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A Theory of Mistaken Assumptions in Contract Law

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1. Introduction

The equitable doctrine of mistaken assumptions allows a court to set aside a contract because of a mistaken assumption about the quality of the thing contracted for.[1] It was first articulated by Lord Denning in *Solle* v. *Butcher* in reaction to the restrictive common law approach to mistaken assumptions formulated by the House of Lords in *Bell* v. *Lever Brothers*.[2] The equitable doctrine was initially criticized as inconsistent with common law principle[3] and an example of "palm tree

[1] The term "mistaken assumption" is meant to distinguish a mistake about a quality that is not a contractual term from a mistake about a quality that is a contractual term. For example, if A and B agree to the purchase and sale of a particular bag of oats and both believe that the oats are old when in fact they are new, that is a mistaken assumption. This paper concerns the circumstances under which this kind of mistake renders a contract void or voidable. On the other hand, if A and B agree to the purchase and sale of a particular bag of "old oats" (with "old" being a term of the contract) but the oats turn out to be new, that is a breach of contract rather than a ground for finding the contract void or voidable. In this paper, I deal only with the common law and equitable doctrines of mistaken assumptions. I do not deal with the doctrines regarding mistaken terms, latent ambiguity, mistake in transcription, or mistaken identity. For convenience, I sometimes refer to the common law and equitable doctrines of mistaken assumptions as the common law and equitable doctrines of mistake.

[2] *Solle v. Butcher* [1950] 1 KB 671 (CA); *Bell v. Lever Brothers* [1932] AC 161 (HL). This needs to be qualified in two respects. First, the issue of whether Lord Denning was the first to articulate this equitable doctrine is controversial. Denning claimed to be relying on a number of authorities, particularly *Cooper v. Phibbs* (1867) LR 2 HL 149 and *Bingham v. Bingham* (1748) 1 Ves Sen 126. But others, including Lord Phillips in *Great Peace*, have questioned whether these cases are authority for the principle that Denning articulated. See *Great Peace Shipping v. Tsavirilus Salvage* [2002] 4 All ER 689 (CA) at para 126. See also CJ Slade, "The Myth of Mistake in the English Law of Contract" (1954) 70 LQR 385 at 405-406; WED Davies, 'Mistake in Equity: Solle v. Butcher Re-Examined' (1969) 3 Man LJ 79; PS Atiyah and FAR Bennion, "Mistake in the Construction of Contracts" (1961) 24 MLR 421 at 440-442; John Cartwright, "*Solle v. Butche*r and the Doctrine of Mistake in Contract" (1987) 103 LQR 594 at 605-607. For the view that Denning's approach was rooted in precedent, see, for example, George E. Palmer, *Mistake and Unjust Enrichment* (Columbus: Ohio State University Press, 1962) 13; Stephen Waddams, "Mistake in Assumptions" (2014) 51 Osgoode Hall Law Journal 749 at 752-753; Stephen Waddams, "Mistake and Unfairness in Contract Law" in John CP Goldberg, Henry E Smith, and PG Turner (eds), *Equity and Law: Fusion and Fission* (CUP, 2019) 241-243. Whether or not Denning was in fact the first to articulate this doctrine, his is the leading judgment on equitable mistaken assumptions. The second qualification is that the principles articulated by Lord Atkin in *Bell* and Lord Denning in *Solle* were not explicitly articulated as doctrines of mistaken assumptions. But that is how they are now understood.

[3] Slade, *supra* note 2 at 403-407; Davies, *supra* note 2 at 79.

justice in its purest and most objectionable form."[4] It was, however, eventually embraced by judges and scholars[5], many of whom found that its open-endedness was "a passport to a just result."[6] In its decision in *Great Peace Shipping* v. *Tsavirilus Salvage*[7], the English Court of Appeal upset this new consensus[8], holding that, contrary to Lord Denning's judgment in *Solle*, there is no equitable doctrine of mistaken assumptions in contract law. The chief reasons given for this conclusion echoed those of the early critics: the equitable doctrine lacked a principled foundation and**,** in any case, could not be reconciled with the authority of *Bell* and the common law doctrine of mistaken assumptions.

The dominant view in the literature on *Great Peace* is that the Court was correct to say that equitable mistake lacks a principled foundation and correct that it cannot be reconciled with common law mistake, but wrong to conclude that the equitable doctrine should be abolished.[9] The reason usually offered for retaining equitable mistake despite its admitted incoherence as a matter of principle is that whereas common law mistake is narrow and rigid, equitable mistake allows for greater judicial flexibility in the face of what may appear to be an injustice.[10]

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[4] Davies, *supra* note 2 at 82.

[5] In England see, for example, *Grist* v. *Bailey* [1966] 2 All ER 875; *Laurence* v. *Lexcourt Holdings* [1978] 2 All ER 810; *Associated Japanese Bank (International) Ltd* v *Crédit du Nord SA* [1988] 3 All ER 902; *Nutt* v. *Read* (1999) 32 HLR 761 (CA); *Clarion Ltd* v. *National Provident Institution* [2000] 2 All ER 265; *West Sussex Properties Ltd* v *Chichester District Council* [2000] EWCA Civ 205. In Canada, see, for example, *Ivanochko* v *Sych* 60 DLR (2d) 474. Though he is critical of *Solle*, John Cartwright discusses the English courts' adoption of Lord Denning's approach to mistake, see *supra* note 2 at 609-611. For a comprehensive discussion of the way American, English, and Canadian contract law adopted Lord Denning's approach, see John McCamus, "Mistaken Assumptions in Equity: Sound Doctrine or Chimera" (2004) 40 Can Bus L J 46. See also Sir Jack Beatson, Andrew Burrows, and John Cartwright, Anson's *Law of Contract*, 30th ed (Oxford: OUP, 2016) at 312. For discussion of *Solle*'s application in Ireland, Australia, Singapore, Canada, and the United States, see David Capper, "Common Mistake in Contract Law" (2009) Singapore Journal of Legal Studies 457 at 464-471.

[6] *West Sussex Properties Ltd* v. *Chichester District Council* [2000] EWCA Civ 205 at para 42.

[7] *supra* note 2.

[8] Of course, critics of Lord Denning's decision in *Solle* remained. See, for example, Cartwright, *supra* note 2; JC Smith, "Contracts – Mistake, Frustration and Implied Terms" (1994) 110 LQR 400.

[9] Adrian Chandler, James Devenney, and Jill Poole, "Common Mistake: Theoretical Justification and Remedial Flexibility" (2004) JBL 34 at 52; Capper, *supra* note 5 at 462.

[10] RA Blackburn, "The Equitable Approach to Mistake in Contract" (1955) 7 Res Judicatae 43 at 50; McCamus, *supra* note 5 at 75-76, 80; Chandler, Devenney, and Poole, *supra* note 9 at 52; John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (Thomsom Reuters, 2012) 775. See also *Miller Paving Ltd v. B Gottardo Construction*

This argument for retaining an equitable doctrine of mistaken assumptions alongside the common law doctrine is unsatisfactory. What is the injustice to which equitable mistake responds? Why can't the common law recognize this injustice and respond to it on its own? And if it cannot respond to it, why not *replace* the narrow common law doctrine with the more flexible equitable one? Why keep both? Unless we can answer these questions, the co-existence of common law and equitable mistake appears as an unprincipled state of affairs that, incompatibly with the rule of law, allows judges to set aside contracts based on a subjective and vague sense of injustice. Indeed, if we cannot answer these questions about equitable mistake in a satisfactory way, the English Court of Appeal was right to abandon it**,** and other jurisdictions ought to follow its lead.

In this article, I offer a different argument for retaining an equitable doctrine of mistaken assumptions. I argue that the justification for the doctrine lies, not in its flexibility or open-endedness, but in its underlying principle. Common law and equitable mistake are expressive of two distinctive conceptions of human freedom; each doctrine understands the normative significance of mistake in a manner suitable to the conception of freedom underlying it. I argue, moreover, that these conceptions of freedom are each incomplete on their own; they require each other for the vindication of their own claims to be conceptions of freedom. The English Court of Appeal was therefore wrong to conclude that the law of contracts must choose between the

Ltd 2007 ONCA 422 at para 26: "*Great Peace* appears not yet to have been adopted in Canada and, in my view, there is good reason for not doing so. The loss of the flexibility needed to correct unjust results in widely diverse circumstances that would come from eliminating the equitable doctrine of common mistake would, I think, be a step backward." The preference for the flexibility of equity's approach to mistaken assumptions is often connected to a concern about how the common law's approach impacts third parties. Because an operative mistake renders the contract void at common law but only voidable in equity, equity's flexibility avoids the harsh consequences for innocent third parties that may follow from finding a contract void *ab initio*. This concern certainly influenced Lord Denning's judgment in *Solle*, *supra* note 2.

doctrines of common law and equitable mistaken assumptions; on the contrary, a law of contracts respectful of the freedom of its subjects requires both.

I begin by arguing that the narrow doctrine of mistaken assumptions at common law derives from a formal conception of freedom as freedom of choice. I argue that, although we cannot do without this conception of freedom, it is nevertheless incomplete. The incompleteness is revealed by the common law of contract's historical treatment of fraud. The problem of fraud pushes us toward a substantive conception of freedom as self-determination and to equity's broader view of the normative significance of mistakes. Yet the substantive conception of freedom, I argue, cannot simply replace the formal one. Freedom conceived as the capacity for choice, though in need of a supplement, is nevertheless fundamental; it thus sets limits to the equitable doctrine of mistake.

2. *Bell*, *Solle*, and *Great Peace Shipping*

In *Bell*, Lever Brothers was the controlling shareholder of the Niger Company, which dealt in West African produce, including cocoa. In 1923, Lever hired Bell and Snelling to oversee the reorganization of Niger. According to the terms of their service agreements, Bell and Snelling were to devote their whole attention during business hours to the business of Levers. Niger prospered under their direction. However, in 1927, Bell and Snelling entered into some transactions in cocoa "on their own behalf," resulting in a profit to them of 1360 pounds. They did not disclose these transactions to Niger or Lever. The new prosperity of Niger resulted in an amalgamation that required the termination of Bell and Snelling. In separate settlement agreements, in consideration for their retirement, Bell received 30,000 pounds and Snelling received 20,000.

After these settlement contracts were concluded, the private transactions in cocoa came to light. Lever sought to have the settlement contracts set aside on the basis of a mistake, claiming that it entered the contracts on the mistaken assumption that there were no grounds for terminating Bell and Snelling. Although the private transactions undoubtedly constituted a breach of their service agreements with Lever, the transactions were apparently so insignificant on the whole that the jury believed that Bell and Snelling had completely forgotten about them by the time they reached the settlement contract. This meant that the case could be treated as one of common mistaken assumptions – both parties were operating under the mistaken assumption that the only way to terminate the service agreements was through a settlement contract. The question for the court was whether this mistaken assumption was a reason for setting the settlement contract aside.

Lord Atkin held that a mistaken assumption rendered a contract void at common law only if the mistake negated a party's "assent" to the contract.[11] He held, moreover, that a mistaken assumption negated assent only where "it is the mistake of both parties and is as to the existence of some quality which makes the thing without the quality essentially different from the thing it was believed to be."[12] An example of a mistake satisfying this stringent test is an agreement for the purchase and sale of a bill of exchange that, unbeknownst to both parties, turns out to be a forgery and therefore worthless.[13] The authenticity of a bill of exchange is a quality without which the bill is not a bill but a piece of paper, in other words, a fundamentally different thing. But Lord Atkin concluded that the facts of *Bell* did not satisfy this test. Although the parties

[11] *Bell*, *supra* note 2 at 218.
[12] *Ibid*.
[13] *Gurney* v. *Womersley* (1854) 4 E & B 133. See also *Gompertz* v. *Bartlett* (1853) 2 E & B 848 (a bill of exchange unenforceable because it lacked a stamp was mistakenly believed to be a foreign bill and therefore valid without a stamp). *Nutt* v. *Read*, *supra* note 5 is a modern example: a contract was found to be void because the parties mistakenly believed that the chalet they were bargaining for was a chattel (and therefore capable of being sold separately from the land), when in fact it was a fixture (and therefore incapable of being sold separately).

mistakenly believed that Bell and Snelling could not be terminated without compensation, this mistake was not one that made the thing bargained for different in kind from what it was jointly believed to be. It was believed to be a settlement contract for the voluntary resignation of Bell and Snelling and that is exactly what it was.

In *Solle*, Butcher rented a flat to Solle. They both believed that rent control legislation did not apply to the flat and they agreed to a rent of 250 pounds per year for a seven-year term. If the flat was subject to rent control, the maximum permissible rent would have been 140 pounds per year, unless Butcher sought special permission for an increase. If he had sought this permission, he would have been entitled to charge a rent of about 250 pounds per year due to the extensive improvements he had made to the flat. However, this permission had to be obtained before entering into a tenancy agreement, as the legislation permitted no rent increases during the term of a contractual tenancy. After the agreement was executed, Solle discovered that the flat was subject to rent control. He sued Butcher, claiming that the rent was legally limited to 140 pounds and seeking recovery of the money he had paid in excess of that amount.

At the Court of Appeal, Lord Denning agreed that the flat was rent controlled, that the permissible rent was only 140 pounds, that no permission for an increase could be sought during the term of the tenancy, and that the tenancy agreement was a valid contract. He argued, however, that the tenancy agreement ought to be set aside on the basis of a common mistaken assumption. A valid contract may be set aside in equity, he said, if the parties were under a common misapprehension as to the facts, "provided that the misapprehension was fundamental."[14]

[14] *Solle*, *supra* note 2 at 693.

Many have complained that Denning did not give any guidance as to when a mistake is "fundamental" in equity.[15] It is true that he provides no explicit definition. But Denning's judgment gives us a clear sense of his meaning: "…the landlord was under a mistake which was to him fundamental: he would not for one moment have considered letting the flat for seven years if it meant he could only charge 140 pounds a year for it."[16] In a subsequent case, Denning found that an insurance settlement contract should be set aside in equity because the insurance company should not be bound to "an agreement it would not have dreamt of making if it had not been under a mistake."[17] A contract is voidable for a mistaken assumption in equity, we can say, if the mistake is fundamental in the sense that, if the complaining party had known the true situation, he or she would not have entered into the contract.

I have presented *Bell* and *Solle* as articulating qualitatively different approaches to the legal effect of a mistaken assumption. First, the tests answer two different questions. Lord Atkin's test answers the question as to when a mistaken assumption undermines the parties' agreement to the exchange and renders the contract void. Lord Denning's test answers the question as to when a mistaken assumption renders a contract voidable; the test assumes a valid contract and the parties' agreement to the exchange. Second, Lord Atkin's test, geared to the issue of agreement, asks whether the thing the parties were actually bargaining for is different from the thing they believed it to be, not merely in some attribute but more fundamentally in kind. By contrast, Lord Denning's test is interested in the complaining party's purpose in

[15] See, for example, Blackburn, *supra* note 10 at 50; McCamus, *supra* note 5 at 63.
[16] *Solle*, *supra* note 2 at 692.
[17] *Magee* v. *Pennine Insurance Co Ltd* [1969] 2 All ER 891 at 894.

entering the contract and whether the realization of that purpose has been thwarted by the mistake.[18]

Preserving the legal force of such radically different types of mistake requires a justification, and that is what I will offer in this article. But first we should notice that the difference between these types has gone unrecognized, and the result is a great deal of confusion in the scholarship and jurisprudence. Lord Atkin's test is frequently summarized in the following way: a mistake will render a contract void only if it is fundamental.[19] This is not incorrect, but it leaves out the most important part. Fundamental may mean different things, and Lord Atkin explained the sense in which he meant it – the mistake must make the object bargained for a different thing from what it was believed to be, so that the complaining party might say: "that is not what I agreed to."

The simplified presentation of Lord Atkin's test is coupled with the failure, which I noted above, to recognize the precise meaning that Lord Denning gave to the word fundamental in *Solle*. The consequence of these two oversimplifications is that Lord Atkin's test and Lord Denning's test appear identical. The standard view is that common law and equity will both refuse to enforce a contract entered into on the basis of a fundamental mistake, the difference between the two approaches being only that equity interprets "fundamental" in a looser, more

[18] Some have expressed skepticism about whether or not there is any meaningful distinction between a mistake that makes the object of contract "different in kind" and a mistake in the motive for entering the contract. The argument is that a difference in kind is just a difference in a quality the parties thought very important, but to refer to "a quality the parties thought very important" is to refer to their motives for contracting. See, for example, James Gordley, "Mistake in Contract Formation" (2004) 52 American Journal of Comparative Law 433 at 438. But a difference in kind not just a difference in a quality thought very important. A difference in kind is a difference in a quality publicly recognized as making the thing in question what it is. For a discussion of this idea in the context of Roman Law, see Edwin C McKeag, *Mistake in Contract: A Study in Comparative Jurisprudence* (Columbia University Press, 1905) 28-29.

[19] Catharine MacMillan, "How Temptation Led to Mistake: An Explanation of *Bell* v. *Lever Bros.*" (2003) 119 LQR 625; Stephen Smith, *Contract Theory* (OUP, 2004) 365; Kevin F K Low, "Coming to Terms with *The Great Peac*e in Common Mistake" in Jason Neyers, Richard Bronaugh, and Stephen Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009) 32.

flexible manner than the common law.[20] The incoherence that results is perfectly captured in Cartwright's summary of the law on mistake prior to the decision in *Great Peace*: "it seemed to be generally accepted…that there was a remedy in equity for common mistakes where the mistake was not sufficiently "fundamental" to satisfy the common law test but was still (in a weaker sense) "fundamental."[21] The only justification offered for this muddled state of the law was that it reflected the challenge of striking a balance between the competing policies of preserving stability and certainty in contracts and relieving against the harsh consequences of a mistake.[22]

Given that context, we can understand why, in *Great Peace*, Lord Phillips found the law on mistaken assumptions completely unsatisfactory. Either a mistake is fundamental or it is not, he argued. If the common law draws the line in one place and equity draws it in another, one or the other must be wrong. If the common law approach to mistake is correct as a matter of principle, what is the legal basis for an equitable doctrine that does something different? Alternatively, if the common law approach is too rigid and harsh, then why not change it? What justification can there be for two doctrines of mistake? That is the logic that led the English Court of Appeal to reject the equitable doctrine.

I have argued that the common law and equitable tests for mistaken assumptions are qualitatively different tests, not the same test distinguished only by stringency or flexibility in application. Lord Phillips' challenge nevertheless remains, although we can now put that challenge in a slightly different way. Rather than asking why law and equity give different

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[20] C Grunfeld, "A Study in the Relationship Between Common Law and Equity in Contractual Mistake" (1952) 15 MLR 297 at 302; Atiyah and Bennion, *supra* note 2 at 440; Andrew Phang, "Common Mistake in English Law: The Proposed Merger of Common Law and Equity" (1989) 9 Legal Studies 291 at 292, 298; JC Smith, *supra* note 8 at 418; Low, *supra* note 19 at 326.
[21] John Cartwright, "Common Mistake in Common Law and Equity" (2002) 118 LQR 196 at 199.
[22] Palmer, *supra* note 2 at 35; Low, *supra* note 19 at 327; Cartwright, *Misrepresentation, Mistake and Non-Disclosure*, *supra* note 10 at 592.

answers to the same test, we should ask: why do law and equity have different understandings of what makes a mistake "fundamental"? And is it the case that one or the other must be wrong?

I'll argue that the common law and equitable tests for mistaken assumptions are different because they rest on different conceptions of the normative significance of mistake corresponding to different conceptions of human freedom. Each of these conceptions of freedom is a constituent part of a complete conception, and a law of contracts fully respectful of the free agency of its subjects therefore requires both doctrines of mistake. It is thus not the case that either the common law or equity must be wrong and we are left to choose between them or, if we can't choose, to vacillate incoherently between the two. As constituents of a complete conception of the normative significance of mistake, the common law and equitable doctrines of mistaken assumptions are both partly right. They can, moreover, be reconciled, not merely through an ad hoc balancing of competing policy considerations, but through a principled articulation of the mutually supplementary role each plays in a contract law that shows respect and concern for the freedom of its subjects.

3. Freedom as the Capacity for Choice and the Common Law of Mistaken Assumptions

There is a conception of freedom that can account for the common law's understanding of the significance of mistake in contracts. It is freedom conceived as the capacity for choice.[23] This conception of freedom is characterized by a commitment to the following series of related ideas. First, freedom means that human beings are not passive victims of causal forces; each

[23] The implications of this conception of freedom for private law are most fully elaborated by Kant and Hegel. It is important to emphasize, however, that the two philosophers disagreed about the extent to which private law can be understood through the lens of this conception alone. See GWF Hegel, *The Philosophy of Right* (TM Knox trans, OUP, 1967) paras 107, 117-118, 120, and 132, where Hegel argues that a right of self-determination circumscribes legal responsibility for the outcomes of actions as well as the validity of legal decisions.

individual's choices are the product of his or her free will. Second, this capacity for choice distinguishes human beings from things—the chooser from the objects of choice–and reveals a self, a locus of ultimate value, distinguishable from the realm of instrumental value. Third, the *content* of any particular choice an individual makes is subjective and contingent. If I can choose freely, it must be the case that when I choose something, my particular choice reflects nothing that I could not have in principle rejected. What I do choose is therefore contingent and morally arbitrary. Fourth, although the content of any particular choice is subjective, the capacity for choice is a universal human capacity and is therefore a conception, not only of human agency, but also of human equality. The abstract capacity for choice is not a conception of human flourishing; it is not an honour to be earned or a goal to be achieved; it is not relative to ability or virtue; it cannot be lost, or damaged, or forfeited. It is an innate capacity, identically present in everyone just because they are human. Fifth, since each human being is equally capable of choice, one human being cannot legitimately be subordinated to the choice of another. Moreover, just as it is wrong to subordinate one free agent to the choice of another, so it is wrong to subordinate a free agent to a law that embodies a goal, value, or interest that he or she may not share. To be subject to a law that embodies a goal, value, or interest that is not mine is to be treated as an instrument ministering to the choices of others. Law must therefore embody only what is non-contingently shared, and the only non-contingently shared thing, on this conception of freedom, is the capacity for free choice. The only legitimate basis for imposing coercive duties on free human beings is therefore to safeguard the free choice of each. We thus arrive at a system of law whose sovereign norm is the negative duty of non-interference with freedom of choice; its corollary is that no one is under a positive duty to minister to the choices of another.[24]

[24] I believe that these ideas elaborate what Kant and Hegel write in the following paragraphs:

For the purposes of understanding the common law of mistaken assumptions, the key idea is that the conception of freedom that I have just elaborated abstracts from the relationship between a free choice and the larger project or plan in which that choice figures. It abstracts from particular purposes to the formal capacity for purposive activity. The freedom to choose, as a universal capacity that distinguishes persons from things, is capable of grounding a system of equal duties in which each must respect the free choice of the other. But the reason for the choice—the plan, or preference, or goal the choice was meant to further—is subjective. A law that attended to the individual's idiosyncratic plans, preferences, and goals would subordinate one free agent to another. So a free choice commands respect, but the reason for the choice is, on this conception of freedom, necessarily a matter of legal indifference.

That is all very abstract, but we can make the point more concrete by considering the common law's approach to a mistaken assumption about the quality of the thing contracted for. Suppose that Charlotte offers to purchase a golden bowl that she finds in an antique dealer's shop. When Charlotte refers to the bowl, she describes it as the bowl "of solid gold." The dealer

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> The concept of Right, insofar as it is related to an obligation corresponding to it . . . has to do, first, only with the external and indeed practical relation of one person to another, insofar as their actions, as facts, can have (direct or indirect) influence on each other. But second, it does not signify the relation of one's choice to the mere wish (hence also to the mere need) of the other, as in actions of beneficence or callousness, but only a relation to the other's choice. Third, in this reciprocal relation of choice no account at all is taken of the matter of choice, that is, of the end each has in mind with the object he wants; it is not asked, for example, whether someone who buys goods from me for his own commercial use will gain by the transaction or not. All that is in question is the form in the relation of choice on the part of both, insofar as choice is regarded merely as free, and whether the action of one can be united with the freedom of the other in accordance with a universal law.

Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor trans, CUP, 1991) 6: 230.

> The universality of this consciously free will is abstract universality, the self-conscious but otherwise contentless and simple relation of itself to itself in its individuality, and from this point of view the subject is a person. …Personality essentiality involves the capacity for rights and constitutes the concept and basis (itself abstract) of the system of abstract and therefore formal right. Hence the imperative of right is: 'Be a person and respect others as persons.'

Hegel, *supra* note 23 at paras 35 and 36.

thus knows that Charlotte thinks the bowl is solid gold. The dealer also knows that she is mistaken; the bowl is golden due to an applied gold veneer. The dealer says nothing about the bowl's composition and accepts Charlotte's offer of purchase. If Charlotte discovers her mistake as she walks out of the shop, can she rescind the contract at common law?

No, she can't.[25] Charlotte's mistake is one to which the common law is indifferent. We have here a voluntary offer to purchase a particular bowl and a voluntary acceptance of that offer. This is a valid contract and the common law will enforce it. The fact that Charlotte wanted a solid gold bowl and believed this bowl met that description, and the fact that she never would have purchased this bowl had she known that it was not solid gold, are matters that relate to the reason for her choice, to her preferences and purposes. But frustrated preferences and purposes do not invalidate a contract at common law; they do not even put the seller under a duty to disabuse the buyer of the mistake he knows she is making.[26]

It is important to emphasize that the common law's indifference to Charlotte's beliefs and purposes cannot be explained by saying that Charlotte's motive in agreeing to the purchase is private and that it is not fair to impose her private understanding about the bowl's quality on the shopkeeper. In this example, Charlotte makes her motive and belief known to the shopkeeper; the common law nevertheless treats these as irrelevant. This is because from a perspective that regards non-interference with free choice as the only norm capable of legitimately coercing free agents, purposes, preferences and beliefs are normatively mute. It makes no difference that the dealer knows of Charlotte's motives and beliefs; her motives and beliefs, even if known, cannot relieve her of an otherwise valid contractual obligation or put her contracting partner under an obligation to disclose. The common law principle of buyer beware, frequently criticized as an

[25] *Smith v. Hughes* (1871) LR 6 QB 597.
[26] *Ibid.*

immoral doctrine explicable only in terms of an outdated laissez-faire economics,[27] can be understood as derived from a conception of freedom as the capacity for choice abstracted from, and indifferent to, the matrix of subjective preferences and goals that give us reasons for our choices.

There are cases, however, where a mistaken assumption about quality renders a contract void at common law. In *Bell*, Lord Atkin held that a mistaken assumption renders a contract void at common law only where two conditions are fulfilled. First, the mistaken assumption must be "common," that is, shared by both parties. Second, the mistaken assumption must be about the "existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be." I want now to spell out how this doctrine of mistaken assumptions, a narrow exception to the common law's general refusal of relief for mistakes about quality, coheres with the conception of freedom as free choice and the central idea that no one can be subordinated to the subjective purposes of another.

When a common mistake about quality makes the thing bargained for a fundamentally different thing than what it was believed to be, we can say that the parties did not reach an agreement as to the exchange value of the thing they were actually bargaining for. So, for example, in the case of a bill of exchange that turns out to be forgery, we can say that the parties reached an agreement as to the exchange value of a particular bill, but they did not reach an agreement as to the exchange value of a mere piece of paper. To put the point in a different way, in these cases, although the offer and acceptance match one another, they do not match the thing the parties are actually bargaining over. Where the mistaken assumption about quality makes the

[27] See, for example, PS Atiyah, *The Rise and Fall of Freedom of Contract* (OUP, 1979) 402-404; Irit Samet, "Equity as a Vehicle for Law Reform: The Case of Unilateral Mistake" (2016) 2 Canadian Journal of Comparative and Contemporary Law 537 at 540.

thing bargained for a different thing than what it was believed to be, we can say that the mistaken assumption defeats the parties' agreement to the exchange and prevents contract formation.

Lord Atkin was clear, however, that the mere fact that the complaining party would not have entered the contract had he not been mistaken is no reason for finding the contract void. He offered the example of A who buys B's horse believing the horse to be sound and who "would certainly not have bought the horse if he had known, as the fact is, that the horse is unsound" and the example of A who buys a painting from B for a sum of money that reflects their shared belief that it is the work of an old master. A would never have paid such a price if he had known, as turns out to be the case, that the painting is a modern copy.[28] In both cases, Lord Atkin said, A may suffer a hardship but nevertheless has no remedy.

It is sometimes said that the mistakes about quality described by Lord Atkin—believing an unsound horse to be sound or a copy to be an old master—negate the agent's consent, and so it might be thought that Lord Atkin's judgment must be understood as an expression of an ideological commitment to the sanctity of contract rather than a philosophical commitment to an abstract conception of freedom.[29] But Savigny, writing in the nineteenth century about the effect of mistake on contract, pointed out the flaw in the notion that a mistaken assumption has any impact on the freedom to choose:

> If we say that the erroneous impression has determined the will, this statement is true only in a very improper sense. It was always the transactor himself who gave the error this determining force. The freedom of his choice between competing decisions was unrestricted; whatever advantage the error might (apparently) present to him, he could reject it, and hence the existence of a free declaration of the will is by no means destroyed by the influence of the erroneous impression.[30]

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[28] *Bell*, *supra* note 2 at 224.
[29] See, for example, EW Patterson, "Equitable Relief for Unilateral Mistake" (1928) 28 Columbia L Rev 859 at 861; Gordley, *supra* note 18 at 446-447; Waddams, *supra* note 2 at 754.
[30] 3 SAVIGNY, System des heutigen romischen Rechts (1840) s. 115 cited and translated in Patterson, *supra* note 29 at 862.

The mistake, in other words, doesn't change the fact that the agent made a choice she was free to reject. The mistake has an impact on the calculation of how best to pursue one's advantage, but a mistaken calculation doesn't force a human being to choose one thing over another. A mistaken choice is still a free choice. In the context of contract, believing an unsound horse to be sound or a copy to be an old master doesn't negate the agent's consent to the exchange; it simply results in the hardship of being bound to a contract that doesn't further one's ends or serve one's purposes. But from a point of view that regards respect for free choice as the sovereign legal norm, that is a subjective hardship to which the law must be indifferent. Lord Atkin's test thus sharply distinguishes between the question of what the parties agreed to and why they agreed to it[31] and concerns itself only with the former. The test, though often described as unduly stringent,[32] simply has the stringency demanded by the standpoint that respects the freedom to choose but, out of respect for the equality of free agents, abstracts from the subjective purposes that motivate particular choices.

In *Bell*, Lord Atkin held that in order to void a contract, the mistaken assumption has to be, not only fundamental, but shared by both parties. When a contract is held void due to a fundamental (in the sense insisted upon by Lord Atkin) mistaken assumption about quality that is shared by both parties, the party seeking to enforce the contract cannot argue that she is being subordinated to the complaining party's idiosyncratic view of what they were bargaining for. From the parties' shared point of view, they did not reach an agreement about the exchange value of what they were bargaining for; the exchange value they agreed to was for a different

[31] HWR Wade describes Lord Atkin's test using this helpful distinction in "Consensus Mistake and Impossibility in Contract" (1941) 7 Cambridge LJ 361 at 366.
[32] JC Smith suggests that the test is so stringent that no set of facts could satisfy it in Smith, *supra* note 8 at 412. See also David Capper, "Reconfiguring Mistake in Contract Formation" in Michael Bryan (ed), *Private Law in Theory and Practice* (Routledge-Cavendish, 2007) 135; Low, *supra* note 19 at 327; Waddams, *supra* note 2 at 756.

kind of thing.

We can, however, extend the logic of this reasoning beyond cases of shared mistake to cases where one party is mistaken and the other party knows she is mistaken but is not operating under the same error herself. Suppose for example, that A offers to sell B a bottle of liquid that A knows B believes to be a bottle of wine. A also knows that B is mistaken—the liquid is water. Here, too, we can say that from the perspective of both parties, the exchange value they agreed to was for a different kind of thing than what they were actually bargaining for; A knows that they are agreeing to the value of wine and A knows that wine is not what she is selling.[33] All this, I believe, is captured by the language of the common law doctrine, which requires a "common" mistaken assumption. The word "common" is capable of meaning both shared and public or known, suggesting that the doctrine pertains both to a shared mistake and a mistake of one that is known to the other.[34] Excluded is the case of a fundamental mistake made by one party that is *unknown* to the other, for to find the contract void in that case is, incompatibly with the equality of the contracting parties, to allow the private perspective of one to determine the obligations of both.

[33] It's important to emphasize that this does not contradict the ruling in *Smith v. Hughes*. *Smith v. Hughes* tells us that if A enters a contract under a mistaken assumption about quality that does not make the thing different in kind from what it was believed to be—for example, believing that new oats are actually old oats--that mistake has no impact on the contract's validity even if the mistake is known to the other party. That, as I argued earlier, is because at common law, the reasons for entering a contract have no normative significance and so it makes no difference whether or not they are known. But in the example I describe, the mistake is one that makes the thing bargained for different in kind from what it was believed to be. When this type of mistake is made by one and known to the other, then from their shared point of view, there is no agreement to the exchange.

[34] Although many think that the common law doctrine of mistaken assumptions requires a shared mistake (see, for example, Cartwright, *Misrepresentation, Mistake and Non-Disclosure*, *supra* note 10 at 731), I am not alone in thinking that the mistake may be either shared or known to the party not mistaken. In "Unilateral Mistake: The Baseball Card Case" (1992) 70 Wash U L Q 57 at 68, Andrew Kull arrives at the same conclusion through a different argument. Catharine MacMillan's study of Roman law suggests that Roman law adopted this position as well. See Catharine MacMillan, *Mistakes in Contract Law* (Hart Publishing, 2010) 15. See also Richard Sutton, "Unequal Bargaining: A Study of the Vitiating Factors in the Formation of Contracts" (1992) 108 LQR 674 at 680. Moreover, there is a parallel here with cases of "snapping up an offer" which say that A cannot accept an offer by B if she knows the offer contains an error. See, for example, *Hartog* v. *Colin and Shields* [1939] 3 All ER 566.

4. The Incompleteness of Freedom as the Capacity for Choice: The Case of Fraud

Lord Atkin's test is frequently criticized as unduly stringent. The critics say that there are cases of mistake that do not satisfy Lord Atkin's test, but where it would nevertheless be very unjust or unconscionable to hold the complaining party to her bargain.[35] *Barr v. Gibson* is an extreme example.[36] The parties contracted for the sale of a ship that, unbeknownst to them, had run aground at the time of the agreement. The court held that although the ship was very likely beyond repair, it was not wholly lost or destroyed, and so the purchaser was bound to his agreement. The parties thought they were bargaining for a ship and that is what they were bargaining for. Llewellyn called the case a "horror piece" and an example of "commercial barbarism."[37] But this is the language that prompts the charge that equity consists of nothing but vague and overblown expressions that enable courts to upset any transaction that strikes them as unfair. If we think Lord Atkin's test for mistaken assumptions insufficient, we need to articulate precisely what it fails to capture and why that matters.

I think that the insufficiency of the common law approach to mistaken assumptions is explicable in terms of the insufficiency of the conception of freedom that underlies it. Many have argued that this account of freedom is insufficient for various reasons – for example, that its

[35] See, for example, Palmer, *supra* note 2 at 13-14, 33-38; Gordley, *supra* note 18 at 450; MacMillan, *supra* note 34 at 280; Capper, *supra* note 5 at 472. In *Solle*, *supra* note 2 at 692, Lord Denning referred to equity's power "to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained" and suggested that relief for mistaken assumptions fell within this jurisdiction. Using similar language, the American Second Restatement of Contracts allows for rescission in the case of a unilateral mistaken assumption where enforcement would be "unconscionable." See Restatement (second) of Contracts (1981) s. 153. What follows is a theory that assumes that the justification for contractual non-enforcement cannot simply rely on the use of expressions such as "very unjust" or "so unfair" or "unconscionable" and must justify equity's intervention by explaining precisely what makes enforcement unjust, unfair, or unconscionable under the circumstances.

[36] 3 M&W 390.

[37] Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little Brown, 1960) 260.

focus on freedom from interference ignores the positive freedom that is achieved in relationship with others[38] or that its focus on the absence of external obstacles to choice ignores internal obstacles--such as irrational fears or unreflectively internalized traditions[39]--that thwart freedom's realization in a concrete life. I won't review these arguments that criticize freedom as choice from a perspective outside it; instead, I want to show that this conception of freedom is inadequate from the perspective of its own distinction between persons and things. This inadequacy is apparent in the view that a law based on freedom as choice must take of fraud.

To see how a system of law based on the formal capacity for choice understands fraud, we have to begin by distinguishing between two types of deception.[40] First, one person may trick another into thinking that the act he or she is performing is a different act from the one it actually is. For example, A may trick B into thinking that she is signing an inconsequential document, when in fact it is an agreement of sale. At common law, this type of deception renders a contract void, for although B freely signed the document, B may legitimately say: "I did not agree to sell you my property."[41] Moreover, A cannot complain that a reasonable person would understand a signature to signify consent to whatever is contained in the document and that she is being subordinated to B's subjective viewpoint; as the trickster, A knows that B's signature did not signify agreement to the sale. Because this form of deception constitutes a taking of property

[38] Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 Yale J.L. & Feminism 7.
[39] Charles Taylor, "What's Wrong with Negative Liberty?" in Charles Taylor, *Philosophy and the Human Sciences: Philosophical Papers 2* (CUP, 1985) 211.
[40] Samuel Williston draws this distinction in *The Law of Contracts* (Baker, Voorhis & Co, 1920-1924) s. 1488.
[41] *Thoroughgood's Case* 2 Co. Rep. 9. In *Foster v. Mackinnon* [1861-73] All ER Rep Ext 1913, Blye J.'s language makes clear that this is different from fraud: "And it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore, in contemplation of law, never did sign the contract to which his name is appended."

without the owner's consent, I suggest that we view it as a form of conversion and call it conversion by deception.

But deception may take a different form and for this form I suggest we reserve the term fraud. Fraud induces a person to accept something that, in the absence of the fraud, he or she would not have accepted. For example, A may falsely tell B that there is oil beneath Blackacre, thus inducing B to purchase a property she would not have otherwise purchased; or A may falsely tell B that her company has just signed a lucrative business contract, inducing B to buy shares she would not have otherwise bought. Here, the fraudster manipulates the victim's beliefs about the value of the exchange, but takes the victim's property only with her consent. Moreover, the victim receives the thing she bargained for – Blackacre, the shares in the company – but the thing simply lacks the value she was induced to believe it had.

Historically, the common law of contracts did not recognize the normative significance of fraud. Contractual liability was grounded in the parties' voluntary agreement,[42] but voluntary was understood as action that was not coerced. Conversion by deception rendered a contract void, but a contract induced by fraud was valid and enforceable and fraud was no defense to breach of contract.[43] When trespass on the case was recognized as a form of action, there was an action on the case for deceit, but this was initially understood as an action brought by a plaintiff against a defendant who had caused him loss by impersonating him.[44] When it was used in a case of fraudulent misrepresentation, it required proof of a false express warranty,[45] and the falsity of the warranty was only actionable where the plaintiff could establish injury caused by using an

[42] DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP, 1999) 71.
[43] Fraud became a defense at common law only with the passage of the Common Law Procedures Act 1854, which allowed equitable defenses in the context of common law claims. See WT Barbour, *The History of Contract in Early English Equity* (Clarendon Press, 1914) 23. See also AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1975; 2006) 535; Ibbetson, *supra* note 42 at 72.
[44] Williston, *supra* note 40 at s. 995.
[45] Ames, "The History of Assumpsit" (1888-1889) 2 Harv L Rev 1 at 9.

unsafe article that was expressly warranted as safe for use.[46] The action for deceit was thus understood as a tort action; it was not conceived as an action brought to recover lost expected value. In line with this view, the common law remedy for deceit was an award of damages; there was no action for rescission.[47] The common law's approach to fraud is expressed in this famous passage from *Chandelor v. Lopus*, where the defendant sold the plaintiff a stone that he said was a bezoar stone, believed to have healing properties: "The bare affirmation that it was a bezoar stone, without warranting it to be so, is no cause of action. And although he knew it to be no bezoar stone, it is not material, for everyone in selling his wares will affirm that his wares are good, or the horse which he sells is sound, yet if he does not warrant them to be so it is no cause of action."[48]

I think we can explain this surprising position.[49] The one who commits fraud does not interfere with my capacity for free choice by, for example, forcibly moving my hand to sign my name, and does not usurp my right to make choices about my property by, for example, tricking me into affixing my signature to an agreement of sale. The fraudulently-induced transaction is a voluntary one in which I agree to an exchange that I was free to reject on the basis of a false belief induced by the other.[50] Once the deception is discovered, the victim of fraud may complain that the exchange does not satisfy her preferences or further her projects in the way she

[46] Francis H. Bohlen, "Misrepresentation as Deceit, Negligence, or Warranty" (1929) 42 Harv L Rev 733 at 734.
[47] J. O'Sullivan, "Rescission as a Self-Help Remedy: A Critical Analysis" (2000) 59 Cambridge Law Journal 509 at 517; Williston, *supra* note 40 at s.1455; Simpson, *supra* note 43 at 536.
[48] (1603) Cro Jac 4.
[49] It is sometimes suggested that the common law did not recognize fraud because it lacked the procedural mechanisms to discover it, in other words, because the common law courts refused to admit parol evidence. See, for example, Michael Lobban, "Contractual Fraud in Law and Equity, c1750-c1850" (1997) 17 OJLS 441. But the parol evidence rule itself embodies the conception of freedom that I have been attributing to the common law, for it is a rule that requires courts to attend only to external manifestations of assent (i.e. what was written and signed) and prohibits them from allowing either party to testify to her intention or understanding of the other party's intention. For an explanation of the parol evidence rule along these lines see Alan Brudner, *The Unity of the Common Law* 2nd ed. with Jennifer M. Nadler (OUP, 2013) 206-208.
[50] *Oakes* v. *Turquand and Harding* (1867) LR 2 (HL) 325 at 349.

was induced to believe it would; but she can't complain that she did not agree to the terms of the exchange or, in the absence of a warranty, that she didn't get what she paid for. Thus a contract law respectful of the individual's freedom to choose but unconcerned with the satisfaction of preferences or the fulfillment of projects will enforce a contract procured by fraud and will not recognize fraud as a defense to breach. The common law's distinction between conversion by deception and fraud tracks the distinction that I argued underlies Lord Atkin's decision in *Bell* – the distinction between what I agreed to and why I agreed to it. In cases of deception as in cases of mistake, the common law of contract cares only about whether I agreed and is indifferent to why.

Of course, no one will find the common law's indifference to fraud satisfactory. Although we can see why the logic of freedom conceived as a formal capacity for choice leads to a contract enforceable even if procured by fraud, most are likely to be troubled by that conclusion. *Chandelor* has been heavily criticized as a judgment that "shocks all sense of common honesty."[51] There is a theoretical justification for this outrage. Fraud shows that it is possible to leave an agent's freedom to choose undisturbed while turning that agent into a tool of one's purposes. In the case of fraud, the victim consents to the transaction, but is nevertheless subordinated to the ends of the fraudster. The victim thinks the transaction is reciprocal, that it aims at her ends as well as the fraudster's. But in truth the transaction's end is the fraudster's alone and the victim is a means to its realization. Fraud thus shows that non-interference with the capacity for choice is inadequate to the recognition of the ultimate worth of human beings in contrast to the instrumentality of things.

[51] RC McMurtie, "Chandelor v. Lopus" (1887-1888) 1 Harv L Rev 191; see also SFC Milsom, *Historical Foundations of the Common Law* (Butterworths, 1969) 321.

To see the wrong in fraud, we have to move from a conception of freedom as the bare capacity to choose to a conception of freedom as living a life in accordance with ends and purposes that are self-chosen. On the conception of freedom that I have thus far been elaborating, freedom is conceived as the capacity for choice undetermined by nature, custom, or other human beings. But implicit in the formal freedom to reject all externally-given ends is the possibility of substantive freedom, the freedom to act from an end that I give to myself, to make choices that realize a purpose or plan that is mine. Implicit in the capacity for rejection is the capacity for self-direction. This is the freedom we call autonomy or self-determination.

Once we move from a conception of freedom as the capacity for choice to freedom as the realization of that capacity in a self-determined life, a new right comes into view. Whereas freedom conceived as the capacity for choice generates a right to non-interference with that capacity, freedom conceived as self-determination generates a right to support for its realization. This is because whereas the capacity for choice is innately present in human beings regardless of their empirical condition and so cannot be damaged or lost, self-determination is a goal whose realization may be thwarted by circumstance, by false consciousness and error, by the manipulations and carelessness of other human beings. The capacity for choice is invulnerable, but self-determination is fragile. A law that is compatible with the self-determination of its subjects must therefore do more than enforce a boundary of non-interference; it must show positive concern for their ability to shape lives they can regard as their own.

From this perspective, law must treat coercion and fraud as equally wrong, for both are cases of one unilaterally subordinating another to ends that are not her own. Moreover, the remedy for a fraudulently induced transaction cannot be damages. Damages merely compensate the victim of fraud for her pecuniary loss but leave the transaction intact, thus binding her to a

contract that fails to reflect a self-authored obligation. Concern for self-determination requires a remedy that allows the victim to avoid the contract – it requires a remedy of rescission for fraud.

5. Self-Determination, Misrepresentation, and Equity

Fraud, the intentional manipulation of an agent's beliefs for one's own purposes, is only one way of undermining that agent's ability to lead a self-determined life. From the perspective of self-determination, an *un*intentional but careless misrepresentation that induces another to enter a contract she would not have otherwise entered is as harmful as an intentional misrepresentation. In both cases, the harm suffered by the victim is that of being bound to a contract that is not expressive of her purposes and that therefore constitutes an external imposition. A law concerned with the self-determination of its subjects must therefore grant rescission, not only for fraudulent misrepresentation, but for negligent misrepresentation as well.

We can go further. From the perspective of self-determination, even an innocent misrepresentation that is not carelessly made but nevertheless induces the agent to enter a contract that she would not have otherwise entered is problematic. Of course, it lacks the manipulation present in fraud or the carelessness of others' welfare present in negligent misrepresentations. But an innocent misrepresentation may nevertheless result in a contractual agreement that misfires as an expression of the purposes of the agent to whom the misrepresentation was made; it too may result in a contract that, if enforced, requires the agent to further a project or purpose that is not her own and so one-sidedly subordinates her to the projects and purposes of another. A law that shows concern for the self-determination of its subjects will thus rescind a contract that, as a result of an innocent misrepresentation, fails to express the purposes of one of the contracting parties.

The movement that I've just described—from the recognition of fraud, to negligent misrepresentation, to innocent misrepresentation as grounds of rescission—is the movement that we find in equity's jurisprudence of misrepresentation. Rescission for a contract induced by fraud, at one time unavailable at common law, began in the courts of equity.[52] For a time, rescission for misrepresentation in equity required an intentional misstatement.[53] But cases from the mid-1800s show that equity began to grant rescission in cases of unintentional but careless misrepresentation as well.[54] Finally, *Redgrave v. Hurd*,[55] decided in 1881, made clear that equity would rescind a contract entered into even on the basis of an innocent misrepresentation.

In his judgment in *Redgrave*, Jessel M.R. tried to assimilate innocent misrepresentation and fraud, in an effort to show both as cases of immorality justifying a refusal of contractual enforcement: "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 seek to take advantage of his own false statements."[56] But we have reason to doubt this justification for extending equitable relief to cases of innocent misrepresentation. If the equitable remedy for fraudulent, negligent, and innocent misrepresentation was a response to the immoral behaviour of the one who misrepresented, we would expect that remedy to be calibrated to the degree of the misrepresentor's moral blameworthiness. Certainly, we would not expect an effacement of the difference between intentional and innocent misrepresentation. But that is just what we find. In equity, fraud, negligent misrepresentation, and innocent misrepresentation are

[52] *Tennent v. City of Glasgow* (1879) 6 R. 554 at 559 makes clear that the idea that a contract could be rescinded because it was induced by a fraudulent misrepresentation originated in the Courts of Equity.
[53] *Attwood* v. *Small* (1838) 6 Cl & Fin 232; Cartwright, *Misrepresentation, Mistake and Non-Disclosure*, *supra* note 10 at 103.
[54] See, for example, *Pulsford* v. *Richards* (1853) 17 Beav 87.
[55] (1881) 20 Ch. D. 1.
[56] *Ibid* at 12.

all simply grounds for rescission**,** and equity's general lack of differentiation between these three forms of misrepresentation is reflected in the contracts textbooks and casebooks.[57] As Daniel Friedmann points out, these simply have chapters entitled "misrepresentation" and rarely contain any separate treatment of the effect of fraud on contract.[58]

The fact that equity treats all the various forms of misrepresentation as grounds for rescission suggests that rescission is a response to the circumstance of the one who has been induced to enter a contract on the basis of a misrepresentation, not to the moral blameworthiness of the one who has misrepresented. This, I believe, is just what Lord Herschell recognized in *Derry v. Peek*, when he held that rescission for misrepresentation rests on a different normative foundation than liability for deceit in tort: "the principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was a 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."[59] In other words, from the perspective of equity, whether the misrepresentation is fraudulent or not, the harm to the complainant is the same.[60] That harm, I have argued, is the harm of being bound to a contract that fails as an expression of one's own projects and purposes, a contract that, if enforced, would require one free agent to unilaterally serve the projects and purposes of another.

6. Self-Determination and Mistakes Not Induced by Misrepresentation

[57] Daniel Friedmann also notices equity's general lack of differentiation between fraud and innocent misrepresentation, although he points out that a few differences remain. See Daniel Friedmann, "The Objective Principle and Mistake and Involuntariness in Contract and Restitution" (2003) 119 LQR 68 at 77.
[58] *Ibid*.
[59] *Derry v. Peek* [1889] UKHL 1. Lord Herschell then contrasted rescission for misrepresentation with liability for deceit, which required proof of fault.
[60] See the addition at s. 158 of WH Lyon, Jr. to Joseph Story, *Commentaries on Equity Jurisprudence: as Administered in England and America* (Little Brown and Co, 1918) 147.

The final movement in this story is the recognition of mistake as a ground of rescission. If we think that human beings are entitled to support for their self-determination, and we think they therefore should not be bound to contracts that fail to express their own projects and purposes, does it make any difference if that failure is due to a contracting partner's misrepresentation or due to one's own error? I think the answer is no. Cases that are traditionally treated as cases of mistake and those that are treated as cases of misrepresentation, whether fraudulent, negligent, or innocent, are all cases of mistake, the only difference being that in cases of misrepresentation, the mistake is induced by one of the contracting parties. But once we see that equity rescinds contracts induced by misrepresentation, not in response to the behaviour of the one who misrepresented, but in response to the consequence for self-determination of being bound to a contract that fails as an expression of self-authored ends, we see that the logical momentum of concern for self-determination pushes equity to rescind a contract entered into on the basis of mistake, whether or not that mistake was induced by another.[61]

[61] Others have argued that the equitable doctrine of mistake is to be understood through the principle against unjust enrichment. See, for example, Palmer *supra* note 2; Brudner, *supra* note 49 at 226-227; Waddams, "Mistake in Assumptions," *supra* note 2; Waddams, "Mistake and Unfairness in Contract Law," *supra* note 2; Hoffman F Fuller, "Mistake and Error in the Law of Contracts" (1984) 33 Emory L J 41 at 78-79. It may be possible to explain the injustice to which the equitable doctrine of mistaken assumptions responds through the concept of unjust enrichment, but we have to be careful how we understand this concept. In this context, when the plaintiff complains that the defendant has been unjustly enriched at her expense, she is complaining that there is a disparity in value between what she believed she was bargaining for and what she actually received and that that disparity constitutes the defendant's enrichment and her corresponding deprivation. But the disparity in value between, for example, a breeding cow and a barren cow or an apartment that has water during the day and an apartment that doesn't is only recognizable from a perspective that takes into account the significance of purposes. The difference in value lies precisely in the difference between the purposes to which the different cows or different apartments may be put. In short, I am suggesting that if we analyze equitable mistake through the lens of unjust enrichment, we are still analyzing it through the lens of concern for the complaining party's self-determination. For an account of mistake as unjust enrichment that recognizes this, see Brudner, *supra* note 49 at 226-227. However, I prefer not to use the language of unjust enrichment for the following reason. The traditional remedy for unjust enrichment is restitution of the enrichment. If mistaken assumptions are understood as an instance of unjust enrichment, we would expect that the remedy for equitable mistake would be restitution of the surplus value. That the remedy (in England and Canada) is the court's refusal to enforce the contract at all suggests that the court is not merely responding to the plaintiff's conferring an unpaid-for benefit on the defendant but rather to the harm of being bound to a contract that fails as an expression of his or her purposes.

Given its understanding of the normative significance of mistake, equity's understanding of the type of mistake that demands contractual rescission is very different from the common law's understanding of the type of mistake that renders a contract void. Equity's concern is not with whether the complaining party's error undermines her agreement, but with whether the complaining party's error has resulted in a contract that fails to express her purpose. This is just what we see in *Solle*. Mistakenly thinking that his flat was not subject to rent control, Butcher entered a long lease agreement with Solle without going through the procedure for a rent increase. For Butcher, the lease agreement was intended to reflect and recoup the substantial investment he had made in improving the flat; the consequence of the mistake is the frustration of that intention.[62] At common law, this contract is enforceable because Butcher agreed to it; but equity, concerned for Butcher's self-determination, intervenes to rescind a contract that, though freely chosen, misfires as an expression of his purposes and one-sidedly serves the purposes of Solle.

Rescission for a mistaken assumption in equity requires a mistake that, in addition to being fundamental, is "common." The reason for this requirement seems clear. When the mistaken assumption is shared at the time of agreement and later discovered, the transaction appears, from the perspectives of both parties, to serve the purposes of one and none of the other's. In *Solle*, since both parties agreed to a rent of 250 pounds on the assumption that rent controls did not apply, the reduced rent imposed by the legislation gives Solle an unpaid-for benefit on Solle's own view of the value of the exchange. To object to rescission under circumstances of a shared mistake is to insist on a right to a bargain that is, on one's own view of

[62] As the language here suggests, there are close connections between the doctrine of mistake and the doctrine of frustration. I believe that much of the analysis presented in this paper could be applied to the doctrine of frustration as well. Nevertheless, the doctrine of frustration has features that are sufficiently unique and controversies that are sufficiently deep to require a separate treatment of the subject.

the matter, wholly one-sided; but to insist on a right to a bargain one acknowledges as one-sided is to deny the equality of the contracting parties.

The same can be said in a case where the mistaken assumption is made by one party and is known to the other at the time of contract formation. Suppose A agrees to rent a house to B, knowing that B intends to live in the house and also knowing that the house will not have water for 12 hours of the day. A, knowing that the lack of water will be a deal-breaker, says nothing about it.[63] B agrees to the rental on the basis of a mistaken assumption about the quality of the house. Here too, the transaction is one-sided from the perspective of both parties since A knows that this agreement fails to realize B's purpose in renting the house. As in the case of a shared mistake, to object to rescission under these circumstances is to assert a right to a bargain that is, based on one's own understanding of the relationship between the other party's purpose and the contract's subject matter, wholly one-sided. But to claim a right to a one-sided bargain is to claim a right to treat the other as a tool of one's purposes. The doctrine of equitable mistake will thus rescind a contract where (a) there is a fundamental mistaken assumption in the sense that the mistake turns the contract into one that serves no purpose of the mistaken party, and (b) where the mistake is common, in the sense that it is either shared by both parties or known to the one who is not mistaken.[64]

I have so far argued that the case of fraud shows the common law's blindness to the way one person may turn another into an instrument of her purposes without usurping her power of choice. I have also argued that, from the standpoint of the norm of equality that underlies the

[63] *Simmons* v. *Evans* 185 Tenn 282.

[64] Although there is disagreement about whether equitable relief for mistake requires a shared mistake, the suggestion that it provides relief for a mistake that is either shared or known to the other party finds some support in the scholarship and case law on equitable mistake. See, for example, *Clarion Ltd* v. *National Provident Institution* [2000] 2 All ER 265 at 275-276; Waddams, "Mistake in Assumptions" *supra* note 2 at 760; John McCamus, *The Law of Contracts* (Irwin Law, 2012) 584-585; Palmer, *supra* note 2 at 80-84.

common law itself, blindness to the normative significance of projects and purposes makes the common law doctrine of mistaken assumptions incomplete as a conception of the legal relevance of mistake. Together, these points add up to an argument for a contract law that retains the equitable doctrine of mistaken assumptions. The question now is whether contract law still requires the common law doctrine of mistaken assumptions. And the larger question is whether contract law requires the formal conception of freedom that underlies that doctrine.

7. Why Retain the Common Law Doctrine of Mistaken Assumptions?

Thus far, my argument seems to favour replacing common law mistake with equitable mistake. After all, in any case where the thing bargained for turns out to be a different kind of thing than what it was believed to be, the party complaining will plausibly be able to make the claim that the thing contracted for does not serve her purposes and therefore unilaterally benefits the other party. In other words, any case that satisfies the narrow test for common law mistake will also satisfy the broader test for equitable mistake. So perhaps the English Court of Appeal was right that a single doctrine of mistake is needed, but wrong to think that the equitable doctrine had to go. I'll now argue, however, that contract law must retain the formal conception of freedom that underlies the common law doctrine, that this conception of freedom sets necessary limits to the equitable doctrine of mistake, and that it justifies a distinction between mistakes that invalidate an agreement and those that give a court reason to refuse to enforce an agreement that is valid.

In discussing equitable mistake, I noted that a court will rescind a contract for a mistaken assumption if the mistake is common, in the sense that it is either shared or else known to the non-mistaken party. But what about the case where one party makes a mistake that is not shared by or known to the other party? From the perspective of the complaining party's self-

determination, it's hard to see why rescission depends on the mistake being shared or known. Whether or not the mistake is common, the consequence of entering a contract on the basis of a mistaken assumption about the contract's subject is an agreement that fails to express the mistaken party's projects and plans. The change from the American First Restatement of Contracts to the Second Restatement of Contracts reflects this logical momentum; whereas rescission required a shared or known mistake in the First Restatement, the Second allows for rescission even when the mistake of one is unknown to the other.[65]

However, the result of following through on the implications of this conception of freedom and abandoning the requirement of a common mistake is that the enforcement or non-enforcement of the contract is hostage to the private perspective of one of the contracting parties. Consider the following example. A is an amateur collector of vintage crystal and comes in to B's vintage shop. The items in B's shop are expensive but A purchases an ordinary glass at the advertised price because he secretly believes it is lead crystal and worth much more. A immediately takes the glass to an expert authenticator, discovers that the glass is only glass – not crystal – and seeks to have the contract rescinded. The purchaser's position in this case seems no different from Butcher's in *Solle*. Operating under a mistaken assumption, he has entered a contract that fails as an expression of his purposes as a collector of vintage crystal.

But the seller's position is different from Solle's. When the mistake is neither shared nor known, an objection to rescission may be understood, not as an assertion of a right to an unpaid-for benefit, but as an objection to being subordinated to the other party's subjective view of the bargain as one-sided. In the example above, the shop owner asks: why is the enforceability of our

[65] Compare Restatement (first) of Contracts (1932) s. 503 with Restatement (second) of Contracts (1981) s. 153. Some scholars have also accepted this logical momentum. See, for example, "Extension of Relief for Unilateral Mistake" (1950) 17 University of Chicago L Rev 725; Gordley, *supra* note 18 at 436-437, 451-452.

agreement dependent on the purchaser's subjective view of the value of what he was purchasing? Here the seller asserts that contractual obligations cannot be hostage to the subjective viewpoint of either one; the claim is based on the equality of the contracting parties. The requirement that the mistake be shared or known is thus a limit on the extent to which contract law can support the complaining party's self-determination. It is a requirement that treats the contracting parties as equals by ensuring that neither is subordinated to the other's subjective point of view.

It is important to see that the requirement that the mistake be common cannot be generated by the substantive conception of freedom as self-determination. Because unilateral mistakes frustrate purposes no less than common ones, self-determination, as I have argued, pushes us toward abolishing the requirement of common mistake. Can we nevertheless generate this requirement from the idea that the law must show *equal* concern for the self-determination of its subjects?

I don't think so. The idea of equal concern for self-determination will only leave us at an impasse in cases of unilateral mistake. I have explained why, for the crystal collector in the example above, concern for self-determination requires rescission of the contract. But the seller will say that security in projects and plans depends on the ability to rely on what reasonably appears to be an agreement, and that a law that allows rescission under these circumstances fails to show concern for *his* self-determination. The problem here is that the parties' purposes are in conflict and concern for their purposes therefore requires conflicting responses: for the purchaser it requires rescission and for the seller it requires enforcement. The idea of equal concern for self-determination cannot resolve this stand-off because equal concern is impossible where one person's fulfillment is the other's frustration and subordination.

In order to resolve this dispute in a manner that treats the parties as equals, we need a conception of equality that is abstract enough to make possible the reconciliation of each person's entitlement with the equal entitlement of the other. That conception, I suggest, is the equality of human beings as free agents capable of choice. We abstract from the parties' conflicting and idiosyncratic projects, plans, preferences, and beliefs and view them as equally entitled to respect for their capacity to choose. From this point of view, we can see that there is no disrespect to a party's equal status as a choosing agent in holding her to a freely chosen agreement where she has made a unilateral mistake. But there is disrespect to a party's equal status as a choosing agent if the existence of her obligation depends on the other party's private plans or beliefs. It is thus the parties' equal status as free choosers that generates the requirement of a common mistake and resolves their dispute without subordinating one to the projects or preferences of the other.

The idea of human beings as free agents capable of choice is a suitable limit to the law's concern for self-determination, not only because it can resolve disputes that cannot be resolved by the concept of self-determination consistently with the parties' equality, but for another reason as well. The formal capacity for choice is presupposed by the idea of self-determination. Living a life that reflects self-chosen plans actualizes the potential contained in the will's capacity not to be determined by external forces; it is a goal whose realization is possible only for those capable of choice. The idea that concern for self-determination is limited by respect for the agent's capacity for choice is just the idea that the ideal of self-determination cannot be allowed to swallow the concept it is supposed to actualize.

If taken as contract law's sovereign norm, self-determination not only pushes us toward relief for unilateral mistakes; it also pushes us toward relief for *all* mistakes that motivate the

decision to enter a contract, not just mistakes about quality that render the thing bargained for unsuitable for the complaining party's purpose. After all, any mistake that relates to motive results in a contract that misfires as an expression of one's purposes. Many scholars have worried about this problem.[66] Consider the following examples. Suppose that A agrees to buy a piece of property from B with the intention of paying for the property with money she believes she is about to inherit. Suppose that B also has reason to believe that A will inherit this money and knows that this is how A intends to pay for the property. If A and B are mistaken and A inherits nothing, **is** this mistake a reason for setting the contract aside? Or suppose that A agrees to buy a property in Toronto from B in the belief that she has secured employment in that city and that B also believes that A is about to be employed there. If it turns out that A does not have the job, does this constitute a reason for setting the contract aside? [67]

It is generally agreed that the answer in these examples must be no, but is there any principled basis for distinguishing these cases from *Solle*? In all these cases we can say that the complaining party's purpose in entering the contract is frustrated by the mistake. These examples show that the logical consequence of treating concern for self-determination as an absolute is a contractual obligation that is hostage, not only to the realization of the specific purpose embodied in the contract's terms (purchasing a house that is inhabitable), but to the realization of the mistaken party's life plans and projects broadly conceived (buying a house that one can afford or that is proximate to one's place of employment). These examples show that if contractual enforceability depends on a contract that coheres with the parties' life plans and long-term projects, there will be little left of the law of enforceable voluntary obligations.

[66] Palmer, *supra* note 2 at 17; Gordley, *supra* note 18 at 436; Hugh Beale, *Mistake and Non-Disclosure of Facts: Models for English Contract Law* (OUP, 2012) at 86.
[67] Examples along these lines are suggested by Gordley, *supra* note 18 at 436 and 443 and Fuller, *supra* note 61 at 72.

There is, however, a principled basis for limiting the equitable doctrine of mistaken assumptions to cases where a common mistake about the quality of the thing bargained for makes it unfit for the purposes of the mistaken party. When individuals enter into contractual agreements through an exchange of promises that bind them in the uncertain future, they agree to serve one another's interest in the security of a *particular* plan – the purchase of this house to live in, this ship to sail, this cow for breeding. But they do not agree to insure the success of their contracting partners' life plans in general. Yet, to hold the contractual obligation hostage to the success of the complaining party's life projects is indeed to construe the contract as an agreement of each to serve the broad interests of the other. The conception of freedom as free choice blocks this move, for what the parties chose—and were paid for—was to insure only the particular purpose evidenced by the contract. Moreover, it is only where that paid-for purpose fails that the resulting contract appears one-sided.

I have argued that respect for each agent's equal capacity for choice and the related idea that no individual can be forced to unilaterally serve another generates two limitations to the equitable doctrine of mistake: the limitation of the doctrine to cases of common mistake and to cases where a mistake about the quality of the thing bargained for turns the contract into one that unilaterally serves the purposes of the non-complaining party. These limitations do not represent a mere compromise between the competing values of concern for self-determination and security of contract. The limitations are necessitated internally by the theoretical momentum of freedom conceived as self-determination; without them, support for self-determination becomes subordination, thus defeating its own aim of promoting equal concern for human freedom.

I have so far tried to show that if contract law is to respect the freedom and equality of its subjects, it cannot do without the abstract conception of freedom as the freedom to choose. The

final step in the argument is to show that the abstract conception of freedom requires a distinct common law doctrine of mistake.

The idea that human beings are innately free agents equally capable of choice depends, as I suggested earlier, on the idea of a choosing self distinct from all the things that might be chosen. It depends on the idea that even though human beings may have powerful needs and desires and may be prone to false consciousness and error, they are nevertheless always free to choose what they will do. The idea that human beings are innately free thus depends on a firm distinction between the question of *whether* I chose something and the question of *why* I chose it. The effacement of the difference between these two questions threatens the conception of the self as a free chooser and so threatens the conception of the self that is required for a contract law that respects the equal freedom of its subjects. We therefore cannot submerge the narrow doctrine of common law mistake in the broader doctrine of equitable mistake. We need two distinct doctrines, the common law doctrine of mistaken assumptions—which asks whether this is what I chose—and the equitable doctrine of mistaken assumptions—which asks if my purpose in making the choice has been frustrated.

In order to preserve a distinct common law doctrine of mistaken assumptions (and the conception of the person underlying it), equity recognizes a final limit to its own operation. That limit lies in the distinction between contracts that are void and contracts that are voidable, between finding that there was no agreement and finding that despite the parties' agreement, there is reason for setting the contract aside. Equity leaves to the common law the question of whether the contract is void and asks only whether it is voidable. In so doing, equity defers to the common law's formal understanding of what agreement entails and what constitutes its negation, and therefore implicitly recognizes the necessity of the conception of freedom that underlies that

understanding. Equity confines itself to the question of voidability, to the question of whether, notwithstanding the parties' agreement (on the common law's view of what this means), the mistake nevertheless frustrates the purposes of one of the contracting parties and therefore ought, under the circumstances, to be set aside. In recognizing that the equitable view prevails on the question of the contract's enforceability, though not its validity, the common law defers in turn to the equitable perspective and the conception of freedom that underlies it.

8. Assumption of Risk

I have so far said nothing about the theory that currently dominates contemporary discussions of contractual mistake, which is that all problems of mistake can be resolved through an analysis of the assumption of risk. This theory has a weak form and a strong form. The weak form says that before we apply a doctrine of mistake, we have to consider whether the risk of mistake was explicitly or implicitly assumed by one of the parties.[68] If one party assumed that risk, there is no room for the operation of a distinct rule of law regarding contractual mistake.

That, however, is perfectly compatible with everything I've said. The idea here is just that we have to be careful not to equate taking a risk with making a mistake. I have argued that in the case of common law mistake, the question is whether the thing bargained for was commonly believed to be a fundamentally different thing than it turned out to be. Here, the reminder of the difference between taking a risk and making a mistake tells us that when we're trying to figure out what the parties believed they were bargaining for, we have to be attuned to the possibility that they were bargaining, not for the exchange of a particular kind of thing, but for the *chance* that the thing in question would turn out to be one particular kind of thing rather than another.

[68] LB McTurnan, "An Approach to Common Mistake in English Law" (1963) 41 Can Bar Rev 1 at 5-6.

For example, someone might pay a large sum for an uncut stone in the hope that it is a diamond but reasonably knowing that there is a chance it is a topaz. Similarly, in the case of equitable mistake, I've argued that the question is whether the mistake about quality results in a contract that fails to serve the purposes of the mistaken party. Here, again, we have to be attuned to the possibility that, in entering the contract, the complaining party was gambling that the thing bargained for would have the quality that furthered her aims. For example, an art collector may purchase a painting in the belief that it is an old master while knowing that some experts in the field believe it to be a copy.[69] When my purpose is to take a chance, both the outcome I desire and the outcome I do not desire can be viewed as expressive of a self-authored plan.

When the assumption-of-risk theory of mistake takes the form of reminding us of the difference between taking a risk and making a mistake, it functions to limit the scope for the application of a doctrine based on the normative significance of mistake, since the doctrine should not apply in cases where parties are properly understood as taking a risk. But it does not eliminate the need for such a doctrine. Whenever the parties to the contract are to be understood as making a mistake rather than taking a risk, the dispute between them must be adjudicated based on a conception of the normative significance of mistake.[70]

The strong theory of risk allocation says that contracts always either explicitly or implicitly allocate the risk of mistake to one of the parties, leaving no room for the operation of a doctrine of mistake.[71] Eisenberg, for example, argues that where the contracting parties are

[69] This example is borrowed from Cartwright, *Misrepresentation, Mistake and Non-Disclosure*, *supra* note 10 at 581.

[70]This understanding of the relationship between the assumption of risk and the doctrine of mistake requires a theory of the difference between taking a risk and making a mistake. I suggest that where a reasonable person would be satisfied of the truth of her assumptions and those assumptions nevertheless turn out to be incorrect, that person is to be understood as making a mistake rather than taking a risk.

[71] See, for example, Smith, *supra* note 8 at 400-403; Melvin Eisenberg, "Mistake in Contract Law" (2003) 91 California L Rev 1573.

operating under a tacit material assumption, they implicitly intend that the risk that the assumption is mistaken is allocated away from the one who is adversely affected by the mistake.[72] "Some things," Eisenberg argues, "go without saying."[73]

But why does this go without saying? Why not conclude that the parties intended that any risks of mistake not explicitly allocated by the contract are to lie where they fall? The problem here is that in the case of a shared tacit assumption, the parties didn't turn their minds to that assumption when they were bargaining. And if they didn't turn their minds to that assumption, what grounds do we have for saying that they intended one result rather than another? It's not clear that either allocating the risk to the party adversely affected or allowing it to lie where it falls "goes without saying."

Langille and Ripstein have an answer to this problem.[74] They argue that meaning is public, that a person means what a reasonable person would understand her to mean.[75] The implication for the assumption-of-risk analysis is that the appropriate question is not: how did the parties intend to allocate the risk of a particular mistake? It is rather: how would a reasonable person understand the risk allocation in this case? In *McRae v. Commonwealth Disposals Commission*,[76] for example, this helpful reformulation of the interpretive question yielded a determinate answer. Here, the seller of a wrecked oil tanker tried to avoid its contract on the basis of mistake (rather than pay damages for breach) when it turned out that the oil tanker did not exist. Although the parties never turned their minds to this possibility, the court rejected the claim of mistake, finding that in the context of the sale of "an oil tanker wrecked on the

[72] Eisenberg, *supra* note 71 at 1623.
[73] *Ibid* at 1628.
[74] Brian Langille and Arthur Ripstein, "Strictly Speaking – It Went Without Saying" (1996) 2 Legal Theory 63.
[75] *Ibid* at 77.
[76] (1951) 84 CLR 377, HCA.

Journmaund Reef," a reasonable person would understand that the seller was assuming the risk of mistake about the tanker's existence.[77]

But in many cases, the objective approach to the question of risk allocation will fail to provide an answer. Consider *Bell*. Some have argued that an employer who gives a golden handshake ought to first determine whether or not it is deserved. If the employer agrees to the payment, perhaps he is reasonably understood to take the risk of being wrong in his assessment of the employee.[78] But it could be argued that a reasonable person would understand that, as between two parties, the risk of mistake falls to the one who is in the significantly superior position to guard against it, which in this case is the employee; or a reasonable person might understand that a generous severance package is offered on condition that the employee hasn't committed serious breaches of his employment agreement. Or consider again *Solle*. Butcher acquired a long lease of flats that were uninhabitable and required significant repair. Solle was Butcher's partner and he managed the project of repairing and letting the flats. On behalf of himself and Butcher, Solle sought legal advice as to whether or not the flats fell within the Rent Act and obtained a legal opinion, which he read to Butcher, advising that they did not. The flats were rented on that basis. On the one hand, it may seem reasonable to say that one who rents out his property takes the risk that he's misunderstood the legislation that applies to rentals. On the other hand, it seems reasonable to think that, under the circumstances, Butcher's agreement to the lease was conditional on the correctness of legal opinion about the application of the legislation.[79]

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[77] *Ibid* at 410.
[78] Atiyah and Bennion, *supra* note 2 at 439; McTurnan, *supra* note 68 at 11; McCamus, *supra* note 5 at 56, 65.
[79] Atiyah and Bennion, who argue that most cases of mistake can be resolved through a determination of who agreed to bear the risk, agree that in *Solle v. Butcher*, "this would no doubt have been a hard decision," and offer no resolution. See Atiyah and Bennion, *supra* note 2 at 442.

My point here is not simply that reasonable people might disagree about how the risk was allocated in these cases. It is that of these competing interpretations of how the parties allocated the risk of mistake, none of which is rooted in the contract's terms, we have no non-arbitrary reason to prefer one over the other. But there is one interpretation that is rooted in the contract's terms and can therefore be preferred non-arbitrarily. It is that since the contracts are silent about the risk of this particular mistake, they do not allocate it. In cases like these, we must conclude that the parties didn't reach an agreement about who was to bear the risk of their mistake, from either a subjective or an objective point of view. Therefore, the legal consequence of that mistake cannot be read off the explicit or implicit terms of their agreement; it must be derived from a conception of the normative significance of mistake. That is what this article has offered.

9. Conclusion

Critics of the equitable doctrine of mistaken assumptions say that it is an unprincipled doctrine that allows judges to set aside contracts based on a vague sense of unfairness. Defenders of the doctrine appear to agree that it lacks a principled foundation, but think that its open-endedness is an argument in its favour. Against both the critics and the defenders, I have argued that the equitable doctrine of mistaken assumptions is a principled doctrine, one that protects individual self-determination by setting aside a contract that, due to a mistake about the quality of the thing contracted for, serves the purposes of one of the contracting parties but none of the other's. This defense of the equitable doctrine may seem to be an argument for replacing the narrow common law doctrine of mistaken assumptions with the equitable one, but I have argued that it is not. Whereas the equitable doctrine of mistaken assumptions is based on a robust conception of freedom as self-determination, the common law doctrine of mistaken assumptions is based on a

thin conception of freedom as free choice and a firm distinction between whether I chose something and why I chose it. Freedom conceived as free choice, I have argued, sets necessary limits to equity's concern for self-determination; without these limits, concern for self-determination becomes subordination and so fails from the perspective of its own claim to vindicate human freedom. Contract law therefore cannot do without the formal conception of freedom as free choice and the understanding of mistake suitable to that conception. Moreover, as I have shown using the case of fraud, it also cannot do without the substantive conception of freedom as self-determination and its understanding of the normative significance of mistake. I have thus defended a contract law that includes both common law and equitable doctrines of mistaken assumptions, the common law doctrine asking whether this is what I chose and the equitable doctrine asking whether that choice is expressive of my purposes.