sum was attributable to the licence and goodwill as distinct from the land, and the licence was duly transferred to the appellant.

The appellant, as has been seen, claimed by his statement of claim declarations that both the contract and the conveyance were void, and it was argued before us that both instruments were void on the ground that they were executed under a " common mistake " as to a fundamental fact, in that all parties believed that the hotel stood wholly on the land sold. But, if one thing in this case is clear, it seems to us to be that neither instrument was or is void.

So far as the contract is concerned, it may be assumed that all parties believed that the hotel stood wholly on the land sold. In that sense there was a " common mistake ". It may also be assumed that the appellant, if he had known that a considerable part of the building stood on Crown land, would not have entered into the contract. But these facts do not make the contract void. The subject of " mistake " in relation to contracts has recently received a good deal of attention in the courts and in legal journals. This Court in *McRae* v. *Commonwealth Disposals Commission* (1) adopted with respect a passage in the judgment of *Denning* L.J. (while saying nothing as to the actual decision) in *Solle* v. *Butcher* (2). To quote now from that judgment at somewhat greater length, his Lordship said:—" . . . once a contract has been made, this is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable

(1) (1951) 84 C.L.R. 377, at p. 407. (2) (1950) 1 K.B. 671.

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ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake. *A fortiori*, if the other party did not know of the mistake, but shared it" (1). *Denning* L.J. has since expressed the same view in *Frederick E. Rose (London) Ltd.* v. *William H. Pim Jnr. & Co. Ltd.* (2), after saying 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" (3). Reference should also be made to two learned articles—"*The Myth of Mistake in the English Law of Contract*" by Mr. *C. J. Slade* (4) and "*The Supposed Doctrine of Mistake in Contract*" by Professor *K. O. Shatwell* (5).

"Mistake" might, of course, afford a ground on which equity would refuse specific performance of a contract, and there may be cases of "mistake" in which it would be so inequitable that a party should be held to his contract that equity would set it aside. No rule can be laid down *a priori* as to such cases: see an article by Professor *R. A. Blackburn* in *Res Judicatæ* (1955), vol. 7, p. 43. But we would agree with Professor *Shatwell* (6) that it is difficult to conceive any circumstances in which equity could properly give relief by setting aside the contract unless there has been fraud or misrepresentation or a condition can be found expressed or implied in the contract.

In the present case there was no fraud or misrepresentation, and the position must depend on the terms, express and implied, of the contract. The contract in express terms provides that the vendor sells "All that piece of land being Crown allotment 15 of section O . . . *together with the licensed premises known as the 'Bull's Head Hotel' erected thereon*". The words "erected thereon" have been discovered to be an inaccurate description. In any case, of course, the contract would be performed by a conveyance of land without mention of any building. But it is, in our opinion, clearly involved in the description of the property sold that the vendors are promising to convey the whole of the land on which the hotel is erected: cf. *Horning* v. *Pink* (7). If the appellant had discovered before conveyance that a substantial portion of the hotel stood on land to which the respondents had no title, it seems clear that he could not

(1) (1950) 1 K.B., at p. 691.
(2) (1953) 2 Q.B. 450, at p. 460.
(3) (1953) 2 Q.B., at p. 459.
(4) (1954) 70 L.Q.R. 385.
(5) (1955) 33 Can. B.R. 164.
(6) (1955) 33 Can. B.R., at pp. 186, 187.
(7) (1913) 13 S.R. (N.S.W.) 529; 30 W.N. 144.

have been compelled to complete the contract. A suit by the respondents for specific performance must have been dismissed: equity has refused to enforce a contract against an unwilling purchaser of land in cases where the defect of title was much less substantial than it is in the present case. Further, he could have claimed damages at law in respect of the respondents' inability to make title, though his damages would have been limited in accordance with the rule laid down in *Bain* v. *Fothergill* (1). On the other hand, he could not himself have had a decree for specific performance requiring the respondents to obtain and convey a title to that part of the land which was outside the title they had: *Perrin* v. *Reynolds* (2).

So far we have been dealing only with the position before the land was conveyed and the licence transferred. It was, we think, more or less assumed, both in the judgment of *Martin* J. and in the respondents' argument before us, that the appellant could have escaped from the contract if he had discovered the true state of affairs while the contract was still executory. But, in view of the argument that the contract was void, and for other reasons, it has seemed desirable to see exactly what the position was at law and in equity. In fact the true state of affairs was not discovered until after the land had been conveyed and the licence transferred. These things having been done, what remedies, if any, are open to the appellant?

To begin with, it is clear that the conveyance was not void. It is an instrument effective at law and in equity vesting in the appellant the legal and beneficial interest in the land conveyed. It would have been so effective even if the contract had been void. It has not been suggested that the transfer of the licence, or the approval thereof by the Licensing Court, was void. It does not, however, necessarily follow, from the fact that the conveyance and the transfer of the licence are effective to do what they purport to do, that the appellant is not entitled to equitable relief. Apart from declarations that the two instruments are void, what he seeks by his statement of claim is an order setting aside the two instruments and repayment of the sum of £5,000. The conveyance, strictly speaking, cannot be set aside: it has done its work and vested the legal title in the appellant for better or worse, although there is, of course, jurisdiction in equity to order a reconveyance. What the appellant really wants seems to be repayment of the sum of £5,000, in return for which he is ready and willing to reconvey the land to the respondents. He says nothing about a re-transfer of the

(1) (1874) L.R. 7 H.L. 158. (2) (1886) 12 V.L.R. 440.

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licence, but it may doubtless be assumed that he is ready and willing to re-transfer the licence, if the approval of the Licensing Court can be obtained. If the appellant is entitled to relief, the proper order would seem to be that on reconveyance of the land and re-transfer of the licence the respondents repay the sum of £5,000. But the substance of the matter is that the Court is asked to undo the whole transaction.

In considering whether equitable relief can or should be granted to the appellant, we may confine our attention to contracts for the sale of land : it is unnecessary to consider the question whether the case of *Seddon* v. *North Eastern Salt Co. Ltd.* (1) was correctly decided (as to which reference may be made to an article by Mr. *H. A. Hammelmann* in the *Law Quarterly Review*, ((1939) 55 L.Q.R. 90)). With regard to transactions relating to land, equitable relief after conveyance was granted in *Bingham* v. *Bingham* (2) ; *Hitchcock* v. *Giddings* (3) ; *Cooper* v. *Phibbs* (4), and *Hart* v. *Swaine* (5). In every case of this type, however, which has been found, the position simply was that the vendor had no title at all to the property sold. In *Bingham* v. *Bingham* (6) the land was actually the property of the purchaser himself. In such cases a court of equity is not called upon to undo anything. The conveyance is simply devoid of legal effect, and, if it were not for the fact that adjustments and allowances will generally have to be made, one would think that the money paid could be recovered at law. Apart from this very special type of case, it is clearly established that equity will not undo a sale of land after conveyance unless there has been fraud or there is such a discrepancy between what has been sold and what has been conveyed that there is a total failure of consideration, or what amounts practically to a total failure of consideration. The classical statement of the attitude of courts of equity by Lord *Campbell* in *Wilde* v. *Gibson* (7) puts the case of fraud as the only case in which equity will grant specific relief after conveyance. But his Lordship was dealing with a case of innocent misrepresentation, and doubtless meant only that, in a case of misrepresentation, equity would not interfere after conveyance unless the misrepresentation was fraudulent. Other statements of the general rule extend the scope of the exception beyond cases of fraud, using various expressions, the general effect of which is, we think, correctly stated by saying that there must be a total failure of consideration or what amounts

(1) (1905) 1 Ch. 326.
(2) (1748) 1 Ves. Sen. 126 [27 E.R. 934].
(3) (1817) 4 Price 135 [146 E.R. 418].
(4) (1867) L.R. 2 H.L. 149.
(5) (1877) 7 Ch. D. 42.
(6) (1748) 1 Ves. Sen., at p. 127 [27 E.R., at p. 934].
(7) (1848) 1 H.L.C. 605, at pp. 632, 633 [9 E.R. 897, at pp. 908, 909].

practically to a total failure of consideration. Of the cases, other than *Wilde* v. *Gibson* (1), it is sufficient to refer to *Legge* v. *Croker* (2); *Brownlie* v. *Campbell* (3); *Re Tyrell*; *Tyrell* v. *Woodhouse* (4); *Angel* v. *Jay* (5), and *Public Trustee* v. *Duchy of Lancaster* (6). The principle of these cases was accepted by *Jenkins* L.J. in *Solle* v. *Butcher* (7). In the same case *Denning* L.J. (8) expressed his disagreement with *Angel* v. *Jay* (5). That case, however, was, like *Solle* v. *Butcher* (9), a case of an agreement for a lease, and one would gather 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 the vendor under a contract for the sale of land. He said that, as applied in *Angel* v. *Jay* (5): "It would mean that innocent people would be deprived of their right of rescission before they had any opportunity of knowing they had it" (10). The main purpose of the usual terms of a contract for the sale of land is to give the purchaser an opportunity of knowing whether there are such defects in the vendor's title as will entitle him to rescind, to limit to a certain extent his right of rescission for defects of title, and to preclude him from relief if he does not exercise the opportunity given him. The truth is, of course, that the "principle" applied in the cases cited is by no means an arbitrary one: it rests on a clear and reasonable basis. Contracts for the sale of land present peculiar features of their own, which are clearly stated in cases to which Mr. *Voumard* referred us, of which may be mentioned *Clare* v. *Lamb* (11) and *Allen* v. *Richardson* (12). It is the purchaser's business to investigate the title thoroughly before he pays his money, and the conveyance effects a radical alteration in the position of the parties, new express or implied covenants generally taking the place of the obligations imposed by the contract.

Here the contract incorporates the conditions contained in the fourth schedule to the *Property Law Act* 1928 (Vict.). Clause 3 of those conditions requires the purchaser to deliver his requisitions on title, if any, within a specified time, and then provides that all requisitions or objections not so delivered shall be deemed to have been waived by him. The defect of title, of which the appellant now complains, could have been made the subject of a requisition by him. It is true that the making of a survey is the only thing which could in this case have revealed the true position, and the

(1) (1848) 1 H.L.C. 605 [9 E.R. 897].
(2) (1811) 1 Ball & B. 506.
(3) (1880) 5 App. Cas. 925.
(4) (1900) 82 L.T. 675.
(5) (1911) 1 K.B. 666.
(6) (1927) 1 K.B. 516, at p. 528.
(7) (1950) 1 K.B., at p. 703.
(8) (1950) 1 K.B., at pp. 695, 696.
(9) (1950) 1 K.B. 671.
(10) (1950) 1 K.B., at p. 696.
(11) (1875) L.R. 10 C.P. 334, at pp. 338, 339.
(12) (1879) 13 Ch. D. 524, at pp. 539-541.

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appellant could not have compelled the respondents to have a survey made. But he could himself, during the four months that elapsed between the making of the contract and completion, have ascertained the true position by having a survey made. The making of a survey is an ordinary precaution for a purchaser to take. Many purchasers, of course, decline to incur the expense involved in a survey, and in many cases it may appear unnecessary, but, generally speaking, and in the absence of misrepresentation, a purchaser may fairly be regarded as omitting the precaution at his own risk. The terms of the contract would not, as we have said, have precluded the appellant from rescinding the contract before conveyance, but, having failed to take the opportunity which those terms gave him, and having taken a conveyance, he falls within the general and reasonable rule that equity will not interfere unless there is fraud or what amounts practically to a total failure of consideration. There is no suggestion of fraud, and it cannot be said that there was a failure of consideration. The appellant would not, in our opinion, be entitled to relief in equity even if the contract had been merely a contract for the sale of land. The fact that the licence has been transferred as well as the land is an additional factor against him, for the apportionment of the purchase money shows, on the one hand, that it was the principal part of the consideration for that purchase money. On the other hand, there is no suggestion that the licence is in jeopardy because of the position with regard to the title to the land. It may be in jeopardy if substantial improvements are not carried out, but that has nothing to do with this case, except so far as it suggests that the appellant may have endangered the licence. There is no certainty in any case that he will be able to re-transfer the licence to the respondents. No claim is made for damages, and the appeal should, in our opinion, be dismissed.

McTIERNAN, WILLIAMS AND WEBB JJ. This is an appeal by the plaintiff from a judgment of the Supreme Court of Victoria (*Martin* J.) dismissing with costs a suit brought by the plaintiff claiming (1) a declaration that the agreement in writing and conveyance hereinafter mentioned were entered into and executed by the plaintiff and the defendants under a common mistake as to the existence of a fact accepted by all parties as a basis or condition fundamental to these transactions, namely that the defendants were the owners of the whole of the land upon which the Bull's Head Hotel was erected, or which was used or occupied in conjunction with that hotel; (2) a declaration that these transactions were void; (3) an order setting the agreement and conveyance aside; and (4) an order

for repayment of the sum of £5,000 by the defendants to the plaintiff. The defendants, now the respondents, are the executor and executrix of the will of Louisa McNamara who died on 19th November 1954. At the date of her death the testatrix was the licensee of hotel premises known as the " Bull's Head Hotel " situated at Grassy Flat near Bendigo and also the owner in fee simple of a rood of land being the whole of the land comprised in Crown allotment 15 of section O " Grassy Flat ", parish of Sandhurst, county of Bendigo, being the land comprised in Conveyance No. 176, book 221, on which the hotel was supposed to be erected.

On 2nd March 1955 the defendants, as her personal representatives, entered into a contract in writing to sell this land by this description to the plaintiff " together with the Licensed Premises known as the ' Bull's Head Hotel ' erected thereon ", " The Victualler's Licence issued for and in respect of the said Hotel and the Goodwill thereof ", and the right title and interest of the vendors (if any) in a permissive occupancy for £5,000, this sum being apportioned for the victualler's licence and goodwill £4,200 and the freehold premises £800. The contract provided for the purchaser paying ten per cent of the purchase money as a deposit, for the balance of the purchase money being paid into the hands of the vendor's solicitor three days prior to the hearing by the licensing court of an application for the transfer of the licence to the purchaser, for this sum being held in trust pending the transfer of the licence to the purchaser and for vacant possession being given and taken on the granting of the transfer. The contract also provided that it was subject to the transfer of the licence being granted to the purchaser, that the obligation of the vendors to convey the freehold premises and to transfer the licence to the purchaser should be simultaneous with the obligation of the purchaser to pay the whole of the moneys agreed to be paid by him, and that time should be considered to be of the essence of the contract and of all conditions thereof. The contract also provided that the conditions in the fourth schedule to the *Property Law Act* 1928 (Vict.) should apply thereto subject to certain modifications. Condition 2 of the schedule, so far as material, provides that the vendor or his solicitor will at the written request of the purchaser or his solicitor within seven days from the date of sale but at the cost and expense of the purchaser furnish within seven days from the date of the request an abstract of title of the land. Condition 3 provides for the production of the muniments of title in respect of the land sold, for an abstract of title and for the making of requisitions and objections thereto in writing within certain specified times. It also provides

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that all requisitions or objections not included in such writing shall be deemed to be waived by the purchaser and that " in default of such requisitions (if none) and subject to such (if any) as are so delivered the purchaser shall be deemed to have accepted title ". Condition 4 confers on the vendor the right to rescind the contract as therein mentioned if the purchaser makes a requisition or objection which the vendor shall be unable or unwilling to remove or comply with unless such requisition or objection is withdrawn. Condition 5 provides that no mistake in the description measurements or area of the land in or omission from the particulars shall invalidate the sale unless the vendor rescinds pursuant to the last preceding condition but if notified to the other party not less than three days before the day fixed for completion or within two months of the day of sale (whichever is the earlier) and not otherwise the same shall be the subject of compensation.

In the present case the plaintiff does not appear to have made any requisitions or objections to the title of the freehold. He accepted title after what his Honour called " a very cursory investigation of the chain of title ". He did not have any survey made. The licence was duly transferred to him on or about 24th June 1955 and on or about the same date the vendors by deed (which for some reason not disclosed bears date 31st December 1955) conveyed to him the land comprised in conveyance No. 176, book 221, for an estate in fee simple. About the same date he entered into possession of the hotel and the balance of purchase money was paid to the defendants.

After the plaintiff had entered into possession of the hotel, he applied for a renewal of the licence, but the licensing inspector objected to the renewal unless certain repairs and improvements were made to the hotel including the provision of a septic tank and it was in the course of a survey made for the purposes of this work that the plaintiff discovered that part of the hotel was not erected on the land conveyed to him but on adjoining Crown land. The portion of the hotel erected on Crown land includes the whole of two bedrooms, portion of two other bedrooms and portion of the lounge. The rest of the hotel, including two bedrooms, the bar, two adjoining parlours, and the kitchen is on the land conveyed. The plaintiff has therefore become the licensee of the premises, the owner of the whole of the land comprised in the conveyance, and has been let into vacant possession of the whole of the hotel building but part of the building is not erected on the land conveyed to him but on adjoining land. Photographs of the hotel tendered in evidence disclose a rather ramshackle old weatherboard building with a

galvanised iron roof. It would probably not cost much to pull down the portion that encroaches on Crown land and rebuild it so that the hotel would stand wholly on the land conveyed. But the contract describes the land sold as the land comprised in conveyance No. 176, book 221 " together with the Licensed Premises known as the 'Bull's Head Hotel' erected thereon " and Mr. *Voumard*, who appeared for the defendants, did not dispute that the contract was one to sell licensed premises as premises that stood wholly on that land. If the purchaser had refused to complete the contract on the ground that portion of these premises encroached on to the adjoining Crown land so that the vendors could not make title to a substantial part of the land on which the building stood, questions would have arisen under the conditions of sale and under the general law whether the purchaser was bound to complete the contract with compensation or was entitled to rescind the contract and also whether the vendor could have rescinded the contract if the purchaser had objected to the title on this ground and had refused to withdraw the objection. If these questions had arisen prior to completion and the vendor had sought to enforce the contract it is probable that the court would have refused specific performance and decided that the purchaser was entitled to rescind the contract. For, as pointed out in many cases of which *Jacobs* v. *Revell* (1) is one example, even where there is a condition for compensation you must consider whether the purchaser has got the subject matter he contracted to buy and, if he doesn't get what he contracted to buy, he may be entitled to say that he will not have compensation at all. But this interesting question need not be pursued because the plaintiff did not object to the title, no survey was made, and completion took place.

The plaintiff now claims to be entitled to set aside the contract and conveyance on the ground that neither would have been entered into but for the common mistake of himself and the defendants that the Bull's Head Hotel was wholly erected on the land sold. He contends that it was such a hotel that he believed he was buying and the defendants believed they were selling (what his counsel Mr. *McInerney* called a lawfully operable hotel, a hotel as a going concern). There was therefore a common mistake of a fundamental nature as to the substance of the property contracted to be sold. What was sold was something essentially different to what the parties supposed it to be. There was an error *in substantialibus*, and the effect of such a common mistake is to make the contract and the subsequent conveyance both void or at least voidable so that the purchaser may sue the vendor for rescission of the contract and

(1) (1900) 2 Ch. 858.

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conveyance even after completion. A large number of authorities were cited to his Honour on the question whether an executed contract can be rescinded after completion on this ground. After discussing these authorities his Honour said: "Accordingly the position appears to be that, in the absence of fraud, a completed contract may be set aside on the ground of mutual mistake only if the true facts are of such a nature that the agreement thereby purported to be made is quite different in substance from what was supposed by both parties to be the case, as, for example, if both parties believed they were dealing in debentures secured in the assets of a company but in fact ordinary shares in that company were transferred by the vendor to the purchaser by mistake." His Honour dismissed the suit because he did not think the present case fell within this principle. He said that, while the plaintiff had not got all that he and the defendants believed that he was getting, it could not properly be said that thereby the identity of the subject matter of the contract was destroyed or that what the plaintiff got was quite different in substance from what both parties believed he was getting so as to enable him to say there was no contract. It was therefore unnecessary to decide whether *restitutio in integrum* was possible because this question did not arise.

The first question to consider is whether the doctrine that a contract can be rescinded for common mistake can apply to the present case at all. The subject matter of the contract is the sale of the land comprised in conveyance No. 176 book 221. The contract states that the land is sold together with the licensed premises known as the Bull's Head Hotel erected thereon. This is a representation that the hotel premises stand wholly on that land. The plaintiff does not allege that the defendants knew or should have known that the hotel stood partly off that land. The representation is at most an innocent misrepresentation. The plaintiff does not claim to set aside the contract now that it has been completed on the ground of innocent misrepresentation. He relies on common mistake. In one sense there is always a common mistake where a vendor sells land to the whole of which he honestly believes he has a good title and the purchaser honestly believes that if he contracts to purchase this land he will get a good title to the whole of it. But if the vendor contracts to sell the land to the purchaser and the purchaser contracts to purchase it, the fact that they would not have entered into a contract but for such a common misapprehension does not avoid the contract. The vendor contracts to sell the land on the basis that he has a good title to the whole of it and the purchaser contracts to purchase it on that basis. If the vendor

cannot make title he commits a breach of the contract and, apart from special conditions, the purchaser is entitled to repudiate it. If the contract states that certain premises are erected on the land sold, that is a representation that the vendor will make title to land on which those premises are erected. The representation becomes a promise contained in the contract and can no longer be relied on as an independent ground for rescission: *Pennsylvania Shipping Co.* v. *Compagnie Nationale de Navigation* (1). If the premises are not erected wholly on the land sold the vendor will fail to fulfill the promise or in other words will fail to make a good title to the whole of the land described in the contract. A purchaser who purchases land which is represented to have a building erected thereon expects to obtain a complete building and not a building partly erected on land to which the vendor cannot make title. When the purchaser discovers that part of the building is not on the land he should object to the title. Such a misdescription is an objection to the title: *In re Jackson and Haden's Contract* (2); *Horning* v. *Pink* (3); *Grace* v. *Mitchell* (4). If the contract contemplates and makes provision for such a misdescription of the land sold how can it be said that it is void or voidable for common mistake. This is what the present contract does. The obligation of the vendor under an open contract is to prove his title strictly but open contracts are now rare and contracts, as in the present case, usually contain stipulations relating to the proof of title and giving the vendor the right to rescind the contract if the purchaser takes an objection with which he is unable to comply. Really there are three stages in the sale of land, first the making of the contract of sale, secondly the interval between the making of the contract and its completion to allow the purchaser to investigate the title, to survey the land and make any relevant inquiries as for instance as to tenancies and thirdly the completion of the contract by the conveyance of the land and the payment of the purchase money. It is in this interval between the making of the contract and its completion that the purchaser has the opportunity of satisfying himself whether or not the vendor can make a good title to the whole of the land described in the contract and if he cannot of exercising such rights as are given to him by the contract or the general law. The contract may, as in the present case, provide to some extent for the rights and obligations of the parties where the vendor is unable strictly to perform his obligation to make a good title to the whole of the land

(1) (1936) 155 L.T. 294.
(2) (1906) 1 Ch. 412.
(3) (1913) 13 S.R. (N.S.W.) 529; 30 W.N. 144.
(4) (1926) 26 S.R. (N.S.W.) 330; 43 W.N. 12.

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sold. Condition 5 of the fourth schedule provides that no mistake in the description measurements or area of the land shall invalidate the sale unless the vendor rescinds pursuant to the last preceding condition. It may be that, in the present case, even with this condition in the contract, the court would not have granted specific performance of the contract even with compensation at the suit of the vendors if the mistake had been discovered prior to completion and would have rescinded the contract if the purchaser had been unwilling to complete. Such questions could have arisen if the purchaser had objected in the second stage but it would be useless to discuss them now because the plaintiff did not object to the title as he could have done and in accordance with the third condition in the schedule must be deemed to have accepted the title. Having accepted the title the plaintiff could have had the land surveyed prior to completion to be certain that the hotel was erected wholly on the land sold. But he neglected to do so. He proceeded blindly to complete the contract. As it has been said the contract contemplated and provided for a mistake in the description of the land. It gave a right to compensation in that event provided compensation was claimed at the proper time. But the contention is that the contract, nevertheless, was void or voidable because it would not have been entered into but for the mistaken belief of both parties that the hotel building stood wholly on the subject land. Such a mistaken belief could not possibly avoid a contract which contemplates and provides for it. In *Bell* v. *Lever Bros. Ltd.* (1), Lord *Atkin*, in discussing the effect of mistake upon the validity of a contract, after referring to *Cooper* v. *Phibbs* (2), to which reference will be made hereafter, said: "Even where the vendor has no title, though both parties think he has, the correct view would appear to be that there is a contract: but that the vendor has either committed a breach of a stipulation as to title, or is not able to perform his contract. The contract is unenforceable by him but is not void" (3).

The peculiar nature of a contract for the sale of land, and in particular the opportunity given to the purchaser of investigating the title and his right to rescind the contract if the vendor fails to show a good title and his alternative right if he so chooses to accept such title as the vendor has, and complete the contract either with or without compensation, places a contract for the sale of land in a special category. Upon the execution of the conveyance the rights and obligations of the parties under the contract are merged in the conveyance except in so far as the contract provides expressly or

(1) (1932) A.C. 161.
(2) (1867) L.R. 2 H.L. 149.
(3) (1932) A.C., at p. 218.

impliedly that merger shall not take place—for instance where it is intended that a right to compensation given by the contract may be exercised even after completion: *Knight Sugar Co. Ltd.* v. *Alberta Railway & Irrigation Co.* (1). As a result the rights of a purchaser against the vendor, apart from those which arise under covenants for title, for quiet enjoyment etc. included in the conveyance itself or implied by statute, are very limited. It is clear that a contract for the sale of land cannot be set aside on the ground that the purchaser was induced to enter into it by an innocent material misrepresentation or on the ground that the vendor has innocently concealed some defect of title after completion has taken place. Actual fraud must be proved. A reference to a few of the many cases where this has been said will suffice: *Wilde* v. *Gibson* (2); *Brownlie* v. *Campbell* (3); *Soper* v. *Arnold* (4); (affirmed (5)); *Public Trustee* v. *Duchy of Lancaster* (6). The finality of the transaction after conveyance has been emphasised in many cases. See for instance *Clare* v. *Lamb* (7); *Allen* v. *Richardson* (8); *Joliffe* v. *Baker* (9). It may be possible in exceptional cases to obtain relief on the ground of common mistake after a contract for the sale of land has been completed. But the cases must be very rare. They are unlikely to go beyond cases where there has been a total failure of consideration. One case is where it is found, after completion, that the purchaser and not the vendor is the owner of the land so that the purchaser is really paying for his own property. In *Bingham* v. *Bingham* (10) the plaintiff had contracted to purchase land from the defendant, to which the defendant had no title although he believed that he had, which was the property of the plaintiff. The defendant conveyed the land to the plaintiff by deed of lease and re-lease. It was contended that it was the plaintiff's own fault as the title deeds had been produced to him and he had had time to examine the title and the maxim *caveat emptor* applied. But it was held that there was a plain mistake and a court would not suffer the defendant to run away with the money in consideration of the sale of an estate to which he had no right. This was a case where the mistake was so fundamental that there was a total failure of consideration. The plaintiff had paid to the

(1) (1938) 1 All E.R. 266, at p. 269.
(2) (1848) 1 H.L.C. 605, at pp. 632, 633 [9 E.R. 897, at pp. 908, 909].
(3) (1880) 5 App. Cas. 925, at pp. 937, 938.
(4) (1887) 37 Ch. D. 96, at p. 102.
(5) (1889) 14 App. Cas. 429.
(6) (1927) 1 K.B. 516, at pp. 528, 529.
(7) (1875) L.R. 10 C.P. 334, at pp. 338, 339.
(8) (1879) 13 Ch. D. 524, at pp. 537 et seq.
(9) (1883) 11 Q.B.D. 255, at pp. 265-267, 272, 273.
(10) (1748) 1 Ves. Sen. 126 [27 E.R. 934] (see also *Belts Supplement* Ves. Sen. Supp. 79 [28 E.R. 462]).

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defendant the purchase money for land which was the property of the plaintiff. In *Cooper* v. *Phibbs* (1) there was also a total failure of consideration. The plaintiff had agreed to lease a fishery of which he was, unknown to him, the tenant for life from the defendant who had no title at all to the property. In *Seddon* v. *N. E. Salt Co. Ltd.* (2) *Joyce* J., after referring to *Wilde* v. *Gibson* (3); *Brownlie* v. *Campbell* (4); *Soper* v. *Arnold* (5) and *Kennedy* v. *Panama, New Zealand & Australian Royal Mail Co. (Ltd.)* (6); held that the court will not grant rescission of an executed contract for the sale of a chattel or chose in action on the ground of an innocent misrepresentation. This principle was applied to an executed lease by the Divisional Court in *Angel* v. *Jay* (7) and by *Devlin* J. in *Edler* v. *Auerbach* (8). In *Solle* v. *Butcher* (9), however, decided six weeks later, the Court of Appeal by a majority (*Bucknill* L.J. and *Denning* L.J., *Jenkins* L.J. dissenting) held that an executed lease can be set aside on the ground that the parties were induced to enter into it by a common mistake. *Denning* L.J. said that " The fact that the lease has been executed is no bar to this relief. No distinction can, in this respect, be taken between rescission for innocent misrepresentation and rescission for common misapprehension, for many of the common misapprehensions are due to innocent misrepresentation; and *Cooper* v. *Phibbs* (1) shows that rescission is available even after an agreement of tenancy has been executed and partly performed. The observations in *Seddon* v. *North Eastern Salt Co. Ltd.* (2) have lost all authority since *Scrutton* L.J. threw doubt on them in *Lever Bros. Ltd.* v. *Bell* (10) and the Privy Council actually set aside an executed agreement in *Mackenzie* v. *Royal Bank of Canada* (11). If and in so far as *Angel* v. *Jay* (7) decided that an executed lease could not be rescinded for an innocent misrepresentation, it was in my opinion, a wrong decision. It would mean that innocent people would be deprived of their right of rescission before they had any opportunity of knowing they had it. I am aware that in *Wilde* v. *Gibson* (3) Lord *Campbell* said that an executed conveyance could be set aside only on the ground of actual fraud; but this must be taken to be confined to misrepresentations as to defects of title on the conveyance of land " (12). In *Leaf* v. *International Galleries* (13), however, both

(1) (1867) L.R. 2 H.L. 149.
(2) (1905) 1 Ch. 326.
(3) (1848) 1 H.L.C. 605 [9 E.R. 897].
(4) (1880) 5 App. Cas. 925.
(5) (1887) 37 Ch. D. 96.
(6) (1867) L.R. 2 Q.B. 580.
(7) (1911) 1 K.B. 666.
(8) (1950) 1 K.B. 359.
(9) (1950) 1 K.B. 671.
(10) (1931) 1 K.B. 557, at p. 588.
(11) (1934) A.C. 468.
(12) (1950) 1 K.B., at pp. 695, 696.
(13) (1950) 2 K.B. 86.

Evershed M.R. and *Jenkins* L.J. reserved their opinions whether *Seddon* v. *N. E. Salt Co. Ltd.* (1) was wrongly decided. We should certainly reserve our opinion on this point as it does not arise directly in the present case. In the case of the sale of land at any rate, relief has never been given on the ground of innocent misrepresentation after the contract has been executed and it is difficult to see why common mistake, unless it leads to a total failure of consideration, should be in any different position. There are *dicta* in the cases that relief can be given after the contract has been completed where there is a common mistake upon a material point although there is only a partial failure of consideration: *Jones* v. *Clifford* (2); *Bettyes* v. *Maynard* (3); *Debenham* v. *Sawbridge* (4). But the proper principle appears to be that, in the case of a completed contract of sale, rescission is only possible on the ground of common mistake where, contrary to the belief of the parties, there is nothing to contract about as in *Bingham* v. *Bingham* (5) and *Cooper* v. *Phibbs* (6). Contracts for the sale of personal property have been said to be void for mistake where the property has ceased to exist at the date of the contract. Instances of such contracts will be found in the speech of Lord *Thankerton* in *Bell* v. *Lever Bros. Ltd.* (7). In *Scott* v. *Coulson* (8) (affirmed (9)) both parties supposed the assured to be alive whereas he was dead. In *Couturier* v. *Hastie* (10) the cargo sold was held not to have existed at the date of the sale. In *Strickland* v. *Turner* (11) the annuitant was in fact dead at the date of the sale of the annuity. These are all cases where the subject matter was not in existence at the date of the sale. But even in these cases the contract is probably not void but merely unenforceable. The one party is unable to supply the very thing that the other party contracted to take and therefore the contract is unenforceable by the one if executory, while if executed the other can recover back money paid on the ground of total failure of consideration: *McRae* v. *Commonwealth Disposals Commission* (12). But it would be hard to find an analogous example in the case of land because land does not cease to exist unless one can take the somewhat fanciful example suggested by *Richards* C.B. in *Hitchcock* v. *Giddings* (13) of an estate swept away by a flood. In *Bettyes* v.

(1) (1905) 1 Ch. 326.
(2) (1876) 3 Ch. D. 779.
(3) (1882) 46 L.T. 766, at p. 769.
(4) (1901) 2 Ch. 98, at p. 109.
(5) (1748) 1 Ves. Sen. 126 [27 E.R. 934].
(6) (1867) L.R. 2 H.L. 149.
(7) (1932) A.C. 161, at p. 236.
(8) (1903) 1 Ch. 453.
(9) (1903) 2 Ch. 249.
(10) (1856) 5 H.L.C. 673 [10 E.R. 1065].
(11) (1852) 7 Ex. 208 [155 E.R. 919].
(12) (1951) 84 C.L.R. 377, at pp. 403-408.
(13) (1817) 4 Price 135 [146 E.R. 418].

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Maynard (1) *Kay* J. referred to *Earl Beauchamp* v. *Winn* (2) as a case of a completed contract but, with all respect to that learned judge, the transaction does not appear to have proceeded beyond a contract for the exchange of two properties. In *Solle* v. *Butcher* (3) *Denning* L.J. referred to the Privy Council setting aside an executed agreement in *MacKenzie* v. *Royal Bank of Canada* (4) but, with all respect to that learned judge, the Privy Council does not seem to have done more than set aside a contract of guarantee on the ground of a material misrepresentation of fact. Shares were hypothecated to the bank as security for the performance of that contract but the rights of the parties depended on the guarantee and therefore rested in the contract. Neither of these cases appears really to support the conclusion that an executed contract for the sale of property can be rescinded for innocent material misrepresentation or for material common mistake. The only authority for that principle appears to be the decision of the majority of the Court of Appeal in *Solle* v. *Butcher* (5) and from the scope of that decision completed contracts for the sale of land are carefully excluded. All that *Scrutton* L.J. said about *Seddon* v. *North Eastern Salt Co. Ltd.* (6) in *Lever Bros. Ltd.* v. *Bell* (7) was that he reserved liberty to consider the decision so far as it decides that executed contracts cannot be rescinded for innocent and material misrepresentation. He did not seriously examine its correctness. The decision of the Court of Appeal was reversed on appeal by the House of Lords so that it is difficult to see why the observations of *Joyce* J. in *Seddon's Case* (6) should have lost all authority simply because *Scrutton* L.J. threw doubt upon them. In *Legge* v. *Croker* (8) *Manners* L.C. held that an executed lease could not be set aside on the ground that the lessee had been induced to enter into it by a material but innocent misrepresentation. This decision seems to be in conflict with that of the Court of Appeal in *Solle* v. *Butcher* (5) yet *Legge* v. *Croker* (8) which was followed in *Angel* v. *Jay* (9) received the approval of Lord *Selborne* L.C. in *Brownlie* v. *Campbell* (10). At least it can be said that in the case of a sale of land nothing has occurred to throw doubt on the statement of *Cozens Hardy* J., as he then was, in *In re Tyrell*; *Tyrell* v. *Woodhouse* (11) that " counsel have not been able to discover a single instance of setting aside a purchase after conveyance except because of fraud or total failure of consideration as in

(1) (1882) 46 L.T., at p. 769.
(2) (1873) L.R. 6 H.L. 223.
(3) (1950) 1 K.B., at p. 695.
(4) (1934) A.C. 468.
(5) (1950) 1 K.B. 671.
(6) (1905) 1 Ch. 326.
(7) (1931) 1 K.B. 557, at p. 588.
(8) (1811) 1 Ball & B. 506.
(9) (1911) 1 K.B. 666.
(10) (1880) 5 App. Cas., at pp. 937, 938.
(11) (1900) 82 L.T. 675.

Bingham v. *Bingham* (1) and *Hitchcock* v. *Giddings* (2). In *Jones* v. *Clifford* (3) the court carefully guarded against deciding anything on this point. If I were to say mutual mistake, not being an error in the substance of what was purchased, justified rescission, every purchaser would be applying to get his purchase set aside. I am not prepared to be the first to give such a decision, and my own view is that there is no jurisdiction to set aside the purchase" (4). In the present case there was at most a partial failure of consideration. The defendants have been able to convey the whole of the land comprised in conveyance No. 176, book 221 on which a large part of the hotel is erected, to give the plaintiff vacant possession of the hotel and the licence has been transferred to him. The contract between the parties was never void. It was at most liable to be set aside in equity not on the ground of mistake but for failure by the vendors to show a good title. A vendor need not have a good title at the date of the contract, it is sufficient if he can show that he can make title at the proper time for completion. A vendor can enter into a valid contract to sell land although he has no title at all. If he can enter into such a contract when he knows that he has none, how can it be said that the contract is void if he mistakenly believes that he has a good title ? The purchaser can waive, if he chooses, all objections to the title and compel the vendor to execute a conveyance of the land even if he has no title to it at all. The purchaser may think it worth his while to complete the purchase simply to obtain vacant possession of the land taking his chance of it ripening into a possessory title in the future, or he may be prepared to take the chance of the vendor acquiring a good title in the future in which case equity would compel the vendor to make good his promise to convey the land to the purchaser when he subsequently acquired it. "A graft into the old stock" as the Master of the Rolls called it in *Seabourne* v. *Powel* (5) as long ago as 1686. The principle is stated in *Smith* v. *Osborne* (6).

The present case on analysis falls completely within the principle that, after the contract has been completed by the execution of the conveyance and the payment of the purchase money, the purchaser, apart from rights arising from the deed of conveyance or subsisting under the contract which do not merge in the deed, has no remedy at law or in equity in respect of any defects either in the title to or

(1) (1748) 1 Ves. Sen. 126 [27 E.R. 934].
(2) (1817) 4 Price 135 [146 E.R. 418].
(3) (1876) 3 Ch. D. 779.
(4) (1900) 82 L.T. 675, at p. 675.
(5) (1686) 2 Vern. 11, at p. 12 [23 E.R. 619, at p. 620].
(6) (1857) 6 H.L.C. 375, at p. 390 [10 E.R. 1340, at p. 1347].

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in the quantity or quality of the estate: *Brett* v. *Clowser* (1). The conveyance having been executed the purchaser must take all the consequences: *M'Culloch* v. *Gregory* (2).

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Macoboy, Taylor & Taylor*, Bendigo, by *Alexander Grant, Dickson & King.*

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R. D. B.

(1) (1880) 5 C.P.D. 376, at pp. 386-389.

(2) (1855) 1 K. & J. 286, at p. 291 [69 E.R. 466, at p. 468].