

Relief for Mistake in Contracting

Ralph A. Newman

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Ralph A. Newman, *Relief for Mistake in Contracting*, 54 Cornell L. Rev. 232 (1969)
Available at: <http://scholarship.law.cornell.edu/clr/vol54/iss2/2>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

RELIEF FOR MISTAKE IN CONTRACTING*

Ralph A. Newman†

Whether the law should enforce a contract that was made by mistake raises the question of the relative importance to be attached to the actual intent of the parties and to the outward expression of their intent. In Anglo-American common law the desirability of speed and certainty in business transactions has overcome the importance of giving effect to the will of the parties and has led to the objective theory of contracts, which requires that the contract be enforced against a party who was mistaken, even if the outward expression of his intent was due to a serious mistake about a material fact.¹ In situations where one or both of the parties have entered into a contract on the basis of a mistake, however, the objective test must often be relaxed in the interest of justice. This article will attempt to describe the current state of the law as it relates to the granting of relief for mistake in contracting.

I

MISTAKE AS A GROUND FOR RESCISSION— THE GENERAL GUIDELINES

Mutual mistake is a ground for rescission, according to section 502 of the Restatement of Contracts, if both parties were mistaken about a matter that vitally affects the basis upon which they contracted. According to section 503 of the Restatement, although the mistakes need not be the same, they must, to make the contract voidable, relate to the same matter.

* A companion article on The Renaissance of Good Faith in Contracting will appear in a later issue of this volume of the *Cornell Law Review*.

† Professor of Law, Hastings College of the Law, University of California. A.B. 1914, LL.B. 1916, Harvard University.

¹ "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties." *Hotchkiss v. National City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911) (L. Hand, J.). "Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motives, design, or the interpretation of words." *O'Donnell v. Clinton*, 145 Mass. 461, 463, 14 N.E. 747, 751 (1888) (Holmes, J.). "[T]he fact that the manifestation was made under a mistake . . . will not prevent the formation of a contract." 1 S. WILLISTON, *CONTRACTS* § 20, at 30 (rev. ed. 1936) [hereinafter cited as WILLISTON].

The theory has found a somewhat fortuitous anchorage in American law since its foremost exponent, Williston, was the reporter for the Restatement of Contracts (1932) in which the primacy of the objective test found expression.

The problem of relief for unilateral mistake is dealt with somewhat obliquely in the Restatement of Contracts. Section 503 provides that a mistake of only one party does not of itself render the transaction voidable. Section 471(c) provides that fraud means non-disclosure where it is not privileged. Section 472(b) provides that there is no privilege of non-disclosure by a party who knows that the other party is acting under a mistake as to an undisclosed material fact, and the mistake, if mutual, would render voidable a transaction caused by relying thereon. Section 502 provides that where the parties were both mistaken regarding a fact assumed by them as the basis on which they entered into the transaction, it is voidable by either party. The combined effect of these provisions is that rescission for unilateral mistake is available if the mistake was recognizable by the other party² and concerned a fact which was so vital that the mistake, had it been mutual, would have made the contract voidable.³

II

DEFINING THE NATURE OF THE MISTAKE

First, the requirement that the mistake must relate to the same fact, in relief for mutual mistake, is highly questionable. The principal object in contracting is seldom the same on both sides.⁴ The mistake will almost always be harmful to only one of the parties,⁵ and, as McClintock has pointed out, separate mistakes about the same fact are hardly "mutual."⁶ The tying of the right to rescind to a corresponding right of the other party, who in fact opposes the rescission, is reminiscent of the discredited doctrine of mutuality of remedy as a condition to specific performance, and indicates a juristic craving for a theoretical symmetry of remedy which is of doubtful value.

² There is practically universal agreement that knowledge by the other party of the mistake gives a right to rescind. 3 A. CORBIN, *CONTRACTS* § 610 (rev. ed. 1960) [hereinafter cited as CORBIN].

³ RESTATEMENT OF CONTRACTS § 472, comment *b* (1932). Until recent times, a preponderating body of authority denied relief even if the unilateral mistake was basic and recognizable, if it was due to negligence. 3 CORBIN § 606. Since most mistakes are negligent in some degree, this qualification precluded rescission in almost all cases of unilateral mistake, although some courts allowed rescission even if negligence was present, usually without stressing the point. *See, e.g., Goodrich v. Lathrop*, 94 Cal. 56, 29 P. 329 (1892) (purchaser looked at the wrong lot).

⁴ Corbin, *Frustration of Contract in the United States of America*, 29 J. COMP. LEG. & INT'L LAW (3d ser.) 1, 4 (parts III-IV, 1947).

⁵ 3 CORBIN § 605, at 643.

⁶ McClintock, *Mistake and the Contractual Interests*, 28 MINN. L. REV. 460, 471 (1944).

Second, the tests for rescission for both mutual and unilateral mistake—that the mistake must be vital and must constitute the basis of contracting—conceal an imprecision of definition behind a verbal facade of simplicity.

There is great difficulty in defining exactly what constitutes a matter that vitally affects the basis on which both parties entered into the transaction. It is often said that relief will be given only for mistakes as to the intrinsic nature of the bargain, and not for mistakes in collateral matters. The most meaningful way to express this distinction seems to be whether the mistake affects the intrinsic value of the contract or whether it makes the contract more valuable or less valuable to one of the parties. Williston is critical of the distinction,⁷ but the test of the Restatement of Contracts, that the mistake must be about an essential fact that was the basis on which each party contracted, seems to exclude mistakes in collateral motive of one of the parties. This construction seems to be corroborated by the provisions of the Restatement of Contracts⁸ and of the Restatement of Restitution,⁹ which make the determination of excusable mistake turn on the question of whether or not the mistake affects the benefit or burden of the expected exchanges. Williston feels that the contract is not voidable where the transaction is the kind of transaction the parties had in mind, and that mistakes as to other facts are unimportant;¹⁰ and it is this approach that has been incorporated into the Restatement definition. The Restatements have abandoned the Roman law test which limited relief to mistakes affecting the identity or quality of the subject matter,¹¹ a test that has long since ceased to be appropriate to the modern economy in which transactions are not confined to exchanges or sales of specific property but include more complicated transactions involving services. The Restatement of Contracts has enlarged this test to include mistakes that affect the nature of the transaction; but in confining excusable mistake to mistakes of that nature, the Restatement preserves the distinction between intrinsic

⁷ 5 WILLISTON § 1544, at 4334.

⁸ RESTATEMENT OF CONTRACTS § 502 (1932): "[A transaction] is voidable by either party if enforcement of it would be materially more onerous to him than it would have been had the fact been as the parties believed it to be . . ."

⁹ RESTATEMENT OF RESTITUTION § 16, comment *c* (1937): "[T]he transaction can be rescinded by, and only by, the one who has given or promised to give more or who has received or has been promised less than he expected."

¹⁰ 5 WILLISTON § 1569.

¹¹ W. BUCKLAND & A. McNAIR, ROMAN LAW AND COMMON LAW 200 (F. Lawson rev. ed. 1952).

and collateral mistake. This distinction loses much of its significance because both mistakes can be equally injurious, depending on the circumstances. There are many cases in which rescission has been granted for intrinsic mistake in matters upon which only one of the parties has relied,¹² and rescission has often been denied for collateral mistake, no matter how decisively it may have motivated the mistaken party to enter into the contract.¹³ "That [the mistake] was material in the sense that but for it plaintiff would not have considered for a moment the making of the contract . . . clearly is not enough."¹⁴ On the other hand there are many cases that have refused rescission for intrinsic mistake,¹⁵ and rescission for collateral mistake has often been granted.¹⁶ The difficulty of defining excusable mistake is not lessened

¹² *E.g.*, *Fleischer v. McGehee*, 111 Ark. 626, 163 S.W. 169 (1914) (mistake as to the absence of standing timber on tract purchased by mistake for another tract); *Goodrich v. Lathrop*, 94 Cal. 56, 29 P. 329 (1892) (purchase of wrong tract); *Burkett v. J.A. Thompson & Son*, 150 Cal. App. 2d 523, 310 P.2d 56 (Ct. App. 1957) (failure to reveal that land was filled); *Clauser v. Taylor*, 44 Cal. App. 2d 453, 112 P.2d 661 (Ct. App. 1941) (failure to reveal that land sold had been filled); *Schaefer v. Henze*, 337 Ill. 41, 168 N.E. 625 (1929) (part of house and land of vendor included by mistake of surveyor); *Jermor Homes, Inc. v. Hoehlein*, 133 N.Y.S.2d 637 (Sup. Ct. 1954) (vendor contracted to sell a house and lot upon which he had built a house plus garage by mistake); *Brown v. Bradley*, 259 S.W. 676 (Tex. Civ. App. 1924) (deed included by mistake property the vendor did not own).

¹³ *Grymes v. Sanders*, 93 U.S. 55 (1876) (purchase of land for mining gold, in belief that an abandoned shaft was on the property; it was actually on another part of the vendor's land) (dicta); *Carignan v. Amoskeag Hamper Co.*, 95 N.H. 262, 61 A.2d 799 (1948) (release given under mistake as to its effect on rights under Workmen's Compensation Act); *Robert G. Watkins & Son v. Carrig*, 91 N.H. 459, 21 A.2d 591 (1941) (solid rock in place to be excavated); *Guaranty Safe Dep. & Trust Co. v. Liebold*, 207 Pa. 339, 56 A. 951 (1904) (failure to disclose prospective establishment of a manufacturing plant near property to be sold); *Kowalke v. Milwaukee Elec. Ry. & Light Co.*, 103 Wis. 472, 79 N.W. 762 (1899) (woman settled claim for personal injuries in ignorance of fact that she was pregnant at time of the accident).

¹⁴ *Hannah v. Steinman*, 159 Cal. 142, 147, 112 P. 1094, 1096 (1911) (dictum).

¹⁵ *Olson v. Shepard*, 165 Minn. 433, 206 N.W. 711 (1926) (mistake in boundaries); *Smith v. Beatty*, 37 N.C. 456 (1843) (defendant leased from plaintiff knowing a gold mine existed); *Harris v. Tyson*, 24 Pa. 347 (1855) (deposits of sand chrome on land to be sold). *See* 5 WILLISTON § 1426, at 3995; *cf.* *Bean v. Valle*, 2 Mo. 126 (1829); *Cavanagh v. Tyson, Weare & Marshall Co.*, 227 Mass. 437, 116 N.E. 818 (1917) (unexpected stone fill where piles were to be installed); *Cotter v. Luckie*, [1918] N.Z.L.R. 811, [1918] Gaz. L.R. 583 (sale of Polled Angus bull), *criticized in* 5 WILLISTON § 1569 n.1.

¹⁶ *Moffett, Hodgkins & Clarke Co. v. Rochester*, 178 U.S. 373 (1900) (mistakes in bid for public work); *McCarty v. Anderson*, 58 So. 2d 255 (La. Ct. App. 1952) (strip of dry land excluded by vendor, without purchaser's knowledge, from land sold, which was, in general, swampy); *Kutsche v. Ford*, 222 Mich. 442, 192 N.W. 714 (1923) (mistake in bid for public work); *Richardson Lumber Co. v. Hoey*, 219 Mich. 643, 189 N.W. 923 (1922) (underground fires were burning close to railroad ties sold; treated by the court as mistake as to the safety of the ties); *St. Nicholas Church v. Kropp*, 135 Minn. 115, 160 N.W. 500 (1916) (mistake in bid for private construction); *O'Shea v. Morris*, 112 Neb. 102, 198 N.W. 866 (1924) (vendor failed to inform purchaser that a driveway was not wholly on property

by the distinction drawn in the Restatement of Contracts and the Restatement of Restitution between mutual and unilateral mistakes, and it is perhaps for this reason that Corbin in his discussion of the effect of mistake treats these two types together.¹⁷ The difficulty of defining the kind of mistake that entitles a mistaken party to rescission is well illustrated by the inconsistencies in Williston's explanations of the provisions of the Restatement of Contracts and in definitions offered by Williston himself. In section 1570 of the revised edition of his treatise, published in 1937, Williston states that mistake justifies rescission where the subject matter is better in an essential respect, or essentially worse, than was supposed. In section 1569 he offers the test that the mistake must make the contract something quite different from what the parties had supposed it to be. Again, he states in section 1544 that where the transaction is the kind of transaction the parties had in mind, mistakes as to other facts are unimportant. His example in section 1570 of an excusable mistake—failure to note an ordinance forbidding the erection of a wooden building, the purpose for which the purchaser bought the property—certainly broadens the latter test. It is difficult to reconcile Williston's statement that the Restatement of Contracts permits relief for mistake in any fact if the parties assumed its truth as a basis for their bargain,¹⁸ with his test, that the mistake justifies relief only where the subject matter is better, or worse, in an essential respect, than was supposed.¹⁹ In the Restatement of Contracts, the statement appears that where both parties erroneously assume the existence of a certain state of facts, the injured party can avoid the transaction, and that it is immaterial whether the mistake affects identity, or attributes, or "other facts."²⁰ This would allow relief for an error in any "decisive fact," a rule which Williston expressly rejects as too broad in section 1544 of his treatise.²¹

The inconsistency of the decisions as to the effect of mistake in contracting is due to the fact that Anglo-American law is torn between the desire for stability of commercial transactions and the feeling that it is unfair to hold a party to a contract that he made without complete

sold); *In re Clark*, 233 App. Div. 487, 253 N.Y.S. 524 (4th Dep't 1931) (settlement of claims to an estate based on error as to amount one of the parties was entitled to receive under a will); *Brown v. Lamphear*, 35 Vt. 252 (1862) (land sold contained a spring by mistake of the vendor, who needed the spring for his retained land); *Donaldson v. Abraham*, 68 Wash. 208, 122 P. 1003 (1912) (mistake in addition in bid for public work).

¹⁷ 3 CORBIN § 608, at 674.

¹⁸ 5 WILLISTON § 1570A, at 4391.

¹⁹ *Id.* § 1570, at 4383-84.

²⁰ RESTATEMENT OF CONTRACTS § 502, comment *a* (1932).

²¹ 5 WILLISTON § 1544, at 4334.

information about all the relevant circumstances. The latter consideration rests on a sense of fair play which looks with disfavor on permitting anyone to reap an advantage from another party's mistakes. Thurman Arnold has referred to "the harsh ethics of traders . . . [which] necessarily justify over-reaching one's opponent and trampling on weaker and less skillful individuals."²² He adds, "There is need for an area, incapable of logical definition though it may be, where a different set of ethics prevail . . ."²³ The ambivalent approach to the problem of excusable mistake, arising out of these conflicting stresses, has introduced into the problem an almost insoluble confusion. Thayer has said that it is almost impossible to define the kind of mistake that entitles a party to rescind.²⁴ Although the tendency is to limit rescission to mistakes that turn the transaction into one of a different kind than was intended, this distinction is difficult to apply;²⁵ and there are many decisions that have allowed rescission for mistakes that do not bear any relationship to basic assumptions.²⁶ It may be stated with assurance that our legal system has no firm test, even in the most general terms, for telling in what cases it is proper, and in what cases improper, to allow rescission for either mutual or unilateral mistake. But it is indisputable that relief is much more freely granted for mutual mistake than where the mistake is unilateral, although this distinction has never been completely justified,²⁷ and that relief is granted more liberally in equity than at law.

III

MISTAKE AS GROUND FOR DENIAL OF SPECIFIC PERFORMANCE

In judicial doctrine a sharp distinction is drawn between the effect to be given unilateral mistake in suits for specific performance and in actions for damages. The denial of specific performance in cases of unilateral mistake rests on the equitable approach to contractual responsibility, according to which there is no valid consent

²² Arnold, Book Review, 36 COLUM. L. REV. 687, 690 (1936).

²³ *Id.*

²⁴ Thayer, *Unilateral Mistake and Unjust Enrichment as a Ground for Avoidance of Legal Transactions*, in HARVARD LEGAL ESSAYS 467 (1934).

²⁵ See Traynor, *La Rude Vita, La Dolce Giustizia; or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223, 229 (1962): "Unquestionably the vagaries of the influence of error discourage courts from inquiring into it as searchingly as they might."

²⁶ See cases cited note 16 *supra*.

²⁷ See Thayer, *supra* note 24, at 473: "[T]here is no justification for any categorical distinction between unilateral and bilateral mistakes . . ."

if the consent was given by mistake. Relief for unilateral mistake is provided in suits for specific performance by denying specific performance against the mistaken party, even though the mistake was not basic, and even if it was not apparent to one party. Specific performance has been refused for intrinsic mistake,²⁸ and even for collateral mistakes.²⁹ Many cases, supported by authority of long tradition, have refused to grant specific performance but have also refused to rescind the contract, thus leaving open to the plaintiff the possibility of recovering damages. But the denial of specific performance is often an inadequate solution, since in many cases the remedy in damages left open to the plaintiff would operate against the mistaken party just as severely as would the enforcement of his obligation by a decree for specific performance.³⁰ The availability of the remedy in damages may thus destroy the effectiveness of the equitable defense.³¹

²⁸ *Mansfield v. Sherman*, 81 Me. 365, 17 A. 300 (1889) (valuable building site included by mistake); *Bean v. Valle*, 2 Mo. 126 (1829) (purchaser concealed his knowledge of a mine on the property); *Malins v. Freeman*, 2 Keen 25, 48 Eng. Rep. 537 (Rolls Ct. 1837) (wrong plot bid in at auction); *Wallace v. McGirr*, [1936] N.Z.L.R. 483, [1936] Gaz. L.R. 388 (purchase of wrong plot); cf. *Mansell v. Lord Lumber & Fuel Co.*, 348 Ill. 140, 180 N.E. 774 (1932) (vendor by mistake, with purchaser's knowledge, failed to provide that deed was to be subject to unpaid assessments); *Chute v. Quincy*, 156 Mass. 189, 30 N.E. 550 (1892); *Twining v. Neil*, 38 N.J. Eq. 470 (Ch. 1884) (purchaser learned of encumbrance after sale); *Gillespie v. Moon*, 2 Johns. Ch. 585 (N.Y. 1817) (mistake in quantity of land sold); *Smith v. Beatty*, 37 N.C. 456 (1843).

²⁹ *Byers v. Stubbs*, 85 Ala. 256, 4 So. 755 (1888) (failure to reveal great demand for land in the vicinity); *Mansell v. Lord Lumber & Fuel Co.*, 348 Ill. 140, 180 N.E. 774 (1932) (vendor by mistake, with purchaser's knowledge, omitted from contract a provision that deed was subject to unpaid assessments); *Hetfield v. Willey*, 105 Ill. 286 (1883) (failure to reveal debts of firm to be sold); *Dunlop v. Wever*, 209 Iowa 590, 228 N.W. 562 (1930) (great difference in value); *Burkhalter v. Jones*, 32 Kan. 5, 3 P. 559 (1884) (mistake in amount of purchase price); *Baker v. Polydisky*, 144 Minn. 72, 174 N.W. 526 (1919) (mistake in option price); *Costello v. Sykes*, 143 Minn. 109, 172 N.W. 907 (1919) (mistake in book value of stock, seriously impairing value of capital); *Panco v. Rogers*, 19 N.J. Super. 12, 87 A.2d 770 (Ch. 1952) (mistake in purchase price); *Twining v. Neil*, 38 N.J. Eq. 470 (Ch. 1884) (mistake as to existence of a prior lien on the property bid in at auction); *Kleinberg v. Ratett*, 252 N.Y. 236, 169 N.E. 289 (1929) (failure to reveal presence of underground stream); *Bray v. Briggs*, 28 L.T.R. (n.s.) 817 (Rolls Ct. 1872) (mistake concerning use to which purchased property could be put); *Day v. Newman*, 2 Cox. Ch. 77, 30 Eng. Rep. 36 (Ch. 1788); *Sneesby v. Thorne*, 7 DeC. M.&G. 399, 44 Eng. Rep. 156 (Ch. 1855).

In *Standard Steel Car Co. v. Stamm*, 207 Pa. 419, 56 A. 954 (1904), specific performance was granted against the mistaken party, who did not know of contemplated improvements in the vicinity; see J. POMEROY & J. MANN, *SPECIFIC PERFORMANCE* § 245 n.(1)(a), at 592 (3d ed. 1926).

³⁰ See *Willard v. Tayloe*, 75 U.S. (8 Wall.) 557 (1869); *Marks v. Gates*, 154 F. 481 (9th Cir. 1907); *Johnson Realty & Inv. Co. v. Grosvenor*, 241 Mich. 321, 217 N.W. 20 (1928); Z. CHAFAËE, *SOME PROBLEMS OF EQUITY* 26 (1950); 3 T. SEDGWICK, *DAMAGES* § 1012 (9th rev. ed. 1912); Garvey, *Some Aspects of the Mergèr of Law and Equity*, 10 CATH. U.L. REV. (1961).

³¹ Much work remains to be done to determine the practical outcome of the right

IV

INCONSISTENT CASE LAW

A. *Denying Specific Performance and Granting Damages*

Many cases in which specific performance has been denied seem, as a matter of elemental justice, to require rescission of the contract. An illiterate carpenter, seventy-seven years old and hard of hearing, thought that an offer for his land was for \$12,500, instead of the actual amount of the offer, \$5,500. The court found that the land was worth \$10,000. Although specific performance was refused, the court also refused to allow rescission, on the ground that the purchaser was guiltless of any wrongdoing.³² In another case a widow, owning a life

to sue for damages after the right of specific performance has been denied. Many problems of specific enforcement arise out of transactions concerning real property, generally at the suit of the purchaser. In actions for damages for breach of contract to buy or sell land, the damages in most jurisdictions are the difference between the purchase price and the value of the land. *See* 32 MICH. L. REV. 518 (1933). Except in catching bargains this difference would be negligible as well as difficult to prove; and if the disparity is great, the inadequacy of the consideration, especially if coupled with even slight proof of unfairness, might lead to a conclusive presumption of fraud even in the prosecution of the claim for damages, and so defeat a recovery. *See* *Miller v. Coffeen*, 265 Mo. 204, 280 S.W.2d 100 (1955). Extreme inadequacy of consideration is ground for denial of specific performance. *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964); *see* *McClintock*, *supra* note 6. Inadequacy may be such as "shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction . . ." *Coles v. Trecothick*, 9 Ves. Jr. 233, 246, 32 Eng. Rep. 592, 597 (Ch. 1804) (Lord Eldon). Inadequacy of consideration has been made by statute a defense in suits for specific performance in several states. Examples are: CAL. CIV. CODE § 3391 (West 1954); GA. CODE ANN. § 37-805 (1935); MONT. REV. CODES ANN. § 17-808 (1947); N.D. CENT. CODE § 32-04-13 (1960); S.D. CODE § 37.4603 (Supp. 1960). The prevailing rule is *contra*; *see* *Annot.*, 65 A.L.R. 7, 86 (1930). If the subsequent proceedings are before a jury, it is doubtful that they will be impressed with the merits of the claimant's case, and jurors have a notorious fondness for disregarding the court's instructions. "[J]uries pay scant attention to the type of instructions commonly given them on the law applicable to the facts . . ." *Farley, Instructions to Juries—Their Role in the Judicial Process*, 42 YALE L.J. 194, 213 (1932). "It is inconceivable that any judge or jury would award damages to this buyer in an 'action at law'; and the bringing of such a suit should have been prevented by a decree of rescission." 3 CORBIN § 608 n.39, *commenting on* *Panco v. Rogers*, 19 N.J. Super. 12, 87 A.2d 770 (Ch. 1952). "[I]t is believed that, in this class of cases, the number of instances where the plaintiff would recover damages, when equity had refused him specific performance, would be surprisingly small." 30 YALE L.J. 506, 509 n.11 (1920), referring to offer made by mistake in addition in *Webster v. Cecil*, 30 Beav. 62, 54 Eng. Rep. 812 (Rolls Ct. 1861), where specific performance was refused for unilateral mistake, and the plaintiff was remitted to his action at law. Even if the subsequent proceedings are before a judge, he may have the same reaction; especially if he is the same judge who dismissed the claim for specific performance.

³² *Panco v. Rogers*, 19 N.J. Super. 12, 87 A.2d 770 (Ch. 1952).

interest in property which she had occupied as her home for more than thirty years, yielded to threats and misrepresentations of her son, who owned the remainder interest and was anxious to sell, and who told her that her life interest would be forfeited unless she joined in the contract of sale. The purchaser had no knowledge of the threats or misrepresentations. The circumstances fully justified the court's denial of specific performance, but its refusal to allow rescission is questionable.³³ In another case the vendor, as the result of a mistake made by his own surveyor in laying out a tract of land, did not know that it included a fine building site worth five times the average price for the plots that were intended to be included in the tract to be sold. The court refused to grant specific performance against the vendor, stating that damages would be an adequate remedy.³⁴ The rationale in all such cases is entirely inconsistent with the theory on which equity grants specific performance of contracts for the sale of real property—that damages are not an adequate remedy. Damages cannot be an inadequate remedy if the vendor knew what he was about, but adequate if he made a mistake. In both cases damages are inadequate from the point of view of the buyer. In case of defective eyesight,³⁵ defective hearing,³⁶ forgotten eyeglasses,³⁷ and mental distress causing mistake,³⁸ relief against the mistaken party has frequently been denied in equity although allowed at law. Occasionally rescission is allowed where the mistake was caused by failure to read the contract.³⁹ There are many cases involving the purchase of the wrong tract of land in which specific performance is denied, but the vendor is left to his remedy in damages.⁴⁰ When the contract calls for a sale by boundaries and not by the acre, relief is denied even at law when the shortage in estimated acreage is substantial.⁴¹ Specific performance is granted with compensation in situations where the sale is at a stated rate per acre,⁴² unless the discrepancy is so great that the purpose of the contract would be defeated were such a remedy to be given.⁴³

³³ *Mainelli v. Neuhaus*, 157 Neb. 392, 59 N.W.2d 607 (1953).

³⁴ *Mansfield v. Sherman*, 81 Me. 365, 17 A. 300 (1889).

³⁵ *Shulter's Case*, 12 Co. Rep. 90, 77 Eng. Rep. 1366 (K.B. 1611).

³⁶ *Panco v. Rogers*, 19 N.J. Super. 12, 87 A.2d 770 (Ch. 1952).

³⁷ *Young v. Springer*, 113 Minn. 382, 129 N.W. 773 (1911).

³⁸ *Grant Marble Co. v. Abbot*, 142 Wis. 279, 124 N.W. 264 (1910).

³⁹ *McMahon v. Tanner*, 122 Utah 333, 249 P.2d 502 (1952).

⁴⁰ *E.g.*, *Malins v. Freeman*, 2 Keen 25, 48 Eng. Rep. 537 (Rolls Ct. 1837); *Wallace v. McGirr*, [1936] N.Z.L.R. 483, [1936] Gaz. L.R. 388.

⁴¹ *Sanders v. Lindsey*, 204 Ky. 57, 263 S.W. 718 (1924).

⁴² *McCombs v. Church*, 180 Cal. 233, 180 P. 535 (1919).

⁴³ *McGeorge v. White*, 295 Ky. 367, 174 S.W.2d 532 (1943).

B. Cases Generally Denying or Granting Relief

It is also difficult to reconcile decisions in which relief of any kind, either specific performance or damages, is denied and decisions in which an agreement incorporating a mistake is enforced. A defendant was held liable for the purchase price of needles, although he had by mistake ordered twenty-five hundred papers of needles instead of twenty-five hundred needles, as he had intended,⁴⁴ and an agreement to trade ten shares of stock, under the impression that the par value was one hundred dollars when it was really two hundred dollars, was enforced.⁴⁵ By contrast, an uneducated man without practical experience bought up a ground rent on his property in the expectation of having it replaced for his own benefit when he sold the property. He signed a contract without such a provision, on the assurance of his own broker that such a provision would be added. The court denied the purchaser any relief, either in specific performance or damages, saying that "all the plaintiff would lose was a windfall."⁴⁶ Until fairly recent times, cases were extremely rare which openly accepted at law the defense of unilateral mistake where the mistake was not apparent to the other party. For many years, however, there have been decisions in which the doctrine of relief has been received into the law by indirection. A mutual friend of the vendor and purchaser pointed out to the purchaser a lot on the other side of the street from the lot the vendor intended to sell, and which was described in the contract. The court found that the minds of the parties had not met.⁴⁷ In another case where the court found that the contract was too indefinite to be enforced specifically, the real reason for the dismissal of the complaint is seen in the court's statement that "the effects of a pure mistake upon the rights of the suffering party are the same as injuries and call as loudly for relief as those of fraud."⁴⁸

V

DEVELOPMENT IN THE LAW REGARDING RELIEF FOR MISTAKE

It seems that a development is taking place, or may already have occurred, in the treatment of unilateral mistake, similar to that which

⁴⁴ *J. A. Coates & Sons v. Buck*, 93 Wis. 128, 67 N.W. 23 (1896).

⁴⁵ *Wilson v. Wyoming Cattle & Inv. Co.*, 129 Iowa 16, 105 N.W. 338 (1905).

⁴⁶ *Kappelman v. Bowie*, 201 Md. 86, 93 A.2d 266 (1952).

⁴⁷ *Stong v. Lane*, 66 Minn. 94, 68 N.W. 765 (1896).

⁴⁸ *Pope v. Speiser*, 7 Ill. 2d 231, 241, 130 N.E.2d 507, 512 (1955), quoting 2 J. POMEROY, EQUITY JURISPRUDENCE, § 867, at 1782 n. (4th ed. 1918).

has occurred in the treatment of the effect of unconscionable conduct on the part of the plaintiff. Judicial statements continue, in cases in which specific performance is denied, to the effect that unilateral mistake is not a defense to actions for damages,⁴⁹ and there are still instances in which rescission for collateral mistake,⁵⁰ or even intrinsic mistake,⁵¹ is denied. But when the mistake goes to an essential feature of the contract, was not due to gross negligence, and it is possible to place the other party in status quo,⁵² rescission, especially in recent

⁴⁹ Cases holding that unilateral mistake is not a defense in actions for damages: *Jansen v. United States*, 344 F.2d 363 (Ct. Cl. 1965) (extrinsic mistake in interpretation of contract); *Noland Co. v. Graver Tank & Mfg. Co.*, 301 F.2d 43 (4th Cir. 1962) (mistake as to size and site of tank to be built by plaintiff, applying South Carolina law); *United States v. Sabin Metal Corp.*, 151 F. Supp. 683 (S.D.N.Y. 1957) (mistake in bid communicated after acceptance, applying federal substantive law); *Sidor v. Kravec*, 135 Conn. 571, 66 A.2d 812 (1949) (specific performance denied, damages also denied because no finding or request to find that the market value exceeded the contract price; dicta as to right to damages); *Burkhalter v. Jones*, 32 Kan. 5, 3 P. 559 (1884) (plaintiff misread purchase price); *Cox-Hardie Co. v. Rabalais*, 162 So. 2d 713 (La. Ct. App. 1964) (mistake in bid); *Piliawsky v. Colar*, 112 So. 2d 730 (La. Ct. App. 1959) (extrinsic mistake as to connectivity of plumbing; mistake by owner); *Dunham v. Hogan*, 143 Me. 142, 56 A.2d 550 (1948) (mistake concerning sale of land and assignment of a contract for the sale of gravel; intrinsic mistake); *Mansfield v. Sherman*, 81 Me. 365, 17 A. 300 (1889) (valuable building site included by mistake); *Perlmutter v. Bacas*, 219 Md. 406, 149 A.2d 23 (1959) (specific performance denied, mistake by purchaser who thought that property had access to road, and intended to subdivide property; intrinsic mistake). Cf. *Pond v. Fisher*, 201 Va. 542, 112 S.E.2d 147 (1960) (purchaser mistaken in supposing property adjoined street; specific performance granted); *Hayford v. Century Ins. Co.*, 106 N.H. 242, 209 A.2d 716 (1965) (intrinsic mistake concerning coverage of fire insurance policy); *Sullivan v. Jennings*, 44 N.J. Eq. 11, 14 A. 104 (Ch. 1888) (bid at foreclosure under mistake as to amount of cash necessary; bid included amount due on second mortgage; specific performance denied); *Johns-Manville Sales Corp. v. Stone*, 5 App. Div. 2d 110, 169 N.Y.S.2d 259 (1st Dep't 1957) (mistake in interpretation of contract, no unjust enrichment shown); *Herman v. Stern*, 419 Pa. 272, 213 A.2d 594 (1965) (provision concerning commissions inserted by mistake).

Specific performance denied, and plaintiff left to his remedy at law in the following cases: *C. H. Young Co. v. Springer*, 113 Minn. 382, 129 N.W. 773 (1911) (forgotten eyeglasses); *Panco v. Rogers*, 19 N.J. Super. 12, 87 A.2d 770 (Ch. 1952) (defective hearing caused mistake in purchase price); *Grant Marble Co. v. Abbot*, 142 Wis. 279, 124 N.W. 264 (1910) (mental distress); *Webster v. Cecil*, 30 Beav. 62, 54 Eng. Rep. 812 (Rolls Ct. 1861) (specific performance denied for mistake in addition); *Willan v. Willan*, 16 Ves. Jr. 72, 33 Eng. Rep. 911 (Ch. 1810) (specific performance denied); *Malins v. Freeman*, 2 Keen 25, 48 Eng. Rep. 537 (Rolls Ct. 1837) (plaintiff bought wrong tract); *Shulter's Case*, 12 Co. Rep. 90, 77 Eng. Rep. 1366 (K.B. 1611) (mistake in nature of the transaction); *Wallace v. McGirr*, [1936] N.Z.L.R. 483, [1936] Gaz. L.R. 388 (plaintiff bought wrong lot).

⁵⁰ *E.g.*, *Carignan v. Amoskeag Hamper Co.*, 95 N.H. 262, 61 A.2d 799 (1948) (settlement under mistake as to effect on rights of injured person under Workmen's Compensation Act); *Wilson v. Wyoming Cattle & Inv. Co.*, 129 Iowa 16, 105 N.W. 338 (1905).

⁵¹ *E.g.*, *Cavanagh v. Tyson, Wear & Marshall Co.*, 227 Mass. 437, 116 N.E. 818 (1917) (stony fill where piles were to be installed); *Robert G. Watkins & Son v. Carrig*, 91 N.H. 459, 21 A.2d 591 (1941) (solid rock in place to be excavated).

⁵² [E]quitable relief by way of rescission may be given if the mistake relates to a

years, has usually been allowed.⁵³ The cases do not draw, for the most part, a distinction between an intrinsic mistake, affecting the subject matter, and a collateral mistake. In many opinions in which the distinction is repeated it seems to be for the purpose of supporting a determination already arrived at by the court on other grounds. In cases involving bids for public work, authority to the effect that a serious mistake in the bid will justify rescission of the bid even after, as well as before, it has been accepted, is almost unanimous, although sometimes based on forced reasoning such as that the mistake was apparent,⁵⁴ or that the bid may be withdrawn, although the statute

material feature of the contract, if it is of such grave consequence that enforcement of the contract as made will be unconscionable, if it occurred notwithstanding the exercise of ordinary diligence by the party making the mistake, and if the other party can be put *in statu quo*.

3 J. POMEROY, EQUITY JURISPRUDENCE § 870(a) (5th ed. 1941) (footnote omitted).

⁵³ Rescission granted:

Bids—notification of mistake before acceptance of bid; *M. F. Kemper Constr. Co. v. Los Angeles*, 37 Cal. 2d 696, 235 P.2d 7 (1951) (item omitted from bid); *People v. John W. Rouse Constr. Corp.*, 26 App. Div. 2d 405, 274 N.Y.S.2d 981 (3d Dep't 1906) (dicta); *State v. Union Constr. Co.*, 9 Utah 2d 107, 339 P.2d 421 (1959).

Bids—notification of mistake after acceptance of bid: *School Comm'rs v. Bender*, 36 Ind. App. 164, 72 N.E. 154 (1904) (item omitted; court found no meeting of the minds); *Murray State Normal School v. Cole*, 209 Ky. 761, 273 S.W. 508 (1925) (item omitted); *Kutsche v. Ford*, 222 Mich. 442, 192 N.W. 714 (1923) (item omitted); *St. Nicholas Church v. Kropp*, 135 Minn. 115, 160 N.W. 500 (1916) (bid for private construction); *School Dist. v. Olson Constr. Co.*, 153 Neb. 451, 45 N.W.2d 164 (1950); *Barlow v. Jones*, 87 A. 649 (N.J. Ch. 1913) (item omitted); *Abner M. Harper, Inc. v. City of Newburgh*, 159 App. Div. 695, 145 N.Y.S. 59 (2d Dep't 1913) (two items transposed); *Donaldson v. Abraham*, 68 Wash. 208, 122 P. 1003 (1912) (mistake in addition); *Board of Educ. v. Hooper*, 350 S.W.2d 629 (Ky. Ct. App. 1961) (action at law on bid bond; judgment for defendant, who had omitted an item from his bid); *Kenneth E. Currah, Inc. v. State*, 106 N.H. 558, 215 A.2d 702 (1965) (adding machine failed to record an item \$100,000 above its capacity).

Cases not involving bids, and in which there was no knowledge of the mistake: *Ricketts v. Pennsylvania R.R.*, 153 F.2d 757 (2d Cir. 1946) (mistake in a release as to land included in deed); *McCarty v. Anderson*, 58 So. 2d 255 (La. Ct. App. 1952) (mistake as to land included in deed); *Kappelman v. Bowie*, 201 Md. 86, 93 A.2d 266 (1952) (wrong plot purchased); *Stong v. Lane*, 66 Minn. 94, 68 N.W. 765 (1896) (wrong plot purchased); *Rosenblum v. Manufacturers Trust Co.*, 270 N.Y. 79, 200 N.E. 587 (1936) (mistake in insurance policy coverage, the policy having expired); *Colvin v. Baskett*, 407 S.W.2d 19 (Tex. Civ. App. 1966) (plaintiff sold three bags of coins, one bag belonging to someone else; rescission granted on ground of no meeting of the minds); *Brown v. Bradley*, 259 S.W. 676 (Tex. Civ. App. 1924) (deed cancelled because it included land vendor did not own).

Rescission was denied in: *United States v. Sabin Metal Corp.*, 151 F. Supp. 683 (S.D.N.Y. 1957); *Steinmeyer v. Schroepfel*, 226 Ill. 9, 80 N.E. 564 (1907); *Daddario v. Town of Milford*, 296 Mass. 92, 5 N.E.2d 23 (1936).

⁵⁴ *R. O. Bromagin & Co. v. City of Bloomington*, 234 Ill. 114, 84 N.E. 700 (1908); *City of Baltimore v. DeLuca-Davis Constr. Co.*, 210 Md. 518, 124 A.2d 557 (1956); *School Dist. v. Olson Constr. Co.*, 153 Neb. 451, 45 N.W.2d 164 (1950); *Rushlight Automatic Sprinkler Co. v. City of Portland*, 189 Ore. 194, 219 P.2d 732 (1950).

says that it is irrevocable, because it does not represent the true intent of the bidder.⁵⁵ An option given for consideration is not only an offer but is also a unilateral contract to keep the offer open,⁵⁶ and bids pursuant to statutes that provide that the bids are irrevocable are equally binding. The cases that allow rescission where notice of the mistake has been received before the bid was accepted are equally as authoritative, therefore, as cases in which notice of the mistake was not received until after the acceptance of the bid. In two cases in the Court of Claims,⁵⁷ a bid for construction work, based on a mistake in each case, was revoked after the acceptance of the bid had been mailed, but before it was delivered to the bidder. The decisions, which granted rescission, were based on the fact that no contract was concluded until the acceptance had reached the offeror. A sounder ground, suggested by Corbin, is that the enforcement of the bid would have been utterly inequitable regardless of whether or not the acceptance became effective on mailing.⁵⁸ No one would maintain that the moral values involved would be any different if the mistake had not been discovered until the following day, after the letter of acceptance had been received. There have been in recent years many cases, other than those involving bids, in which rescission has been granted for unilateral mistakes.⁵⁹ In the last ten years three different jurisdictions have granted rescission for unilateral mistake,⁶⁰ and there has been no case denying rescission. It may be that all that is necessary for the coalescence of the standards of equity and common law in this area of contracts is for the courts to make explicit a change that has already taken place.

There is strong justification for providing relief for mistake in a more meaningful fashion than by merely denying specific enforcement. The difference between the moral position of a person who has been guilty of sharp practice in the inducement of a contract and of one who seeks to enforce a contract made by a mistake of which the other party was unaware and for which he was not responsible, is hardly

⁵⁵ *City of Baltimore v. DeLuca-Davis Constr. Co.*, 210 Md. 518, 124 A.2d 557 (1956). Relief generally has been allowed only for clerical errors, as distinguished from errors of judgment. 5 WILLISTON § 1578.

⁵⁶ 5 WILLISTON § 1441.

⁵⁷ *Rhode Island Tool Co. v. United States*, 128 F. Supp. 417 (Ct. Cl. 1955); *Dick v. United States*, 82 F. Supp. 326 (Ct. Cl. 1949).

⁵⁸ 3 CORBIN § 609, at 683 n.47.

⁵⁹ See cases cited note 53 *supra*.

⁶⁰ *Board of Educ. v. Hooper*, 350 S.W.2d 629 (Ky. Ct. App. 1961); *McClure v. Rignanes*, 25 App. Div. 2d 565, 267 N.Y.S.2d 910 (2d Dep't 1966); *Colvin v. Baskett*, 407 S.W.2d 19 (Tex. Civ. App. 1966).

so great as to justify a difference in result. The distinction between cheating a person and letting him cheat himself is tenuous. Corbin has said that "a just and reasonable man will not insist on profiting by the other's mistake."⁶¹ Lord Denning has expressed the opinion that that "[i]f good faith is required in a person who gives a promise, so it should be in a person who takes the benefit of it. He should not enforce it in circumstances which it was never intended to cover."⁶² Although Lord Denning's remark was made with reference to relief for frustration due to subsequent unforeseeable events, it would not seem to make a significant difference whether the frustration results from future happenings or occurs immediately upon the making of the contract. In frustration cases the disappointment of the expectations of one of the parties occurs later, making it more likely that a detrimental change of position has taken place than in the case of mistakes, which are usually discovered promptly. If no detriment occurs that cannot be adequately compensated in damages, there seems to be little significant difference between the two situations. The choice seems to lie between a rule based on circumstances that ordinarily occur, and a rule to be flexibly applied on the basis of the facts of the particular case with regard to detrimental change in position. Throughout most of legal history the common law choice would have inclined in favor of certainty, the equitable choice in favor of flexibility. It would seem that the equitable approach would be more closely in harmony with modern attitudes toward the objectives of law.

CONCLUSION

Exceptions to the rule denying rescission for unilateral mistake have already gained a firm foothold in the areas of insurance contracts,⁶³ releases of claims for personal injuries,⁶⁴ compromise settlements,⁶⁵ admiralty claims for salvage,⁶⁶ bids for construction work,⁶⁷ and cancellation or reformation of irrevocable inter vivos trusts.⁶⁸

⁶¹ 3 CORBIN § 609, at 682 (footnote omitted).

⁶² A. DENNING, *THE CHANGING LAW* 105 (1953).

⁶³ *Columbia Nat'l Life Ins. Co. v. Black*, 35 F.2d 571 (10th Cir. 1929); *Rosenblum v. Manufacturers Trust Co.*, 270 N.Y. 79, 200 N.E. 587 (1936).

⁶⁴ *Seidman v. New York Life Ins. Co.*, 162 Misc. 560, 296 N.Y.S. 55 (Sup. Ct. 1937).

⁶⁵ *Ricketts v. Pennsylvania R.R.*, 153 F.2d 757 (2d Cir. 1946); *Marks v. Gates*, 154 F. 481 (9th Cir. 1907); 9 J. WIGMORE, *EVIDENCE* § 2416 (3d ed. 1940).

⁶⁶ *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942).

⁶⁷ See cases cited note 53 *supra*.

⁶⁸ Annot., 59 A.L.R.2d 1229 (1958).

The exceptions are sufficiently numerous to indicate judicial dissatisfaction with the traditional requirement that the mistake must relate to basic assumptions and, if not mutual, must have been apparent to the party desiring enforcement of the contract. The confused state of the authorities in the United States may indicate that we are at the threshold of a moral advance in this area of contract law such as occurs from time to time after a preliminary period of indecision and marshalling of judicial determination. The adoption of the negative interest theory of damages, already applied in Anglo-American equity and at law in a few states, would carry us a long way toward the moral approach.⁶⁹ A firmly established doctrine is not eliminated, however, by scattered decisions. If other jurisdictions wait until the weight of authority changes, it will never change.

The chief purposes of the requirement that the mistake be known to the party desiring to enforce the contract are to guard against false claims of mistake and to eliminate the factor of the knowing party's change of position in reliance on the contract. If the mistake is clearly proved and due weight is given to the other party's change of position, as Corbin suggests,⁷⁰ the requirement of recognizability of the mistake, which can easily be resolved so as to correspond with the court's predilection for granting or denying relief, could be dispensed with without serious threat to contractual stability.

A relaxation of the strict rules of law has been urged by many authorities. McClintock has said, "[W]here the two forms of remedies are now administered by the same courts, in the same form of action, the distinction should be abandoned and rescission allowed in any case where specific performance would be denied because of the mistake."⁷¹ Patterson has questioned the law-equity distinction and says that courts have frequently found pretexts for refusing to apply it.

⁶⁹ Jhering's theory of damages for the negative interest was first stated in an article published in 1860. Jhering, *Culpa in Contrahendo, oder Shadenersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen*, in 4 R. JHERING, *JAHRBUCHER FÜR DIE DOGMATIK* 1 (1860). His theory is explained in English in Smith, *Four German Jurists*, 12 *POL. SCI. Q.* 21, 43-48 (1897): There can be no claim for damages for nonperformance because this would recognize the contract as valid. The only claim is to be put in as good a position as if the other party had never been led to suppose that he had a contract—the "negative interest." The doctrine of *culpa in contrahendo* follows from the duty to use care in contracting; Jhering based liability for negative damages on negligence in contracting. Section 122 of the German Civil Code gives full recognition to this theory. ZPO § 122 (C. H. Beck 1966). This measure of damage is applied in our law in cases of restitution. *E.g.*, *Abner M. Harper, Inc. v. City of Newburgh*, 159 App. Div. 695, 145 N.Y.S. 59 (2d Dep't 1913); 3 CORBIN § 606.

⁷⁰ 3 CORBIN § 609, at 689.

⁷¹ McClintock, *supra* note 6, at 477 (footnote omitted).

He adds that the doctrine is "insupportable" in mistakes that result in economic consequences.⁷² Pound has remarked, "In states where the value of the bargain may be recovered, it may well be sometimes that the bargain might as well be enforced in equity, if it is not to be cancelled."⁷³ Corbin has pointed out:

Courts refusing to decree rescission for unilateral mistake often say that to do otherwise would tend greatly to destroy stability and certainty in the making of contracts. In some degree, this may be true; but certainty in the law is largely an illusion at best, and altogether too high a price may be paid in the effort to attain it, . . . A sufficient degree of stability and certainty will be maintained if the court carefully weighs the combination of factors in each case, is convinced that the substantial mistake asserted was in fact made, and gives due weight to material changes in position.⁷⁴

If we have discarded the dual standard of legal morality which grew from accidents of remote history, we are doing the law a disservice in pretending that the dual standard still exists, and we are encouraging practices on a lower moral level in the multitude of transactions that never reach the courts. It is difficult to ignore the fact that most countries of the western world allow relief for mistake in contracting in a manner similar to that which we apply in our own legal system in suits for specific performance.⁷⁵ Whatever choice we make, it should

⁷² Patterson, *Equitable Relief for Unilateral Mistake*, 28 COLUM. L. REV. 859 (1928).

⁷³ R. POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW 132 (1922).

⁷⁴ 3 CORBIN § 609, at 688-89.

⁷⁵ In English law the only mistake of legal significance at common law is mistake which obliterates the subject matter in the sense the parties understood it; such mistake that the identity of the subject matter is different from the subject matter in the terms agreed upon. The effect of such mistake is that there is no contract at all, a phenomenon which Lawson interprets as eliminating the doctrine of *error in substantia* from English law. Lawson, *Error in Substantia*, 52 L.Q. REV. 79 (1936). The defendant prevails not because his mistake constitutes a defense to an otherwise enforceable contract, even though the mistake was substantial and mutual, but because there was no valid contract, by reason of the absence of any subject matter as the parties understood it to be. Other mistake, even if substantial, has no effect in English common law; that is to say, in actions for damages. It must be a case either of *res extincta* or *res sua*, to make the contract void. G. CHESHIRE & C. FIFOOT, LAW OF CONTRACT 192 (6th ed. 1964). Relief for common or mutual mistake, even if the mistake was not fundamental in the foregoing sense, will be granted in equity, if the court sees fit, by ordering specific performance of the contract as rectified, *id.* at 200, or by setting the contract aside, or by the denial of specific performance. *Stewart v. Kennedy*, 15 App. Cas. 75 (H.L. 1890); *Huddersfield Banking Co. v. Henry Lister & Son*, [1895] 2 Ch. 273 (common mistake); *Townshend v. Stangroom*, 6 Ves. Jr. 328, 31 Eng. Rep. 1076 (Ch. 1801); *Bray v. Briggs*, 26 L.T.R. (n.s.) 817 (Rolls Ct. 1872); *Webster v. Cecil*, 30 Beav. 62, 54 Eng. Rep. 812 (Rolls Ct. 1861); *Malins v. Freeman*, 2 Keen 25, 48 Eng. Rep. 537 (Rolls Ct. 1837); G. CHESHIRE & C. FIFOOT, *supra* at 198.

It would seem that the provision in the Law of Property Act of 1925, 15 Geo. 5, c. 20, § 49, sched. 2, authorizing the court in its discretion to return the deposit

be based on our conclusion as to whether stability of transactions is more important than recognition of the obligation to share the burdens of misfortune when a contract has been made by mistake, and the other party can be restored to the position he was in before the contract was made. The choice should not rest on a technical distinction between law and equity.

when specific performance has been denied, constitutes a legislative adoption of the equity approach to relief for mistake, according to which the court may rescind the contract if it sees fit to do so, and expressly authorizes such action.

In the civil law, which has never been troubled by a division of jurisdiction between courts of law and courts of equity, the problem of adjusting the hardship caused by mistake is solved by excusing the mistaken party from performing, while protecting the other party against actual loss, although not against the loss of his expected profit.