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Mistake in Assumptions

Stephen Waddams

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Mistake in Assumptions

Abstract

Mistake raises several important and difficult questions for contract law. The question addressed here is, when is it an excuse from contractual obligation that a contract has been made under the influence of a mistake of fact? Posed in this form, the question invites attention to aspects of contract law not usually considered in relation to each other, particularly misrepresentation, frustration, and more generally, unjust enrichment, all areas in which Professor McCamus has written extensively. This article brings these areas together with the object of throwing useful light on each of them, both from the point of view of understanding the legal past, and from the point of view of proposing appropriate rules for the future.

Keywords

Mistake (Law); Contracts; Canada

Mistake in Assumptions

STEPHEN WADDAMS*

Mistake raises several important and difficult questions for contract law. The question addressed here is, when is it an excuse from contractual obligation that a contract has been made under the influence of a mistake of fact? Posed in this form, the question invites attention to aspects of contract law not usually considered in relation to each other, particularly misrepresentation, frustration, and more generally, unjust enrichment, all areas in which Professor McCamus has written extensively. This article brings these areas together with the object of throwing useful light on each of them, both from the point of view of understanding the legal past, and from the point of view of proposing appropriate rules for the future.

Les erreurs soulèvent quantité de questions cruciales et ardues en matière de droit contractuel. La question abordée ici est de savoir dans quelles circonstances un contrat entaché d'une erreur de fait dégage ses parties de l'obligation contractuelle? Posée ainsi, la question met en lumière des aspects du droit contractuel qui ne sont généralement pas examinés l'un par rapport à l'autre, en particulier les fausses déclarations, l'inexécutabilité et, de façon plus générale, l'enrichissement injustifié, tous des domaines sur lesquels le professeur McCamus a abondamment écrit. Cet article rassemble ces aspects dans le but d'éclairer chacun d'eux, tant pour la compréhension du système juridique passé que la proposition de règles appropriées pour l'avenir.

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THIS ARTICLE ADDRESSES ONE OF THE MOST FUNDAMENTAL QUESTIONS of contract law: When is it an excuse that a contract has been made under the influence of a mistake of fact? Posing the question in this form invites attention to aspects of contract law not always considered in relation to each other, particularly misrepresentation, frustration, and, more generally, unjust enrichment. Considering these areas together will, it is suggested, throw useful light on each of them, both from the point of view of understanding the past, and from the point of view of proposing just and workable rules for the future.

George Palmer wrote, over fifty years ago, that finding a workable scheme of classification was “one of the most intractable problems in the law of mistake.”¹ He added that,

[i]n many parts of the law there is a generally accepted framework of classification, but this is not true of mistake. Distinctions that some writers find important are ignored by others or else dismissed as unimportant. In the decisions there is a lack of system that goes far beyond what one expects to find in our generally unsystematic case-law.²

These words remain largely true in respect of Anglo-Canadian law. Mistake is intertwined with concepts of contract formation, the objective principle of contract interpretation, the law relating to written contractual documents (including the effect of signature and equivalent manifestations of assent), the parol evidence rule, transfer of title to goods, *non est factum*, rectification, misrepresentation, frustration, and unjust enrichment. To a large extent, the law on each of these topics has developed independently, so that their interrelationship remains largely unexamined. The result does little credit to common law methods.

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1. George Palmer, *Mistake and Unjust Enrichment* (Columbus: Ohio State University Press, 1962) at 4-5.
 2. *Ibid* at 5.

Palmer, following the words just quoted, continued by proposing a “fundamental” distinction between “mistake in the expression of a transaction” (in which he included “misunderstanding” and “mistake in integration”) and “a mistake that relates only to the reasons for entering into the transaction,” which he called “mistake in assumptions.”³ He wrote:

The distinction parallels that between the statement “I did not intend to say this” and “I did intend to say this but it was because I mistakenly believed the facts were thus and so.” Although situations shade into one another, the distinction seems in-escapable if we are to separate mistake in integration from mistake in assumptions. It is also essential to an analysis of the consequences of misunderstanding.⁴

This is the same distinction that was recognized in *Smith v Hughes*,⁵ the case of the oats mistakenly thought to be old, where a crucial distinction was drawn between the buyer’s belief (after examining the sample and making his own judgment) that the oats were *in fact* old, and the buyer’s belief that the seller had positively *contracted* that they were old. Justice Blackburn said, “The difference is the same as that between buying a horse believed to be sound, and buying one believed to be warranted sound... .”⁶

Palmer, when he came to deal with mistake in assumptions, suggested that the crucial considerations were avoidance of unjust enrichment and allocation of risk.⁷ Palmer’s thinking has directly influenced the Second Restatement of Contracts⁸ but has not yet been fully adopted in English or Canadian law. Professor John McCamus has largely accepted Palmer’s framework of analysis, and argues persuasively and effectively in favour of its adoption by Canadian courts. McCamus’s treatment of the law relating to mistake in assumptions is, in my opinion, very valuable: He combines an accurate account of the actual law, past and present, with cogent critical analysis, in readable and interesting form, and does all this in a way that constitutes a model for academic analysis, while at the same time successfully addressing—and actually influencing—the courts.⁹

3. *Ibid* at 5-6.

4. *Ibid* at 6.

5. (1871) LR 6 QB 597, [1861-73] All ER Rep 632.

6. *Ibid* at 638.

7. Palmer, *supra* note 1 at 38, 53-57.

8. *Restatement (Second) of the Law of Contracts*, § 151-54 (1981).

9. *Miller Paving Ltd v B Gottardo Construction Ltd*, 2007 ONCA 422 at paras 20, 24, 26, 86 OR (3d) 161 [*Miller Paving*], citing John D McCamus, “Mistaken Assumptions in Equity: Sound Doctrine or Chimera?” (2004) 40:1 Can Bus LJ 46 [McCamus, “Mistaken Assumptions”]. See also *Stone’s Jewellery Ltd v Arora*, 2009 ABQB 656, 314 DLR (4th) 166 at para 30 [*Stone’s Jewellery*].

I. EQUITY

Unfortunately, for a writer seeking an easy and accessible way in which to present the issues surrounding mistake in assumptions, an examination of the relation between common law and equity cannot be avoided. Before the *Judicature Acts*,¹⁰ the courts of equity had an undoubted power to rescind an agreement for mistake. In *Bingham v Bingham*,¹¹ an eighteenth-century case expressly approved by the House of Lords in 1867,¹² there was a mistake as to the title to land. The court said, “though no fraud appeared, and the defendant apprehended he had a right, yet there was a plain mistake, such as the court was warranted to relieve against, and not to suffer the defendant to run away with the money in consideration of the sale of an estate, to which he had no right.”¹³ The phrase “run away with the money” plainly anticipates an unjust enrichment perspective. The equitable power to give relief was recognized by Joseph Story,¹⁴ Stephen Martin Leake,¹⁵ and J.P. Benjamin,¹⁶ and was affirmed by the House of Lords in *Cooper v Phibbs* where Lord Westbury said,

at the time of the agreement ... the parties dealt with one another under a mutual mistake as to their respective rights. ... In such a state of things there can be no doubt of the rule of a Court of equity with regard to the dealing with that agreement. ... if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake.¹⁷

The relevance of “mutual” or “common” mistake will be discussed below in Part III, below.

Though the existence of the equitable power to rescind a contract was not doubted, its limits were ill-defined. The power was, like all equitable remedies, discretionary, and the discretion would not be exercised in the absence of what

10. *Judicature Acts*, 1873 (UK), 36 & 37 Vict c 66, s 25(11).

11. (1748) 1 Ves Sen 126 [*Bingham*]. See also Palmer, *supra* note 1 at 100, n 14 (listing several other eighteenth- and nineteenth-century equity cases).

12. *Cooper v Phibbs*, [1867] UKHL 1, LR 2 HL 149 [*Cooper*].

13. *Bingham*, *supra* note 11 at 81 [citations omitted].

14. Joseph Story, *Commentaries on Equity Jurisprudence*, vol 1 (Boston, Mass: Little, Brown, and Company, 1836) at 155. Joseph Story, *Commentaries on Equity Jurisprudence*, 13th ed, vol 1 by Melville M Bigelow (Boston, Mass: Little, Brown & Company, 1886) at 149-50.

15. Stephen Martin Leake, *The Elements of the Law of Contracts* (London, UK: Stevens, 1867) at 178.

16. JP Benjamin, *A Treatise on the Law of Sale of Personal Property: with references to the American decisions and to the French code and civil law* (London, UK: H Sweet, 1868) at 303.

17. *Cooper*, *supra* note 12 at para 23.

seemed to the court to be sufficient reason. After the *Judicature Acts*, it might have been expected that the new court, uniting as it did the powers of the courts of law and equity (with equity to prevail in case of conflict¹⁸), would exercise the power of the former court of equity to rescind contracts for mistake. However, despite the *Judicature Acts*, there was a reluctance by English writers and judges to recognize the full breadth of the equitable power to rescind for mistake. Palmer put it this way: “[I]n modern times English judges have sometimes remembered earlier English equity, but often it seems to be either forgotten or consciously discarded.”¹⁹ The main reason for this reluctance was probably that the limits of the equitable power had not been clearly defined.²⁰ Without the ability to state clear limits, recognition of the power appeared to jeopardize the stability and certainty of contracts and was out of keeping with the desire prevailing in the late nineteenth century to achieve a high degree of predictability and certainty in legal rules, which was combined with a deep suspicion of discretion in judicial decision-making.

An important and closely related reason for the infrequent use of equitable power was that it appeared unnecessary, and therefore undesirable, to separate the concept of relief for mistake from that of contract formation: It appeared to be an attractive simplification to apply a single principle (consent) to both, and thereby to eliminate altogether the need for discussion of the old equitable jurisdiction.²¹ But looking at the question in terms of contract formation was wholly alien to the methods of thought of the old equity cases. Equity intervened in order to prevent an unconscionable result, not because the contract was void. On the contrary, the contract was assumed to be valid at law, and this was precisely why the intervention of equity was both justified and required. Here, as elsewhere, the effect of merging the equitable and legal jurisdictions was, ironically, to suppress the former equitable powers to grant relief.²²

18. *Judicature Acts*, *supra* note 10.

19. Palmer, *supra* note 1 at 14.

20. Catharine MacMillan, *Mistakes in Contract Law* (Oxford, UK: Hart Publishing, 2010) at 48-49.

21. See the discussion of the works of Frederick Pollock in Part II, below.

22. Stephen Waddams, “Equity in English Contract Law: the Impact of the Judicature Acts (1873-75)” (2012) 33:2 *J Legal Hist* 185 [Waddams, “Equity in English Contract Law”].

II. CONSENT

The apparent attraction of a single simple principle (consent) to resolve the problem of mistake ran into two fundamental and related difficulties. The first was that the adoption of consent as the sole determining test had the effect of excluding other relevant dimensions of the question. These other dimensions might be summarized as asking whether the risk of the mistake could fairly be said to have been allocated by the contract to the mistaken party. The same point might be stated in terms of whether the promisee had a reasonable expectation of receiving the benefit of the transaction and whether any enrichment caused by enforcement of the transaction should be considered unjust.

The second and related difficulty was that a test based solely on consent was potentially far too wide. Almost every disadvantageous contract involves a mistake of some sort, and in almost every such case it is possible for the disadvantaged party to show that in the absence of the mistake the contract would not have been made. To set aside contracts for this reason alone would undermine the security of transactions. Before the *Judicature Acts*, this danger was avoided by the self-restraint of equity in exercising the power to rescind.

It seems, at first sight, to be an advance in legal thinking to formulate a single simple principle that will determine all cases without the need to resort to discretion. But to say that the only test is whether the purported contract is void for lack of consent conceals the need for the court to exercise judgment in determining the question of whether the risk can fairly be said to have been allocated by the contract to the mistaken party. This process undoubtedly involves an element of uncertainty; but uncertainty cannot satisfactorily be eliminated, since addressing the question of risk allocation is crucial to the attainment of results that are fair to the individual parties and that maintain the stability of transactions, while avoiding very large fortuitous enrichments. Palmer said that, "There is no simple formula for testing relievable mistake. ... at the critical point of decision there is no substitute for what Holmes once called 'judgment and tact ...,'"²³ but these propositions were not agreeable to the search for precision that dominated English law during the late nineteenth and most of the twentieth centuries. One can appreciate the seductive temptation, from the point of view of precision and predictability, of reducing every mistake question to the question of consent, but the attempt to make consent the sole relevant principle has had the effect of concealing or eliminating other equally important principles.

23. Palmer, *supra* note 1 at 53.

The loss of the equitable perspective had other consequences. The concept of a contract that is not necessarily void, but that may be set aside by the judgment of the court for sufficient reason (*i.e.*, that is voidable), admits of the possibility of enforcement by the mistaken party if that party so chooses. It also admits of the possibility of partial relief or relief on terms that the court can fashion in order to meet the circumstances of the particular case. And it admits of the possibility of denying or restricting relief in order to protect third parties who may have relied on the validity of the contract. These important objects were familiar features of equity, but they tend to be lost if the sole and decisive question is formulated in terms of whether the contract is void for lack of consent. One of the hidden effects of the adoption of consent as the sole test of mistake in English law has been the loss of important elements of flexibility that had existed in English law as it was (taking the two systems together) before the *Judicature Acts*. This loss of flexibility was not intended or authorized by the *Judicature Acts*, and, partly because the former equitable flexibility has not generally been recognized by modern English courts or English law, no serious attempt to justify its removal has ever been advanced.

Frederick Pollock, as the influential author of the first book to examine the effects on contract law of the unification of the courts,²⁴ must take much of the responsibility for the weakening of the old equitable jurisdiction. Catharine MacMillan's severe, but justified, observation is that "the equitable treatment of mistake was sometimes overlooked, sometimes misunderstood and sometimes marginalised in Pollock's treatment of it."²⁵ The first edition of Pollock's *Principles of Contract at Law and in Equity*, published in 1876, included a chapter on mistake, which, though lengthy,²⁶ was rather discursive, inconclusive, and, at times, self-contradictory. He wrote that "[m]istake does not *of itself* affect the validity of contracts at all,"²⁷ adding in a footnote that "as Fear is to Coercion so is Mistake to Fraud,"²⁸ implying that mistake is irrelevant without fraud. He then added, "But mistake may be such as to prevent any real agreement from being

24. Frederick Pollock, *Principles of Contract at Law and in Equity: being a Treatise on the General Principles concerning the Validity of Agreements, with a special view to the Comparison of Law and Equity, and with reference to the Indian Contract Act, and occasionally to Roman, American, and Continental Law* (London, UK: Stevens and Sons, 1876) [Pollock, *Principles of Contract at Law and in Equity*].

25. MacMillan, *supra* note 20 at 153.

26. The chapter on mistake occupies 88 pages in a book of 577 pages.

27. Pollock, *supra* note 24 at 357 [emphasis in original].

28. *Ibid* at 357, n a. [emphasis in original].

formed; in which case the agreement is void both at law and in equity ...”²⁹ These words indicate an attempt to assimilate law and equity under the single principle of contract formation, and this theme was reflected in the principal subheading of the chapter pertaining to mistake entitled “As excluding true consent.”³⁰

One of the dangers of adopting a legal test that is too wide is that, when, as inevitably happens, it is rejected, there is a swing to the opposite extreme of an unduly narrow test. This is illustrated by Pollock’s treatment of consent. In his first edition Pollock cited, with full approval, the following proposition from the *Indian Contract Act*: “Where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.”³¹ This proposition was too wide to be an accurate description of English law in 1876, or to be acceptable as a test for the future, and Pollock must soon have realized this, for he distanced himself from the proposition by degrees. In the third edition, the concept of consent was introduced with the words, “The Indian Contract Act gives the rule in *rather wide* language ...”³² And in the fifth edition, published in 1889, it was reduced to a footnote.³³

A. *BELL V LEVER BROS LTD*

In English law, the adoption of consent as the only relevant criterion led to the assertion, in *Bell v Lever Bros Ltd*, of what came to be perceived as a very narrow view of relief for mistake.³⁴ In that case, large sums of money were paid to terminate two employment contracts that could have been terminated without any compensation had the employer known of earlier misconduct by the employees. Restitution of the money was sought by the employer and allowed by the two lower courts, but disallowed by a bare majority of the House of Lords. It has been pointed out by McCamus, as by others, that the very narrow view of availability of relief for which the case has usually been thought to stand is based largely on the opinion of Lord Atkin alone, and that Lord Atkin’s opinion itself

29. *Ibid* at 357.

30. *Ibid* at 367.

31. *Ibid* at 397. Pollock states: “We cannot do better than begin with the rule and illustrations as given in the Indian Contract Act...” (*ibid*).

32. Frederick Pollock, *Principles of Contract: being a Treatise on the General Principles concerning the validity of agreements in the Law of England*, 3d ed (London, UK: Stevens and Sons, 1881) at 455 [emphasis added].

33. Frederick Pollock, *Principles of Contract: a Treatise on the General Principles concerning the validity of agreements in the Law of England*, 5th ed (London, UK: Stevens and Sons, 1889) at 469, n k.

34. *Bell v Lever Bros Ltd*, [1932] AC 161 (HL), [1931] UKHL 2 [*Bell*].

contains significant ambiguities.³⁵ McCamus goes on to argue that the result of refusing relief could well be supported on the ground that an employer who agrees to a severance payment without enquiry may be said to take the risk of prior misconduct.³⁶

Another way of supporting the result (perhaps itself only a variation of the risk-analysis approach) might be to observe that the payments made were far too large to be explained as a compromise of possible claims for wrongful dismissal. The whole case for relief depends on the suggestion that the company had paid £50,000 for something (i.e., dismissal of the employees) that it could have had for nothing.³⁷ But the context suggests that the payments were approved by the directors partly as gifts. The letters offering the payments spoke of the deep appreciation of the board for the employees' work for the company.³⁸ Their salaries were £8,000 and £6,000, respectively, and their contracts had two years left to run at the date of termination. A fair compromise of claims for wrongful dismissal might, one would suppose, have been in the range of £20,000 to £25,000 at the most, allowing for mitigation; but the company paid more than twice as much. Since it was not possible to separate the gift element from the compromise element and since the motive for making the gifts was recognition of valuable services that the company had actually received (as to which there was no fundamental mistake), it can be argued in support of McCamus's analysis that the employer assumed the risk of paying more than the employees' strict entitlement.

Nevertheless, as mentioned, *Bell v Lever Bros Ltd* was interpreted by the English courts and by commentators as restricting relief for mistake to very narrow grounds. In *Solle v Butcher*, a case decided by the Court of Appeal in 1950,³⁹ Lord Denning accepted that *Bell v Lever Bros Ltd* laid down a very narrow test at common law, but then sought to avoid the result by reasserting the powers of the old Court of Equity. As the discussion above indicates, Lord Denning could claim considerable historical support for his view of equity, but the effect of his decision was unfortunate because, partly on account of his reputation as a bold (and, his critics would say, heretical) innovator, the decision in *Solle v Butcher* was inevitably seen as barely concealed defiance of the House of Lords.

35. John McCamus, *The Law of Contracts*, 2nd ed (Toronto, ON: Irwin Law, 2012) at 562-65 [McCamus, *The Law of Contracts*].

36. *Ibid* at 564.

37. Palmer, *supra* note 1 at 92.

38. *Bell*, *supra* note 34 at 7. The letters exchanged between the parties stated: "I should like to be allowed to say how deeply the Board of Messrs. Lever Brothers appreciate the work that you have done for the Niger Company during the period that you have been in control."

39. *Solle v Butcher*, [1950] 1 KB 671, [1949] 2 All ER 1107 [*Solle*].

Lord Denning himself did little to dispel this impression in saying that “if [*Bell v Lever Bros Ltd*] had been considered on equitable grounds, the result might have been different.”⁴⁰ Of course, the House of Lords in 1932 was as fully a court of equity as was the Court of Appeal in 1950, and it was perhaps a little tactless to suggest that the House had overlooked that fact (which would itself be a rather fundamental mistake). *Solle v Butcher*, therefore, though followed in some English and Canadian cases,⁴¹ was often regarded with a degree of suspicion. In *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*,⁴² *Solle v Butcher* was rejected by the English Court of Appeal as inconsistent with the principles of *Bell v Lever Bros Ltd*. Lord Phillips stated:

We are *only* concerned with the question whether relief might be given for common mistake in circumstances wider than those stipulated in *Bell v Lever Brothers*. But that, surely, is a question as to where the common law should draw the line; not whether, given the common law rule, it needs to be mitigated by the application of some other doctrine. The common law has drawn the line in *Bell v Lever Brothers*. The effect of *Solle v Butcher* is not to supplement or mitigate the common law; it is to say that *Bell v Lever Bros* was wrongly decided.

Our conclusion is that it is impossible to reconcile *Solle v Butcher* with *Bell v Lever Brothers* If coherence is to be restored to this area of our law, it can only be by declaring that there is no jurisdiction to grant rescission of a contract on the ground of common mistake where that contract is valid and enforceable on ordinary principles of contract law.⁴³

It is a curious irony that the equitable jurisdiction (which was supposed to prevail after 1875) should have been suppressed by reliance on the very feature (the validity of the contract at common law) that had given jurisdiction to the courts of equity in the first place. Wherever equity intervened to set aside a contract, the contract was valid at common law (otherwise equity could not have intervened).⁴⁴

McCamus has criticized *Great Peace* in an influential article⁴⁵ and in his treatises on contracts and on restitution. As he persuasively shows, the actual result (denial of relief) in *Great Peace* was readily justifiable in the circumstances of that case on the ground of allocation of risk: the defendant, faced with a serious

40. *Ibid* at 694.

41. See *Grist v Bailey*, [1967] Ch 532, [1966] 2 All ER 875; *Toronto-Dominion Bank v Fortin et al (No 2)* (1978), 88 DLR (3d) 232, 27 CBR (NS) 232.

42. [2002] 4 All ER 689, 3 WLR 1617 [*Great Peace* cited to All ER].

43. *Ibid* at paras 156-57 [emphasis in original].

44. See the discussion in Part I, above.

45. McCamus, “Mistaken Assumptions,” *supra* note 9.

emergency, agreed to pay a minimum charge in exchange for the guaranteed availability of the plaintiff's ship for saving life in case rescue should be needed. There was no need for the court, in enforcing the contract, to seek to reverse *Solle v Butcher*. Lord Phillips, who gave the leading judgment, actually conceded that a wider ground of relief than recognized in *Bell v Lever Bros Ltd* was desirable and necessary and suggested legislative reform.⁴⁶ That the court should reject *Solle v Butcher*, and then immediately call for legislative reform to reinstate it (for the legislature, if it did amend the law, would be likely to give back to the courts some sort of wide equitable power), is, as McCamus rightly says, "particularly unrealistic in the Canadian context," where uniform (or indeed any) legislative reform on this issue is unlikely.⁴⁷ Even in the context of English law it seems regrettable, and there is a reasonable prospect that the United Kingdom Supreme Court may, for this reason, eventually reject the reasoning in *Great Peace*. In his discussion of *Great Peace*, Sir Guenter Treitel wrote "that the American rules on this subject are much closer to those of English equity than to those of the English common law, and do not seem to have caused widespread inconvenience."⁴⁸ In the following edition, these words were repeated together with the express suggestion that the House of Lords (then the highest court) might overrule the Court of Appeal on this question.⁴⁹

46. *Great Peace*, *supra* note 42 at para 161.

47. McCamus, "Mistaken Assumptions," *supra* note 9 at 85.

48. Sir Guenter Treitel, *Treitel: The Law of Contract*, 11th ed (London, UK: Sweet & Maxwell, 2003) at 312.

49. Edwin Peel, *Treitel: The Law of Contract*, 12th ed (London, UK: Sweet & Maxwell, 2007) at 8-030. See also *Futter v The Commissioners for Her Majesty's Revenue and Customs*, [2013] UKSC 26, Pens LR 195 [*Futter*]. In *Futter*, the UK Supreme Court asserted and applied a broad equitable power to rescind a trust instrument executed under a serious mistake as to its tax consequences. It declined to extend the reasoning applied in *Great Peace* but stated, without further comment, that *Great Peace* had "effectively overruled" *Solle* (*ibid* at para 115). The broad approach of the Supreme Court, however, to rescission for unconscionability and its attention to "the traditional rules of equity," suggest that *Great Peace* might well be reconsidered on an appropriate occasion. See *Futter* at paras 115, 128.

III. MUTUAL MISTAKE

Although the phrase “mutual mistake” was used in *Cooper v Phibbs* and has been repeated in many modern cases and treatises, the equitable perspective implies that it cannot be a requirement of relief that the mistake should be shared. Relief was given, as MacMillan has said, “for reasons related to conscience, and not consent.”⁵⁰ In some circumstances, it was unconscientious to insist on enforcement of an agreement made by the other party under a mistake; this perspective implies that the case for relief is based not on lack of mutual consent but on the mistake of the party who suffers by it. On this point, Palmer wrote that “[i]t takes a peculiar sense of justice”⁵¹ to regard the case of a party damaged by mistake as weaker where the other party knows the truth. McCamus similarly suggests that it would be ironic to insist on a requirement of common mistake.⁵² The equitable perspective of preventing an unjust result suggests, as McCamus also argues, that the crucial question is not whether the mistake was shared, but whether the party damaged by the mistake could fairly be said to have agreed to take the risk of the mistake.

IV. LAW, EQUITY, AND UNJUST ENRICHMENT

Attention to the equitable treatment of mistake before the *Judicature Acts* is, as we have seen, necessary for an understanding of the past and supports an argument in favour of recognizing a flexible power in the modern court to grant relief. But it is scarcely desirable and unlikely to be productive, in the twenty-first century, to propound an argument that, a century and a half after the *Judicature Acts*, an equitable doctrine of mistake continues to exist parallel to, but somehow still separate from, the common law. Modern Canadian courts are more likely to be influenced by a simple argument that the court today has full power to do justice between the parties and that general considerations of justice require a power to give relief from contracts entered into on the basis of fundamental mistake in order to avoid fortuitous and unjust enrichment, where the contract does not allocate the risk of the mistake to the party who suffers by it. It is certainly open to the Supreme Court of Canada to adopt such a view, particularly as the court has been quite creative in the general field of unjust enrichment. McCamus, as

50. MacMillan, *supra* note 20 at 38. See also *ibid* at 53, 68, 136.

51. Palmer, *supra* note 1 at 94.

52. McCamus, *The Law of Contracts*, *supra* note 35 at 584.

the author of the leading Canadian book on restitution,⁵³ is in a uniquely strong position to advance such an argument, and, as we have seen, the argument has been substantially accepted by at least two Canadian courts.⁵⁴

The topic can be assigned neither exclusively to contract, nor exclusively to restitution, as McCamus's parallel discussion of it in each of his treatises plainly shows. It is true that contract and restitution may be, and often are, separate sources of obligation, and that the independence of the subjects has naturally (in view of the earlier regrettable entanglement of unjust enrichment with contract) been emphasized by modern writers, but it does not follow that the concepts operate entirely independently of each other. It has sometimes been suggested that unjust enrichment has no role to play in adjusting the rights of contracting parties unless and until the contract has first been set aside, but this approach is not quite satisfactory in the present context because the question itself of whether or not the contract should be set aside involves questions of unjust enrichment (using that phrase in its general sense).⁵⁵ The questions of unjust enrichment and allocation of risk are similarly interrelated, because where the risk has, expressly or by fair implication, been allocated by the contract to the mistaken party, the consequent enrichment of the other party will not be perceived as unjust.

If a principle were adopted, as suggested, recognizing the power of the court, in proper cases, to give relief for mistake in assumptions, and recognizing the importance of avoiding unjust enrichment in this context, two other aspects of contract law that have generally been considered separately from mistake would be brought into a new perspective. These are the topics of misrepresentation and frustration, both of which may be regarded as aspects of mistake and involve considerations of unjust enrichment.

V. MISREPRESENTATION

Whenever the making of a contract is induced by a false statement by one of the parties, a mistake in assumptions occurs on the part of both parties if the misrepresentation is innocent. An innocent misrepresentation does not necessarily justify the imposition of any obligation on the representor. If the

53. Peter D Maddaugh & John D McCamus, *The Law of Restitution*, loose-leaf (consulted on: 8 February 2013), v 2 (Toronto, ON: Thomson Reuters Canada, 2013), c 17 at 17:200.

54. See *Miller Paving*, *supra* note 9; *Stone's Jewellery*, *supra* note 9.

55. See Stephen Waddams, "Contract and Unjust Enrichment: Competing Categories or Complementary Concepts?" in Charles Rickett & Ross Grantham, eds, *Structure and Justification in Private Law: Essays for Peter Birks* (Oxford, UK: Hart Publishing, 2008) at 167.

statement in question does not meet the test of contractual formation, there is no ground for imposing contractual liability;⁵⁶ and if the statement does not meet the test of tortious liability, there is no ground for imposing liability in tort.⁵⁷ These propositions may be accepted, so far as they go, but it does not follow from them that an innocent misrepresentation is legally irrelevant. There is another relevant principle, namely that a misrepresentation inducing a contract, even though it does not justify the imposition of any obligation on the misrepresenter, affords the party misled an excuse from contractual obligation and, if the contract has been executed, restitution to reverse an unjust enrichment.

The concept of misrepresentation as an excuse, recognized by equity before the *Judicature Acts*,⁵⁸ was powerfully reinforced by Sir George Jessel M.R. six years after the acts came into force in *Redgrave v Hurd*:

As regards the rescission of a contract, there was no doubt a difference between the rules of Courts of Equity and the rules of Courts of Common Law—a difference which of course has now disappeared by the operation of the *Judicature Act*, which makes the rules of equity prevail. According to the decisions of the Courts of Equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was, “A man is not to be allowed to get a benefit from a statement which he now admits to be false. ...” The other way of putting it was this: “Even assuming that moral fraud must be shewn in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency: no man ought to take advantage of his own false statements.”⁵⁹

The phrases “get a benefit,” “obtained a beneficial advantage,” and “take advantage of” show that the avoidance of unjust enrichment (though not at that time by that name) played a prominent part in Jessel’s reasoning. Jessel emphasized the contrast with the common law position and the power of the court to set aside or rescind the contract, not just to refuse specific performance.

56. *Heilbut, Symons & Co v Buckleton*, [1912] UKHL 2, [1913] AC 30 [*Heilbut*].

57. *Derry v Peek*, [1889] UKHL 1, 14 App Cas 337 [*Derry*]. See also *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, [1963] UKHL 4, [1964] AC 465. In *Hedley*, negligence, though recognized as a ground of liability for misrepresentation, required proof of fault.

58. Edward Fry, *A Treatise on the Specific Performance of Contracts Including Those of Public Companies* (London, UK: Butterworths, 1858) at 193. Edward Fry, *A Treatise on the Specific Performance of Contracts Including Those of Public Companies*, 2nd ed (London, UK: Stevens & Sons, 1881) at 282.

59. (1881) 20 Ch D 1 at 12-13.

The significance of *Redgrave v Hurd* was neglected by Pollock,⁶⁰ but was recognized by Sir William Reynell Anson⁶¹ and by the House of Lords in *Derry v Peek*,⁶² where it was distinguished from the question of tortious liability of the representor for deceit. Lord Herschell said that the action in deceit

differs essentially from one brought to obtain rescission of a contract... . The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand.⁶³

He went on to contrast the tortious action for deceit where proof of dishonesty was required. However, in *Heilbut, Symons & Co v Buckleton*⁶⁴ the House of Lords held that a statement inducing a contract did not amount to a warranty in the absence of contractual intention, adding that “[i]t is ... of the greatest importance ... that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made.”⁶⁵ This assertion was taken to exclude any monetary award for innocent misrepresentation. Consequently, until statute gave some flexibility,⁶⁶ English law found itself in the very anomalous position of allowing rescission where rescission would formerly have been given by a court of equity, but denying any remedy at all where rescission was impossible, unless the claimant could establish that the statement was fraudulent (in the common law sense of actual deceit) or that it was a contractual warranty (a concept that would have opened the door to excessive damages in some cases).

Thus, the equitable power of rescission for innocent misrepresentation was accepted but minimized by being restricted to such remedies as could have been given before 1875 by the court of equity acting alone. Had the courts after 1875 given attention to the reasons underlying the equitable power of rescission as explained in *Redgrave v Hurd* (i.e., avoidance of unjust enrichment), they would have concluded that the new court had ample power, where actual rescission was impossible, to give a monetary remedy that would represent the economic

60. See discussion in Waddams, “Equity in English Contract Law,” *supra* note 22 at 198.

61. Sir William Reynell Anson, *Principles of the English Law of Contract and of Agency in its relation to Contract*, 5th ed (Oxford, UK: Clarendon Press, 1888) at 151-52.

62. *Derry*, *supra* note 57.

63. *Ibid* at 359. To the same effect, see also the words of Lord Bramwell at 347.

64. *Heilbut*, *supra* note 56.

65. *Ibid* at para 51.

66. *Misrepresentation Act*, 1967 (UK), c 7. The *Misrepresentation Act*, however, introduced new complexities and anomalies.

equivalent of rescission—not common law damages for a contractual or tortious wrong, but an award calculated to prevent the maker of a false statement from profiting by it. The neglect of this intermediate remedy has had lasting and deleterious effects on this branch of English contract law. The complexities that have caused so much trouble to Anglo-Canadian law⁶⁷ are neatly and compendiously resolved in a recent European document, Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, which provides that a party may avoid a contract for mistake if “the other party ... caused the mistake.”⁶⁸ The comment explains that the concept underlying this provision is that justice requires that a person, even if completely innocent, should not be allowed to make a profit from his or her own false statement. A monetary obligation may arise, not as damages for any kind of wrongdoing, but in order to avoid or reverse an unjust enrichment.⁶⁹

VI. FRUSTRATION

The other topic that appears in a new light in relation to mistake in assumptions is frustration. English treatises have generally treated mistake and frustration as completely separate topics, largely because of the tendency, discussed above, to consider mistake as an aspect of contract formation. On the other hand, frustration, which was formulated in terms of bringing the contract to an end, appeared to be related to the idea of discharge of contractual obligations, and, so it seemed, belonged at the other end of a treatise. Yet, from the perspective of avoidance of unjust enrichment, as Palmer pointed out,⁷⁰ the problems of justice are identical whether the mistake is as to an existing fact or as to a future event. McCamus also considers that “[c]ases of frustration are ... quite similar to cases of mistaken assumptions concerning the facts existing at the time an agreement is entered into.”⁷¹ “Quite similar” may perhaps be understating the point, for it is sometimes almost impossible to distinguish between the two kinds of mistake,

67. See Angela Swan, *Canadian Contract Law*, 2nd ed (Toronto, ON: LexisNexis Canada, 2009). Swan has said much of the law of misrepresentations is “needlessly complex” (*ibid* at 647).

68. Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) (Munich: Sellier, European Law Publishers, 2009) at art II – 7:201(1)(b).

69. *Ibid* 7:212.

70. Palmer, *supra* note 1 at 36. See also Swan, *supra* note 66 at 704. Swan says that “[t]he problems of frustration are closely related to those of mistake: in each case the deal that the parties made turns out to be a different deal from that which they (or at least one of them) expected.”

71. McCamus, *The Law of Contracts*, *supra* note 35 at 600.

as in the cases arising from the cancellation of the coronation processions for Edward VII in 1902, where some contracts to rent seats or rooms had been made before announcement of the cancellation, and others just afterwards (but in ignorance of the announcement).⁷² Even the leading frustration case, *Krell v Henry*,⁷³ could plausibly be regarded as a mistake case, since, at the time of the contract (and unknown to both parties), the King was probably suffering from a physical condition called incipient appendicitis that was certain (had the medical facts been fully known) to result in cancellation of the processions.

A conceptual amalgamation of the frustration and mistake cases would have several far-reaching and, it is suggested, potentially beneficial consequences. It would make recognition of relief for mistake easier to establish and accept, since it is now recognized that relief for frustration is based on broad considerations of justice (the implied-term explanation having been generally abandoned).⁷⁴ It is true that mistake is an older juridical concept than frustration, but, if they are recognized as resting on the same principles, the following argument has force: If relief is available (as it is) for mistake as to future facts (*i.e.*, frustration), it must also be available for mistake as to existing facts. Secondly, recognition of the decisive importance of risk allocation to both mistake and frustration would benefit the analysis of both topics. As McCamus says, “The relevance of risk-allocation analysis is also supported by the analogy of the mistaken assumptions cases. . . . The doctrines thus perform similar and related functions and it is appropriate, therefore, that the analytical frameworks they employ would also be similar.”⁷⁵

Thirdly, the treatment of reliance and of benefits conferred under the contract, which have been much discussed in the context of frustration, could be carried over to mistake cases, where the potential problems of restitution and reliance are closely analogous, if not identical. Fourthly, the rigidities incidentally imposed in respect of reliance and restitution by the *Law Reform (Frustrated Contracts) Act*⁷⁶ (the “*Act*”), which McCamus rightly calls “rather unsatisfactory,”⁷⁷ could be avoided in the context of mistake, and could in turn lead to a more flexible approach to the same problems in the context of frustration in jurisdictions that have not adopted the *Act*. Even in jurisdictions that have adopted the *Act*, a more flexible approach applicable to both mistake and frustration might

72. *Griffith v Brymer* (1903), 47 Sol Jo 493, 19 TLR 434.

73. [1903] 2 KB 740, [1900-03] All ER Rep 20.

74. See McCamus, *The Law of Contracts*, *supra* note 35 at 605-06.

75. *Ibid* at 618.

76. 6 & 7 Geo VI c 40.

77. McCamus, *The Law of Contracts*, *supra* note 35 at 637.

produce benefits in the shape of statutory interpretation on doubtful points and on questions where the statute is not precisely applicable. It may also generate suggestions for possible legislative reform. This issue is closely linked with the general law of restitution, and is usefully discussed in McCamus's treatise on restitution⁷⁸ as well as the general law on contracts.

Fifthly, viewing the question as one of avoidance of unjust enrichment is conducive to flexibility in several respects by avoiding the all-or-nothing, "on/off" concepts implicit in former and present approaches to both mistake (contract valid or void) and frustration (contract valid or discharged). As was mentioned above,⁷⁹ the concept of a contract that is not necessarily void, but that may be set aside by the judgment of the court for sufficient reason (i.e., one that is voidable), admits of the possibility of enforcement by the mistaken party if that party so chooses; it admits of the possibility of partial relief, or relief on terms, which the court can fashion in order to meet the justice of the particular case; and it admits of the possibility of denying or restricting relief in order to protect third parties who may have relied on the validity of the contract. These possibilities may be relevant in cases of frustration as well as in cases of mistake, and are valuable tools of justice.

Overall, an examination of this subject demonstrates both the beneficial power of good academic analysis in law, and the dangers of neglecting it. The best academic writing, as exemplified by Palmer and McCamus, is capable of clarifying thoughts on important theoretical questions while at the same time assisting the courts in the practical administration and development of the law.

78. See Maddaugh & McCamus, *supra* note 52 at c 18.

79. See Part I, above.