

The defendant did not ask that the agreement should be performed, but was content to accept a cancellation if the plaintiffs' claim for a refund were disallowed.

Both parties acquiesced in the conclusion that the by-law was valid, and that it presented an insuperable obstacle to carrying out the original intention.

The plaintiffs' real difficulty was, that while disappointed in the enlarged use to which it was proposed to put the defendant's land, by extending and increasing the buildings and plant, they did get, or could have got, under the agreement, this very land with the business and goodwill agreed for. It was out of the question to say that there was a total or even a partial failure of consideration—there being no evidence that the price agreed upon was made in any way to depend upon the proposed additions and enlargements.

The defendant was not responsible for the plaintiffs' disappointment; he practised no deceit and made no false or erroneous representations.

There was no mistake, mutual or otherwise, in regard to the parties, the subject-matter, or the consideration—the usual grounds for relief upon the plea of mistake. In no case has relief been granted to a purchaser because he was disappointed in the use to which he might be able to put the purchased property, unless some other ground intervened.

Reference to *Smith v. Hughes* (1871), L.R. 6 Q.B. 597; *Cooper v. Phibbs* (1867), L.R. 2 H.L. 149; *Scott v. Coulson*, [1903] 1 Ch. 453, [1903] 2 Ch. 249; *Tamplin v. James* (1880), 15 Ch.D. 215; *Appleby v. Myers* (1867), L.R. 2 C.P. 651; *Herne Bay Steam Boat Co. v. Hutton*, [1903] 2 K.B. 683; *Krell v. Henry*, ib. 740; *Civil Service Co-operative Society v. General Steam Navigation Co.*, ib. 756.

The appeal should be dismissed with costs.

MACLAREN, J.A., concurred.

MAGEE, J.A., agreed in the result.

HODGINS, J.A., said that the prohibition in the by-law existed at the date of the contract; and, if it rendered the purpose an impossible one at that date, the contract would be void ab initio, subject to whatever qualifications in the consequent rights of the parties might be found to subsist owing to its having been executed partly or in whole: *Clark v. Lindsay*