

1966
April 19,
20, 21;
May 17

Goff J.

GRIST v. BAILEY

[1965 G. No. 586]

Contract—Mistake—Mutual mistake as to essential matter of fact—Contract of sale “subject to existing tenancy”—Refusal by vendor to complete—Purchaser’s action for specific performance—Vendor’s belief that house occupied by statutory tenant—Same belief by plaintiff’s agent—Whether contract void at law—Alternatively, whether should be set aside in equity—Whether mistake as to basis of contract.

The plaintiff contracted to purchase from the defendant a freehold property “subject to the existing tenancy thereof” at a price of £850. The defendant refused to complete the contract on the ground that she had believed at the time it was entered into that the property was subject to a statutory tenancy in favour of A whereas in fact the property was not so subject. The value of the property with vacant possession, she claimed, was about £2,250. The plaintiff’s agent for the negotiation of the contract had believed at the time of the contract that there was a protected tenancy of the property in favour of B. In fact, at the date of the contract, there was no protected tenancy at all in existence.

On the question whether the contract was void at law, alternatively, whether it ought to be set aside in equity, on the ground of mistake as to a fundamental element therein common to both the plaintiff’s agent and the defendant:—

Held, (1) that, on the evidence, there was a common mistake as to the nature of the tenancy affecting the property in that both plaintiff and defendant believed there was a protected tenancy subsisting at the date of the contract, though they may have differed in their belief as to who the protected tenant was.

(2) That while at law the mistake was not such as would avoid the contract, in equity the mistake was fundamental in that there was not in fact an “existing tenancy” within the meaning of the contract and that neither party, knowing the true state of affairs, would have negotiated for so small a price for the property as £850 (post, p. 542B–C).

(3) That the defendant or her agents had not been at fault so as to be disentitled to relief in equity (post, p. 542E–F).

Bell v. Lever Bros. Ltd. [1932] A.C. 161, H.L. considered.

Dicta of Denning L.J. in *Solle v. Butcher* [1950] 1 K.B. 671, 693; 66 T.L.R. (Pt. 1) 448; [1949] 2 All E.R. 1107 applied.

ACTION.

This was an action by the plaintiff, Frank Grist, for specific performance by the defendant, Mrs. Minnie Bailey, of a contract dated September 11, 1964, for the sale by her to the plaintiff of a freehold house at 248, Rainsford Road, Chelmsford, at the price

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A of £850. Clause 7 of the contract provided that the property was sold "subject to the existing tenancy thereof."

The defendant had purchased the property in 1946 when it was in the occupation of a Mr. and Mrs. Brewer. Mrs. Brewer died on August 18, 1961, and Mr. Brewer on June 6, 1964. Their son occupied the premises until January, 1965, when he left of his own accord and paid the rent to that date in one sum.

B In paragraph 3 of her defence to the plaintiff's claim for specific performance, the defendant alleged that she had believed at the date of the contract that the house was in the occupation of Mrs. Brewer and her husband, Mr. E. F. Brewer, Mrs. Brewer being the statutory tenant under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1957, and (in paragraph 4) that at that date, September 11, 1964, the market value of such a house was £850 if in the occupation of a statutory tenant and £2,250 if vacant possession could be offered. She counterclaimed for rescission of the contract or that it be set aside on the ground of mistake. In his reply and defence to the counterclaim, the plaintiff alleged that a Mr. Rider, who was his agent in negotiating the contract, believed the house was then occupied by a statutory tenant, meaning by that a person having some protection under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1957.

Further facts are stated in the judgment.

E *Gerald Godfrey* for the defendant, who, it was agreed, should begin. Specific performance ought to be refused, and indeed the contract rescinded, on the ground of the common mistake of the parties as to a matter of fundamental importance. The parties contracted on the basis that the property was in the occupation of a protected tenant. The defendant's case is that Mrs. Brewer was in fact the original tenant; on her death, Mr. Brewer would then have succeeded to the tenancy under the "transmission" provisions of section 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as amended); and, since Mr. Brewer had died before the date of the contract, and there could be only one "transmission" of the tenancy, Terry Brewer, who was in occupation of the property at the date of the contract, was no kind of tenant at all. Even if that analysis is wrong, it is still the fact that both parties were mistaken in their common belief at the date of the contract that the property was in the occupation of a protected tenant. Having regard to the difference in value of the property (a) occupied, (b) not occupied by a protected tenant, the mistake

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was of fundamental importance. The contract is accordingly void, or at any rate voidable in equity. A common mistake such as this might admittedly not be sufficient at law to render the contract void but mistake has, at law, a more limited effect than it has in equity. The plaintiff relies on *Bell v. Lever Brothers Ltd.*,¹ but the obiter dicta of the majority there for some reason ignore the recognition correctly afforded in the dissenting speech of Lord Warrington of Clyffe² to "the special doctrines and practice of courts of Equity in reference to the rescission on the ground of mistake of contracts, conveyances and assignments of property and so forth, or to the refusal on the same ground to decree specific performance." See also *Solle v. Butcher*³ and the judgment of Denning L.J.⁴ where he deals with the two kinds of mistake, one rendering a contract void, at common law, from the beginning and the other rendering a contract voidable in equity and so liable to be set aside at the court's discretion. The wider nature of the doctrine of mistake in equity is also considered by Denning L.J. in *Oscar Chess Ltd. v. Williams*⁵ and in *Frederick E. Rose (London) Ltd. v. William H. Pim Jnr. & Co. Ltd.*⁶ The equitable doctrine of mistake was earlier considered by Lord Chelmsford in *Beauchamp (Earl) v. Winn*⁷ where he instanced circumstances in which equity would interfere to set aside contracts because of mistake. Again, Chitty on Contracts, 22nd ed. (1961), vol. 1, p. 90, para. 191, a standard work on the subject, deals with the effect of mistake at common law and in equity and refers at p. 96, para. 203, to the way in which mistake at law, if common to both parties, affects assent, and at p. 115, para. 254 refers to the extension of the equitable principle or rescission and to the enunciation by the Court of Appeal in *Solle v. Butcher*⁸ of a new doctrine of mistake in equity giving the courts a discretionary jurisdiction to grant such relief as in the circumstances might seem just. See also the summary, in Cheshire & Fifoot on Contract, 5th ed. (1960), p. 184, as to the jurisdiction of the court in equity, which is adopted.

A. A. Baden Fuller for the plaintiff. The general rule is that a mutual mistake as to the subject matter of a contract does not entitle either party to treat himself as not bound by it unless the mistake is such as to change the identity of the subject matter:

¹ [1932] A.C. 161; 48 T.L.R. 161, H.L.

² [1932] A.C. 161, 210.

³ [1950] 1 K.B. 671; 66 T.L.R. (Pt. 1) 448; [1949] 2 All E.R. 1107.

⁴ [1950] 1 K.B. 671, 690-691.

⁵ [1957] 1 W.L.R. 370, 373; [1957] 1 All E.R. 332, C.A.

⁶ [1953] 2 Q.B. 450, 460; [1953] 3 W.L.R. 497; [1953] 2 All E.R. 739.

⁷ (1873) L.R. 6 H.L. 223, 233. ⁸ [1950] 1 K.B. 671.

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- A *Bell v. Lever Brothers Ltd.*⁹ The subject matter of the contract in this case is a dwelling house for sale "subject to the existing tenancy thereof". The subject matter is the dwelling house sold for an estate in fee simple and this is unaffected by the terms of the tenancy. Even if a mistake as to the terms of a tenancy could affect the "subject matter" of the sale of a house, there was here
- B no such mistake because both parties thought, correctly, that the property was in the occupation of a statutory tenant; their mistake was as to who was the statutory tenant, not whether there was one, and such a mistake could not affect the identity of the subject matter. It is true that Denning L.J. in *Solle v. Butcher*¹⁰ thought
- C that *Bell v. Lever Brothers Ltd.*¹¹ might have had a different result if it had been considered on equitable grounds, but in *Leaf v. International Galleries*¹² Denning L.J. dealt with mistake at law in the sale of a Constable and said such mistake would not avoid the contract in that case for there was no mistake at all about the subject matter of the sale. This is the position in the present case.
- D Even should this case be approached on the principles stated in *Solle v. Butcher*,¹³ the evidence does not show them to be applicable. The price was a proper value for the property as occupied by a statutory tenant; neither party was mistaken about this for Mr. and Mrs. Brewer's son, Mr. Terry Brewer, was there, and the mistake of the parties in thinking that Mr. or Mrs. Brewer
- E was in occupation as a statutory tenant was a mistake which either did not affect their minds when entering into the contract or it was not "fundamental" within the test laid down in *Solle v. Butcher*.¹⁴ The plaintiff was not at fault in making a mistake about the identity of the statutory tenant because there was no reason why he should know who he was; but the defendant was at fault because she or
- F her advisers should have discovered the mistake before answering the plaintiff's "inquiries before contract".

As to succession to a statutory tenancy under the Rent Acts, see Megarry on the Rent Acts, 9th ed. (1961), p. 202, Halsbury's Laws of England, 3rd ed., vol. 23 (1958), pp. 811-812, and the cases, *Salter v. Lask*¹⁵ and *Summers v. Donohue*.¹⁶

- G Godfrey replied.

Cur. adv. vult.

⁹ [1932] A.C. 161, 217, 236.

¹⁰ [1950] 1 K.B. 671, 694.

¹¹ [1932] A.C. 161.

¹² [1950] 2 K.B. 86, 89.

¹³ [1950] 1 K.B. 671.

¹⁴ *Ibid.*

¹⁵ [1925] 1 K.B. 584.

¹⁶ [1945] 1 K.B. 376.

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May 17. GOFF J. read the following judgment: This is an action for specific performance of an agreement dated September 11, 1964, for the sale by the defendant to the plaintiff of a freehold house, known as 248, Rainsford Road, Chelmsford, for the sum of £850. The only term in that agreement to which I need refer is clause 7, which provides that "the property is sold subject to the existing tenancy thereof."

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The defence raised a number of alternatives, depending upon how the facts might turn out concerning the state of knowledge about the tenancy of the plaintiff's agent, a Mr. Rider, who gave evidence before me. In the end, the defence maintained that the agreement had been entered into under a common mistake of fact, and there was a counterclaim on the same grounds to have the agreement rescinded or set aside.

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The facts giving rise to the dispute are as follows: The defendant, who used to live in Chelmsford, purchased the property in 1946 and it was then in the occupation of a Mr. and Mrs. Brewer, both since deceased. Mrs. Brewer died on August 18, 1961, survived by Mr. Brewer, who died on June 6, 1964. This left their son, Mr. Terry Brewer, the sole occupant of the premises. He carried on living there until November, and as the only rent book produced in evidence shows, he continued to pay rent in advance down to September 10, 1964, that payment covering a period up to October 12, 1964. He left certain furniture and other things on the premises until January, 1965, when he finally left of his own accord and paid rent down to that date in one lump sum.

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The defendant moved from Chelmsford in 1956 and left the management of the property to a firm of solicitors, Messrs. Stamp, Wortley & Co. The rent was paid by attendance at Stamp, Wortley & Co.'s office. It was received by a junior boy or girl who used to take the book in to be signed.

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A proposal to buy the property was first made by Mr. Rider as agent for the plaintiff to Stamp, Wortley & Co. by a letter dated February 13, 1963, and on March 30, 1963, he offered £600, which he later increased to £800. This was not accepted and on July 19, 1963, he withdrew his offer.

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There the matter rested for over a year until it was taken up again on August 6, 1964, by Stamp, Wortley & Co., who made an offer to sell for £850 subject to contract, which was accepted, and after usual conveyancing business resulted in the agreement of September 11, 1964.

- A The matter proceeded nearly to completion and in fact on October 14, 1964, Stamp, Wortley & Co. actually delivered a completion statement and asked for an appointment to complete, but on November 9, 1964, they wrote to the plaintiff's solicitors claiming that the contract was entered into upon the basis that the property was subject to a Rent Act protected tenancy but that,
- B since the date of the contract, it had been ascertained that the original protected tenant and her husband were both dead at the date of the contract, and that there was resident in the property a son of the former tenant who had no protection under the Rent Acts and, on that ground, contending that the contract was
- C unenforceable and refusing to complete.

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- In these circumstances, the first question which arises is one of law, namely, what is the effect of common mistake? The leading case on this subject is *Bell v. Lever Bros. Ltd.*¹ This, of course, is binding upon me and if exhaustive is really fatal to the defendant, since it lays down very narrow limits within which mistake operates
- D to avoid a contract. It was there held that mistake as to the quality of the subject-matter of the contract must be such as to make the actual subject-matter something essentially different from what it was supposed to be: see *per* Lord Atkin.²

- In that case the plaintiffs sought to recover large sums which they had paid by way of compensation for the determination of certain contracts of service which, though they did not know it, they were entitled to rescind. The case as pleaded was not one of mutual mistake, and Lord Blanesburgh³ held it was too late to amend, and Lord Atkin⁴ doubted whether amendment was permissible, but on the assumption that the pleadings were amended to raise this issue they⁵ and Lord Thankerton⁵ all agreed that
- F the case must fail.

- I should have thought that this was more fundamental than any mistake made in the present case, and moreover the examples of the horse, picture and garage given by Lord Atkin⁶ in his speech would in my judgment apply to prevent any mistake, as to the nature of the tenancy affecting the property, being sufficient to
- G avoid the present agreement.

Mr. Godfrey has argued, however, that there is a wider principle in equity, in support of which he quotes Cheshire &

¹ [1932] A.C. 161; 48 T.L.R. 161, H.L.

² [1932] A.C. 161, 218.

³ *Ibid.* 192.

⁴ *Ibid.* 216.

⁵ *Ibid.* 162.

⁶ *Ibid.* 224.

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Fifoot on Contract, 5th ed. (1960), p. 184, *Solle v. Butcher*,⁷ particularly the judgment of Denning L.J.⁸ and *Huddersfield Banking Co. Ltd. v. Henry Lister & Son Ltd.*,⁹ and see also Chitty on Contracts, 22nd ed. (1961), vol. 1, p. 90, para. 191 and p. 115, para. 254.

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In *Solle v. Butcher*,¹⁰ as it seems to me, Denning L.J. clearly drew a distinction between the effect of mistake at law which, where effective at all, makes the contract void, and in equity, where it is a ground for rescission or for refusing specific performance; and, as it further seems to me, he clearly thought that this was wider than the jurisdiction at law. His Lordship said¹⁰: .

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“The principle so established by *Cooper v. Phibbs*¹¹ has been repeatedly acted on; see, for instance, *Earl Beauchamp v. Winn*¹² and *Huddersfield Banking Co. Ltd. v. Lister*.”¹³; and then he added: “It is in no way impaired by *Bell v. Lever Bros. Ltd.*,¹⁴ which was treated in the House of Lords as a case at law depending on whether the contract was a nullity or not. If it had been considered on equitable grounds, the result might have been different.”

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Denning L.J.¹⁵ laid down the equitable rule in these terms:

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“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 relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault.”

Bucknill L.J.¹⁶ did not specifically refer to *Bell v. Lever Bros. Ltd.*,¹⁷ but he laid down the principle in similar terms, saying¹⁸:

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“there was a common mistake of fact on a matter of fundamental importance, namely, as to the identity of the flat with the dwelling-house previously let at a standard rent of £140 a year, and that the principle laid down in *Cooper v. Phibbs*¹⁹ applies.”

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Mr. Baden Fuller has submitted that there is no difference between law and equity and no case which suggests that *Bell v. Lever Bros. Ltd.*²⁰ does not cover the whole field, save what he describes as one casual remark of Denning L.J. in *Solle v. Butcher*,²¹ and he says, moreover, that Denning L.J. himself resiled from his earlier view in the later case, *Leaf v. International*

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⁷ [1950] 1 K.B. 671; 66 T.L.R. (Pt. 1) 448; [1949] 2 All E.R. 1107.

⁸ [1950] 1 K.B. 671, 689.

⁹ [1895] 2 Ch. 273, C.A.

¹⁰ [1950] 1 K.B. 671, 694.

¹¹ (1867) L.R. 2 H.L. 149, H.L.

¹² (1873) L.R. 6 H.L. 223, 234.

¹³ [1895] 2 Ch. 273.

¹⁴ [1932] A.C. 161.

¹⁵ [1950] 1 K.B. 671, 693.

¹⁶ *Ibid.* 680.

¹⁷ [1932] A.C. 161.

¹⁸ [1950] 1 K.B. 671, 686.

¹⁹ L.R. 2 H.L. 149.

²⁰ [1932] A.C. 161.

²¹ [1950] 1 K.B. 671, 694.

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A *Galleries*.²² I cannot accept this interpretation of Denning L.J.'s judgment,²³ or indeed of *Solle v. Butcher*²⁴ as a whole. I think it was a carefully considered view of the relevant law and equity, and I do not think Denning L.J. in *Leaf v. International Galleries*²⁵ resiled from it in any way. As Mr. Godfrey has pointed out, relief in equity was not possible in *Leaf's* case²⁵ because it was too late and in *Frederick E. Rose (London) Ltd. v. William H. Pim Jnr. & Co. Ltd.*,²⁶ Denning L.J. again accepted the equitable view where he said²⁷:

C "At the present day, since the fusion of law and equity, the position appears to be that when the parties to a contract are to all outward appearances in full and certain agreement, neither of them can set up his own mistake, or the mistake of both of them, so as to make the contract a nullity from the beginning. Even a common mistake as to the subject-matter does not make it a nullity. Once the contract is outwardly complete, the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground: see *Solle v. Butcher*.²⁸ Could this contract, then, have been set aside? I think it could, if the parties had acted in time."

Again, in *Oscar Chess Ltd. v. Williams*,²⁹ Denning L.J. said²⁹:

E "They both believed it was a 1948 model whereas it was only a 1939 one. They were both mistaken and their mistake was of fundamental importance. The effect of such a mistake is this: it does not make the contract a nullity from the beginning, but it does in some circumstances enable the contract to be set aside in equity. If the buyer had come promptly, he might have succeeded in getting the whole transaction set aside in equity on the ground of this mistake: see *Solle v. Butcher*³⁰; but he did not do so and it is now too late for him to do it: see *Leaf v. International Galleries*."³¹

F Be that as it may, I cannot dismiss what Denning L.J. said in *Solle v. Butcher*³² as a mere dictum. It was in my judgment the basis of the decision and is binding on me; and, as I have said, I think Bucknill L.J.³³ took the same view. Whether the mistake in *Huddersfield Banking Co. Ltd. v. Henry Lister & Son Ltd.*³⁴ would have been sufficient at law, Kay L.J.'s statement³⁵ is, I

²² [1950] 2 K.B. 86; 66 T.L.R. (Pt. 1) 1031; [1950] 1 All E.R. 693, C.A.

²³ Ibid. 89.

²⁴ [1950] 1 K.B. 671.

²⁵ [1950] 2 K.B. 86, 91.

²⁶ [1953] 2 Q.B. 450; [1953] 3 W.L.R. 497; [1953] 2 All E.R. 739.

²⁷ Ibid. 460.

²⁸ [1950] 1 K.B. 671.

²⁹ [1957] 1 W.L.R. 370, 373; [1957] 1 All E.R. 332, C.A.

³⁰ [1950] 1 K.B. 671.

³¹ [1950] 2 K.B. 86.

³² [1950] 1 K.B. 671, 693.

³³ Ibid. 686.

³⁴ [1895] 2 Ch. 273.

³⁵ Ibid. 284.

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think, further support for the view that there is this equitable jurisdiction. A

Then I have to decide first, was there a common mistake in this case; secondly, was it fundamental; and perhaps thirdly, was the defendant at fault?

The first question presents some difficulty because there was, I think, some divergence between the views of Mr. Rider and the defendant. The former clearly thought that the tenant was Mr. Brewer, and indeed he was at the time when Mr. Rider began the negotiations, since if Mr. Brewer was not the original contractual tenant he clearly became a statutory tenant after his wife's death. The defendant, however, gave evidence that Mrs. Brewer was the tenant, although in cross-examination she said she could not say whether Mrs. Brewer was not the tenant when she, the defendant, purchased the property. B C

There is a letter dated January 31, 1964, from the solicitors, Stamp, Wortley & Co., to Mr. Rider on another matter, in which they refer to "our client's tenant, Mrs. Brewer"; but the partner, a Mr. Bailey, who attended to this property on behalf of the defendant, was not called to give evidence, so I have no direct evidence what the defendant's agents thought. Mr. Ginn, a legal executive employed by Stamp, Wortley & Co. (who took over the conveyancing on their behalf after the "subject to contract" agreement of August, 1964), in reply to No. 37 of the plaintiff's solicitors' preliminary inquiries, said "Tenant, Mr. E. F. Brewer," and he said he got the answer from records in the office. D E

It is clearly established, however, that the defendant did not know that either Mr. or Mrs. Brewer had died. Even if Mr. Bailey knew that Mrs. Brewer was dead, as to which I have no evidence, I am bound to infer that he did not know that Mr. Brewer was also dead. Mr. Ginn did not know that either was dead, and Mr. Rider said that he first learned that Mr. Brewer was dead after the date of the agreement, and that he then learned that Mr. Terry Brewer was in occupation. Mr. Rider further gave evidence that so far as investment was concerned his mind went no further than that the sort of prices they were discussing were prices relevant to a tenant remaining there, and that he assumed all along there was a protected tenant and that when the purchase was completed they would have a protected tenant, and again that he would never have expected to get this property for anything like £850 with vacant possession. He said he made his offer on the basis that there was a protected tenant and that he would stay there. F G

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A Such being the state of the evidence, in my judgment there was a common mistake, namely, that there was still subsisting a protected tenancy in favour of Mr. or Mrs. Brewer; and it is to be remembered that the language of clause 7 of the agreement is "subject to the existing tenancy thereof." In my view, this was nonetheless a common mistake, though the parties may have differed in their belief as to who the tenant was, whether Mr. or Mrs. Brewer, although that may have a bearing on materiality.

B Then, was it fundamental? In view of Mr. Rider's own evidence to which I have referred, and the evidence of Mr. Cooper Hurst, a surveyor called on behalf of the defendant, that in his opinion the vacant possession value as at August, 1964, was £2,250, in my judgment it must have been, if Mr. Terry Brewer had no rights under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1957.

C This was the case pleaded in paragraph 3 of the defence and counterclaim, but it depends upon showing that Mrs. Brewer was the contractual tenant, since then her husband became statutory tenant, and the effect of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g) was spent, leaving no protection for Mr. Terry Brewer: see *Summers v. Donohue*.³⁶

D The onus of proving the premise upon which that way of presenting her case depends is upon the defendant, and in my opinion she has failed to discharge it. The defendant herself was uncertain, and Mr. Bailey was not called. There was evidence that during her life Mrs. Brewer's was the hand by which payment was made, but that is by no means inconsistent with her husband having been the tenant, and the conveyance to the defendant which was produced stated that the property was then in the occupation of Mr. Brewer.

E The only rent book in evidence is in the name of Mrs. Brewer, but that was clearly inaccurate as it starts some years after her death; nor can I infer that the earlier ones were also all in that name which had merely been perpetuated after her death, since though Mr. Godfrey was unable to prove and, therefore, unable to put in any earlier ones, he very properly disclosed to me that they were not consistent, being sometimes in Mrs. Brewer's name, but sometimes in that of Mr. Brewer.

F But, in my view, that is not the end of the matter. It is still necessary in my judgment to consider whether, even so, the true facts were not materially different from those supposed. I thought at one time they were not, since just as a statutory tenant is a

³⁶ [1945] 1 K.B. 376.

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person who is free to leave but cannot be dispossessed against his will, save on certain limited grounds, so Mr. Terry Brewer could either leave as he did, or claim a statutory tenancy under section 12 (1) (g) of the Act of 1920, with the like protection. But in truth, in my view, the two positions are not the same, but, on the contrary, are materially different. One is a status quo which one has no reason to believe will not continue indefinitely. The other is a state of flux. I am satisfied, and I draw the inference, that had they known the true state of affairs, the defendant's agents would never have offered, nor would she have agreed to sell, the property at a price anything like as small as £850 without first making inquiries as to Mr. Terry Brewer's intentions. Moreover, at the date of the agreement he had not claimed protection under the Act, and he never did, and in my judgment those are facts which I am entitled to take into account in considering whether the mistake was material.

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His right to claim to be a tenant under the Act, which he never exercised, was not in my judgment an existing tenancy within the meaning of the agreement, and not what either Mr. Rider or the defendant contemplated. It was argued for the plaintiff that Mr. Terry Brewer was a tenant of some kind; but I think not, because the periodic payments of rent which he made were before Stamp, Wortley & Co. knew of his father's death, whilst the final payment was on quitting the premises, and receipt of that sum could not recognise him as a tenant. But if tenant he ever was, it was certainly not the existing tenancy contemplated by the parties.

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There remains one other point, and that is the condition laid down by Denning L.J.³⁷ that the party seeking to take advantage of the mistake must not be at fault. Denning L.J. did not develop that at all and it 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 I do not consider that the defendant or her agents were at fault so as to disentitle them to relief.

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It was argued that the vendor should know who her tenants are, but this was a case of a long-standing and informal tenancy, the rent under which was paid simply by attendance in the outer office, where it was received by some junior boy or girl, and Mr. Brewer had but recently died.

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The result, in my judgment, is that the defendant is entitled to relief in equity, and I do not feel that this is a case for simply

³⁷ [1950] 1 K.B. 671, 693.

- A refusing specific performance. Accordingly, the action fails, and on the counterclaim I order rescission. It is clear that this, being equitable relief, may be granted unconditionally or on terms, and Mr. Godfrey, on behalf of the defendant, has offered to submit to a term that the relief I have ordered should be on condition that the defendant is to enter into a fresh contract at a proper vacant possession price, and, if required by the plaintiff, I will impose that term.

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*Action dismissed with costs.
 On counterclaim order rescission
 with costs.*

- C Solicitors: *Candler, Stannard & Co. for Leonard Gray & Co. of Chelmsford; Jaques & Co. for Smith, Morton & Long, Halstead.*

K. N. B.

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UNGOED-
 THOMAS J.

- F *Revenue—Estate duty—"Interest in possession"—Settlement—Discretionary trust of income—Accumulation of surplus income as addition to capital—Trust of capital and income for children of named member of discretionary class on his death—Exercise of trustees' power of advancement for benefit of children—Death of named member of discretionary class—Whether estate duty payable on advances under section 43 of Finance Act, 1940—Whether an interest in possession in property from which advances made—Whether any interest in possession of a measurable amount—"Interest"—"In possession"—Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 2 (1) (b), 7 (7)—Finance Act 1940 (3 & 4 Geo. 6, c. 29), s. 43 (as amended).*

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A testator by his will made in February, 1934, gave to trustees a residuary trust fund, one-fourth share of which was to be held on the following trusts: (1) During his son's lifetime to apply all or part at their discretion of the income for the maintenance or benefit of the son or his wife or children (if any), and to accumulate surplus income as an addition to capital but with power at any time to resort to the accumulations and to apply them in