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American Mutual Mistake: Half-Civilian Mongrel, Consideration Reincarnate

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Genealogy admits no a priori except an ancestor.[1]

I. INTRODUCTION: AMERICAN MUTUAL MISTAKE

This study gives a genealogy of precedent for the American contract doctrine of mutual mistake of basic assumptions. It tracks the way in which precedents came together to form the doctrine of mutual mistake and direct the application of that doctrine in cases in which it is applied in the late twentieth century. The first part of this study, the introduction, describes the doctrine's current formulation, application, and rationale, and sets parameters to this study. The second part traces the genealogy of mutual mistake. Conclusions follow. *Inter alia*, this study determines that, though mutual mistake appears to take its form from civil law, it retains within it and thus continues to enforce a portion of the pre-classical common law contract doctrine of consideration.

A. Mutual Mistake Doctrine

Many law students learn about the American doctrine of mutual mistake by studying the "cow case."[2] Walker promised to sell Rose 2d of Aberlone, a cow, to Sherwood.[3] Walker had purchased Rose as a breeder for $850; as a breeder she was worth $750 to $1,000, he said.[4] But Walker thought Rose's breeding days had ended. He and Sherwood bartered for Rose as if she were only beef, setting a price at about $78.[5] After the bargain was struck, Walker discovered Rose was pregnant.[6] The court allowed Walker to keep the cow because Walker

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1. Powhattan would not have guessed that two of his descendants, George Bush and Woodrow Wilson, would become chief executives of a nation covering the continent. Gary Boyd Roberts, Ancestors of American Presidents 266 (1989). Probably Pocahontas's role in presidential ancestry comes as a surprise to many. Bush in fact shares common ancestry with 15 other United States presidents; so did FDR. *Id.* at 262. Both Bush and FDR claim William Hutchinson, "noted religious reformer, 'heretic,' and a founder of Rhode Island" as grandfather. *Id.* at 239. Bush may be related to as many as half of all Americans. *Id.* at xiii. Henry Squire, born circa 1563, counts no fewer than five presidents among his distant grandsons. *Id.* at 180. Ford and Nixon were related, *id.* at 243, though that probably does not explain the pardon. (Ford and Nixon's common ancestry is through Reverend Stephen Bachiler, of Hampton, N.H. Bachiler died about 1660. *Id.*) Nixon was also related to Princess Diana, *id.* at 284, but so were John Adams, John Quincy Adams, Millard Fillmore, Rutherford B. Hayes, Grover Cleveland, Teddy Roosevelt, Woodrow Wilson, and FDR. *Id.* at 277-85. Hmm ...!

2. Sherwood v. Walker, 33 N.W. 919 (Mich. 1887), *limited to its facts in* Lenawee County Bd. of Health v. Messerly, 331 N.W.2d 203, 209 (Mich. 1982).

3. *Sherwood*, 33 N.W. at 919-21.

4. *Id.* at 922.

5. *Id.* The price was "five and a half cents per pound, live weight fifty pounds shrinkage." *Id.* at 920. Rose weighed 1420 pounds. *Id.* At that weight, less 50 pounds shrinkage, her price was approximately $78.

6. *Id.* at 920.

and Sherwood entered the contract believing that Rose was barren when she was actually a breeder.[7] They made a mutual mistake.

The *Sherwood* court required, as would courts today, that Walker prove three things in order to merit relief from his contract: (i) that a mistake of fact occurred, (ii) that both parties to the contract made that mistake, and (iii) that the mistake was serious enough to justify relief.[8] These elements are stated today by courts in various ways. Some courts use the language proposed by the Restatement (Second) of Contracts:

> Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party . . . .[9]

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7. Henry Home, writing concerning Scottish equity jurisprudence in the 1700s, considered a case directly converse to *Sherwood*:

> A horse is purchased as a stallion for breed; but unknown to both [vendor and purchaser], he happened to be gelt before the bargain. It may be doubted, whether such a bargain be not effectual at common law, as the error is only in the quality of the horse; but undoubtedly it may be set aside in equity, upon a principle mentioned more than once above, That the vender *certans de lucro captando*, ought not to take advantage of the purchaser's error, who is *certans de damno vitando*.

Henry Home of Kames, Principles of Equity 205 (Bell 4th ed. 1800). I tell students reciting *Sherwood* "you can run but you can't 'hyde,'" to "take the bull by the horns" and "steer us right," "you've got this case corralled," "I've never 'herd' a better recitation," "you're obviously the cream of the crop, here," "we just want the meat of the court's reasoning," "I'm going to milk this one for all it's worth before we put this case out to pasture," "that will end the cheesy jokes," and "that was udder nonsense." I get the class' attention by calling "hey." I suggest we take a poll to see whether the case was rightly decided. That's the tail end, seriously.

8. *See* cases cited *infra* notes 9-21, 26-28.

9. Restatement (Second) of Contracts § 152 (1981). Section 152 also adds ". . . unless he bears the risk of the mistake under the rule stated in § 154." *Id.* For reasons discussed *infra* text accompanying notes 74-79, I do not discuss assumption of risk in this study. The Restatement (Second)'s statement of the rule has been widely followed. *See, e.g.*, Livingstone v. North Belle Vernon Borough, 91 F.3d 515, 525 n.10 (3d Cir. 1996); SEC v. Levine, 881 F.2d 1165, 1172 (2d Cir. 1989); Burnside-Ott Aviation Training Ctr., Inc. v. United States, 985 F.2d 1574, 1581 (Fed. Cir. 1993); United States v. Lewis, 964 F. Supp. 1513, 1521 (D. Kan. 1997); Louis Scherzer Partners, LP v. FDIC, 885 F. Supp. 1415, 1417 (D. Or. 1995); Ryan, Klimek, Ryan Partnership v. Royal Ins. Co. of America, 728 F. Supp. 862, 870 (D.R.I. 1990); In re The Dow Co. "Sarabond" Prods. Liability Litig., 660 F. Supp. 270, 275 (D. Colo. 1987); United States v. Southwestern Elec. Coop., Inc., 676 F. Supp. 897, 899 (S.D. Ill. 1987); Shore Builders, Inc. v. Dogwood, Inc., 616 F. Supp. 1004, 1011 (D. Del. 1985); In re Barrister's Land Co., Inc., 57 B.R. 863, 865 (Bankr. N.D. Miss. 1985); In re Clark Entertainment Group, Inc., 183 B.R. 73, 78 (Bankr. D.N.J. 1995); Knieper v. United States, 38 Fed. Cl. 128, 139 (Fed Cl. 1997); Morris v. United States, 33 Fed. Cl. 733, 747 (Fed. Cl. 1995); Finley v. Liberty Mut. Ins. Co., 456 So. 2d 1065, 1067 (Ala. 1984); Stormont v. Astoria Ltd., 889 P.2d 1059, 1061 (Alaska 1995); Renner v. Kehl, 722 P.2d 262, 265 (Ariz. 1986); Aig Hawaii Ins. Co. v. Bateman, 923 P.2d 395, 399 (Haw. 1996); Maloney v. Sargisson, 465 N.E.2d 296, 299 (Mass. App. Ct. 1984); City of Savage v. Formanek, 459 N.W.2d 173, 175 (Minn. Ct. App. 1990); Gray v. First NH Banks, 640 A.2d 276, 279 (N.H. 1994); Bonnco Petrol, Inc. v. Epstein, 560 A.2d 655, 659 (N.J. 1989); State v. Garley, 806 P.2d 32, 35 (N.M. 1991) (dicta); Reilley v. Richards,

Though generally courts agree that a "mistake of both parties," a "mutual" or "common" mistake, is requisite,[10] they have disagreed how to phrase the seriousness requirement. As alternatives to the second Restatement's "basic assumption [having] material effect" formulation, courts require that the mistaken fact be material,[11] substantial,[12] fundamental,[13] essential,[14]

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632 N.E.2d 507, 509 (Ohio 1994); Fada v. Info. Sys. and Networks Corp., 649 N.E.2d 904, 908 (Ohio Ct. App. 1994); Chemical Bank v. Washington Public Power Supply Sys., 691 P.2d 524, 538 (Wash. 1984).

10. *See, e.g.*, cases cited *supra* note 9 and *infra* notes 11-21, 26-28.

11. *See, e.g.*, Ramsey v. Colonial Life Ins. Co. of America, 12 F.3d 472, 479 (5th Cir. 1994); Roseburg Lumber Co. v. Madigan, 978 F.2d 660, 665 (Fed. Cir. 1992); U.S. Postal Serv. v. Phelps Dodge Refining Corp., 950 F. Supp. 504, 517 (E.D. N.Y. 1997); Matlock v. National Union Fire Ins. Co. of Pittsburgh, 925 F. Supp. 468, 474 (E.D. Tex. 1996); R.J. Wildner Contr. Co. v. Ohio Tumpike Comm'n, 913 F. Supp. 1031, 1041 (N.D. Ohio 1996); In re Victory Markets Inc., 202 B.R. 668, 673 n.3 (Bankr. N.D. N.Y. 1996); Merced County Mutual Fire Ins. Co. v. State, 284 Cal. Rptr. 680, 684 (Cal. Ct. App. 1991); Dainty Rubbish Serv., Inc. v. Beacon Hill Ass'n, Inc., 630 A.2d 115, 119 (Conn. App. Ct. 1993); Eubanks v. CSX Transp., Inc., 478 S.E.2d 387, 390 (Ga. Ct. App. 1996); Metropolitan Property and Cas. Ins. Co. v. Dillard, 487 S.E.2d 157 (N.C. Ct. App. 1997); Shop'N Save Warehouse Foods, Inc. v. Soffer, 918 S.W.2d 851, 862 (Mo. Ct. App. 1996); Pharmacia Hepar, Inc. v. City of Franklin, 676 N.E.2d 587 (Ohio Ct. App. 1996); Hampton v. Surety Dev. Corp., 817 P.2d 1273, 1274 (Okla. 1991); Vernon v. Steven L. Mabe Builders, 430 S.E.2d 676, 680 (S.C. Ct. App. 1993); Knudsen v. Jensen, 521 N.W.2d 415, 418 (S.D. 1994); de Monet v. Pera, 877 S.W.2d 352, 356-57 (Tex. App. 1994); Great American Ins. Co. v. North Austin Mun. Util. Dist. No. 1, 902 S.W.2d 488, 499-500 (Tex. App. 1993); *see also generally, e.g.*, 26 C.F.R. § 301.7122-1(c) (1997) (referring to "mutual mistake of a material fact sufficient to cause a contract to be . . . set aside"). "Material" was the term used in the first Restatement. *See* Restatement of Contracts § 502 (1932).

12. *See, e.g.*, Allen v. Westpoint-Pepperell, Inc., 933 F. Supp. 261, 268 (S.D. N.Y. 1996); *USPS*, 950 F. Supp. at 516 ("substantial and fundamental"); The Indep. Order of Foresters v. Donaldson, Lufkin & Jenrette Inc., 919 F. Supp. 149, 153 (S.D. N.Y. 1996); Bailey v. Ewing, 671 P.2d 1099, 1102 (Idaho 1983) ("substantial and fundamental"); Carpenter v. Vreeman, 409 N.W.2d 258, 261 (Minn. Ct. App. 1987) ("subject matter of the contract, or some substantial part thereof"); South v. Transportation Ins. Co., 913 P.2d 233, 235 (Mont. 1996); Weissman v. Bondy & Schloss, 660 N.Y.S.2d 115, 116 (N.Y. App. Div. 1997); P.K. Dev., Inc. v. Elvem Dev. Corp., 640 N.Y.S.2d 558, 559-60 (N.Y. App. Div. 1996); D'Agostina v. Harding, 629 N.Y.S.2d 524, 526 (N.Y. App. Div. 1995); Loveday v. Cate, 854 S.W.2d 877, 879 (Tenn. Ct. App. 1992) ("substantial and fundamental"); *deMonet*, 877 S.W.2d at 357 ("subject matter of the contract and the substance thereof").

13. *See, e.g.*, Sheng v. Starkey Labs., Inc., 117 F.3d 1081, 1083 (8th Cir. 1997) ("fundamental subject matter or terms"); Costello v. Sykes, 172 N.W. 907, 910 (Minn. 1919) (Hallam, J., dissenting); Copland v. Nathaniel, 624 N.Y.S.2d 514, 518 (N.Y. Sup. Ct. 1995); In re Marriage of Murray, 852 P.2d 204, 205 (Or. Ct. App. 1993); *Knudsen*, 521 N.W.2d at 418; *Loveday*, 854 S.W.2d at 879 ("substantial and fundamental"); *see also* cases cited in the immediately preceding footnote employing the terms "substantial and fundamental."

14. *See, e.g.*, United States v. Barnes, 83 F.3d 934, 938 (7th Cir. 1996); Wilson v. Massachusetts Indem. & Life Ins. Co., 920 F.2d 1548, 1551 (10th Cir. 1990); In re Rothman, 204 B.R. 143, 153 (Bankr. E.D. Pa. 1996); In re Allegheny Int'l, Inc., 158 B.R. 343, 350 (Bankr. W.D. Pa. 1992) (reporting Ohio law); Hartford v. Industrial Comm'n of Arizona, 870 P.2d 1202, 1207 (Ariz. Ct. App. 1994); In re Appraisal of Enstar Corp., 593 A.2d 543, 551 (Del. Ch. 1991) (finding mistake "neither material nor essential"); Stewart v. Thrasher, 610 N.E.2d 799, 805 (Ill. App. Ct. 1993); Jackson v. Blanchard, 601 N.E.2d 411, 418 (Ind. Ct. App. 1992) ("material or essential"); Clayton X-ray Co. v. Evenson, 826 S.W.2d 45, 47 (Mo. Ct. App. 1992); Gocek v. Gocek, 612 A.2d

vital,[15] the *sine qua non* or efficient cause of the contract,[16] or going "to the heart of the bargain" or transaction,[17] to the subject matter of the contract (as opposed to something incidental),[18] or to the "very nature of the purchase,"[19] or that the mistake result in some hardship.[20] Some courts use more than one of these terms.[21]

Courts and commentators have found this requirement of seriousness difficult to understand and apply. Foulke said in 1911: "The law on this point is

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1004, 1006 (Pa. Super. Ct. 1992); Vrabel v. Scholler, 85 A.2d 858, 860 (Pa. 1952) ("essence, the sine qua non of the contract"); *Knudsen*, 521 N.W.2d at 418 ("It must go to the essence of the object in view, and not be merely incidental."); Jennings v. Jennings, 409 S.E.2d 8, 12 (Va. Ct. App. 1991); *see also* 1 Joseph Story, Commentaries on Equity Jurisprudence, as Administered in England and America 157 (1836) ("In cases of mutual mistake, going to the essence of the contract, it is by no means necessary, that there should be any presumptive fraud. On the contrary, Equity will often relief, however innocent the parties may be.").

15. *See, e.g.*, United States v. Fowler, 913 F.2d 1382, 1389 (9th Cir. 1990) (reviewing Idaho law); McLaughlin v. Jung, 859 F.2d 1310, 1313 (7th Cir. 1988); Al Copeland Enterp. v. Schwab, 726 F. Supp. 254, 255 (E.D. Mo. 1989); In re Franklin County Visiting Nurses Ass'n, Inc., 73 B.R. 280, 282 (Bankr. N.D. Fla. 1987); Mar-Char Enterp. v. Charlie's The Lakes Restaurant, Inc., 451 So. 2d 930, 930 (Fla. Dist. Ct. App. 1984); Hines v. Hines, 934 P.2d 20, 26 (Idaho 1997); Showalter, Inc. v. Smith, 629 N.E.2d 272, 275 (Ind. Ct. App. 1994); Dover Pool & Racquet Club, Inc. v. Brooking, 322 N.E.2d 168, 170-71 (Mass. 1975) (employing both *basic assumption* and *vital*); Saline County v. Thorp, 88 S.W.2d 183, 185 (Mo. 1935); South v. Transportation Ins. Co., 913 P.2d 233, 235 (Mont. 1996); Gramanz v. Gramanz, 930 P.2d 753, 758 (Nev. 1997); S.J. Groves & Sons & Co. v. State, 273 S.E.2d 465, 495 (N.C. Ct. App. 1980); Ranger Ins. Co. v. Globe Seed & Feed Co., 865 P.2d 451, 456 (Or. Ct. App. 1993); Warner v. Sirstins, 838 P.2d 666, 669 (Utah 1992); Downing v. Stiles, 635 P.2d 808, 812 (Wyo. 1981).

16. *See, e.g.*, Howell v. Waters, 347 S.E.2d 65, 69 (N.C. Ct. App. 1986); *Vrabel*, 85 A.2d at 860 ("essence, the sine qua non of the contract").

17. *See, e.g.*, Harbor Ins. Co. v. Stokes, 45 F.3d 499, 501 (D.C. Cir. 1995); Bituminous Coal Operators' Ass'n, Inc. v. Connors, 867 F.2d 625, 635 (D.C. Cir. 1989); Onsite/Molokai Ltd. Partnership v. GE, 838 F. Supp. 1390, 1396 (D. Haw. 1992); Palumbo v. Ewing, 540 F. Supp. 388, 393 (D. Del. 1982); Allstate Ins. Co. v. National Tea Co., 323 N.E.2d 521, 528 (Ill. App. Ct. 1975); Childers v. Alexander, 571 P.2d 591, 594 n.2 (Wash. Ct. App. 1977); Davey v. Brownson, 478 P.2d 258, 260 (Wash. Ct. App. 1971) ("heart of the subject matter of the transaction").

18. *See, e.g.*, Horner v. Bourland, 724 F.2d 1142, 1145 (5th Cir. 1984); Sheng v. Starkey Laboratories, Inc., 117 F.3d 1081, 1083(8th Cir. 1997) ("fundamental subject matter or terms"); Texas Dep't of Housing & Community Affairs v. Verex Assurance, Inc., 68 F.3d 922, 931 (5th Cir. 1995); Harding v. Willie, 458 N.W.2d 612, 614 (Iowa Ct. App. 1990) ("material . . . in respect to the subject-matter"); Reilley v. Richards, 632 N.E.2d 507, 509 (Ohio 1994) ("material to the subject matter"); Durham v. Uvalde Rock Asphalt Co., 599 S.W.2d 866, 870 (Tex. App. 1980); Rancourt v. Berba, 678 A.2d 886, 887 (Vt. 1996) ("material fact affecting the subject matter").

19. *See, e.g.*, Beasley v. Medin, 479 N.W.2d 95, 98 (Minn. Ct. App. 1992).

20. *See* John Burns Constr. Co. v. Interlake, Inc., 433 N.E.2d 1126, 1130 (Ill. App. Ct. 1982) (requiring the mistake to be "of such grave consequence that enforcement of the contract would be unconscionable").

21. *See, e.g.*, Monet v. PERA, 877 S.W.2d 352, 357 (Tex. App. 1994), which required in quite non-technical fashion that the mistaken fact "involve[] the subject matter of the contract and the substance thereof," be material and not relate "merely to a collateral matter," and be "essential to an understanding of the consequences of the agreement." *See also, e.g.*, cases cited *supra* note 12 employing terms "substantial and fundamental."

probably as yet undeveloped, and we have not collected enough cases to enable us to make any definite statement as to the principle involved."[22] More recently, commentators have called the element troublesome[23] and imprecise.[24] The Restatement (Second) of Contracts (and Professor Farnsworth's hornbook) opts to give examples of the requirement's application rather than any definition or guiding principle.[25]

However, a review of the case law establishes some consistent patterns of application. Courts employ American mutual mistake to resolve a gamut of cases which might appear unrelated at first glance. Mutual mistake applies to warrant relief (or in other words, a factual assumption is found to be basic, essential, etc.) most often when the mistake results in present impossibility or impracticability of performance,[26] present frustration,[27] or a gross undercutting of the equivalence of the parties' exchange.[28] Though not previously explicated

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22. Roland R. Foulke, *Mistake in the Formation and Performance of a Contract*, 11 Colum. L. Rev. 197, 299, 222-23 (1911).

23. Eric Rasmusen & Ian Ayres, *Mutual and Unilateral Mistake in Contract Law*, 22 J. Legal Stud. 309, 322 (1993).

24. Frona M. Powell, *Mistake of Fact in the Sale of Real Property*, 40 Drake L. Rev. 91, 92 (1991).

25. Restatement (Second) of Contracts § 152 & cmts. (1981); E. Allan Farnsworth, Contracts § 9.3 (2d ed. 1990).

26. *See, e.g.*, Draper Mach. Works, Inc. v. Department of Natural Resources, 815 P.2d 770, 778 (Wash. 1991); Rancourt v. Verba, 678 A.2d 886, 887 (Vt. 1996); *see also, e.g.*, Restatement (Second) of Contracts §§ 152 cmt. b ("The term 'basic assumption' has the same meaning here as it does in Chapter 11 in connection with impracticability. . . ."), 261, 262, 263, 266(1) (1981).

27. *See, e.g.*, Ramsey v. Colonial Life Ins. Co. of America, 12 F.3d 472 (5th Cir. 1994); U.S. Postal Serv. v. Phelps Dodge Ref. Corp., 950 F. Supp. 504, 516 (E.D.N.Y. 1997) ("The mistake must be so fundamental that it defeats the object of the contract."); R.J. Wildner Contracting Co. v. Ohio Turnpike Comm'n, 913 F. Supp. 1031, 1041 (N.D. Ohio 1996); Stormont v. Astoria Ltd., 889 P.2d 1059 (Alaska 1995); Copland v. Nathaniel, 624 N.Y.S.2d 514, 518 (N.Y. Sup. Ct. 1995) ("The mistake must be material and fundamental so as to defeat the object of the contract."); Reilley v. Richards, 632 N.E.2d 507 (Ohio 1994); Hampton v. Surety Dev. Corp., 817 P.2d 1273 (Okla. 1991); In re Marriage of Murray, 852 P.2d 204, 205 (Or. Ct. App. 1993) ("Mutual mistake is a ground for rescission . . . if the mistake is so fundamental that it frustrates the purpose of the contract."); Loveday v. Cate, 854 S.W.2d 877 (Tenn. Ct. App. 1992); *see also, e.g.*, Hartle v. United States, 22 Cl. Ct. 843, 846-47 (1991); Thieme v. Worst, 745 P.2d 1076, 1079-81 (Idaho Ct. App. 1987); Murr v. Selag Corp., 747 P.2d 1302, 1305-07 (Idaho Ct. App. 1987); Winter v. Skoglund, 404 N.W.2d 786 (Minn. 1987); City of Savage v. Formanek, 459 N.W.2d 173, 175-76 (Minn. Ct. App. 1990); A.T. Switzer Co. v. Midwestern Constr. Co. of Mo., 670 S.W.2d 69, 70-71 (Mo. Ct. App. 1984); Hillside Assocs. of Hollis, Inc. v. Maine Bonding & Cas. Co., 605 A.2d 1026, 1030-31 (N.H. 1992); Chemical Bank v. Washington Pub. Power Supply, 691 P.2d 524, 538 (Wash. 1984); *see generally* Restatement (Second) of Contracts §§ 152 cmt. b ("The term 'basic assumption' has the same meaning here as it does in Chapter 11 in connection with . . . frustration."), 265, 266(2) (1981).

28. *See, e.g.*, In re Clark Entertainment Group, Inc., 183 B.R. 73, 78 (Bankr. D.N.J. 1995); In re Allegheny Int'l, Inc., 158 B.R. 343, 350-51 (Bankr. W.D. Pa. 1992); Bailey v. Ewing, 671 P.2d 1099 (Idaho Ct. App. 1983); Showalter, Inc. v. Smith, 629 N.E.2d 272, 275 (Ind. Ct. App. 1994) ("[T]he transaction may be avoided if because of the mistake a quite different exchange of values occurs from the exchange of values contemplated by the parties."); Garb-Ko v. Lansing-Lewis Serv., Inc., 423 N.W.2d 355, 357-58 (Mich. Ct. App. 1988); South v. Transportation Ins. Co., 913 P.2d 233

in such short form, these three categories explain most of the case law.[29] I am not the first to notice these strong patterns of application. They lurked about the case reports throughout the nineteenth and this century. They were noted by

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(Mont. 1996); D'Agostino v. Harding, 629 N.Y.S.2d 524, 526 (N.Y. App. Div. 1995); Showalter, Inc. v. Smith, 629 N.E.2d 272, 275 (Ind. Ct. App. 1994); *see also* Edward H. Rabin, *A Proposed Black-Letter Rule Concerning Mistaken Assumptions in Bargain Transactions*, 45 Tex. L. Rev. 1273 (1967); *see generally* Restatement (Second) of Contracts § 152(1) (1981) (requiring that the mistake have a "material effect on the agreed exchange").

29. Recently Professor Andrew Kull suggested that a "windfall principle," namely that courts leave unallocated losses where they find them, "frequently resolve[s]" mutual mistake cases. Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 Hastings L.J. 1, 9-11 (1991). Kull agrees that mutual mistake overlaps with present frustration in application (*see, e.g., id.* at 2-3) but argues that courts do not adjust losses after finding mutual mistake. With due respect for Professor Kull, I do not see the same results in the American cases. The so-called "windfall" principle Kull suggests seems to apply whenever courts do not grant relief for mutual mistake. Given lawyers' penchant for bringing these mutual mistake claims, this occurs often. Usually it occurs because courts find the parties have assumed the risk of a mistake, but it can also occur because the lawyer is trying to expand mutual mistake beyond its traditional bounds of application. To see in a refusal to grant relief a hidden principle of "windfall" is unwarranted. Until courts articulate such a windfall principle in mutual mistake cases, seeing it there is merely to mistake concomitance for causation.

Kull also opines that courts do not generally grant relief after performance has begun and that the executory contract is more likely to be rescinded. Kull, *supra*, at 10-11. Rescission, the traditional remedy for American mutual mistake, is not generally available when the parties can not be placed in their original positions, however. This traditional rule of equity, rather than a windfall principle, probably accounts for hesitancy to grant relief after execution, when it is far more difficult to account for all of the costs of performance. However, despite this difficulty, courts often do not leave losses where they find them but order restitution in mutual mistake cases. *See, e.g.*, J.J.B. Hilliard v. Fox, 735 F. Supp. 674 (W.D. Va. 1990); Link v. Dowdy, 816 S.W.2d 927 (Mo. Ct. App. 1991); French Energy, Inc. v. Alexander, 818 P.2d 1234, 1237-38 (Okla. 1991); Isaacs v. Bokor, 566 S.W.2d 532 (Tenn. 1978); Stryken v. Panell, 832 P.2d 890 (Wash. Ct. App. 1992). The cases are numerous. Indeed, considering that mistake was a traditional ground for relief in the action for money had and received, I would be surprised were they not numerous. A more complete view of the case law thus shows that the windfall principle's results are not even concomitant with those of mutual mistake.

Perhaps Kull's windfall principle applies to the mutual mistake or common mistake doctrine employed in the United Kingdom, where mutual mistake did not form fully until after classical contract law reached its zenith in the United Kingdom courts. Possibly mutual mistake did not truly develop in the United Kingdom until Bell v. Lever Bros., Ltd., App. Cas. 161 (A.L. 1932). By that time, United Kingdom courts had also developed doctrines of supervening impossibility and frustration, in which United Kingdom courts and parliament had recognized that a windfall rule operated. *See, e.g.*, Taylor v. Caldwell, 122 Eng. Rep. 309 (K.B. 1863) (impossibility); Krell v. Henry, 2 K.B. 740 (1903) (frustration); Kull, *supra*, at 34-35 and n.122. The windfall principle was (and is) not part of generally recognized American mutual mistake, however. Here, mutual mistake's much earlier genesis in equity and in the action for money had and received precluded its application to protect one party unless the other could be placed back in its original position. *See infra* Part II. Moreover, mutual mistake's close ties to restitution even encouraged courts to order money to change hands, in order to balance losses between parties. Kull notes that in the end English law dropped the windfall principle and in its place adopted the restitutionary remedy. Kull, *supra*, at 34-35. Ironically, the remedy the English courts adopted recognizes that mistake is akin to a failure of consideration warranting restitution, *see id.*, a fact American courts realized and put to general use in the early 1800s. *See* Part II.D.2.

McKeag (1905),[30] Foulke (1911),[31] Palmer (1962),[32] Rabin (in part) (1967),[33] and the reporters to the second Restatement (1981).[34]

Some categories of cases have been thought difficult to group with those listed here. For example, courts have given mutual mistake relief when a vendor and purchaser contract for a certain number of acres of land but the tract transferred does not contain that number.[35] Courts traditionally grant relief in

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30. Edwin C. McKeag, Mistake in Contract: A Study in Comparative Jurisprudence 77-84, 124 (Columbia Univ. Press 1905) (noting the relationship between mistake and impossibility and concluding that "mistake is not the dominant factor" in these cases; noting also that American mistake doctrine recognizes mistake-in-motive).

31. Foulke, *supra* note 22, at 221-23 (recognizing that impossibility of performance and something like unjust enrichment underlie many of the cases).

32. George E. Palmer, Mistake and Unjust Enrichment 35-39 (Ohio State 1962) (recognizing that mutual mistake doctrine has been mostly applied in cases of present impossibility, frustration, and unjust enrichment).

33. Rabin, *supra* note 28, at 1288-91 (recognizing that a principle of "gross inequality of exchange" explains many cases).

34. The Restatement (Second) of Contracts recognizes these three categories. Its definition of mutual mistake requires that the mistake have a "material effect on the agreed exchange," for instance, Restatement (Second) of Contracts § 152(1) (1981), which takes in cases in which the exchange of the parties is grossly undercut. However, reference to frustration and impossibility is inartfully buried in the comments to § 152: "The term 'basic assumption' has the same meaning here as it does in Chapter 11 in connection with impracticability (§§ 261, 266(1)) and frustration (§§ 265, 266(2)). See Uniform Commercial Code § 2-615(a)." Restatement (Second) of Contracts § 152 cmt. b (1981). As a result, few courts have seen the connection between mistake and frustration and impossibility. Most courts employing the Restatement (Second)'s terminology for mistake simply decide frustration and impossibility cases under the rubric of "basic assumption." *See generally, e.g.*, many of the cases granting relief for mutual mistake listed in the preceding footnotes.

Professor Farnsworth claims that the Restatement (Second)'s phrase "basic assumption," a word referring to the "seriousness" requirement of mutual mistake, comes from the Uniform Commercial Code section on impracticability. Uniform Commercial Code § 2-615; *see* Farnsworth, *supra* note 25, at § 9.3; *see also* John E. Murray, Jr., Murray on Contracts § 91.D.1 (3d ed. 1990). Probably this phrase floated about contract and commercial law for years in discussions. The earliest I have seen it, however, is in Foulke's 1911 article on mutual mistake. It appears in the midst of Foulke's attempt to explain mutual mistake cases in which he sees a tie to unjust enrichment. He says presciently, "[I]t may be said that there is injustice when the parties have mutually made the same assumption as the basis of the formation of the contract, and it subsequently turns out that the fact is otherwise . . . ." Foulke, *supra* note 22, at 223. This usage is foreshadowed by William W. Story: "Where there is a mutual mistake, as to a fact forming the basis of the contract, the contract will be void . . . ." William W. Story, A Treatise on the Law of Contracts, Not Under Seal 69 (Little, Brown 1844).

35. *See generally, e.g.*, Speedway Enter., Inc. v. Hartsell, 251 P.2d 641 (Ariz. 1952); Dixon v. Morse, 463 P.2d 284 (Idaho 1970); Hagenbuch v. Chapin, 500 N.E.2d 987 (Ill. Ct. App. 1986); Overly v. Treasurer and Receiver Gen., 181 N.E.2d 660 (Mass. 1962); Ewing v. Bissell, 777 P.2d 1320 (Nev. 1989); Little Stillwater Holding Corp. v. Cold Brook Sand & Gravel Corp., 573 N.Y.S.2d 382 (Cty. Ct. 1991); Seyden v. Frade, 494 P.2d 1281 (Nev. 1972); Mills v. Brown, 568 S.W.2d 100 (Tenn. 1978); Branton v. Jones, 281 S.E.2d 799 (Va. 1981); 1 Story, *supra* note 14, at 158; Annotation, *Measure and Elements of Damages Recoverable from Vendor Where There Has Been Mistake as to Amount of Land Conveyed*, 94 A.L.R.3d 1091 (1979) [hereinafter Annotation, *Damages for Mistake in Acreage*]; Annotation, *Relief by Way of Rescission or Adjustment of Purchase Price*

such cases for mutual mistake when the price in the contract was set "per acre" rather than "in gross" or for a lump sum.[36] These cases are consistent with the categories set forth above. When the vendor agrees to sell more than he has, he is prevented by present impossibility of performance. Alternatively, the exchange is grossly undercut as to the mistaken acres, for the purchaser pays for them in exchange for nothing.[37] When the lot sold actually contains more acres than the purchaser agrees to buy, the parties' exchange is grossly undercut as to the excess acreage, for the vendor transfers them in exchange for nothing.[38]

Another prominent and more difficult use of mutual mistake doctrine is proposed by parties seeking to set aside a prior settlement of a lawsuit.[39] Frequently an injured party will argue that when settling it had injuries or claims of which neither party knew.[40] A number of courts grant relief in such cases if certain injuries were unknown but not if merely the extent of known injuries was mistaken.[41] Other courts disallow relief from settlements for mere mutual mistake.[42] These cases fit well in either the frustration-of-purpose category or the gross-undercutting-of-the-exchange category. Whether relief is granted depends on the parties' and the courts' view as to the purpose of, or the exchange contemplated by, the settlement agreement at issue.[43]

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for Mutual Mistake as to Quantity of Land, Where the Sale is in Gross, 1 A.L.R.2d 9 (1948) [hereinafter Annotation, *Relief from Sale in Gross*]; Annotation, *Relief, by Way of Rescission or Adjustment of Purchase Price, for Mutual Mistake as to Quantity of Land, Where Contract of Sale Fixes Compensation at a Specified Rate Per Acre or Other Area Unit*, 153 A.L.R. 4 (1944) [hereinafter Annotation, *Relief for Mistake of Acres*]; 77 Am. Jur. 2d, *Vendor and Purchaser* §§ 58, 92, 107, 109 (1997).

36. *See, e.g.*, *Speedway Enter.*, 251 P.2d at 646; *Dixon*, 463 P.2d at 285; *Hagenbuch*, 500 N.E.2d at 989-91; *Ewing*, 777 P.2d at 1323; *Seyden*, 494 P.2d at 1282; *Mills*, 568 S.W.2d at 102; *Branton*, 281 S.E.2d at 801. The parties assume the risk of incorrect acreage when the sale is made in gross. *Branton*, 281 S.E.2d at 801. This rule is well-established, though it is subject to certain exceptions. *See generally, e.g.*, Annotation, *Damages for Mistake in Acreage*, *supra* note 35; Annotation, *Relief from Sale in Gross*, *supra* note 35; Annotation, *Relief for Mistake of Acres*, *supra* note 35.

37. *See, e.g.*, *Dixon*, 463 P.2d at 286-87; *Hagenbuch*, 500 N.E.2d at 989-91; *Ewing*, 777 P.2d at 1324.

38. *See, e.g.*, McGeorge v. White, 174 S.W.2d 532 (Ky. Ct. App. 1943).

39. *See generally, e.g.*, Michael A. DiSabatino, Annotation, *Modern Status of Rules as to Avoidance of Release of Personal Injury Claim on Ground of Mistake as to Nature and Extent of Injuries*, 13 A.L.R.4th 686, 691 (1982) (listing hundreds of cases) ("The great weight of authority is that a release of claims for personal injuries may be avoided under appropriate circumstances on grounds of mutual mistake of the parties at the time of signing the release as to the nature and extent of injuries.").

40. *Id.*

41. *Id.* § 5.

42. *Id.* § 3[b].

43. *See, e.g.*, Williams v. Glash, 789 S.W.2d 261, 264 (Tex. 1990) (calling for an analysis of the intention of the parties and the circumstances under which the agreement was reached); *compare id. with id.* at 265-67 (Spears, J., joined by Cook and Hecht, JJ., dissenting) (suggesting that the proper function of the courts in these cases is to balance peaceful settlement of disputes with policies favoring just compensation of accident victims).

Mutual mistake is distinct from other mistake-related doctrines such as misunderstanding,[44] mistake in performance or payment,[45] mistake in transcription,[46] and unilateral mistake.[47] The rationales and policies which animate these other doctrines differ from those guiding mutual mistake, and these doctrines generally apply to fact scenarios other than those covered by mutual mistake.[48] Moreover, these doctrines have a different history than mutual mistake. They therefore lie outside the scope of this article. The volume and complexity of material covered here requires a narrower scope.

B. Rationale

Mutual mistake's ambiguous doctrine and broad, seemingly unconnected applications have prompted a number of courts and commentators to theorize as to mutual mistake's rationale. Most recently, American mutual mistake has been deconstructed[49] and subjected to economic analysis.[50] Economic analysis

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44. The doctrine of misunderstanding is exemplified by the case of the ships Peerless: Raffles v. Wichelhaus, 2 H. & C. 906 (1864). In that case, a buyer agreed to buy cotton arriving on the ship Peerless, and the seller agreed to sell cotton arriving on the Peerless, but the parties were referring to different ships, so no contract formed. In a case of misunderstanding, the parties agree to different performances. That is the standard explanation of *Raffles*. *See generally, e.g.*, Restatement (Second) of Contracts §§ 20, 201 (1981); Lon L. Fuller & Melvin Aron Eisenberg, Basic Contract Law 361 (6th ed. 1996); Farnsworth, *supra* note 25, § 7.9; Palmer, *supra* note 32, at 9-13.

45. Palmer aptly illustrates mistake in performance with Simms v. Vick, 65 S.E. 621 (N.C. 1909). In *Simms*, the maker of a $175 note overpaid it by $67.50 because he forgot an earlier payment. The court allowed him to recover the overpayment. *See also, e.g.*, Palmer, *supra* note 32, at 21-30.

46. Mistake in expression or mistake in integration occurs when the parties reach agreement, but in the final, written expression of their agreement express it incorrectly. For this type of mistake, courts generally reform a contract so that it reflects the parties' agreement. Restatement (Second) of Contracts § 155 (1981); Farnsworth, *supra* note 25, § 7.5; Palmer, *supra* note 32, at 17-21. Mistake in transcription is also often referred to in the case law confusingly as "mutual mistake." *See, e.g.*, Terry Matthews, Inc. v. C&L Contracting, Inc., 959 F. Supp. 1434 (W.D. Okla. 1997); Wedin v. Wedin, 944 S.W.2d 847 (Ark. Ct. App. 1997) (Griffen, J., dissenting); City of Fargo v. D.T.L. Properties, 564 N.W.2d 274 (N.D. 1997); In re Estate of Harford, 936 P.2d 48 (Wash. Ct. App. 1997).

47. The elements of unilateral mistake are generally written to be similar to those of mutual mistake, except that only one party need be mistaken as to the assumption and some additional hardship must be shown and/or the other party must have known or had reason to know of the mistake. *See generally, e.g.*, Restatement (Second) of Contracts § 153 (1981); Farnsworth, *supra* note 25, § 9.4; Palmer, *supra* note 32, at 88-98.

48. *See, e.g.*, Palmer, *supra* note 32; Foulke, *supra* note 22; *see also generally* John D. Calamari & Joseph M. Perillo, The Law of Contracts §§ 9-26 to 9-36 (3d ed. 1987).

49. Kenneth L. Schneyer, *The Culture of Risk: Deconstructing Mutual Mistake*, 34 Amer. Bus. L.J. 429 (1997).

50. Rasmusen & Ayres, *supra* note 23, at 309; Janet K. Smith & Richard L. Smith, *Contract Law, Mutual Mistake, and Incentives to Produce and Disclose Information*, 19 J. Legal Stud. 467 (1990); Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. Legal Stud. 1 (1978); Richard A. Posner, Economic Analysis of Law 90-103 (3d ed. 1986).

yields inconclusive results as to mutual mistake's efficiency: the doctrine can be applied efficiently or not.[51] Some have suggested that relief for mutual mistake must be available in contract law, even though sometimes applied inefficiently overall, to lower the potential risks of transacting or at least to bolster the perception that courts will sanction the reasonable actions of contracting parties.[52]

Holmes thought that a contract induced by mutual mistake contained a contradiction in terms.[53] In Holmes' view, Walker sold Sherwood "Rose the mere beef cow," but Rose was not a mere beef cow, so the term "Rose" conflicted with "mere beef cow."[54] Such a contract is "void," Holmes said, "because two of its essential terms are repugnant, and their union is insensible."[55] By this explanation, Holmes reduced a contract induced by mutual mistake to an agreement to absurdity. Because an absurdity, by definition, means nothing coherently, the parties have objectively agreed to nothing and no contract forms. Mutual mistake is, therefore, a failure of the parties objectively to assent.[56]

Perhaps Holmes' reasoning influenced later courts to state that a contract induced by mutual mistake failed to show a "meeting of the minds." Cases citing a "meeting of the minds" rationale abound.[57] "Meeting of the minds" commonly

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51. Rasmusen & Ayres, *supra* note 23, at 339.

52. Students have suggested these rationales in my contracts classes.

53. Oliver Wendell Holmes, The Common Law 242-45 (Mark DeWolfe Howe ed., 1963).

54. *See id.* at 243.

55. *Id.*

56. Holmes reduced many complicated contract questions to failure of objective assent. Holmes' most infamous reduction involves Raffles v. Wichelhaus, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864), the case of the two ships Peerless. Seller and buyer contracted for the sale of cotton on board "the Peerless," when that ship arrived in port. At least two *Peerlesses* existed, however, and the seller meant one and the buyer the other. The court declined to enforce the contract without giving a *ratio decidendi*. *Id.* Holmes thought that the parties had disagreed objectively, by agreeing for objectively different ships. Later commentators have seen *Raffles* as a case of subjective, not objective, disagreement, because the parties did appear objectively to agree. Professor Eisenberg criticizes Holmes: "Holmes had it backward: the result in *Peerless* is correct because the parties meant different things, not because they said different things." Fuller & Eisenberg, *supra* note 44, at 361. Holmes believed that the meaning of a proper name was the object to which it corresponded, however, not what the speaker intended to mean by it. Holmes, *supra* note 53, at 242, 245 n.7. Under such a theory of meaning, the parties said different things. Holmes concedes that such a theory of meaning can result in confusion, as in *Raffles*. *Id.*

57. *See, e.g.*, Independent Order of Foresters v. Donaldson Lufkin & Jenrette Inc., 919 F. Supp. 149, 153 (S.D.N.Y. 1996) ("The purpose behind a claim of mutual mistake is to rescind an agreement between the parties that does not reflect a 'meeting of the minds.'"); Sabine Corp. v. Ong Wester, Inc., 725 F. Supp. 1157, 1189 (W.D. Okla. 1989); In re Barrister's Land Co., Inc., 57 B.R. 863, 866-67 (Bankr. N.D. Miss. 1985); Badgley v. United States, 31 Fed. Cl. 508, 512 (Fed. Cl. 1994); Marengo Fed. Sav. & Loan Ass'n v. First Nat'l Bank of Woodstock, 527 N.E.2d 121, 124 (Ill. App. Ct. 1988); Wilkin v. 1st Source Bank, 548 N.E.2d 170, 172 (Ind. Ct. App. 1990); Harding v. Willie, 458 N.W.2d 612, 614 (Iowa Ct. App. 1990); Bouchard v. Blunt, 579 A.2d 261, 263 (Me. 1990); LaFleur v. C.C. Pierce Co., 496 N.E.2d 827, 830-31 (Mass. 1986); Jeselsohn v. Park Trust Co., 135 N.E. 315, 317 (Mass. 1922); Melia v. Riina, 612 N.Y.S.2d 506, 508 (N.Y. App. Div. 1994); Hampton v. Surety Dev. Corp., 817 P.2d 1273, 1274-75 (Okla. 1991); Madill Bank & Trust Co. v.

refers to the parties' subjective agreement,[58] though courts today sometimes understand the term objectively, as Holmes would urge.[59] Perhaps Holmes' influence remains strong here, for this explanation for mutual mistake is probably more objectionable than any other[60] and some account must be made for its

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Herrmann, 738 P.2d 567, 572-73 (Okla. Ct. App. 1987); Knudsen v. Jensen, 521 N.W.2d 415, 418 (S.D. 1994) (noting that the mistake "must be so fundamental in character that because of it the minds of the parties did not meet").

58. Murray, *supra* note 34, § 30; E. Allan Farnsworth, *"Meaning" in the Law of Contracts*, 76 Yale L.J. 939, 943-44 (1967). That is also the traditional meaning. In the nineteenth century, when subjective assent was often considered necessary to contract formation, subjective "meeting of the minds" was spoken of occasionally as if objective assent were irrelevant. *See, e.g.*, Dickinson v. Dodds, 2 Ch. D. 463 (1876); Cooke v. Oxley, 3 T.R. 653, 100 Eng. Rep. 785 (K.B. 1790).

59. *See* Murray, *supra* note 34, § 30.

60. The meeting of the minds rationale is objectionable for several reasons. First, failure of contracting parties' minds to meet, in the sense meant by Holmes, means that no contract formed. Holmes appears to concede as much. Holmes, *supra* note 53, at 242-43. But courts almost uniformly hold that mutual mistake renders a contract voidable, not void. *See* Kline v. Cisneros, 76 F.3d 1236, 1239 n.3 (D.C. Cir. 1996); Lloyd v. FDIC, 812 F. Supp. 293, 298 (D.R.I. 1993); Feaster v. First Fed. Savs. Bank of Kansas, 723 F. Supp. 1413, 1416 (D. Kan. 1989) ("[U]nder the doctrine of mutual mistake the contract would be voidable, not void."); Tilbury v. Osmundson, 352 P.2d 102, 104 (Colo. 1960); Sargent v. Coolidge, 399 A.2d 1333, 1345 (Me. 1979); Maloy v. Smith, 341 P.2d 912, 915 (Okla. 1959) ("A deed procured through . . . mutual mistake is not void but voidable."); Kipp v. Agee, 457 P.2d 673, 676 (Wyo. 1969) ("[M]utual mistake renders a contract merely voidable and not void."); *see also* Stormont v. Astoria Ltd., 889 P.2d 1059, 1061 (Alaska 1995); Rekis v. Lake Minnewaska Mountain Houses, Inc., 573 N.Y.S.2d 331, 335 (N.Y. App. Div. 1991). Thus, either such contracts can form without mutual assent, as Holmes used "assent," or mutual mistake does not cause a failure of the parties' minds to meet objectively. Further, if the "minds met" notion refers to subjective agreement, it is (or should be) irrelevant. In most cases, the subjective assent of at least one party to an agreement is not strictly necessary under current contract law (at least the other party must assent to a contract, or no one will enforce the agreement). *See, e.g.*, Embry v. Hargadine, McKittrick Dry Goods Co., 105 S.W. 777 (Mo. Ct. App. 1907); Lucy v. Zehmer, 84 S.E.2d 516 (Va. 1954); Farnsworth, *supra* note 25, §§ 3.6, 3.7.

Second, unless one holds to the objective correspondence theory of meaning espoused by Holmes, *see supra* note 56, the parties' minds actually do meet in the formation of a contract induced by mutual mistake. The parties make the same mistake, or the doctrine does not apply. Third, that rationale confuses mutual mistake with misunderstanding, i.e., the case of Raffles v. Wichelhaus, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864) (the case of the two ships *Peerless*). In *Raffles* the parties minds truly did not meet subjectively, and that failure prevented contract formation. Possibly the "minds not met" rationale made its way into mutual mistake cases when judges who did not understand the difference between the two doctrines conflated them. Fourth, the rationale is historically irrelevant. Mutual mistake doctrine was more or less fully formed by 1823. *See infra* text accompanying notes 287-319. No mention of "meeting of the minds" occurs in mistake law prior to or concurrent with that time. Finally, Holmes' rationale would render the mutuality of the mistake irrelevant.

Holmes is at least in good company. Samuel Pufendorf spoke of error similarly in 1673:

> When an error has arisen in regard to the very thing which was the object of the agreement, the latter is vitiated, not so much on account of the error, as because the terms of the agreement were not satisfied. For in agreements the object in regard to which they agree, and its qualities, ought to be known, without which knowledge clear consent is unintelligible.

popularity. Professor Hamburger ties mutual mistake to the civil law notion of consensus in contracts, which required understanding of the circumstances surrounding the contract,[61] but *meeting of the minds* fails to include this facet of consensus.

Other courts reason that in a mutual mistake case the parties agree both subjectively and objectively; these courts hold that a mutual mistake does not cause a failure of minds to meet.[62] These courts are more likely to cite a broad, equitable rationale, such as unconscionability,[63] or unjust enrichment,[64] or even unfairness or injustice.[65] Clearly courts are searching for an all-encompassing rationale.

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2 Samuel von Pufendorf, De Officio Hominis et Civis Juxta Legem Naturalem, Libri Duo IX.12 # 51 (Frank G. Moore trans., Oxford 1927) (1673). Pufendorf does not discuss mutual mistakes, but, then, under this rationale they are irrelevant.

61. Philip A. Hamburger, *The Development of the Nineteenth-Century Consensus Theory of Contract*, 7 Law & Hist. Rev. 241 (1989). According to Professor Hamburger, consensus included for civilians a sufficient understanding of the circumstances to preclude mutual mistake. *Id.* at 283.

62. *See, e.g.*, M.R. ex rel. D.R. v. East Brunswick Bd. of Educ., 838 F. Supp. 184, 192 (D.N.J. 1993) ("Mutual mistake presumes that the parties have had a meeting of the minds but that at the time of contract both assumed the same misconception as to a basic assumption."); Hartford v. Industrial Comm'n of Arizona, 870 P.2d 1202, 1207 (Ariz. Ct. App. 1994).

63. *See, e.g.*, Ramsey v. Colonial Life Ins. Co. of America, 12 F.3d 472, 479-80 (5th Cir. 1994); Fulghum v. Kelly, 340 S.E.2d 589, 591 (Ga. 1986); Romine, Inc. v. Savannah Steel Co., 160 S.E.2d 659, 660 (Ga. Ct. App. 1968); Keller v. State Farm Ins. Co., 536 N.E.2d 194, 200 (Ill. App. Ct. 1989).

64. *See, e.g.*, Reggio v. Warren, 93 N.E. 805, 807 (Mass. 1911); Moritz v. Horsman, 9 N.W.2d 868, 871 (Mich. 1943); *see also, e.g.*, Murray, *supra* note 34, § 91.D.2. Professor George Palmer, prominent author regarding the law of restitution, was chief promoter of the notion that mutual mistake is best explained by unjust enrichment. *See* Palmer, *supra* note 32, at 38. Palmer said, "It is the idea which brings most of the cases together." *Id.* By *unjust enrichment* Palmer meant, however, "lack of economic equivalence, attributable to the mistake." *Id.* Perhaps Professor Palmer's tying mutual mistake to this narrow definition of unjust enrichment prompted Professor Rabin's attempt to define basic assumption to include inequality of exchange such that the parties' bargain is undercut. Rabin, *supra* note 28, at 1273 n.6 (calling Professor Palmer's monograph extremely helpful). Palmer's definition is considerably more narrow than "unjust enrichment" normally carries. Compare Palmer's "lack of economic equivalence, attributable to mistake," with Harper v. McCoy, 276 S.E.2d 782, 784 (S.C. 1981), which employed a more traditional notion: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other . . . . [T]he question is: Did he, to the detriment of someone else, obtain something of value to which he was not entitled." Palmer admits that unjust enrichment is not "always essential to relief." Palmer, *supra* note 32, at 38. In fact, in nearly every place Palmer cites the unjust enrichment rationale as a factor, he also notes that the parties' general expectations of reality must be protected. *Id.* at 38, 47 ("Enforcement in the name of protecting justified contract expectations seems also to defeat such expectations. With the addition of a substantial enrichment of the purchaser, the seller's claim for restitution is hard to resist.").

65. *See, e.g.*, United States v. Lewis, 964 F. Supp. 1513, 1521 (D. Kan. 1997); Harbaugh v. Hausman, 569 N.E.2d 523, 529 (Ill. App. Ct. 1991); Symphony Space, Inc. v. Pergola Properties, Inc., 631 N.Y.S.2d 136, 144 (N.Y. App. Div. 1995) ("justice and fairness"); D'Antoni v. Goff, 383 N.Y.S.2d 117, 119 (N.Y. App. Div. 1976) ("justice and fairnes"); Ray D. Lowder, Inc. v. North Carolina State Highway Comm'n, 217 S.E.2d 682, 696 (N.C. Ct. App. 1975) ("fairness").

Commentators have been only a little more helpful. Most commentators have only stated broadly that the presence of a mutual mistake undercuts the policies for enforcement of a contract. Professor Palmer's book *Mistake and Unjust Enrichment*, for instance, notes tersely: "When mistake in assumptions occurs, the context that shaped the making of the agreement is seen to be false, and if the discrepancy is radical the policies favoring enforcement of contract lose much of their force."[66] Professor Steven Burton's recitation is likewise terse: "There are times when a mistake seems to undermine the authority of a contract as a joint commitment stemming from the parties' autonomous undertakings and enforceable because of their will or because socially beneficial."[67] And Professor Schneyer, focusing on contract's function of allowing us to plan and make more orderly certain areas of our lives, concludes that we need mutual mistake doctrine for protection because such attempts at order are "meaningless if there is truly radical uncertainty about everything."[68]

The plethora of rationales offered indicates that no one knows the "true rationale" for mutual mistake or that one does not exist. Some commentators decry this lack of rationale.[69] Others are content to report cases and decline to try to explain mutual mistake's widely varying applications.[70] Even so, no one has suggested doing away with mutual mistake. Most agree the doctrine is salutary, even though they cannot explain precisely why we have it.

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66. Palmer, *supra* note 32, at 36; *see also id.* at 38 ("The reasons that justify enforcement of contract are much diluted. Eventually they face a serious challenge.").

67. Steven J. Burton, Principles of Contract Law 220 (1995).

68. Schneyer, *supra* note 49, at 452. Professor Schneyer's discussion of the general purposes of contract reflects concerns about contract as a set of social conventions that allow us to order certain areas of our lives. *See id.* at 448-52. Home put the matter this way in the 1700s: "The moral sense would be little concordant with the fallibility of our nature, did it leave me bound . . . ." Home, *supra* note 7, at 201.

Professor Frona Powell suggests that mutual mistake removes the justification for reliance on a promise. Powell, *supra* note 24, at 117-18. Professor Edward Rabin likewise advises that mistake law should "prevent one from profiting from a grossly disparate exchange resulting from the mistake of another" as well as "protect an innocent non-mistaken party from harm flowing from a mistaken party's attempt to rescind a contract honestly and fairly made." Rabin, *supra* note 28, at 1300.

69. Rasmusen & Ayres, *supra* note 23, at 309-14; Foulke, *supra* note 22, at 222-23 ("The law on this point is probably as yet undeveloped, and we have not collected enough cases to enable us to make any definite statement as to the principle involved.").

70. *See, e.g.*, Restatement (Second) of Contracts § 152 & cmts. (1981) (comment a, "Rationale," briefly explains (or merely repeats) some of the terms of § 152 but omits a rationale for the rule); Restatement of Contracts § 502 & cmts. (1932) (same); Farnsworth, *supra* note 25, §§ 9.1-9.3; Calamari & Perillo, *supra* note 48, § 9-26; 13 Walter H.E. Jaeger & Samuel Williston, A Treatise on the Law of Contracts ch. 46 (3d ed. 1970) (listing most imaginably relevant cases but grouping them as to the kind of transaction involved rather than according to the principles applied); Arthur Linton Corbin, Corbin on Contracts chs. 27-29 (2d ed. 1970) (same as Jaeger and Williston); Foulke, *supra* note 22, at 197, 299 (noting the inconsistencies in the use of the doctrine and declining to give a general explanation).

C. *Purposes of this Study*

This study gives a genealogical account of the development of American mutual mistake. History explains its broad applications. History also prompts further study of mutual mistake's rationale—or rationales (I think it unlikely that a doctrine with such an ancient lineage and varied application over so many centuries has now one singular reason for its existence). The willingness of many to comment on mutual mistake without giving a rationale for it is as interesting as the various attempts to rationalize it. Nietzsche claimed that the desire to explain moral actions arose only when "aristocratic value judgments declined."[71] Perhaps we share such "aristocratic value judgments" with our distant legal ancestors and therefore need no explanation for mutual mistake. Indeed, one sees in this study a continuity between the decisions of Roman and later civil courts, English law, and American jurisprudence. Though manifest in different legal form, their concerns are sometimes also our concerns. But first I must make some disclaimers.

D. *Parameters of this Study*

Some parameters on the scope of this study are necessary. First, time and attention limit its focus. It does not trace mutual mistake much after it reached its present formulation and application around 1840. Of course, other developments have occurred since that time, most notably the Restatements. These developments were mostly formal, however, with respect to the elementary doctrine of mutual mistake set forth above. They recognized the case law as it stood and tried to report it, sometimes using new words to express the seriousness element, for instance, but they did not change its substance much. This study reports only the doctrine's genesis, which occurred long before the Restatements and, with respect to the doctrine's application, even before or near the beginning of the rise of classical contract law in America.

Second, the study focuses only on mutual mistake, not other kinds of mistake such as unilateral mistake, mistake in transcription, or misunderstanding.[72] Third, this study does not try to explain non-American mutual mistake. The American doctrine has English, Roman, and French ancestors. American mutual mistake developed in America, however. English mutual mistake law developed later and has since been influenced by developments peculiar to the United Kingdom's largely monolithic court structure.[73] Non-American mistake

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71. Friedrich Nietzsche, On the Genealogy of Morals, Essay 1, section 2 (Walter Kaufman ed. & trans., 1969).

72. These doctrines are distinguished from mutual mistake *supra* notes 44-48.

73. The English doctrine is also called "common mistake." Chitty on Contracts §§ 5-001 to 5-021 (27th ed. 1994); John Cartwright, Solle v. Butcher *and the Doctrine of Mistake in Contract*, 103 L.Q. Rev. 594 (1987). Current English mutual mistake law has been greatly influenced by the decision of Bell v. Lever Bros. Ltd., App. Cas. 161 (H.L. 1932), a House of Lords decision, and

law appears in this study only insofar as it appears relevant to the development of American mutual mistake.

Fourth, this study makes no attempt to explain assumption of risk, a principle the second Restatement purports to make a part of mutual mistake law.[74] Assumption of risk doctrines have always been corollary to relief for mistake.[75] Several reasons exist for not discussing them here: (a) Risk analysis is logically separate from mutual mistake; courts often analyze risk assumption independently of mutual mistake doctrine.[76] (b) Risk analysis gives a reason

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subsequent decisions by lower tribunals. *See, e.g.*, Chitty on Contracts, *supra*. Discussion of *Bell* and its progeny present a different mode of analysis than that on which this study proceeds. In England the legal system was made largely monolithic by the Judicature Acts of 1873 and 1875. A single case such as *Bell* therefore has far-reaching effects. In America the federal legal system prevents any contracts decision from having like effects. Thus, this study can, at most, discuss American mutual mistake only in terms of general principles.

74. *See* Restatement (Second) of Contracts §§ 152, 154 (1981).

75. Maxims requiring risk analysis have been employed as corollaries to various mistake doctrines since relief for mistake was first possible in America or England. Joseph Story's extremely detailed explanation of mistake cases in 1836 lists numerous such maxims:

> It is not, however, sufficient in all cases to give the party relief, that the fact is material; but it must be such, as he could not by reasonable diligence get knowledge of, when he was put upon inquiry. For, if by such reasonable diligence he could have obtained knowledge of the fact, Equity will not relieve him; since that would be to encourage culpable negligence.

1 Story, *supra* note 14, § 146, at 159.

> . . . where the means of information are open to both parties; and where each is presumed to exercise his own skill, diligence, and judgment in regard to all extrinsic evidence. In such cases Equity will not relieve.

Id. § 149, at 161.

> In like manner, where the fact is equally unknown to both parties; or where each has equal and adequate means of information; or where the fact is doubtful from its own nature; in every such case, if the parties have acted with entire good faith, a Court of Equity will not interpose.

Id. § 150, at 163. John Fonblanque, in annotating Henry Ballow's earlier 1737 equity treatise, noted that "equity will not interpose, if the fact was, from its nature, doubtful, or, at the time of the agreement, equally unknown to both parties . . . ." Henry Ballow, A Treatise of Equity 106 n.t (Garland reprt. 1979) (John Fonblanque, rev., ed., ann., 1793) [hereinafter Fonblanque's Equity]. Fonblanque does not distinguish between mutual and unilateral mistake. *Id.* Powell, likewise, writing in 1790, wrote similarly regarding assumption of risk principles, and declared them to govern both cases involving mutual and unilateral mistakes. 2 John J. Powell, Essay upon the Law of Contracts and Agreements 196-200 (Garland 1978) (1790).

76. Many cases employ risk analysis alternatively to analysis of mutual mistake, holding that an assumption of risk renders analysis of mutual mistake unnecessary. *See, e.g.*, Harbor Ins. Co. v. Stokes, 45 F.3d 499, 501-03 (D.C. Cir. 1995); P.K. Dev., Inc. v. Elvem Dev. Corp., 640 N.Y.S.2d 558, 560 (N.Y. App. Div. 1996); Copland v. Nathaniel, 624 N.Y.S.2d 514, 518-19 (N.Y. Sup. Ct. 1995). On the other hand, sometimes courts confuse risk analysis with analysis of whether a fact was serious or important enough that mistaking it warrants relief. *See, e.g.*, R.J. Wildner Contracting Co. v. Ohio Turnpike Comm'n, 913 F. Supp. 1031, 1041 (N.D. Ohio 1996) (holding that a mistake is not material because it "must have been within the contemplation of the parties at the time of contracting").

for denying mutual mistake, not granting it: Only if the adversely affected party has not assumed the risk can relief be granted.[77] This study focuses primarily on how courts have given relief for mutual mistake. A logically separate factor making relief inappropriate is only marginally relevant. Inasmuch as it appears relevant, it appears briefly below.[78] (c) Assumption of risk analysis is not unique to mutual mistake but is common to both unilateral and mutual mistake.[79] (d) Whether a party has assumed a risk is a fact-intensive question, generally.[80] Thus, historical instances of risk assumption often bear less precedential relevance to later cases.

On a related note, this study sees mistake-of-law cases in which relief was granted as identical to cases of mistake of fact. Some courts have refused to relieve for mistake of law,[81] but some have granted relief: "[I]gnorantia juris non excusat"[82] did not prevent equitable relief, for example, in *Bingham v. Bingham* (1748),[83] *Lansdown v. Lansdown* (1732),[84] or *Gartner v. Eikill* (1982).[85] Joseph Story attempted, not altogether successfully, to reconcile cases addressing mistakes of law.[86] In the end, Story concluded that courts' refusal to grant relief for mistake of law resulted largely from judicial allocation of risk: The law is available to all, and parties make legal conclusions at their peril.[87]

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77. *See, e.g.*, Restatement (Second) of Contracts § 152 (1981) ("[T]he contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154 . . . ."); Restatement of Contracts § 502 cmt. c & f (1932) (cmt. f: "Where the parties know that there is doubt in regard to a certain matter and contract on that assumption, the contract is not rendered voidable because one is disappointed in the hope that the facts accord with his wishes. The risk of the existence of the doubtful fact is then assumed as one of the elements of the bargain.").

78. *See infra* text accompanying note 427.

79. The Restatement (Second) recognizes this fact by tacking risk analysis under § 154 to both mutual and unilateral mistake. *See* Restatement (Second) of Contracts §§ 152 & 153 (1981); *see also generally, e.g.*, Farnsworth, *supra* note 25, §§ 9.2-9.3.

80. *See, e.g.*, Restatement (Second) of Contracts § 154(c) (1981).

81. *See, e.g.*, Heath v. A.B. Dick Co., 253 F.2d 30, 35 (7th Cir. 1958); Hartle v. United States, 22 Cl. Ct. 843, 849 (1991); Murphy v. Torstrick, 309 S.W.2d 767, 770 (Ky. Ct. App. 1958); In re Estate of Hysinger, 785 S.W.2d 619, 624 (Mo. Ct. App. 1990); Kiahtipes v. Mills, 649 P.2d 9, 13 (Utah 1982); *see also* Marriott Fin. Servs., Inc. v. Capitol Funds, Inc., 209 S.E.2d 423, 428 (N.C. Ct. App. 1974); Damstra v. Starr, 585 S.W.2d 817, 820 (Tex. App. 1979).

82. *See, e.g.*, Bilbie v. Lumley, 2 East 469, 472, 102 Eng. Rep. 448, 450 (K.B. 1802) (refusing to grant relief); Lawrence v. Beaubien, 2 Bailey 623, 649 (S.C. 1831) (counsels' arguments here are a veritable "whose who" of English mistake of law cases).

83. 1 Ves. Sen. 126, 78 Eng. Rep. 934 (Ch. 1748).

84. Mosely 364, 25 Eng. Rep. 441 (Ch. 1730).

85. 319 N.W.2d 397, 399-400 (Minn. 1982); *see also* Gayle Mfg. Co., Inc. v. Federal Sav. & Loan Ins. Corp., 910 F.2d 574, 582 n.5 (9th Cir. 1990) (noting California law); Tidwell v. Tidwell, 505 So. 2d 1236, 1238 (Ala. Civ. App. 1987). Farnsworth calls it the modern trend. Farnsworth, *supra* note 25, § 9.2.

86. 1 Story, *supra* note 14, §§ 110-40 (covering 35 pages).

87. *See id.* § 126, at 142 n.1 (noting there is "much . . . force" in the reasoning of Chancellor Kent that "[e]very man is to be charged, at his peril, with a knowledge of the law" and stating that failure to know the law is "culpable negligence" and further citing the maxim that the "law aids the vigilant, and not those, who slumber over their rights").

I see the cases similarly. This study therefore assumes that when courts have granted relief for mistake of law, they have merely (a) refused to impose the risk of legal mistake on the party seeking relief, and (b) treated the mistake of law the same as a mistake of fact. Cases granting relief for mistake of law are therefore the same analytically as mistake-of-fact cases in which the court does not impose the risk of the mistake on the party seeking relief.

Finally, this study in no way attempts to give the last word on the history and meaning of mutual mistake. Sources are limited; the sources relied on here certainly do not give the full account; and undoubtedly I have overlooked questions that could be asked. Perhaps more importantly, the questions asked and answered here tell as much about the author as about the law, but I believe that to be unavoidable.[88]

II. ON THE GENEALOGY OF MUTUAL MISTAKE

Mutual mistake doctrines are ancient.[89] This study concludes that American mutual mistake developed in the early 1800s and was well-formulated in

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88. After the noon bell booms out its twelve beats in my ear, it has often been said of me, "[he] suddenly starts up and asks himself: 'what really was that which just struck?'" Nietzsche, *supra* note 71, at Preface, ¶ 1. Invariably I miscount the bells. Likewise most of us:

> sometimes rub our ears *afterward* and ask, utterly surprised and disconcerted, "what really was that which we have just experienced?" and moreover: "who *are* we really?" and, afterward as aforesaid, count the twelve trembling bell-strokes of our experience, our life, our *being*—and alas! miscount them.

Id.

89. The Roman law contained a doctrine of mutual mistake. *See infra* notes 90-106 and accompanying text. Some known Anglo-Saxon procedure suggests a mistake doctrine of some sort. A plaintiff would swear to the court:

> In the name of Almighty God, thou didst engage to me sound and clean that which thou soldest to me, and full security against after claim, on the witness of N. who then was with us two.

J. Laurence Laughlin, *The Anglo-Saxon Legal Procedure*, *in* Essays in Anglo-Saxon Law 183, 195 (1905). The defendant would then swear, if he could:

> In the name of Almighty God, I know not in the thing about which thou suest, foulness or fraud, or infirmity, or blemish, up to that day's-tide that I sold it to thee; but it was both sound and clean, without any kind of fraud.

Id. at 196. Interpreters of this translation of a now-dead language can not be too careful. Any inferences drawn from it are suspect. But if, as the plaintiff implies, infirmity exists in an item, and if knowledge about the infirmity is relevant and fraud does not exist, then the defendant must have been mistaken. That the defendant-seller's ability to make the oath discharged him (*see id.*) suggests that mistake was not grounds for relief from a promise under Anglo-Saxon law. Assuming the plaintiff would not have bought had he known of the mistake, any such mistake would have been mutual.

Theoretical reasons for mutual mistake's existence in most legal systems suggest themselves: Legal systems often proscribe an effect for the volitional act of two or more people. Given that we err, even in important beliefs, it follows that such legal systems must address whether volition mistakenly exercised changes the legal effect. Our law and its predecessors have typically attached some legal significance to our volitionally entering into certain kinds of relationships or transactions.

American courts by at least 1840. By then it had the same elements and roughly the same application that it has today. American courts adopted into it doctrines, ideas, and fragments of texts developed over centuries in first Roman and other civil law, and then English law. I discuss first Roman and other civil law, then English common law, English chancery, and finally American law.

A. Roman Law

The Roman digests[90] give at least two clear instances of mutual mistake:

> Ulpian: . . . Now what are we to say when both parties are in error over both the material and its quality? Suppose that I think that I am selling and you think that you are buying gold, when it is, in fact, copper, or again, that co-heirs sell to one of their number, for a substantial price, a bracelet said to be gold which proves to be largely copper? It is settled law that the sale holds good because there is some gold in it. Even if a thing be of gold alloy, though I think it solid gold, the sale is good. But if copper be sold as gold, there is no contract.[91]
>
> Julian: . . . You sold me a table plated with silver, with the understanding that it was solid, neither of us being aware that it was

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Ergo, our law must address the effect of mistake. Roman, civil, English, and American jurisprudence all have done so.

90. Discussion of Roman law in this paper is necessarily truncated. The Roman law dealt with several other forms of mistake outside the scope of this paper, including misunderstanding and unilateral mistake. 2 The Digest of Justinian XVIII.1.9 (Theodor Mommsen, Paul Krueger, and Alan Watson, eds., Univ. of Penn. Press 1985) [hereinafter Mommsen's Digest] (misunderstanding: "Hence, if I thought that I was buying the Cornelian farm and you that you were selling the Sempronian, the sale is void because we were not agreed upon the thing sold. The same is true if I intended to sell Stichus and you thought that I was selling you Pamphilus, the slave himself not being there."); *id.* at XVIII.1.11 (unilateral mistake: "[I]f I sell you a woman and you think that you are buying a male slave, the error over sex makes the sale void."). Moreover, Roman law talked of other kinds of mistake not often raised in American courts in the twentieth century, including error as to the person with whom one was contracting or as to the nature of the transaction. Andrew Borkowski, Textbook on Roman Law 245-46 (Blackstone 1994); R.W. Lee, The Elements of Roman Law §§ 537-41 (Sweet & Maxwell, 4th ed. 1956).

91. 2 Mommsen's Digest, *supra* note 90, at XVIII.1.14. Scott gives the following alternative translation:

> But what shall we say where both parties are mistaken as to both the substances and the nature of the object of the sale; as, for instance, where I think I am selling gold, and you think that you are purchasing gold, when, in fact, the metal is brass; or where, for example, two co-heirs sell a bracelet which is said to be of gold, at a high price to another co-heir, and it is discovered that it is, for the most part, copper? It is held that this is a sale, even though I think it to be gold, the sale will be valid, but where copper is sold for gold the sale will not be valid.

5 S.P. Scott, The Civil Law, The Digest XVIII.1.14 (The Central Trust Co. 1973). Scott's translation does not preserve as clearly the distinction between *material* and *quality*.

not. The sale is void, and the money paid on account of it can be recovered.[92]

These passages include at least two of the three elements of American mutual mistake: (i) a mistake, and (ii) that is common to both parties to a transaction. What kind of mistake warranted relief? The passage from Ulpian implies that a "material" difference (an error "*in materia*") will qualify. To Americans, *material* commonly means "relevant" or "important." *Material* in this passage from Ulpian is distinguished from *quality* or "*in . . . qualitate*," however. *Material* in this sense probably means the stuff of which an object is composed, its matter. *Quality*, as opposed to matter, may mean something like "that about an object which is not essential to its being the material that it is." In another passage, Ulpian equates *material* with *substance* and the Greek word for *essence*:

> The next question is whether there is a good sale when there is no mistake over the identity of the thing but there is over its substance ["in substantia"]: Suppose that vinegar is sold as wine, copper as gold or lead, or something else similar to silver as silver. Marcellus, in the sixth book of his *Digest*, writes that there is a sale because there is agreement on the thing despite the mistake over its substance. I would agree in the case of the wine, because the [essence] is much the same, that is, if the wine has gone sour; if it be not sour wine, however, but was vinegar from the beginning such as brewed vinegar, then it emerges that one thing has been sold for another. But in the other cases, I think that there is no sale by reason of the error over the material ["in materia"].[93]

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92. 5 Scott, *supra* note 91, at XVIII.1.41.1. Mommsen, Krueger, and Watson give the following alternative translation:

> You unwittingly sold me, who did not know the facts, a silver-covered table as solid silver; the purchase is of no effect and a *condictio* will lie to recover the money paid.

2 Mommsen's Digest, *supra* note 90, at XVIII.1.41.1.

93. 2 Mommsen's Digest, *supra* note 90, at XVIII.1.9.2. Scott gives the following alternative translation:

> Hence, the question arises, where no mistake is made as to the object itself, but there is one as to the substance of which it is composed; as, for instance, if vinegar is sold for wine, copper for gold, or lead for silver or something else which resembles silver, whether there is a purchase and sale.
>
> Marcellus says, in the Sixth Book of the Digest, that, in this case, there is a purchase and sale, because the object was agreed upon, although there was an error with reference to the matter of which it was composed. I am of the same opinion, so far as the wine and vinegar are concerned; for, as they are very nearly the same thing, that is to say, the same substance, provided the wine becomes sour, but if it did not become sour but was so in the beginning, that is, if it contained vinegar, it will be held that one thing has been sold for another. In the other instances, however, I think the sale was null, whenever a mistake was made with reference to the substance of which the articles were composed.

5 Scott, *supra* note 91, at XVIII.1.9(2). The translation given in the text is preferred because it preserves most closely the Latin terms. Interestingly, Scott translates *substance* as "the matter of

This important passage confirms that an error *in substantia* or *in materia* might void a contract, while an error of some other kind (such as *in . . . qualitate*?)[94] will not. However, which errors were *in substantia*, of the essence, was difficult to tell. Mistaking copper for gold, or vinegar for wine, was *in substantia*.[95] Mistaking gold alloy for solid gold was not.[96] But is mistaking white wine for red *in substantia*? What if we mistake 14-carat gold for 24-carat gold? A pregnant breeder cow for a barren beef cow?[97] A lot zoned agricultural for one zoned commercial?[98] Modern Roman law commentators continue to puzzle over what counted as the substance of a thing and what did not.[99]

Puzzlement over what *in substantia* might have meant, besides causing confusion as to what Roman law actually required, raises theoretical questions about the rationale for Roman mutual mistake. Did the *in materia* or *in substantia* element require that the mistake be important, or material to the transaction, as does the word *material* in American law? Or did the Romans attribute some metaphysical significance to an error in material or substance that made a contract founded on one void by natural law?

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which it was composed." He translates *materia* as "the substance of which the articles were composed."

94. 2 Mommsen's Digest, *supra* note 90, at XVIII.1.9, 10, & 14.

95. *Id.*

96. 2 Mommsen's Digest, *supra* note 90, at XVIII.1.10 & 14 (Ulpian: "It is settled law that the sale holds because there is some gold in it. Even if a thing be of gold alloy, though I think it solid gold, the sale is good.") (Paul said: "It would be different if the thing was gold, although a quality inferior to that supposed by the purchaser. In that case, the sale is good.").

97. This, of course, is the central difficulty of Sherwood v. Walker, 33 N.W. 919 (Mich. 1887), in which the court frames the discussion in roughly these terms also. *See id.* at 923-24, 924-27 (Sherwood, J., dissenting).

98. This was the mistake made in Golem v. Fahey, 13 Cal. Rptr. 63 (Cal. Dist. Ct. App. 1961). The court held that the mistake warranted rescission, though the issue was mooted by the long-term tenant's failure to rescind formally. *Id.* at 63-65; *see also* Gartner v. Eikill, 319 N.W.2d 397 (Minn. 1982), in which the court also held that a zoning ordinance mistake warranted rescission of the sale of a lot. *Id.* at 400.

99. *See* discussions in Borkowski, *supra* note 90, at 245-46; W.W. Buckland, A Textbook of Roman Law from August to Justinian 414-16 (Cambridge 1921); W.W. Buckland, Elementary Principles of the Roman Private Law § 127 (Cambridge 1912); W.W. Buckland & Arnold D. McNair, Roman Law and Common Law 196-97 (Cambridge 1965); W.A. Hunter, A Systematic and Historical Exposition of Roman Law in the Order of a Code 581-84 (Wm. W. Gaunt & Sons, Inc., reprint 1992) (1885); Lee, *supra* note 90, §§ 537-44; John George Phillimore, Private Law Among the Romans from the Pandects 313-15 & 314 n.4 (McMillan & Co. 1863); James Mackintosh, Roman Law in Modern Practice 181-85 (Rothman 1995) (1934) ("This is the case [of mistake] that gave the most trouble," noting that Savigny tried to show that the difference was actually between "quality" and "essence" as determined in the particular trade at issue). For an interesting discussion of *substance* as opposed to *accident* as those words appear in Sherwood v. Walker, 33 N.W. 919 (1887), see Robert L. Birmingham, *A Rose by Any Other Word: Mutual Mistake in* Sherwood v. Walker, 21 U.C. Davis L. Rev. 197 (1987). Even if the *in substantia* doctrine identified aspects of a good considered essential by those persons who usually traffic in it, no reason exists to restrict the doctrine's application to transactions in regularly traded goods between those who regularly trade. The doctrine would remain ambiguous when applied outside those parameters.

In some cases of clear impossibility of performance, Roman law appeared to adopt the natural law rationale. Roman law held void certain contracts for impossible performances—namely those in which the object of sale had ceased to exist.[100] One might think that parties would not contract to sell and buy a non-existent item unless they mistakenly thought the object existed. One would think, moreover, that such an object had changed its material or substance, from existent to non-existent substance. Paulus in fact talks of one such contract as if it were void for mistake (in possibly a third mutual mistake case from the Digests):

> I bought a house, both the vendor and I being unaware that it had been burned down. Nerva, Sabinus, and Cassius say that even though the site remains, there is no sale and the price, if paid, can be recovered by *condictio*.[101]

Here the focus is that the parties were unaware the house had burned down. Gaius comes to the same result via natural law, however:

> If we stipulate for something to be given to us, which is of such a nature that this cannot be done, it is evident that such a stipulation is void by natural law; as, for example, if an agreement is entered into for the delivery of a freeman, or for that of a slave who is dead, or for a house which has been burned, and this is done between parties who did not know that the man in question was [ ] free, or that the slave was dead, or that the house had been destroyed by fire. . . . A stipulation is also void if a person contracts for property which belongs to himself, not knowing that this is the case.[102]

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100. "Even though there is agreement on a thing, if the thing ceases to exist before the sale, the contract is void." 2 Mommsen's Digest, *supra* note 90, at XVIII.1.15. Scott translates:

> Even though the parties may agree upon the article which is the object of the sale, still, if, in accordance with the course of nature, it ceases to exist before the sale is concluded, the purchase will be void.

5 Scott, *supra* note 91, at XVIII.1.15.

101. 2 Mommsen's Digest, *supra* note 90, at XVIII.1.57. Scott translates the same passage:

> I purchased a house, both the vendor and myself being ignorant at the time when the sale was made that it had been burned. Nerva, Sabinus, and Cassius say that nothing was sold, even though the site remained, and that the money which had been paid could be recovered by suit.

5 Scott, *supra* note 91, at XVIII.1.57.

Paulus' references to the parties' knowledge allows him to relate mistake law to fraud:

> Where both purchaser and vendor knew that the house had been entirely, or partially destroyed by fire, the transaction is of no effect, on account of fraud being set off on both sides, and a contract which depends upon good faith cannot stand where both parties are guilty of deceit.

Id. at XVIII.1.57(3).

102. 10 Scott, *supra* note 91, at XLIV.7.1(9)-(11); *see also, e.g., id.* at XVIII.1.34.1 (statement of Paul).

This passage places natural law prior to contracting parties' knowledge or volition. If natural law actually held this position in Roman law, then Paulus' reliance on (and Gauis' mention of) the parties' ignorance of the burned house is irrelevant. Natural law would prohibit a legal obligation to sell or buy a burned house prior, at least logically, to the civil law's taking account of the parties' mistaken beliefs.[103] Possibly Romans relied on one rationale at one time in their history and another rationale at another time. Mistake (and assent) rationales come fairly late in Roman contract jurisprudence.[104] Without further light, Roman law remains ambiguous as to its ground for decision in these cases.

The presence of a natural law ground for deciding the burned house case suggests a metaphysical explanation for *material* and *substance* in the other mutual mistake instances noted above. If an item sold is different in substance from the item named in the contract, then the item named in the contract does not exist. If it does not exist, then a contract for it would be contrary to natural law and therefore void. Interpreted this way, the parties' mistake warrants relief not because it undermines consent to the contract but because it creates a contract contrary to natural law. The Roman use of *material* and *substance* in the mutual mistake cases leaves open this possible interpretation.

Though the theory of the Roman cases is uncertain, Roman law left mutual mistake another lasting heritage: the fact patterns themselves. For instance, the hypothetical in which one precious metal is sold as another appears often in later literature.[105] The fact pattern possibly cited most in American law involves Gauis' dead slave, although in American discussion the slave becomes a horse.[106]

B. Other Civil Law

I have arbitrarily limited discussion of post-Roman civil law to that which appears to have had the greatest effect on American jurisprudence. Civilians

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103. *See also* 2 Mommsen's Digest, *supra* note 90, at XVIII.1.6 (Pomponius: "Regardless of the purchaser's state of knowledge, purchase of one's own property is void; but if he bought in ignorance, he can recover the price he paid, because he was under no obligation.").

104. Assent theory of contracts and mistake law were formulated rather late in Roman law as descriptions of classes of cases not previously generalized to such a degree. Buckland & McNair, *supra* note 99, at 196-97; *see also id.* at 203-04 (discussing cases of impossibility under Roman law).

105. *See, e.g.*, Wieler v. Schilizzi, 17 C.B. 619, 624, 139 Eng. Rep. 1219, 1221 (C.P. 1856) ("If a man buys an article as gold, which everyone knows requires a certain amount of alloy, he cannot be said to get gold if he gets an article so depreciated in quality as to consist of gold only to the extent of one carat."); Gompertz v. Bartlett, 2 El. & Bl. 849, 853-55, 118 Eng. Rep. 985, 987 (K.B. 1853) ("The case is precisely as if a bar was sold as gold, but was in fact brass, the vendor being innocent. In such a case the purchaser may recover."); Home, *supra* note 7, at 204-05 (As to errors of quality, Home writes, "Or, I purchase a watch, the case of which I take to be gold, though only silver gilt. Equity will not relieve me from the bargain . . . ."); 1 Robert J. Pothier, A Treatise on the Law of Obligations 11 (William D. Evans ed. & trans., R.H. Small 2d American ed. 1826).

106. *See infra* notes 206, 394, 430 and accompanying text.

have been discussing error since the Romans described the cases noted above. Grotius[107] and Pufendorf[108] both wrote passages on error later cited in America. Other than the Roman law itself, however, by far the most prominent among civilian sources influencing early American and contemporary English authorities is Pothier. Robert Joseph Pothier published his *Treatise on the Law of Obligations or Contracts* in French in 1761.[109] The work had a lasting

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107. Hugo Grotius' *De Jure Belli ac Pacis Libri Tres* appeared first in 1625. It gives natural law and civil bases for the law governing nations. As to mutual mistake, Grotius reasoned from both natural law and consent relating mistake to frustration of purpose:

> 1. The treatment of agreements based on a misapprehension is perplexing enough. It is, in fact, customary to distinguish between errors which affect the substance of the matter and those which do not . . . .
>
> The majority of these distinctions come from the Roman law, not only the old civil law, but also the edicts and decision of the praetors; and some of them are not entirely true or accurate.
>
> 2. Now a method of ascertaining the truth according to nature is furnished to us by the fact that as regards the force and effect of laws nearly every one agrees that, if [the application of] a law rests upon the presumption of a certain fact which does not actually obtain, then that law does not apply; for the whole foundation for the [application of the] law is overthrown when the truth of the [alleged] fact fails. . . . .
>
> In like manner, then, we shall say that, if a promise has been based on a certain presumption of fact which does not so obtain, by the law of nature it has no force. For the promisor did not consent to the promise except under a certain condition which, in fact, did not exist.

2 Hugo Grotius, De Jure Belli ac Pacis Libri Tres, II.XI.VI (Francis W. Kelsey, trans., Oxford 1925). Grotius was cited by Joseph Story. 1 Story, *supra* note 14, at 158 n.1 ("Grotius has made some sensible remarks upon the subject of error in contracts.").

108. Samuel von Pufendorf published *De Jure Naturae et Gentium, Libri Octo* in 1672. Pufendorf, like Grotius, rested his conclusions about error in contracts on lack of consent and natural law. He concludes:

> And so in contracts, an error about a thing or some quality of it, in view of which a man was induced to enter the agreement, renders the agreement void. For it is supposed that the man consented not absolutely but because of the supposition of the presence of that thing or quality, on which as a condition he based his consent; and when the thing or quality is not to be found, the agreement also is understood to be void.

II Samuel von Pufendorf, De Jure Naturae et Gentium, Libri Octo I.III.12 (C.H. Oldfather & W.A. Oldfather, trans., Oxford 1934) (translated from the edition of 1688). Pufendorf gives as an example the Roman case of a soldier's father, on believing falsely that his son was dead, altered his will to give the soldier's inheritance to another. After the father died, the soldier returned home and sued for his inheritance. Pufendorf would hold the father's altered will void for lack of consent. *Id.* at III.III.VI (so would Grotius, *see* Grotius, *supra* note 107, at II.XI.VI.2; these facts were considered anciently by Cicero). Pufendorf reasons, alternately: "[I]t is possible to make a simpler reply on the basis of natural law, to wit: The father's will was based upon the belief that his son was dead, and since this is clearly false, the purpose of the father is null . . . ." Pufendorf, *supra*, at III.III.6. Pufendorf published an abridgment of *De Jure Naturae et Gentium* one year later, in 1673, called *De Officio Hominis et Civis Juxta Legem Naturalem.* It also contains a short statement of the effects of error. *See* Pufendorf, *supra* note 60, at I.IX.12. Pufendorf is cited by the United States Supreme Court at Allen v. Hammond, 36 U.S. (11 Pet.) 63, 71 (1837) (citing *De Jure Naturae et Gentium* for the proposition that mutual mistake nullifies consent).

109. 1 Pothier, *supra* note 105, at 11. The first American edition of Pothier was published in

influence on the common law in England and America. At one time a British commentator opined that Pothier's contract doctrine was "law at Westminster as well as Orleans."[110] Pothier's discussion of mutual mistake was likewise influential, though terse. In fact, he merely cites the Digests, interpreting them to rest solely on failure of consent rather than natural law:

> Error annuls the agreement, not only when it affects the identity of the subject, but also when it affects that quality of the subject, which the parties have principally in contemplation, and which makes the substance of it. Therefore if, with the intention of buying from you a pair of silver candlesticks, I buy a pair that are only plated, though you have no intention of deceiving me, being in equal error yourself, the agreement will be void, because my error destroys my consent; for my intention was to buy a pair of silver candlesticks. Those which you offer to sale [sic] being plated, it cannot be said that they are what I intended to buy. This is decided by *Julian* in a similar case, *l.* 41. § I.*ff.d.t. and Ulpian, l.* 14, where he says, *Si aes pro auro veneat non valet.*[111]

Later civilians largely followed Pothier's lead. Dean Roscoe Pound's 1914 comparative law textbook lists various Roman digest sections relating to mistake and their modern civil code counterparts.[112] The codes and various civil law commentators Pound cites generally agree with Pothier on mistake law, and continue prominently to retain Roman law's distinction between essence/substance and quality/accident.[113] The distinction appears lately in Louisiana civil law also.[114]

1806.

110. Sir W. Jones, Essay on the Law of Bailments 29 (2d ed. 1804). Pothier had great influence in America, also. R.H. Helmholz, *Use of the Civil Law in Post-Revolutionary American Jurisprudence*, 66 Tul. L. Rev. 1649, 1654, 1659 (1992) ("Indeed, in the American reports, Mansfield and Pothier seem sometimes almost to have vied for the attention of American Lawyers, the former emerging only slightly ahead of the latter in general repute.").

111. 1 Pothier, *supra* note 105, at 11. The Latin Pothier quotes is translated in Mommsen, Krueger, and Watson to read, "But if copper be sold as gold, there is no contract." 2 Mommsen's Digest, *supra* note 90, at XVIII.1.14.

112. Roscoe Pound, Readings in Roman Law and the Civil Law and Modern Code as Development Thereof 34-44 (Harvard 1914).

113. *Id.* at 39-43; *see also* John Makdisi, *An Objective Approach to Contractual Mistake in Islamic Law*, 3 B.U. Int'l L.J. 325, 329 (1985) ("French law adopted the Roman concept of actionable mistake but expanded the concept of error as to quality."). Home distinguishes errors *in substantialibus* from errors in quality in Scottish equity. Home, *supra* note 7, at 204-05 (as to errors of quality, Home writes, "The other kind is where the error is in the qualities of a subject, not in the subject itself; a purchase, for example, of a horse, understood to be an Arabian of true blood, but discovered after to be a mere Plebeian. The bargain is effectual at common law . . . ." and "I purchase, for example, a telescope, believing it to be mounted with silver, though the mounting is only a mixed metal. Or, I purchase a watch, the case of which I take to be gold, though only silver gilt. Equity will not relieve me of the bargain . . . ."; as to errors of substance, see *supra* note 7).

114. *See, e.g.*, Cutright v. Wilson, 410 So. 2d 1274, 1282 (La. App. 3d Cir. 1982) (Culpepper,

C. English Common Law

1. Earliest Attitudes

a. Rejection

Conventional wisdom holds that early English common law did not recognize mutual mistake.[115] A.W.B. Simpson reports that early assumpsit entirely lacked a mistake defense.[116] And indeed, English doctrine as it exists

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J., concurring) (citing Pothier's section regarding error, including the language cited in this study *supra* text accompanying note 109); *see also* George L. Bilbe, *Mistaken Assumptions and Misunderstanding of Contracting Parties—Louisiana Legislation and Jurisprudence*, 44 La. L. Rev. 885 (1984); Timothy Hoff, *Error in the Formation of Contracts in Louisiana: A Comparative Analysis*, 53 Tul. L. Rev. 329 (1979) (discussing various kinds of civil law error).

115. *See, e.g.*, A.W.B. Simpson, A History of the Common Law of Contract: The Rise of the Action of Assumpit 535 (Oxford 1975) ("The idea that mistake could form an independent ground for invalidity belongs to the nineteenth century, when the theory of *consensus ad idem*, the meeting of the minds, held sway."); Schneyer, *supra* note 49, at 431. Professor Atiyah describes Kennedy v. The Panama Royal Mail Co., 2 L.R. 580 (Q.B. 1867), as the first "serious attempt . . . to lay down a general principle as to the effect of mistake in contracts." Patrick S. Atiyah, The Rise and Fall of Freedom of Contract 436 (1979).

116. Simpson, *supra* note 115, at 535. Professors Berman and Reid have recently described succinctly the writ system of procedure in which the English common law developed and the genesis of the writ of assumpsit:

> In establishing, in 1178, the Court of Common Pleas as the first permanent professional English royal court, Henry II had limited its civil jurisdiction to the types of complaints for which the chancellor would issue a writ. At first, these were chiefly complaints that alleged certain types of "trespasses" (as they came to be called) against the rights of possession of land and chattels, as well as against the bodily security of the person. Later, the chancellor also granted writs of "debt" for the payment of money that the plaintiff claimed belonged to him, writs of "detinue" to recover damages for the wrongful detention of the plaintiff's chattels, writs of "replevin" for the return of chattels pledged for an obligation that had been fulfilled, writs of "covenant" for breach of a sealed instrument containing a promise, and various others. By the year 1300 there were dozens of different types of such "forms of action" commenced by a royal writ issued to local royal officials (sheriffs), ordering them to have the defendant before the judges of Common Pleas or King's Bench to answer the charges stated in the writ. In the fourteenth and fifteenth centuries, however, very few new types of writs were issued, although one of them, "trespass-on-the-case," was of great importance, because it gave a legal remedy for certain types of harm to persons or property caused "indirectly" and also for certain types of harm caused by failure to perform an act that the defendant had specially undertaken to perform (" special assumpsit"). In the 1530s and 1540s, a new form of trespass-on-the-case called indebitatus assumpsit gave a remedy for breach of certain types of obligations for which there was no express undertaking but one could be implied because the defendant was "indebted," as when the defendant had received something of value from the plaintiff and, in the absence of an agreement on the price, would not pay for the benefit he obtained.

Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 Emory L.J. 437, 451-52 (1996).

today—in form somewhat like the American doctrine—apparently did not surface in the English common law opinions until the latter part of the nineteenth century.[117] *Chandelor v. Lopus* (1603),[118] once a leading case establishing *caveat emptor* doctrine, is indicative of the early common law's attitudes toward mistake, at least with respect to the writ of assumpsit.[119]

In *Chandelor*, a goldsmith sold Lopus a stone for £100 which the goldsmith said was a bezar stone.[120] But the stone was not a bezar stone.[121] Lopus' complaint did not allege that the goldsmith warranted the stone's character or that the goldsmith knew it was not a bezar, however. Lopus won at trial, but the goldsmith appealed, claiming essentially that no relief could be granted if the goldsmith could have been ignorant of the stone's true character. The court of Exchequer-Chamber reversed, holding that Lopus could not sue without a

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117. *See infra* text accompanying notes 225-238. Some indications exist that very early common law granted relief for mutual mistake, at least for error of law. Consider the following from *The Mirror of Justices*:

> Contracts are avoided to the disadvantage of the party who would have gained by them, by reason of vice . . . . Contracts are vicious . . . (4) by reason of a false supposition.
>
> . . . .
>
> (4) In the fourth case, as if false supposals be made in charters or other muniments. Such is the case where a charter of feoffment is made but the donor remains seised; or a charter of quitclaim is made to one is not seised; for no charter, sale or gift will hold good permanently if the donor be not seised at the time of the contract in both rights, the right of possession and the right of property. And as a charter which supposes a gift to be made without a transmutation of seisin is void, so also is a quitclaim if the maker of the charter be himself in the possession of the thing that is quitclaimed. And as in these cases the charters are void, so also are the warranties and all that concerns such writings, for they have no validity because of their false suppositions.
>
> . . . .
>
> A contract may make a false supposal as to homage done in fraud of the law, as if I receive your homage in respect of any other service than the service which issues from a hauberk fee [knight's fee].

The Mirror of Justices Book II, Ch. XXVII (Selden Society, William Joseph Whittaker, ed. 1895). The *Mirror* was probably written about 1285-90, though the date is not certain. *See id.* at Frederic William Maitland, Introduction, at xxiii-xxv. Doubts exist as to whether the *Mirror* reports the law of its time correctly. *See id.* at xli-liv. Moreover, the *Mirror*'s author appears to have been familiar with Roman and canon law, and may have reported this instead of English court decisions. *See id.* at xxxi-xxxv. In any event, the law of false suppositions, or any other hint of relief for mistake, does not appear in the common law reports at a time relevant to the formation of American mutual mistake, nor have I found any indication that early relief for mistake influenced American law.

118. Cro. Jac. 4, 79 Eng. Rep. 3 (Ex. 1603).

119. *See* Fonblanque's Equity, *supra* note 75, at 109-10 n.x (note distinguishing English common law from equity: "the general rule of the common law of England is caveat emptor").

120. A bezar stone or bezoar stone is "any of various concretions found in the alimentary organs [of goats, for example] . . . formerly believed to possess magical properties and used in the Orient as a medicine or pigment." Webster's Third New Int'l Dictionary (Unabridged) 210 (1976).

121. Professor Atiyah suggests that the plaintiff in *Chandelor* may have been complaining that the bezar stone did not have magical powers, not that it was not a bezar stone. Atiyah, *supra* note 115, at 179. This hypothesis would explain in part the court's reluctance to grant relief.

warranty.[122] Whether the goldsmith "knew it to be no bezar-stone, it is not material."[123] *Chandelor* therefore implies that innocent mutual mistakes about the subject matter of a sales contract do not warrant relief. The rule in *Chandelor* was followed in many later cases.[124]

b. Non-Existence of Subject Matter

Conventional wisdom leaves the tale half told, however. Sometimes relief was granted at common law on what must have been mutual mistake facts without reference to mistake. For instance, courts held void certain releases and conveyances if the subject matter of the contract did not exist.[125] Most likely

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122. Merely affirming a representation or stating a fact about an item created no warranty under the law at the time *Chandelor* was decided. *See, e.g., Harvey v. Yonge*, reported at Simpson, *supra* note 115, at Appendix 16, wherein it was "held that an action does not lie at the suit of this B on the naked assertion of S, and it was his folly that he [B] was willing to give this [money] to him [S]. But it would be otherwise if S had warranted the term to be of such value, for the warranty is a means of inducing confidence." To create a warranty, the seller therefore had to use specific language such as "I warrant . . . ."

123. Cro. Jac. 4, 79 Eng. Rep. 3, 3-4 (Ex. 1603).

124. *See, e.g.*, Harvey v. Young, Yelv. 20, 80 Eng. Rep. 15 (K.B. 1602); Derry v. Peek, 14 App. Cas. 337, 356 (1889). The old common law sometimes took account of error in certain other situations, however. St. Germain reported in 1519-20 "*Certain cases and grounds where ignorance of the deed excuseth in the laws of* England, *and where not*":

> If a man buy a horse in open market of him that in right had no property to him, not knowing but that he hath right, he hath good title and right to the horse, and the ignorance shall excuse him.

The italicized language is a chapter heading from Christopher St. Germain, Doctor and Student, Ch. XLVII, at 256 (1787 ed.) (1519-20); Dialogue II published in 1530); *see also* William Noy, The Principal Grounds and Maxims with an Analysis of the Laws of England 146 (Goodrich 3d American ed. 1845). The horsebuyer became something like a buyer in the ordinary course. *See* U.C.C. § 2-403. But the situation was different when land was at issue:

> [I]f a man buy lands whereunto another hath title, which the buyer knoweth not, that ignorance excuseth not him in the law, no more than it doth of goods.

St. Germain, *supra*, Ch. XLVII, at 257; *see id.*, Ch. XVI, at 151. The situation was also different if the sale was not made in market overt:

> *Caveat emptor.* If I sell another man's Horse, and he take him out of the Vendee's possession; yet I shall have an action of debt for the money.

J. Phillipps, The Principles of Law Reduced to Practice 12 (1660).

125. *See, e.g.*, Quick v. Ludborrow, 3 Bulst. 29, 30, 1 Roll R. 196 (13 Jac.), 81 Eng. Rep. 25 (K.B. c. 1616) (Dodderidge, Justice) ("[A] release doth not operate, but upon an estate, interest or right, none of which is here in this case, and therefore his release is void."); Arthur v. Bokenham, 11 Mod. R. 148, 150-51 (3 Anne), 88 Eng. Rep. 957 ("[I]t is plain by the rules of the common law, that is, such rules as are to govern conveyances and dispositions of estates, that the law did never allow any person, by any conveyance at common law, to dispose of the lands he had not, or had no right or interest in at the time of making and executing of such conveyance."); II John Joseph Powell & Edward Wood, A Complete Body of Conveyancing, In Theory and Practice 64-65, 79-80, 338-39, 351 (Strahan & Woodfall 1791); 18 Vin. Abr. 299; John Cowell, The Institutes of the Laws of England 172-73, 174 (Roycroft 1651) ("If a man promiseth to give a thing which is not in *Rerum natura*, nor cannot be possibly, it is void, so if one promise that which is not any ones particularly,

these were cases of mutual mistake. Serious parties, unless mistaken, would not contract for a non-existent right. Indeed, we know from English chancery cases that sometimes cases of this type resulted from mistake.[126] Some evidence suggests that this line of English cases was based on natural law, just as were some Roman resolutions of this fact pattern.[127]

c. Account

The English common law also granted relief for mistake under the common law action for account, long before *Chandelor* was decided.[128] Account was burdened with technical requirements and procedures, however; it declined before it could affect the development of American law.[129]

d. Money Had and Received

When the action of account declined, at least part of account's function transferred to the action for money had and received, a form of *indebitatus assumpsit*.[130] Money had and received upon a mistake first appears in the law reports in the later 1600s.[131] This action became prominent in the 1700s, as

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as a thing sacred or publick." "A Covenant is made also invalid, by a condition which is naturally impossible; as if the Covenant be to give me so much if I touch heaven with my finger . . . .").

126. Several mistake cases involving title mistakes were brought in chancery. *See, e.g.*, Hitchcock v. Giddings, 4 Price 135, 146 Eng. Rep. 418 (Ex. 1817); Bingham v. Bingham, 1 Ves. Sen. 126, 27 Eng. Rep. 934 (1748) (Mr. Bingham's attempt to transfer to himself an estate he already owned); Mildmay v. Hungerford, 2 Vern. 243, 23 Eng. Rep. 757 (Ch. 1691). These cases are discussed *infra* notes 243-252 and accompanying text.

127. *See, e.g.*, authorities cited *supra* note 125. For a later case, see Gompertz v. Bartlett, 2 El. & Bl. 849, 853-55, 118 Eng. Rep. 985 (Q.B. 1853) ("The case is precisely as if a bar was sold as gold, but was in fact brass, the vendor being innocent. In such a case the purchaser may recover.").

128. Tomkins v. Bernet, 1 Salk. 22, 91 Eng. Rep. 21 (K.B. 1693); Hewer v. Bartholomew, Cro Eliz. 614, 78 Eng. Rep. 855 (K.B. 1598); *see also* R.M. Jackson, The History of Quasi-Contract in English Law (Cambridge 1936).

129. Commentators report various reasons for this decline. Barbour reports that the only remedy for account was specific performance. W.T. Barbour, The History of Contract in Early English Equity 16 (Octagon 1974) (1914). Moreover, no remedy was given for account until after two hearings. *Id.* at 16 n.2. Jackson reports that account could be contested by wager of law. Jackson, *supra* note 128, at 21 n.4. Also, until 1705 account could not be brought against executors. *Id.* Jackson cites all these reasons as contributing to account's decline. *Id.* at 36. He also notes, though, that the chancery court's inquisition-like evidentiary methods were far more likely to search out the truth in an accounting than were the common law's rules of evidence. *Id.*

130. *See generally* Jackson, *supra* note 128; William A. Keener, A Treatise on the Law of Quasi-Contracts 26-158 (1893); Peter B.H. Birks, *English and Roman Learning in* Moses v. MacFerlan, 37 Current Legal Probs. 1, 22 (1984).

131. *See* Tomkins v. Bernet, Salk. 22, 91 Eng. Rep. 21, Skin. 411, 90 Eng. Rep. 182 (K.B. 1693) (Skinner reported as follows in dicta: "if a man pay money upon a policy of assurance, supposing a loss, where there was not any loss, that in such case this shall be money received to the use of the payer; [Holt, C.J.] admitted [this], because here the money was paid upon a mistake; the

account was dying out.[132] In 1760, Lord Mansfield, in *Moses v. MacFerlan*,[133] described the money had and received doctrine as follows:

> This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which *ex aequo et bono*, the defendant ought to refund . . . . [I]t lies for money paid by mistake; or upon a consideration which happens to fail . . . .
>
> In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity* to *refund* the money.[134]

Some mutual mistakes were remedied before 1800 by means of the action for money had and received, and possibly as early as 1693.[135] Only after 1800 do these actions begin to mention "mutual mistake," however.[136] Even then

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same law if it was upon a fraud in the receiver"); *see also* Jackson, *supra* note 128, at 58; Simpson, *supra* note 115, at 494-95; Atiyah, *supra* note 115, at 181-84; *see also, e.g.*, Martin v. Sitwell, Holt, K.B. 25, 90 Eng. Rep. 911 (K.B. 1691) (a failure of consideration case obviously involving a mistake).

132. Atiyah, *supra* note 115, at 184.

133. Moses v. McFerlan, 2 Burr. 1005, 1012, 97 Eng. Rep. 676 (K.B. 1760).

134. 2 Burr. 1005 at 1012, 97 Eng. Rep. 676, 680-81 (K.B. 1760); *see also* Buller v. Harrison, 2 Cowp. 565, 568, 98 Eng. Rep. 1243, 1244 (K.B. 1777) (Mansfield, C.J., adding that money received by mistake ought to be returned "in point of equity and conscience"). Of course, Lord Mansfield is wrong about it being one word—he spoke twenty-four. Relief for money had and received by mistake was well-developed in the law by at least 1733. The court in Attorney General v. Perry, 2 Comyns 481, 92 Eng. Rep. 1169, 1174 (K.B. 1733), reported that mistake could be:

> under colour, and upon an apprehension, though a mistaken apprehension of having a good authority to receive it, as where it is received by imposition, fraud or deceit in the receiver (for there is always an imposition and deceit upon him that pays, where it is paid) by colour of a void warrant or authority, although the receiver be innocent of it.

Id. at 491. Clearly a number of different kinds of mistake cases had been successful by this time. Mistake law was not clearly explicated further in the early cases, however. Jackson, *supra* note 128, at 59.

135. *See, e.g.*, Cox v. Prentice, 3 M. & S. 344, 105 Eng. Rep. 641 (K.B. 1815); Tomkins v. Bernet, Salk. 22, 91 Eng. Rep. 21, Skin. 411, 90 Eng. Rep. 182 (1693) (indicating in dicta that money had and received would lie in the case of an insurer's paying money to an insured when both the insurer and insured mistakenly believed that a loss had occurred); Farrer v. Nightingal, 2 Esp. 639, 170 Eng. Rep. 481 (1798) (opinion of Lord Kenyon); Cripps v. Reade, 6 T.R. 606, 101 Eng. Rep. 728 (K.B. 1796). In *Cripps*, Cripps paid money to Reade for a lease but was later ousted by another with better right to the property. Lord Kenyon declared, "[H]ere . . . the [lease] . . . proceeded on a misapprehension by both parties that the defendant was the legal representative of the lessee, though it turned out afterwards that he was not. As therefore the money was paid under a mistake, I think that an action for money had and received will lie to recover it back . . . ." *Id.* at 729.

136. *See, e.g.*, Cox v. Prentice, 3 M. & S. 344, 105 Eng. Rep. 641 (K.B. 1815). The reasoning in *Cox*, a case for money had and received, almost surely includes a reference to Pothier. Both Lord Ellenborough and Lord Dampier (two of four judges) mention "mutual error," but Lord Ellenborough, whose opinion appears first in the reports, also refers to the parties' mistake as "equal

they do not refer explicitly to mistake by the elements of American mutual mistake we have discussed,[137] though they generally grant relief on a showing of a mistake and some seriousness or hardship. The presence of some or all of these elements, *ex aequo et bono*, or in justice and conscience, required that money had and received should be returned, but a distinct doctrine is not well-formulated in these early cases. The money-had-and-receivedcases had a Roman analogue, *condictio*,[138] mentioned in Paul's "burnt house" case discussed above.[139] Evidence of direct importation is not strong, however, though Roman law influenced many English judges, particularly Mansfield.[140] Probably the

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error," nearly the exact language used by Evans in his translation of Pothier. *See supra* text accompanying note 109.

Powell's 1790 treatise on contract law discusses a kind of mutual mistake. He distinguishes mistake brought about by fraud from the case of "an error or mistake respecting the thing or subject bargained for, equally unknown to both parties." 1 Powell, *supra* note 75, at 140. But Powell explains that no relief for mistake was given in this case:

> if it plainly appear that there was no intention of fraud in either of the contracting parties, and that the one had no more knowledge of the thing contracted about that the other; there, if, in a doubtful point, one party mistake, it is so much the worse for him, but the contract is valid notwithstanding; for the assent is complete and full to treat upon the subject as it stands.

Id. at 142. Powell leaves open room for a case such as Bingham v. Bingham, 1 Ves. Sen. 126, 78 Eng. Rep. 934 (Ch. 1748), which probably involved a mutual mistake, *see supra* text accompanying notes 243-247, but grounds such cases on failure of one party to assent, not on mutual mistake. 1 Powell, *supra* note 75, at 147-51. Zephaniah Swift, writing in Connecticut in 1796, agreed with Powell. *See* 2 Zephaniah Swift, A System of the Laws of the State of Connecticut 465 (1796) (expressly rejecting equitable relief for mutual mistake; Swift is obviously quoting Powell).

137. *See* Cox v. Prentice, 3 M.& S. 344, 105 Eng. Rep. 641 (1815) (Ellenborough, C.J., declaring that "this is a case of mutual innocence or equal error, which is not an unusual case for money had and received. . . . . Our decision will not clash with the rule, caveat emptor; for here both parties were under a mutual error, neither of them being to exercise nor exercising any judgment upon the subject. I think this is a proper case for money had and received.") (Dampier, J.,: "It is a case of mutual error.").

138. 2 Mommsen's Digest, *supra* note 90, at XVIII.1.57; *see also supra* note 92; 4 Scott, *supra* note 91, at VII.6.1; *id.* at XII.6. Mackintosh records a translation of the Institutes of Justinian, III.27.6.7, as follows:

> A person to whom money, not owing, is paid by mistake is thereby laid under a *quasi* contractual obligation; an obligation, indeed, which is so far from being contractual that, in strictness, it may be said to arise from the extinction rather than from the formation of a contract; for when a man pays over money intending thereby to discharge a debt, his purpose clearly is to undo a bond already formed, not to create a fresh one; while the person who takes the money comes under an obligation exactly as if he had received it on loan, and therefore he is liable to a personal action (*condictio*).

Mackintosh, *supra* note 99, at 192-93.

139. *See* discussion of Roman cases listed *supra* notes 100-102 and accompanying text.

140. The earliest reported cases do not mention the Digests, nor have commentators generally thought the action to have Roman origins. *See generally* sources cited *supra* note 135 (indicating that English law of uses was money had and received's most direct ancestor), and Holmes v. Hall, 6 Mod. 161, 87 Eng. Rep. 918 (K.B. 1704); Berman & Reid, *supra* note 116, at 464-67. *But see* 1 George Spence, The Equitable Jurisdiction of the Court of Chancery 633 n.c (Lea & Blanchard

English court system between 1700 and 1820 handled most cases of mutual mistake by means of the action for money had and received.

2. *Money Had and Received, Mistake, and Consideration*

Though Mansfield insisted that the action for money had and received was "equitable" in nature,[141] various legal historians have given a wholly legal genesis for the action of money had and received.[142] Hazeltine attributed the equitable notions found in money had and received solely to Lord Mansfield.[143] The mistake variant of money had and received also appears to be a legal, as opposed to equitable, creation, at least as used in that action.[144] Both mistake and failure of consideration cases in money had and received play a role in American mutual mistake's history, however. In order to illustrate how, this study must first explain what *consideration* historically meant as used in the money had and received action.

The law courts may originally have borrowed the word *consideration* from chancery or canon law.[145] Moreover, what evidence exists indicates that the chancery in the fifteenth century granted relief similar to that later available in the common law action for money had and received.[146] But after the common lawyers worked out a usage for *consideration* in the later 1500s, the chancery generally followed it.[147] Accordingly, early precedents (in the 1600s) of failure

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1846). Perhaps the emergence of mistake as a species of *indebitatus assumpsit* for money had and received is best explained as lawyers' noticing that cases of failure of consideration often involved mistake, as in Martin v. Sitwell, Holt, K.B. 25, 90 Eng. Rep. 911 (K.B. 1691). That theory also explains the tendency of lawyers to refer to *Martin* as if it were a mistake case. *See infra* note 202. Certainly an action for money had and received on a mistake was more palatable to lawyers familiar with the Roman doctrine. Moreover, Mansfield's summary of money-had-and-received cases cites *condictio* precedents explicitly. Moses v. MacFerlan, 2 Burr. 1005, 1012, 97 Eng. Rep. 676, 680 (K.B. 1760); *see also* Daniel R. Coquillette, *Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern and Anglo-American Commercial Law*, 67 B.U. L. Rev. 877, 955-56 (1987); Birks, *supra* note 130, at 1. Birks shows that "Lord Mansfield's references to 'equity' are to the Roman *aequitas*, not to the chancery jurisdiction." Birks, *supra* note 130, at 21.

141. *Moses*, 97 Eng. Rep. at 680.

142. *See, e.g.*, Jackson, *supra* note 128; Simpson, *supra* note 115, at 303-14; Atiyah, *supra* note 115, at 181-84. Professor Birks argues that Mansfield meant by *ex aequo et bono* not doctrines of English chancery, but the Roman *aequitas*, which meant "natural justice and equity" or "what is fair when weighed . . . by reason" or "reasonable." Birks, *supra* note 130, at 20-21.

143. Jackson, *supra* note 128, at xiv.

144. As to mistake, *see* Martin v. Sitwell, 1 Show. 156, 157, 89 Eng. Rep. 509-10, Holt 25, 90 Eng. Rep. 911, 912 (K.B. 1691) (Holt, C.J.); Tomkins v. Bernet, Salk. 22, 91 Eng. Rep. 21, Skin. 411, 90 Eng. Rep. 182 (K.B. 1693).

145. *See infra* authorities cited notes 150-157; Simpson, *supra* note 115, at 316-488; Barbour, *supra* note 129, at 66-168; R.H. Helmholz, *Assumpsit and* Fidei Laesio, 91 L.Q. Rev. 406 (1975).

146. *See generally* Barbour, *supra* note 129, at 123; Jackson, *supra* note 128, at 20-21.

147. Anonymous, Cary 5, 21 Eng. Rep. 3 (Ch. c. 1570-1602). This entire entry in Cary's reads, "Upon *nudum pactum* there ought to be no more help in Chancery than there is at the common law, neither against him that hath waged his law in debt, though peradventure falsely." Chancery did not

of consideration in money had and received show no signs that chancery is the source of the *consideration* concept.[148] Chancery appears not to have used *failure of consideration* at all, not at least before 1800.[149]

As used in money-had-and-received cases, particularly those of the nineteenth century and prior, *consideration* should be understood in its old, broad sense as *a good reason for promising*. The precise meaning of "consideration" at common law has been debated by others at length.[150] However, very early

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follow this rule absolutely, however, as it occasionally broadened the meaning of *consideration* in equity. *See generally* Roscoe Pound, *Consideration in Equity*, *in* Celebration Legal Essays (1919).

148. *See* Martin v. Sitwell, 1 Show. 156, 157, 89 Eng. Rep. 509-10, Holt 25, 90 Eng. Rep. 911, 912 (K.B. 1691) (Holt, C.J.) (in Holt's report, holding that "the money was received without any consideration, and consequently . . . received to the plaintiff's use"); *see also* Attorney General v. Perry, 2 Comyns 481, 490-94, 92 Eng. Reg. 1169, 1173-75 (K.B. 1733).

149. *See generally, e.g.*, Fonblanque's Equity, *supra* note 75, at 361-74 & n.(g). Fonblanque states that "as a covenant without a consideration is null, it is the same thing, if a cause of consideration happen to cease." Though the chancery cases Fonblanque cites support that statement roughly, they rest on broader grounds. Probably the most broad statement comes from Stent v. Baillis, 2 P. Wms. 217, 24 Eng. Rep. 705 (K.B. 1724), in which the Master of the Rolls opined:

> It is against natural justice, that any one should pay for a bargain which he cannot have; there ought to be a *quid pro quo*, but in this case, the defendant has sold the plaintiff a *bubble* or *moonshine*.
>
> It is impossible that this bargain should ever be made good to the plaintiff . . ., and the money cannot be said to be due in conscience, supposing the plaintiff to be incapable of coming at what he contracted for, an in consideration whereof he was to pay his money.

2 P. Wms. at 219-20, 24 Eng. Rep. at 706. The court mentions consideration but clearly rests its decision on something besides the lack of this legal element. Natural justice and conscience are probably the best grounds for the decision, or impossibility or lack of a *quid pro quo*. Other cases cited by Fonblanque likewise fail to show chancery's use of a doctrine of failure of consideration. *See, e.g.*, Hale v. Webb, 2 Brown C.C. 78, 29 Eng. Rep. 44 (Ch. 1786); Henley v. Axe, 2 Brown C.C. 17, 29 Eng. Rep. 9 (1786); Mortimer v. Capper, 1 Brown C.C. 156, 28 Eng. Rep. 1051 (Ch. 1782); Steele v. Wright (1773), mentioned in Doe v. Sandham, 1 T.R. 705, 708 (1787); Brown v. Quilter, Ambler 619, 27 Eng. Rep. 402 (Ch. 1764); Hanger v. Eyles, 21 Vin. Abr. 540 (declining to aid in collection of a debt for which the debtor would receive no benefit; no mentioning of consideration explicitly); Tourville v. Naish, 3 P. Wms. 307, 24 Eng. Rep. 1077 (Ch. 1734); Ex parte Manning, 2 P. Wms. 410, 24 Eng. Rep. 791 (Ch. 1727); Hick v. Phillips, Prec. Ch. 575, 24 Eng. Rep. 258 (Ch. 1721) (mentioning the harsh and inequitable effects of the transaction); White v. Nutts, 1 P. Wms. 61, 24 Eng. Rep. 294 (Ch. 1702); Cass v. Rudele, 2 Vern. 280, 23 Eng. Rep. 781 (Ch. 1692); Newton v. Rowse, 1 Vern 460, 23 Eng. Rep. 586 (Ch. 1687); Anonymous, 2 Chanc. Cas. 19 (1679); Duckenfield v. Whichcott, 2 Chanc. C. 204, 22 Eng. Rep. 912 (Ch. 1674); Harding v. Nelthrope, Nelson 118, 21 Eng. Rep. 804 (Ch. 1667-68); Carter v. Cummins (c. 1665), mentioned in Harrison v. Lord North, 1 Chanc. C. 83, 22 Eng. Rep. 706 (Ch. 1667). Notwithstanding that these cases do not rest on failure of consideration, they do evince a broad concern with fairness in transactions. In Brown v. Quilter, Ambler 620, 27 Eng. Rep. 402 (Ch. 1764), Lord Northington, Chancellor, expressed his readiness to enjoin a landlord from collecting rent after the rental house had burned down, notwithstanding that the common law had rejected such a result in Paradine v. Jane, Aleyn 26, 73 Eng. Rep. 897 (K.B. 1647).

150. *See, e.g.*, Atiyah, *supra* note 115 (historical discussion throughout); Simpson, *supra* note 115, at 316-488 (excellent historical discussion); Farnsworth, *supra* note 25, § 1.6; K. Sutton, Consideration Reconsidered (1974); Oliver Wendell Holmes, The Common Law, Lects. VII & VIII (1881).

cases clearly reveal a broader concept than our twentieth century "bargain-based" doctrine, broader even than the benefit/detriment doctrine the bargain concept supposedly refined or replaced.[151]

One of the earliest explications of consideration in common law literature is found in Christopher St. Germain's *Doctor and Student*, as published in 1530:

> . . . and of other promyses made to man vpon a certayne consyderacyon/ yf the promyse be not agaynst the lawe. As yf .A. promyse to gyue .B. .xx.li. bycause he hathe made hym suche a house or hath lente hym suche a thynge or suche other lyke/ I thynke hym bounde to kepe hys promyse. But yf hys promyse be so naked that there is no maner of consyderacyon why yt sholde be made/ than I thynke hym not bounde to perfourme it/ for it is to suppose that there was som errour in the makyng of the promyse . . . .[152]

The consideration outlined in St. Germain's text and often employed in the 1500s has been variously described as a requirement for an "adequate motive,"[153] reason,[154] inducement,[155] or cause[156] for the promise given.[157]

When defined as good reason or appropriate circumstances for making a promise, "consideration" could (and did) include payment of money,[158] marriage, detriment, benefit,[159] a return promise,[160] natural love and affection between immediate family members,[161] a prior debt, and possession of assets

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151. *Accord* Atiyah, *supra* note 115, at 139-93; Simpson, *supra* note 115, at 316-26; II Thomas Atkins Street, The Foundations of Legal Liability 64-66 (1906).

152. Christopher St. Germain, Doctor and Student, Second Dialogue, Ch. 24 (Selden Society 1974) (1530).

153. Simpson, *supra* note 115, at 322; Barbour, *supra* note 129, at 60.

154. St. Germain, *supra* note 152, at Dial. II, ch. 24 (discussing consideration and causes as "reasonable").

155. Barbour, *supra* note 129, at 60 ("motive or inducement . . . sufficient to support a promise").

156. *See, e.g.*, Sharington v. Strotton, Plowden 298, 75 Eng. Rep. 454 (1566). *Doctor and Student* uses cause and consideration similarly or identically (which is difficult to tell). St. Germain, *supra* note 152, at Dail. II, ch. 24.

157. Professor Simpson opined that "consideration" as used in the late 1500s had no synonym. Simpson, *supra* note 115, at 331.

158. *See, e.g.*, John Style's Case, published at Simpson, *supra* note 115, at Appendix of Cases, No. 8, p. 630-31 ("The law is the same if I give certain money to one to make me a house by a day, and he does not do this by the day—there this is a consideration whereby there for the nonfeasance I shall have an action on my case").

159. *See* Mayor and Commonality of London v. Hunt, 3 Lev. 37, 83 Eng. Rep. 565 (K.B. 1681), held, for instance, that the benefit of a safe port was consideration sufficient to support a promise to pay a customs charge imposed at the port. *Id.* at 565.

160. *See, e.g.*, Strangborough & Warners Case, 4 Leon. 3, 74 Eng. Rep. 686 (K.B. 1589).

161. *See, e.g.*, various reports of *Marsh v. Rainsford*. In *Marsh*, a father sought to induce his daughter's suitor to marry the daughter, with a promise of 200*l.*, but before the father and suitor could agree on a day for payment, the suitor secretly married the daughter, after which the father consented to the marriage and promised to pay 100*l.* The court gave the now son-in-law an action

by executors and administrators.[162] Consideration was central to recovery on a promise, generally speaking. In fact, evidence exists that some jurists thought

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on a writ of assumpsit, apparently on the ground that the father's love and affection for his daughter were sufficient consideration. Marsh v. Rainsford, 2 Leon. 111, 74 Eng. Rep. 400 (1587) ("Wrey, Justice, Although the consideration be precedent, yet if it were made at the instance of the other party, the action would have lien. But here the natural affection of the father to his daughter, is sufficient matter of consideration."); Marsh v. Kavenford, Cro. Eliz. 59, 78 Eng. Rep. 319 (1587) ("Egerton and Foster argued, that this was no consideration; for it is past, and had no reference to any act before: but if the marriage had been at the request of the defendant, and after the marriage he promised, &c. this had been good. —Popham, Daniel, and Coke *contra*. For the father's natural affection doth continue, and her advancement is sufficient cause of the promise."); Marsh v. Rainsford, 2 Dyer 272b, 73 Eng. Rep. 608 (K.B. 1587) (reporting only the facts and the result); Simpson, *supra* note 115, at Appendix No. 11, p. 633 (a much fuller report of the arguments of counsel and judges, taken from a Harvard manuscript). In the Harvard manuscript the reporter appears to have concluded: "And as I gather the better opinion of the justice was that if one marries my daughter without my request, or without any communication had with me, or against my will, nevertheless if after the marriage I say that in consideration of his having married my daughter, I shall give him so much money, that on this he will have an action, for the natural affection is sufficient." *Id.* at 636. Leonard, Croke, and the Harvard manuscript reporter all seem to have agreed that natural affection between father and daughter constituted whole or part of the consideration in this case. Other cases prove further that love and affection could function as consideration to make a promise actionable in assumpsit. Church v. Church, reported in Hunt v. Wotton, Raymond 259, 83 Eng. Rep. 133 (31 Car. 2) (K.B. 1678) ("Where in *assumpsit* the plaintiff declared that whereas the plaintiff had at his own charges buried the defendant's child, the defendant promised to pay him his charges; and though there was no request laid, yet judgment was given for the plaintiff . . . ."), and at Hunt v. Bate, 2 Dyer 272a, 272b n.(b), 73 Eng. Rep. 605 (K.B. 1568); Bret's Case, Cro. Eliz. 756, 78 Eng. Rep. 987 (K.B. 1600). In *Bret's Case* the court explained:

> that natural affection of itself is not a sufficient consideration to ground an *assumpsit*; for although it be sufficient to raise an use, yet it is not sufficient to ground an action, without an express *quid pro quo*. But it is here good, because it is not only in consideration of affection, but that her son should afterwards continue at his table, which is good as well for the money due before, as for what should afterwards become due.

Id. Simpson concludes from *Bret's Case* and *Marsh* that a past benefit combined with love and affection was sufficient consideration to ground assumpsit. Simpson, *supra* note 115, at 436-37. At least two American cases continue in a related vein, holding love and affection to be sufficient consideration but holding that other kinds of consideration also existed in the case. *See* Dawley v. Dawley's Estate, 152 P. 1171 (Colo. 1915) (enforcing a promise of a mother to pay money to her adopted son, and holding that his adoption did not preclude the validity of love-and-affection consideration); Arnold v. Park, 8 Bush 3 (Ky. 1871) (enforcing a release and stating, "[A]ppellee was the son of Geo. Park, and that of itself constituted a sufficient consideration"). At any rate, love and affection continued to be a sufficient consideration in equity in cases of family settlements. *See, e.g.*, Wycherley v. Wycherley, 2 Eden 175, 28 Eng. Rep. 864, 865 (Ch. 1763) (enforcing a memorandum promising to execute a deed to secure £500 each to the defendant's sisters, the court stating it would consider "the ease and comfort and security of families as a sufficient consideration"). Dutton v. Poole, 2 Lev. 211, 83 Eng. Rep. 523, 1 Vent. 318, 332, 86 Eng. Rep. 205, 215 (K.B. 1677), which gave third party beneficiary rights to a family member, also appears to give legal effect to love and affection in contract law.

162. These categories are thoroughly discussed, with numerous citations, by Simpson, at Simpson, *supra* note 115, at 412-45, 459-65. *Consideration* was defined slightly differently in chancery than in law courts. *See generally* Pound, *supra* note 147.

consideration more central than the promise itself.[163] Only such prominence accounts for such definitions as, "A consideration is a cause or meritorious occasion, *requiring* a mutual recompense in fact or law."[164] This prominence also accounts, as Professor Atiyah notes, for the common law's proclivity for implying promises, particularly in cases of prior debt, which were actionable without a promise.[165] In such cases a consideration made relief in assumpsit appropriate, but the promise was a fiction.

Courts were concerned with the substance of the consideration at this early stage, not that promising took place in a certain form. St. Germain's Student of the common law says: "[A] nude contracte is where a man maketh a bargayne or a sale of his goodes or landes wythout any recompence appoynted for yt."[166] A bargain and sale can only lack consideration if bargaining and selling is not itself consideration. But a bargain and sale most typically involved mutual exchange, as Plowden later stated in 1566:

> [A] bargain and sale is, when a recompense is given by both the parties, as if a man bargains his land for money, here the land is recompense to the one for the money, and the money is recompense to the other for the land, and this is properly a bargain and sale.[167]

As Plowden describes it, it is not the reciprocity of performances or promises that gives consideration, but the recompense given for the promise.[168] It is true that when a return promise was the alleged consideration, the plaintiff need not have performed in order to recover from the defendant.[169] But such recovery was justified on the ground that the defendant could later sue the plaintiff on the

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163. *See, e.g.*, Stone v. Withypoll, 1 Leon. 114, 74 Eng. Rep. 106; Cro. Eliz. 126, 78 Eng. Rep. 383, Owen 94, 74 Eng. Rep. 924; Latch, 82 Eng. Rep. 254 (K.B. 1588). Owen reports Coke's winning argument: "The consideration is the ground of every action on the case . . . ."

164. Calthorpe's Case, 2 Dyer 334b, 336b, 73 Eng. Rep. 758, 759 (K.B. 1574).

165. Atiyah, *supra* note 115, at 143-67. Atiyah argues that promises were sometimes thought of merely as evidence of an obligation that arose out of the consideration. *Id.*

166. St. Germain, *supra* note 152, at Dial. II, ch. 24.

167. Sharington v. Strotton, 1 Plowden 298, 303, 5 Eng. Rep. 454, 461 (1566) (argument of Plowden as counsel for the defendants).

168. *See also* John Rastell, Difficult and Obscure Wordes and Termes of the Lawes of this Realme 47-48 (c. 1527, reprinted with English translation in 1579). Rastell defines *Contract* as:

> a bargaine or couenaunt betweene two parties, where one thinge is geeuen for an other which is called *quid* pro quo, as if I sell my horse for money, or if I make you a lease of my manor of Dale in consideration of xx.li. that you giue me, these are good contracts because there is one thig for an other, But if a man make promyse to mee that I shall haue twentye shyllinges, and that hee wil be debtour to mee thereof, and after I aske the the ww.s. and hee wil not deliuer it, yet I shal neuer haue any action to recouer this xx.s. for that, that this promise was no contracte but a bare promyse, and *ex nudo practo* [sic] *non oritur actio.*

Id.

169. *See* Gower v. Capper, Cro. Eliz. 543, 78 Eng. Rep. 790 (K.B. 1596).

plaintiff's promise.[170] This recompense by action substituted where recompense by performance might fail. Courts were concerned that some substantive reason for the defendant's promise exist. This concern was most often expressed in application of the doctrine of consideration.[171]

Some early cases, which might appear to be exceptions, show good reasons for promising apart from consideration itself. In *Sturlyn v. Albany*,[172] the court said, "[F]or when a thing is to be done by the plaintiff, however so small, this is sufficient consideration to ground an action."[173] But the consideration in that case was that the promisee show the promisor a document embodying a legal obligation that the promisor pay. Had the plaintiff neither done nor promised anything, the plaintiff could still have sued by a writ of debt. In such a case the substantive reason for the promise is satisfied and the formal action taken by the plaintiff could suffice as consideration without lessening the court's satisfaction that good reason for the promise existed.

Other cases, such as those involving an exchange of a small amount of money for a more valuable promise or a chance at more money,[174] probably show the beginnings of the formalistic bargain theory which eventually took the place of more substantive concerns.[175] Sheppard indicates that in those kinds

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170. *See, e.g.*, Wichals v. Jones, Cro. Eliz. 703, 78 Eng. Rep. 938, 939 (K.B. 1599) ("for there is a mutual promise, the one to the other; so that if the plaintiff doth not [perform], the defendant may have his action against him; and so also the defendant shall be charged as to him; and a promise against a promise is a good consideration"). Manwood, J., argued that in the case of a promise against a promise is not good unless the promisor whose promise is consideration had to perform or actually does perform. *Compare* West v. Stowel, 2 Leon. 154, 74 Eng. Rep. 437 (K.B. 1577) (Mounsen, J.: "here the consideration is sufficient, for here this counter promise is a reciprocal promise"), *with id.* (Manwood, J.: "Such a reciprocal promise betwixt the parties themselves at the match is sufficient; for there is consideration good enough to each, as the preparing of the bows and arrows, the riding or coming to the place appointed to shoot, the labour in shooting, the travel in going up and down between the marks; but for the bettors by, there is not any consideration, if the bettor doth not give aim . . . .").

171. *But see also, e.g.*, St. Germain, *supra* note 152, at Dial. II, ch. 24 ("Yf he to whome the promyse ys made: haue a charge by reason of the promyse whyche he hathe also perfourmed: than in that case he shall haue an accyon for that thyng that was promysed *thoughe he that made the promyse haue no worldely profyte by yt.*") (emphasis added) (emphasizing also that detriment would make a promise actionable).

172. Cro. Eliz. 67, 78 Eng. Rep. 327 (K.B. 1587).

173. *Id.* at 328.

174. *See also, e.g.*, Rastell, *supra* note 168, at 47-48 ("but if any thinge were geuen for the xx.shillinges though it were not but to the value of a peny, then it had ben a good contracte").

175. Plowden actually argued that a formalistic mechanism that forced deliberation could replace consideration as reasons for promising, in Sharington v. Strotton, 1 Plowden 298, 75 Eng. Rep. 454 (K.B. 1566):

> [B]y the law . . . there are two ways of making contracts . . . for lands or chattles. The one is, by words, which is the inferior method; the other is, by writing, which is the superior. And because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration. [Verbal agreements without consideration are unenforceable, and] the reason is, because it is by words which pass from men lightly and inconsiderately, but

of cases the jury probably gave "damages according to the loss,"[176] which might well have been merely the small amount of money given or promised by the plaintiff.

Powell's 1790 treatise on contract law[177] retains the older, reason-based notion of consideration. But Powell shows signs of growing acceptance of consideration as a formal mechanism forcing a party merely to deliberate before promising, which mechanism disregarded the substantive reasons the party had for promising. Thus, Powell reports: "A *Consideration* is the *material* cause of a contract or agreement [the older doctrine]; or that, in expectation of which, each party is induced to give his assent to what is stipulated reciprocally between both parties [the newer doctrine]."[178] Powell reports the old, reason-based law:

> So if one buy of me an house, or other thing for money, and no money be paid, nor earnest given, nor day set for payment, nor the thing delivered; here no action lies for the money, or the thing sold, but the owner may sell it to another if he will.[179]

Without money already paid, a day set, or a thing delivered, no reason exists to promise, so no reason exists to enforce the promise. Powell also notes that a marriage will serve as consideration[180] as will prior, just debt[181] or any "duty before,"[182] past consideration given at the request of the promisor,[183] and in equity the establishment of family peace.[184] Mere bargaining will not serve: "idle and insignificant considerations, are looked upon as none at all; for whenever a person promises without a benefit arising . . . or loss, it is considered as a void promise."[185]

But Powell's discussion of whether a mere writing can be consideration indicates that the traditional, reason-based consideration theory is giving way to

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> where the agreement is by deed, there is more time for deliberation. For when a man passes a thing by deed, first there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, . . . [and so on]. So that there is great deliberation used in the making of deeds, for which reason they are . . . adjudged to bind the party without examining upon what cause of consideration they were made.

Id. at 308-09, 75 Eng. Rep. at 470. The court was never accepted by the *Sharington* court, however. *See id.* at 309, 75 Eng. Rep. at 471.

176. William Sheppard, Action on the Case 18, 21 (1663) (". . . [F]or a penny is as much obliging in a promise as 100*l*. But there it is probably the jury will give damage according to the losse").

177. 1 Powell, *supra* note 75, at 330-69.

178. *Id.* at 330.

179. *Id.* at 331 (citing Sharington v. Strotton, 1 Plowden 298, 75 Eng. Rep. 454 (K.B. 1566)).

180. *Id.* at 350.

181. *Id.* at 351.

182. *Id.* at 350.

183. *Id.* at 351-52.

184. *Id.* at 362.

185. *Id.* at 355.

a consent-based will theory of contract formation, which was more consistent with and a precursor to our formal, bargain-based consideration. Lords Wilmot and Mansfield had by 1765 already suggested in *Pillans v. Van Mierop*[186] that a writing could be consideration. Wilmot and Mansfield said the purpose of consideration was to force deliberation, and a writing alone would suffice.[187] Though Powell thought a writing requirement alone would not force enough deliberation,[188] Powell agreed with Wilmot and Mansfield about consideration's purpose.[189] Even though a sealed writing had always been enforced at common law without consideration, Powell concluded that a sealed writing "import[s] in itself a consideration, namely, the will of him who made it."[190] In the course of his reasoning, Powell quoted Roman law at length, giving numerous examples from Roman law in which an agreement is enforced because it shows the deliberate "consent" of the parties reflected in a bargained-for exchange; Powell opined that these exchanges suffice as consideration.[191]

Notwithstanding these indications of change, as of 1790 the older consideration doctrine was still much in force. In the money-had-and-received cases which gained prominence in that century, *failure of consideration* meant the absence of the efficient causes or motives of the promise. This use of *failure of consideration* retained some force into the twentieth century[192] and persists in

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186. 3 Burr. 1663, 97 Eng. Rep. 1035 (K.B. 1765). The King's Bench rejected this suggestion in Rann v. Hughes, 7 T.R. 350, 101 Eng. Rep. 1014 (K.B. 1778).

187. *Pillans*, 3 Burr. at 1669-73; 97 Eng. Rep. at 1038-40.

188. 1 Powell, *supra* note 75, at 355.

189. *See id.* at 330, 341-42.

190. *Id.* at 333. Powell here is quoting Plowden's argument from a portion of Sharington v. Strotton, Plowden 298, 75 Eng. Rep. 454 (K.B. 1566). *See supra* note 175.

191. *See* 1 Powell, *supra* note 75, at 333-42. Powell writes:

> A contract was the consent of two or more persons to something to be given or done. It followed of course, that a promise *accepted* immediately became a contract; for, then, there was the assent of two person to the thing promised.

Id. at 334. And later:

> I give you this that you may give me that; which was where one gave money or goods on a contract that he should be paid money or goods for them. Of this kind were all loans . . . and all sales of goods . . . . Or *facio ut facias*, I do *this* for you, that you may do that for me; this was where one agreed with another to do his work for him, if he would do the work of the former in return; or where two persons agreed to marry together, or to do any other positive act on both sides; or to forbear on one side in consideration of something done on the other. . . . Or it might have been for mutual forbearance on both sides . . . .

Id. at 335-36. Powell reports that all of these kinds of contracts were *pacts* with consideration in Roman law—pacts with consideration, as opposed to naked pacts. *Id.* at 337-38.

192. The New Jersey Supreme Court explained *failure of consideration* in part:

> That type of "failure of consideration" which is a defense is where the thing expected to be received by one party and given by the other party, cannot be or has not been given without fault of the party contracting to give it.

Cook v. Commercial Cas. Ins. Co., 190 A. 99, 101 (N.J. 1936); *see also* Shirk v. Neible, 59 N.E. 281, 284 (Ind. 1901) ("An answer of failure of consideration implies that there was a consideration

some of its original meaning today. Thus, some courts continue to scrutinize contracts under a failure of consideration doctrine to ensure that good reason for holding both parties to the bargain still exists, even though a bargaining process has already occurred.[193]

In the late 1700s and early 1800s, when American mutual mistake was developing, courts employed this older understanding of consideration in the action for money had and received, to determine when a *failure of consideration* had occurred. In accord with this older understanding, a failure of consideration occurred when the reasons for making the promise disappeared.

Failure of consideration, this meaning embedded in it, was closely related to mutual mistake, for any time the parties mistakenly believed a fact the non-existence of which would also result in a failure of consideration, relief was warranted on either mistake or failure of consideration grounds. *Jones v. Ryde* (1814)[194] illustrates this point. In *Jones*, the defendant sold to the plaintiff a negotiable instrument. Both assumed the instrument had not been altered from its original. In fact, a forger had increased the amount of the instrument by

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sufficient . . . but that it has subsequently failed, in whole or in part, without fault of the defendant."). Consider also the following:

> [F]ailure of consideration implies that a consideration, originally existing and good, has since become worthless or has ceased to exist or been extinguished, partially or entirely.

Douglass v. Douglass, 188 P.2d 221, 223 (Okla. 1947); *see also, e.g.*, Benson v. Andrews, 292 P.2d 39, 44 (Cal. Ct. App. 1955); Kelley, Glover & Vale, Inc. v. Heitman, 44 N.E.2d 981, 984 (Ind. 1942); Columbia Restaurant v. Sadnovick, 157 So. 280, 281-82 (La. App. 2d Cir. 1934); Henry v. Reich, 72 N.E.2d 500, 501 (Ohio Ct. App. 1947); Guss v. Nelson, 78 P. 170, 173 (Okla. 1904); Shinn v. Stemler, 45 A.2d 242, 243 (Pa. 1946); In re Conrad's Estate, 3 A.2d 697, 699, 699 n.5 (Pa. 1938) (holding failure of consideration a defense to a sealed instrument); In re Killeen's Estate, 165 A. 34, 35 (Pa. 1932); Rauschenback v. McDaniel's Estate, 11 S.E.2d 852, 854 (W.V. 1940). *But see* Farrell v. Third Nat'l Bank in Nashville, 101 S.W.2d 158, 163 (Tenn. Ct. App. 1936) ("Failure of consideration is in fact simply a want of consideration."). Historically, failure of consideration could also occur by breach of the other party after the first party's payment of money. *See, e.g.*, *Henry*, 72 N.E. at 501 ("[I]t is the neglect, refusal and failure of one of the contracting parties to do, perform, or furnish, after making and entering into the contract, the consideration in substance and in fact agreed upon.").

193. The Fifth Circuit recently reported Texas law: "Failure of consideration occurs when, because of some supervening cause after an agreement is reached, the promised performance fails." In re Topco, Inc., 894 F.2d 727, 742 (5th Cir. 1990). Other cases report the law similarly. *See* Henslee v. Boyd, 360 S.W.2d 505, 507 (Ark. 1962); World Wide Lease, Inc. v. Woodworth, 728 P.2d 769, 773-74 (Idaho Ct. App. 1986); Worner Agency, Inc., v. Doyle, 459 N.E.2d 633, 635 (Ill. App. Ct. 1984); Ryan v. Tinker, 744 S.W.2d 502, 505 (Mo. Ct. App. 1988); Ennis v. LcLaggan, 608 S.W.2d 557, 561 (Mo. Ct. App. 1980); Fugelsang v. Fugelsang, 517 N.Y.S.2d 176, 177 (N.Y. App. Div. 1987); Bonner v. Oklahoma Rock Corp., 863 P.2d 1176, 1186 (Okla. 1993) ("The test is whether the failure of performance defeats the object of the contract."); Bernal v. Garrison, 818 S.W.2d 79, 84 (Tex. App. 1991); General Ins. Co. of America v. Carnicero Dynasty Corp., 545 P.2d 502, 504-05 (Utah 1976). In some cases, the supervening or later nature of the failure is not part of the formulation of the doctrine. *See, e.g.*, *Worner Agency*, 459 N.E.2d at 635 ("Failure of consideration . . . necessarily admits the contract, but then refers to transactions in which consideration was anticipated but did not materialize.").

194. 5 Taunt. 488, 128 Eng. Rep. 779 (C.P.D. 1814).

1000*l*. As a consequence, the plaintiff had paid 1000*l*. too much for it and sought recovery of that amount in an action for money had and received.[195] Gibbs, Chief Justice of Common Pleas, opined that the 1000*l*. could be recovered because it was paid by mistake.[196] Justice Heath, though agreeing with Gibbs that the money was recoverable because paid under mistake, also noted, "If a person gives a forged bank note, there is nothing for the money: it is no payment."[197] Justice Dallas combined mistake with failure of consideration explicitly: "Upon the ground therefore that the money was in part paid by mistake, upon a consideration that has failed, I am of opinion, that the Plaintiffs are entitled to recover it back."[198]

Jones was typical of its time.[199] It seemed everyone who studied the matter saw the overlap between mistake and failure of consideration. Blackstone in 1783 discussed money had and received in such a way that failure of consideration could be taken to include mistake.[200] By 1893 William Keener argued

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195. *Id.* at 488-89, 128 Eng. Rep. at 780.

196. *Id.* at 492-93, 128 Eng. Rep. at 781-82.

197. *Id.* at 494, 128 Eng. Rep. at 782.

198. *Id.* at 495, 128 Eng. Rep. at 782. Dallas, J., also speaks of the doctrines separately but as if either were adequate grounds to grant relief in this case: "The case falls not only within the general principle that where a man has paid more than the thing is eventually worth, and the consideration fails, he may recover it back, but also comes within the express authority of *Cripps v. Reade* [in which only mistake was mentioned]." *Id.*

199. *See, e.g.*, Cochrane v. Willis, 1 Ch. App. 58, 46 Eng. Rep. 906 (Ch. 1865) (Knight-Bruce, L.J.: "There was substantially an absence of consideration and substantially a mistake . . . ."); Cocks v. Masterman, 9 B. & C. 902, 109 Eng. Rep. 335 (K.B. 1829) (counsel arguing that "[t]he money in this case was paid by the plaintiffs to the defendants without consideration, and under a mistake as to the facts"); Bruce v. Bruce, 5 Taunt. 495, 128 Eng. Rep. 782 (C.P.D. 1814) (decided with *Jones*); Staniforth v. Staggs, 1 Camp. 398 n.*, 564, 170 Eng. Rep. 998 n.*, 1059 (1808) (case argued as mistake but held to be failure of consideration); Harvey v. Gibbons, 2 Lev. 161, 83 Eng. Rep. 499. *Harvey* held that, because a servant could not legally release his master's debtor, the debtor's promise given in exchange for a release by the servant was without consideration. It seems likely that the parties to the *Harvey* contract would not have agreed had they known that the law prohibited the servant's release from having legal effect, although it is possible that the debtor may have been gambling to that effect. *But see* 4 Leon. 2, 74 Eng. Rep. 686 (26 Eliz.) (The entire report reads, "A man in consideration of 20*l*. paid him, promiseth to assign to J.S. the lease of a stranger; it was adjudged, that an action would lie upon such a promise, because the assumor might purchase the house and then assign it."). A later American case handled an issue similar to that in *Jones* solely as a failure of consideration. Terry v. Bissel, 26 Conn. 23 (Conn. 1857). For American cases recognizing the relationship between mistake and failure of consideration, see Claflin v. Godfrey, 38 Mass (21 Pick) 1 (Mass. 1838); Champlin v. Laytin, 6 Paige 189 (1836); Bellas v. Hays, 5 Serg. & Rawle 427, 440 (Pa. 1819) (Gibson, J.: "Mistake [is] perhaps not very different from want of consideration."). American counsel argued both mistake and failure of consideration when both appeared applicable. *See, e.g.*, Mowatt v. Wright, 1 Wend. 355, 357-59 (N.Y. 1828) (arguments of Troup and Raymond).

200. III W. Blackstone, Commentaries on the Laws of England 162 (1783). Blackstone defined money had and received as "when one has had and received money of another's, without any valuable consideration given on the receiver's part." *Id.* Blackstone then says that this remedy "lies for money paid by mistake." *Id.*

at length, citing both English and American cases, that relief for money had and received under a mistake could only occur if consideration failed.[201] Street in 1906 and English lawyers before and after him cited failure of consideration cases to support mistake analysis.[202] Foulke, in his 1911 discussion of American mutual mistake, mentioned the relationship.[203] And as late as 1954 a British commentator argued that most common law mutual mistake cases were grounded not on mistake but on failure of consideration.[204] This overlap in the law continues today.[205]

Failure of consideration cases thus overlapped with mutual mistake cases, because reasons for promising can disappear because of a mistake. But failure of consideration could also occur because performance is impossible from the outset or because the purpose of a contract, the reason for making the promise, is frustrated at the time the contract forms. Courts in money had and received cases treated these fact patterns also as instances of failure of consideration or mistake, or both.[206] Thus, in money had and received, mistake developed a relationship with impossibility, frustration, and failure of consideration.

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201. Keener, *supra* note 130, at 34-43.

202. Street, *supra* note 151, at 211 n.3. Both Street and Keener cite Martin v. Sitwell, Holt, K.B. 25, 90 Eng. Rep. 911 (K.B. 1691), as a mistake case. Street, *supra* note 151, at 211 n.3; Keener, *supra* note 130, at 112. The parties in *Martin* may have been mistaken, but the court's opinion is grounded solely on failure of consideration. *Martin*, 90 Eng. Rep. at 912. English lawyers also argued *Martin* as a mistake case. Attorney General v. Perry, 2 Comyns 481, 492 (1733) (argument of the attorney general). Strickland v. Turner, 7 Ex. 208, 86 R.R. 619 (1852), a failure of consideration case, is cited for mistake in 1 Chitty on Contracts, *supra* note 73, § 5-011, and in Sir John Salmond & James Williams, Principles of the Law of Contracts 223 (Sweet & Maxwell 1945).

203. Foulke, *supra* note 22, at 222 & n.87 (discussing Keener and other authorities).

204. C.J. Slade, *The Myth of Mistake in the English Law of Contract*, 70 L.Q. Rev. 385, 396-97 (1954).

205. *See, e.g.*, Seitz v. Industrial Comm'n of Arizona, 911 P.2d 605, 608 (Ariz. Ct. App. 1995) ("Whether one characterizes these facts as a failure of consideration, a mutual mistake of material fact, or [other] . . . it is clear that petitioner is entitled to rescind this contract . . . ."); Cottonhill Inv. Co. v. Boatmen's Nat'l Bank of Cape Girardeau, 887 S.W.2d 742, 743 (Mo. Ct. App. 1994) (reporting a trial court's determination that a mutual mistake caused a "substantially total failure of consideration"). Reported cases in which mutual mistake is pleaded with failure of consideration as a defense to a contract action are far too numerous to list, even if one restricts the search to cases reported in the 1990s.

206. As to present frustration, see Cole v. Gower, 6 East 110, 102 Eng. Rep. 1229 (K.B. 1805) (Ellenborough, C.J.); Staniforth v. Staggs, 1 Camp. 398 n.*, 564, 170 Eng. Rep. 998 n.*, 1059 (1808) (case of frustration of purpose argued as mistake but held to be failure of consideration); Wilde v. Griffin, 5 Esp. 142, 170 Eng. Rep. 765 (1804); Wharton v. Hudson, 3 Rawle 390 (Pa. 1832); Rheel v. Hicks, 25 N.Y. 289 (1862) (a case in which money was paid to the government for the support of an illegitimate child on the mistaken belief, shared by both parties, that a woman was pregnant with an illegitimate child; she was not, it was later learned).; *cf.* Woodward v. Cowing, 13 Mass. 215 (1816) (dicta: the case was resolved against the plaintiff on assumption-of-risks grounds). In England, cases of future frustration were denied. *See, e.g.*, Gillan v. Simpkin, 4 Camp. 241, 171 Eng. Rep. 77 (1815); Jackson, *supra* note 128, at 86 & n.1. *Gillan* reported that relief for present frustration was available in money had and received, however. *Gillan*, 4 Camp. at 242, 171 Eng. Rep. at 77 (dicta).

3. *Later Development*

When mutual mistake which rendered a contract voidable began to develop in the English common law, it came slowly. Commentators often cite several cases from the early to mid-1800s as establishing such a doctrine, but cases from this period do not generally mention mutual mistake, or even mistake.[207] Contemporary writings of commentators on English common law confirm this analysis. Comyn's early treatise on contracts[208] does not mention such a mistake doctrine, nor does Chitty's reworking of Comyn's treatise published in America in 1834.[209] Reference to the doctrine occurs at least by 1807 in equity,[210] and dicta in an 1811 law case shows that at least some common lawyers had thought about it.[211] But cases actually resting on such doctrine

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As to present impossibility handled as failure of consideration, see Farrer v. Nightingal, 2 Esp. 639, 170 Eng. Rep. 481 (1798), and American cases Murray v. Richards, 1 Wend. 58 (N.Y. 1828); Merrit v. Clapp, 2 Cai. Cas. 117, 120 (N.Y. 1804) (holding a note failed as consideration when its maker became insolvent); Keener, *supra* note 130, at 244; *see also* Lakeman v. Pollard, 43 Me. 463, 467 (1857) (quantum meruit case); Wolfe v. Howes, 20 N.Y. 197, 202 (1859) (quantum meruit); Fenton v. Clark, 11 Vt. 557 (1839) (quantum meruit). The Restatement classed impossibility as failure of consideration as well. Section 399 of the first Restatement gives the following illustration of failure of consideration:

> A contracts to give B for $50, payable in one month, an option to buy for $10,000, A's horse, Orion, at the end of a racing season lasting three weeks. In two weeks Orion dies. B's contractual duty to pay $50 is discharged.

Restatement of Contracts § 399 illus. (1) (1932). This illustration is a variation of the dead horse case from Roman law. *See supra* text accompanying notes 102, 106.

207. These cases typically rest on failure of consideration only, though probably they did involve a mistake, namely the mistake that the consideration had not failed. *E.g.*, Couturier v. Hastie, 5 H.L.C. 673, 101 R.R. 329 (1856), *cited in* Sir William R. Anson, Principles of the English Law of Contract and of Agency in Its Relation to Contract 146 (Oxford 1952), and in Sir John Salmond & James Williams, Principles of the Law of Contracts 220 (Sweet & Maxwell 1945). Chitty in 1 Chitty on Contracts, *supra* note 73, § 5-011, recognizes *Couturier*'s failure to mention mistake but cites it anyway in the next paragraph to support a proposition concerning mistake, *id.* § 5-012] n.59. *See also, e.g.*, Strickland v. Turner, 7 Ex. 208, 86 R.R. 619 (1852), cited in 1 Chitty on Contracts, *supra* note 73, § 5-011, and in Salmond & Williams, *supra*, at 223.

208. Samuel Comyn, A Treatise of the Law Relative to Contracts and Agreements Not Under Seal (Riley 1809).

209. Joseph Chitty, A Practical Treatise on the Law of Contracts, Not Under Seal (Francis J. Troubat, ed., Grigg & Elliot 3d American ed. 1834).

210. Stapylton v. Scott, 13 Ves. Jun. 424, 33 Eng. Rep. 353 (Ch. 1807).

211. *See* Boughton v. Sandilands, 3 Taunt. 342, 368, 128 Eng. Rep. 136, 146 (C.P.D. 1811) (Mansfield, C.J.: "No argument has been raised from the cases of contracts for the sale of goods, for building houses, or the like. Such contracts, whether under seal or not under seal, if they proceed on a clear mistake, on both sides, are void."); *see also* Cox v. Prentice, 3 M. & S. 344, 105 Eng. Rep. 641 (K.B. 1815) (a case in *indebitatus assumpsit* discussing the doctrine under the rubric of that writ). A later case in equity, Robinson v. Dickenson, 3 Russ. 399, 38 Eng. Rep. 625 (Ch. 1828), appears to question whether the dicta in *Boughton* actually represented the state of the law. *Id.* at 412-13, 38 Eng. Rep. at 631.

must have been rare. However, the common law was moving toward recognition of mutual mistake.

In *Hitchcock v. Giddings* (1817)[212], the Court of Exchequer held that non-existence of the subject matter of a contract at the time the contract of sale is formed allows a court to refuse to enforce the contract. Though this holding in itself appears to be little more than reiteration of former cases involving non-existence of the subject matter of the contract,[213] *Hitchcock* foreshadowed our mutual mistake doctrine in several ways.[214] First, its facts are similar to many modern cases to which mutual mistake doctrine is applied.[215] Second, it relied on equitable precedent and notions of equity;[216] courts today do the same.[217]

Third, *Hitchcock* granted in substance the modern equitable remedy for mistake: The court refused to enforce the contract.[218] Later American courts

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212. 4 Price 135, Daniell 1, 146 Eng. Rep. 41 (Ex. 1817).

213. *See supra* cases cited notes 125, 127.

214. *Hitchcock* was cited numerous times by American courts and commentators. *See, e.g.*, Galloway v. Finley, 37 U.S. (12 Pet.) 264, 277 (1838); Allen v. Hammond, 36 U.S. (11 Pet.) 63, 67 (1837); Smith Eng'g Co. v. Rice, 102 F.2d 492, 498 (9th Cir. 1938); United States v. Charles, 74 F. 142, 145 (8th Cir. 1896); Lawrence v. Dana, 15 F. Cas. 26 (D. Mass. 1869); Waples's Case, 16 Ct. Cl. 126 (1880); Burnside's Case, 3 Ct. Cl. 367 (1867); Hecht v. Batcheller, 17 N.E. 651, 652 (Mass. 1888); Riegel v. American Life Ins. Co., 25 A. 1070, 1073 (Pa. 1893); Ross v. Harding, 391 P.2d 526, 533 (Wash. 1964); Enrico v. Overson, 576 P.2d 75, 77 (Wash. Ct. App. 1978); 1 Story, *supra* note 14, at 157 n.3.

215. In *Hitchcock*, a seller sold a vested remainder in fee simple, expectant on an estate in fee tail. *Hitchcock*, 4 Price at 135-36, 146 Eng. Rep. at 418. After signing the contract, the parties to it learned that the tenant in fee tail had suffered a recovery, so that the vested remainder had not existed when the contract was executed. *Id.* at 136. *See, e.g.*, Shores v. Shaffer, 146 S.E.2d 190 (Va. Ct. App. 1966) (holding a lease void for mutual mistake because the lessor did not own the property supposedly leased); Washington Sec. Co. v. State, 114 P.2d 965 (Wash. 1941) (resolving a similar case on failure-of-consideration grounds); Robertson v. Robertson, 119 S.E. 140 (Va. 1923); Wolfinger v. Thomas, 115 N.W. 100 (S.D. 1908); *see also generally, e.g.*, cases of impossibility cited *supra* note 26 and discussion concerning acreage cases *supra* notes 35-38 and accompanying text.

216. The court appears to have reasoned that if a Court of Equity would grant relief here for mistake, and that result was consistent with common justice, then the Court of Exchequer would also grant relief. *Hitchcock*, 4 Price at 139-41, 146 Eng. Rep. at 419-20. Chief Baron Richard's opinion notes no fewer than five times what a court of equity would do in this case. Perhaps these references are dicta. The court found fraud, which would warrant non-enforcement of the contract. But it relied on equitable precedent to define fraud. *Id.* at 139 ("That is, without doubt, what we call a fraud, in Courts of Equity."). For a case similar to *Hitchcock* in an American jurisdiction, see Conner v. Henderson, 15 Mass. 319 (1818).

217. Cases noting mutual mistake's equitable character are far too numerous to list. *See, e.g.*, UT Communications Credit Corp. v. Resort Dev., Inc., 861 S.W.2d 699, 707 (Mo. Ct. App. 1993) ("Equity may grant relief against a . . . mutual mistake of both parties."); Brookside Memorials, Inc. v. Barre City, No. 96-429, 1997 WL 357862, *3 (Vt. June 14, 1997) ("Equity affords relief against mutual mistake . . . ."); Diffendarfer v. Dicks, 11 N.E. 825, 828 (N.Y. 1887) ("[T]he jurisdiction of chancery to rescind contracts for . . . mutual mistake of material facts, is one of the best settled and most beneficent powers of a court of equity.").

218. *Hitchcock*, 4 Price at 141-42, 146 Eng. Rep. at 420.

grant equitable rescission, which has the same result.[219] Granting relief from enforcement differed from the normal common law method of dealing with mistakes in *indebitatus assumpsit*, in which money had and received was repaid, though *indebitatus* actions had been moving in this direction.[220]

In many ways, *Hitchcock* is an amalgam of prior lines of case law. In its formal holding, *Hitchcock* clearly falls in the "non-existence of the subject matter" line. As noted above, holdings of these types were fairly common, and ancient with respect to certain kinds of contracts.[221] On the other hand, in its reasoning and language, it is an equity decision.[222] Perhaps the court was unduly influenced by counsel.[223] Perhaps *Hitchcock* resulted from the odd jurisdiction of the Exchequer, which sometimes sat in equity and sometimes in law. *Hitchcock* was cited later by both law and equity commentators as precedent.[224] *Hitchcock* played a role later in the development of American mutual mistake law.

Beyond *Hitchcock*, further explicit English common law development (relevant to American law) waits until 1867, for the case of *Kennedy v. The Panama, New Zealand, and Australian Royal Mail Co.*[225] *Kennedy* was a case of innocent misrepresentation,[226] but in such cases mutual mistake doctrine is often applicable,[227] and the court discussed mutual mistake on the way to

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219. *See, e.g.*, United States Postal Serv. v. Phelps Dodge Ref. Corp., 950 F. Supp. 504, 516 (E.D.N.Y. 1997) ("Rescission is . . . appropriate on . . . ground of a mutual mistake . . . ."); Equitable Mortgage Corp. v. Mortgage Guar. Ins. Corp., 791 F. Supp. 620, 625 (S.D. Miss. 1990) ("[T]he appropriate remedy is that of rescission."); Estate of Blakely v. Federal Kemper Life Assur. Co., 640 N.E.2d 961, 966 (Ill. App. Ct. 1994) ("Rescission is a proper remedy for . . . mutual mistake . . . ."); Schultz v. Hourihan, 656 N.Y.S.2d 526, 528 (N.Y. App. Div. 1997) ("A contract is voidable under the equitable remedy of rescission if both parties entered into the contract under a mutual mistake of fact . . . ."); McIntyre v. Zara, 394 S.E.2d 897, 900 (W.V. App. 1990) ("[T]he circuit court should order rescission . . . ."). Of course, "rescission is not the exclusive remedy for mutual mistake; a court may consider other equitable remedies in fashioning a just result." Thieme v. Worst, 745 P.2d 1076, 1080 (Idaho Ct. App. 1987).

220. *See, e.g.*, Farrer v. Nightingal, 2 Esp. 639, 170 Eng. Rep. 481 (1798), in which the plaintiff sued in *indebitatus assumpsit* for return of £5 paid as a lease deposit. The court not only ordered return of the £5 but declared that the plaintiff may "consider the contract at an end." *Id.* at 639-41, 170 Eng. Rep. at 481-82.

221. *See supra* text accompanying notes 125-127.

222. *See supra* note 216 and accompanying text.

223. *See Hitchcock*, 4 Price at 137, 170 Eng. Rep. at 419. *Hitchcock* was argued for the plaintiff by a certain Fonblanque, perhaps the Fonblanque who annotated Ballow's treatise on equity.

224. 1 Story, *supra* note 14, at 157 n.3; Chitty on Contracts, *supra* note 73, § 5-011 n.51.

225. 2 L.R. 580 (Q.B. 1867). Professor Atiyah describes Kennedy as the first "serious attempt . . . to lay down a general principle as to the effect of mistake in contracts." Atiyah, *supra* note 115, at 436 (1979). That description fails to take account of American law.

226. In *Kennedy*, the plaintiff Lord Gilbert had bought stock in the defendant company on the mistaken representation (which the company stated in the stock prospectus) that the company had a contract to deliver mail to New Zealand. *Kennedy*, 2 L.R. at 582-84. On later finding the company had no such contract, Lord Gilbert sought to have his money returned. *Id.* at 580, 584.

227. *Kennedy* could have been tried as a mistake case because both the company and Kennedy

refusing to grant relief.[228] The Court's citation almost solely to Roman law is particularly interesting:

> The principle [at issue] is well illustrated in the civil law, as stated in the Digest [XVIII.I.9-11]. There, . . . the framers of the digest [state] thus: "Inde quaeritur, si in ipso corpore non erretur, sed in substantia error sit, ut, puta, si acetum pro vino veneat, aes pro auro, vel plumbum pro argento vel quid aliud argento simile: an emptio et venditio sit;" and the answers given by the great jurists quoted are to the effect, that if there be misapprehension as to the substance of the thing there is no contract; but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding. Paulus says, "Si aes pro auro veneat, non valet, aliter atque se aurum quidem fuerit, deterius autem quam emptor existemarit: tune enim emptio valet." Ulpianus, in the eleventh law, puts an example as to the sale of a slave very similar to that of the unsound horse in *Street v. Blay* . . . . And, as we apprehend, the principle of our law is the same as that of the civil law; and the difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration.[229]

After citing so prominently the Roman sources, *Kennedy*'s reasoning afterwards appears limited to misrepresentation.[230] Nevertheless, this passage from *Kennedy* made an indelible impression on later mutual mistake law in England.[231] In the United States, the Michigan Supreme Court and others adopted

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were in error as to the same fact. *Id.* at 580. Presumably the court would have reached the same conclusion regarding mistake as it did representation, however, because both theories depend on the analysis discussed in the case. *Id.* at 586-90.

228. *See id.* at 580. The court held that rescission from a contract induced by an honest, non-fraudulent misrepresentation would only be granted when the misrepresentation prevented the subject matter of the contract from being "in substance" that named in the contract. *Id.* at 588-90.

229. *Kennedy*, 2 L.R. at 587-88. Ulpian's statement translated reads: "The next question is whether there is a good sale when there is no mistake over the identity of the thing but there is over its substance: Suppose that vinegar is sold as wine, copper as gold or lead, or something else similar to silver as silver." 2 Mommsen's Digest, *supra* note 90, at XVIII.1.9(2). Paul's statement may be translated as follows: "It would be different if the thing was gold, although a quality inferior to that supposed by the purchaser. In that case, the sale is good." *Id.* at 10. Street v. Blay, 2 B. & Ad. 456, 109 Eng. Rep. 1212 (K.B. 1831), was an assumpsit action arising upon the sale of a horse. The court discussed failure of consideration but not mistake. *See id.* at 457-64, 109 Eng. Rep. at 1213-15.d

230. *Kennedy*, 2 L.R. at 588-90. The court held that the company's representation was not "as to the substance" of Kennedy's stock purchase. *Id.*

231. *See, e.g.*, Bell v. Lever Bros., App. Cas. 161 (1932).

Kennedy's Roman substance/essence v. accident/quality distinction into mutual mistake law.[232] Reference to Roman law was the jurisprudential fashion of the day for mutual mistake cases.[233] Recently-reported common law cases resting on that distinction are rare, however.[234]

The language from *Kennedy*, besides proving a Roman parentage for some states' versions of the seriousness element of mutual mistake, also shows a close relationship between mutual mistake and the older consideration doctrine. The *Kennedy* court was not content to require only a mistake as to the substance of the object sold, or the *agreement* or *transaction*; that would have been the Roman doctrine. Reference to that doctrine would allow us to speculate whether the *Kennedy* court held to an importance or natural law theory of the seriousness requirement in mutual mistake.

Kennedy's reference to substance is not to the Roman *in substantia*, however. *Kennedy* required a mistake as to the "*substance of the whole consideration*".[235] Rome had no doctrine of consideration, nor did the civil law, so *Kennedy*'s requirement must be understood within the context of English common contract law. Talk of "the whole consideration" makes little sense if *consideration* means only a process or formal mechanism. I suggest *consideration* here refers to the older, reason-based notion. If it does, *Kennedy* adopts the older consideration

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232. *See, e.g.*, Sherwood v. Walker, 33 N.W. 919, 923 (Mich. 1887), *limited to its facts in* Lenawee County Bd. of Health v. Messerly, 331 N.W.2d 203, 209 (Mich. 1982) (rejecting the substance/quality or accident distinction in favor of a basic/non-basic distinction); *see also, e.g.*, Costello v. Sykes, 172 N.W. 907, 908 (Minn. 1919) (referring to *Kennedy* as a leading case); Hecht v. Batcheller, 17 N.E. 651, 652 (Mass. 1888) (argument of Warren and Brandeis for the plaintiffs) (citing also to *Hitchcock v. Giddings*).

233. Even mistake cases cited by *Sherwood* cited Roman authorities. *See* Gibson v. Pelkie, 37 Mich. 379 (1877) (citing to, *inter alia*, earlier English cases and to Pothier, *supra* note 105 and accompanying text, which relied almost exclusively on Roman sources); Cutts v. Guild, 57 N.Y. 229 (1874) (citing Roman law and a number of English cases); Huthmacher v. Harris's Adm's, 38 Pa. St. 491 (1861). The arguments of counsel in *Huthmacher* are especially interesting. Counsel for both parties cited both American and English case law and civil law sources for various aspects of their cases. With respect to mistake in particular, counsel for appellant said:

> A tropical bird was sold recently in New Orleans, the owner finding in its craw some valuable stones. Were these jewels sold with the bird?

38 Pa. St. at 494. Counsel for respondent replied:

> The citation of an ancient case touching this kind of contract, may be excused as an offset to the case[] of the tropical bird . . . . It is stated by Plutarch, in his life of Solon (1st Plutarch Lives 205) that . . . .

38 Pa. St. at 497. Did citation to the tropical bird case loosen the standards for argument? Because it was a civil case or because it was cited loosely (and possibly inconclusively)?

234. *See, e.g.*, Gartner v. Eikill, 319 N.W.2d 397 (Minn. 1982), which cites *Sherwood*. *Gartner* does not rest on the distinction between substance and quality but instead cites the nearly equally dubious distinction between value and "the very nature" of the subject matter of the contract. *Id.* at 399.

235. Kennedy v. The Panama, New Zealand, and Australian Royal Mail Co., 2 L.R. 580, 588 (Q.B. 1867).

doctrine into mutual mistake analysis. *Sherwood*[236] recited this consideration language as well as the Roman terms,[237] and the requirement that the mistake affect the "substance of the consideration" is still found in some states' mutual mistake law.[238] This was not the only time the older consideration doctrine crept into mistake law, however. English equity showed signs of that much earlier, and in America consideration was tied to mutual mistake from the beginning.

D. English Equity

Were England's common law the only direct authority for our mutual mistake, this history would be shorter. But mutual mistake had a more complicated, more ancient history in English equity. In equity, however, the doctrine is more obscure, at least in part because the early equity cases are reported obscurely.[239] The doctrine of mutual mistake did not develop to its current state in English equity. The Chancery granted relief for "mistake," or "misunderstanding," without further explanation, and the doctrine became no more specific than that.[240] *Mistake* was in fact a traditional head of English chancery jurisdiction by the 1500s,[241] but the chancery did not define various

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236. Sherwood v. Walker, 33 N.W. 919 (Mich. 1887).

237. *See id.* at 923.

238. *See, e.g.*, In re Appraisal of Enstar Corp., 604 A.2d 404, 411 (Del. 1992); Iversen Const. Corp. v. Palmyra-Macedon Central Sch. Dist., 539 N.Y.S.2d 858, 860 (N.Y. Sup. Ct. 1989). Many courts have stated such a requirement at one time or another. *See, e.g.*, Hannay v. Steinman, 112 P. 1094, 1097 (Cal. 1911); Houghton v. Mendenhall, 52 N.W. 269, 270 (Minn. 1982); Rothschild v. Frank, 16 Misc. 621 (N.Y. 1896).

239. *See, e.g.*, Mildmay v. Hungerford, 2 Vern. 242, 23 Eng. Rep. 757 (Ch. 1691), which Fonblanque reports as granting relief, Fonblanque's Equity, *supra* note 75, at 114 n."?", and which Story correctly reports as denying relief, 1 Story, *supra* note 14, at 138-39 n.2. Reported cases in English Chancery extend only back to the mid-1500s, and between that date and 1660 their reporting was both incomplete and haphazard. F.W. Maitland, Equity: A Court of Lectures 8 (John Brunyate, ed., 2d ed. 1936); Barbour, *supra* note 129, at 66-168 (examining chancery petitions, occasionally indorsed by the chancellor, before 1500). The Yearbooks occasionally mention a position taken by the Chancery also.

240. *See, e.g.*, Tothill 131, 21 Eng. Rep. 145 (Ch.) (listing a variety of mistake cases from 1551-1632, most of which appear to involve scrivener's errors, and none of which appear to be mutual mistake). *But cf.* Parke v. Peake, Choyce 116, 21 Eng. Rep. 71 (Ch. 1577) (scrivener's error resolved without apparent reference to mistake). Possibly the doctrine had not developed in the civil law either. Though the Romans distinguished mutual from unilateral mistake, and the cases discussing misunderstanding are clearly distinguishable on their facts from other cases, the Romans made no attempt to categorize mistake cases. Pothier discusses mistake in contract as if it were a unitary doctrine. 1 Pothier, *supra* note 105, at 11-13.

241. *See, e.g.*, case authorities *supra* note 240; Henry Ballow, A Treatise of Equity (Nutt & Gosling 1737). Ballow wrote:

> Another Impediment of Assent is Ignorance and Error, either in Fact or Law; if it be the Cause and Motive of the Agreement. And if the Mistake is discovered before any Step is taken towards Performance, it is but just that he should have Liberty to retract; at least

mistake doctrines. As a consequence, early chancery cases do not distinguish mutual from unilateral mistake or misunderstanding (apparently granting relief for all of these) or money paid by mistake, and barely distinguish mutual mistake from fraud.[242]

Some fact patterns in the early mistake cases appear to involve true mutual mistakes, however; other kinds of mistake and fraud can be ruled out. For instance, in *Bingham v. Bingham*,[243] the plaintiff purchased an estate from the defendant that the plaintiff had previously acquired by devise.[244] Why would he do such a thing? He claimed the defendant told him the devise was void.[245] If it was, then the defendant had prior right to the estate and could eject the plaintiff. Plaintiff apparently purchased in order to avoid defendant's ejectment suit. Later, when the plaintiff learned he had bought property he already owned, he sued to get his money back. He won. The court held that "no fraud appeared."[246] That no fraud appeared indicates the defendant did not know the

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> upon satisfying the other of the Damage that he has sustained by losing the Bargain. But if the Contract is either wholly or in Part performance, and no Compensation can be given him, then is it absolutely binding, notwithstanding the Error. Yet this is not to be understood where there proves to be an Error in the Thing or Subject, for which he bargained. For then the Business is null in it self, by the general Laws of Contracting, inasmuch as in all Bargains, the Matter, about which they are concerned, and all the Qualities of it, good or bad, ought to be clearly understood; and without such a distinct Knowledge, the Parties cannot be supposed to yield a full Consent.

Id. at 10.

242. Fonblanque's Equity treatise incorporates the same confusion. *See, e.g.*, Fonblanque's Equity, *supra* note 75, at 116-22 & nn.t-x. Fonblanque writes about mistake and error generally: "Another impediment of assent is ignorance and error, either in fact or in law. . . . [And] where there proves to be an error in the thing or subject for which [a person] bargained; . . . then the business is null in itself, by the general rules of contracting . . . ." In support for this proposition, Mr. Fonblanque cites various cases sometimes involving, *inter alia*, misunderstanding in the *Raffles v. Wichelhaus* sense, *e.g.*, Graham v. Hendren, 19 Va. (5 Munf.) 185 (1816), and *supra* notes 56 and 60 (discussing *Raffles v. Wichelhaus*), money paid by mistake, The President, Directors, etc., of the Union Bank v. The President, Directors, etc. of the Bank of the United States, 3 Mass. 74 (1807), and suspiciously fraudlike facts, Cocking v. Pratt, 1 Ves. Sr. 400, 78 Eng. Rep. 1105 (Ch. 1749) (*see also* Cocking v. Pratt, Supp. Ves. Sr. 176, which reports the allegations found in the bill in equity). Mistake in assumption appears to be the ground for many of these decisions, however. *See Cocking*, 1 Ves. Sr. at 400-01; Bingham v. Bingham, 1 Ves. Sr. 126, 78 Eng. Rep. 934 (Ch. 1748) ("there was a plain mistake"); Mildmay v. Hungerford, 2 Vern. 242, 23 Eng. Rep. 757 (Ch. 1691); Gee v. Spencer, 1 Vern. 32, 23 Eng. Rep. 287 (Ch. 1681) ("a misapprehension in the party"). Henry Ballow's equity treatise contained this same confusion. Ballow, *supra* note 241, at 10. Powell's section on equitable jurisdiction to relieve from contracts likewise appears to group mutual and unilateral mistake. 2 Powell, *supra* note 75, at 196-203. Though Powell describes mistake warranting relief as "mistake in the parties," he describes his examples as those "entered into upon the [mistaken] presumption by one of the parties of a fact." *Id.* at 196. Hamburger also notes this obscurity in early mistake cases. *See* Hamburger, *supra* note 61, at 282.

243. *Bingham*, 1 Ves. Sr. 126, 27 Eng. Rep. 934 (1748).

244. *See id.*; 1 Ves. Supp. 79, 28 Eng. Rep. 462.

245. *Bingham*, 1 Ves. Sr. at 126, 27 Eng. Rep at 934.

246. *Id.* Had the defendant knowingly tricked the plaintiff, the court could have found fraud.

devise to the plaintiff was valid, and thus that both parties were mistaken. *Bingham* has been commonly taken to support the doctrine of mutual mistake.[247]

Chancery has given us a number of other early cases of apparent mutual mistake, going back at least to *Gee v. Spencer* (1681),[248] indicating mutual mistake warrants relief.[249] It would be difficult to emphasize enough just how devoid of reasoning or rationale the English equity cases are. *Gee*, for instance, merely states, "This release was set aside, and [a case] cited *that a misapprehen-*

Jervis v. Duke, 1 Vern 19, 23 Eng. Rep. 274 (1681); Ballow, *supra* note 241, at 10-11; Fonblanque's Equity, *supra* note 75, at 111 & n.y.

247. Perkins v. Gay, 3 Serg. & Rawle's 325, 331 (Pa. 1817); 1 Story, *supra* note 14, § 124 (discussing *Bingham*). *But contra* C.J. Slade, *The Myth of Mistake in the English Law of Contract* 70 L.Q. Rev. 385, 406 (1954) (contending that *Bingham* should be explained as a "failure of consideration"). *Bingham* is better explained as a mistake case than as a failure-of-consideration case for two reasons. First, while mentioning consideration, the court relied on mistake: "[T]here was a plain mistake, such as the court was warranted to relieve against, and not to suffer the defendant to run away with the money in consideration of the sale of an estate, to which he had no right." *Bingham*, 1 Ves. Sr. at 126, 27 Eng. Rep. at 934. Second, failure of consideration was a law, not equity, doctrine. *See, e.g.*, Strickland v. Turner, 7 Ex. 208, 86 R.R. 619, 11 Eng. Rep. 919 (1852); Gompertz v. Bartlett, 2 E. & B. 849, 118 Eng. Rep. 975 (K.B. 1853); *see also* authorities cited *supra* note 149.

A case similar to *Bingham* was taken by Home also to illustrate mutual mistake, and is put on assent grounds:

> I sell to John a horse, understood by both of us to be my property. After all is agreed on, it is discovered to be his property. The bargain is void even at [Scottish] common law, as it is incapable of being fulfilled on either side. I cannot convey the property to him, nor can he receive the property from me. It was not my intention to sell a horse that did not belong to me; nor was it his intention to pay for his own horse. The case where the horse belongs to a third person is in effect the same. I did not intend to sell the horse that belongs not to me; nor did John intend to purchase from me that belongs to a third person.

Home, *supra* note 7, at 208. Home advocates that cases of land ought to be dealt with on the same ground, though he notes that they are not under the common law he reports. *Id.*

248. 1 Vern. 32, 23 Eng. Rep. 286 (Ch. 1681), *cited in* 2 Powell, *supra* note 75, at 556.

249. Cocking v. Pratt, 1 Ves. Sr. 400, 27 Eng. Rep. 1105 (Ch. 1749) (discussed in 1 Story, *supra* note 14, 138-39 n.2); Lansdown v. Lansdown, Mosely 364, 25 Eng. Rep. 441 (Ch. 1732); Gee v. Spencer, 1 Vern. 32 (1681); Luxford's case, *cited in Gee*, 1 Vern. at 32, 18 Vin. Abr. 370. *But see* Mildmay v. Hungerford, 2 Vern. 243, 23 Eng. Rep. 757 (Ch. 1691). A more questionable case of mutual mistake is Merrick v. Harvey, Nelson 48, 21 Eng. Rep. 786 (Ch. 1649), in which the defendant gave the plaintiff a bond to pay money due on accounts, and then two days later the parties "(some Things being forgotten)" executed general releases in favor of each other. The release was not intended to release the bond, however, so the court ordered that the bond be set aside. *Id.* The report leaves uncertain whether the ground for relief was failure to except the bond from the general release, in which case only a scrivener's error existed, or whether the parties intended a general release but had entirely forgotten the bond. Stapylton v. Scott, 13 Ves. Jun. 425, 33 Eng. Rep. 353 (1807), describes a doctrine of mutual mistake and applies it in accord with modern application, but the only case cited for the mutual mistake proposition in *Stapylton* was Calverly v. Williams, 1 Ves. Jr. 210, 30 Eng. Rep. 306 (Ch. 1790), a misunderstanding case which mentions "mutual mistake" but means by that "misunderstanding."

sion in the party shall avoid his release."[250] The result is that, though in the equity cases we see mistake covering situations of impossibility or frustration of purpose, or the undercutting of a bargain,[251] the written reports of these cases do not recognize these concerns. They simply grant relief and ground it on mistake or misapprehension. At most a report such as *Bingham* might say the court "was warranted . . . not to suffer the [other party] to run away with the money in consideration of the sale . . ., to which he had no right."[252]

Related cases give similar hints at the Chancery's reasoning. A case reported at 37 Hen. VI 13 (1458) shows a mutual mistake but was decided on other grounds. The defendant assigned debts to the plaintiff in return for which plaintiff gave a bond. The plaintiff later sought relief in chancery from the bond on the ground that the debts, being choses in action merely, were not assignable at law. The chancellor, with the concurrence of the law justices on whom he called to assist, decided that the bond should be delivered up as given without a *quid pro quo*! The defendant refused to give up the bond, so the chancellor sent him to prison.

In *Broderick v. Broderick*,[253] an heir at law, understanding that a devise in a recently-executed will had deprived him of his real property inheritance, released for 100 guineas all rights to the lost property. The deed of release recited that the will was valid. The heir later, in exchange for fifty more guineas, joined the devisee in a lease of the property. The proposed tenant promised to pay £4,000 for the lease (thus proving the property had great value). The heir later learned that the will was void.

The Chancery held oddly that the heir's release and lease were void for misrepresentation because the recitation in the deed was false.[254] But the heir is the one who made the misrepresentation in the deed! How could his own misrepresentation void it? Surely the court felt the heir was innocent and mistaken (probably the devisee was also mistaken). But a collateral ruling of the Chancellor in the case suggests another supporting rationale. A witness testified that he told the heir, before the heir signed the lease, that the will was invalid.

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250. *Gee*, 1 Vern. at 32, 23 Eng. Rep. at 287.

251. *Bingham v. Bingham* exemplifies all three, perhaps, if the case is considered one of legal error. The plaintiff's purchase of an estate he already owned was legally impossible. But because the defendant did not own the estate, the plaintiff's purpose in purchasing was frustrated. Because the defendant held no estate, the plaintiff received nothing in the bargain. In Cocking v. Pratt, 1 Ves. Sr. 400, Ves. Supp. 176, 27 Eng. Rep. 1105 (Ch. 1749-50), a mother and daughter had relied on an incorrect accounting of the husband-father's estate in coming to a settlement of their shares. Had they correctly determined the father's estate, the daughter would have been entitled to possibly £600 more than otherwise. No performance was impossible, but the exchange was grossly undercut. *Cocking*, 1 Ves. Sr. at 401, 27 Eng. Rep. at 1106. The court also mentioned, several times, that the daughter intended to receive her full share of the estate, *id.* at 400-01, 27 Eng. Rep. at 1105-06, an intent which was frustrated by the mistake.

252. *Bingham*, 1 Ves. Sr. at 126, 78 Eng. Rep. at 934.

253. 1 P. Wms. 239, 24 Eng. Rep. 369 (Ch. 1713).

254. *Id.* at 239-40; 24 Eng. Rep. at 369-70.

But "Lord Chancellor said, it was not to be believed, that if the heir knew that the will was not duly executed, he would, for so small a consideration, have parted with his estate."[255] Probably this concern for the reasons for promising lay behind the chancery's more explicit mistake cases also.[256]

What is the source of mistake law in English chancery? Unfortunately, the reported cases do not give a source. If Chancery was unwilling to cite a mistake rationale in 1458 but later found one in the 1500s, we could speculate that in the meantime an interest in Roman law influenced the chancellors. Many chancellors were trained in the civil law,[257] which was taught at Oxford.[258] Surely the Chancellors studied Grotius and Pufendorf in the seventeenth century and later.[259] On the other hand, perhaps the Chancery borrowed mistake law from the common law action for account, convinced that relief was too uncertain or difficult to obtain at law. English law tended to develop piecemeal, especially in chancery where the somewhat fluid notion of conscience prompted relief and decisions were reported sparsely. Moreover, chancellors were well-educated and moved about in English and European society.[260] Undoubtedly they were

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255. *Id.* at 241; 24 Eng. Rep. at 370. *Broderick* is almost identical to Evans v. Llewelyn, 2 Bro. C.C. 150, 29 Eng. Rep. 86 (Ch. 1787), which is founded on mistake, though probably unilateral mistake, as the devisee-releasee appeared there to harbor doubts as to the validity of his devise.

256. In Stent v. Bailis, 2 P. Wms. 217, 24 Eng. Rep. 705 (Ch. 1724), Stent had promised to pay to Bailis a certain sum of money on August 10, 1720, in exchange for stock in the Lustring Company. On August 20, 1720, an order to show cause why the company's patent should not be repealed issued and a "proclamation was published to forbid [further] transfers" of the stock. Later, the proclamation's prohibition was enacted by parliament. *Id.* at 217-18, 24 Eng. Rep. at 705. Of course, the stock price plummeted. Bailis sued Stent at law on Stent's promise and won. Stent brought a bill in equity seeking an injunction against Bailis's collection efforts. *Id.* at 218, 24 Eng. Rep. at 705-06. The Master of the Rolls opined:

> It is against natural justice, that any one should pay for a bargain which he cannot have; there ought to be *quid pro quo*, but in this case, the defendant has sold the plaintiff a *bubble* or *moonshine*.
>
> It is impossible that this bargain should ever be made good to the plaintiff . . ., and the money cannot be said to be due in conscience, supposing the plaintiff to be incapable of coming at what he contracted for, and in consideration whereof he was to pay his money.
>
> If I should buy an house, and before such time as by the articles I am to pay for the same, the house be burnt down by casualty of fire, I shall not in equity be bound to pay for the house, and yet the house may be built up again; but I doubt it will be possible to set up the company again, as in the other case the seller may do the house.

Id. at 219-20, 24 Eng. Rep. at 706. On rehearing, the Chancellor recommended that the parties share the loss, and they later settled. *Id.* at 221-22, 24 Eng. Rep. at 707. The opinion proves that someone in the Chancery court was concerned about reasons for making promises, however.

257. Simpson, *supra* note 115, at 401 (listing various biographical facts about chancellors from 1432 to 1501); *see also* I & II Lord Campbell, Lives of the Lord Chancellors of England (1874).

258. John Fortescue, De Laudibus Legum Anglie 115-17 (Chrimes, trans. & ed., 1942) (1468-71).

259. *See supra* notes 107-108.

260. Francis Bacon, for example, was chancellor in the early 1600s. *See* Hastings Lyon & Herman Block, Edward Coke, Oracle of the Law (Rothman 1992) (Houghton 1929).

influenced not only by civil and common law but also canon law,[261] merchant law, borough law, and whatever other ideas prevailed in their times.

E. American Development

Thus far this study has outlined law that lawyers in the American colonies would most likely have studied. Colonial American lawyers had access to English law and equity reports, commentary (and *Powell on Contracts* and *Newland on Contracts* in particular, which discussed a few cases of mutual mistake from English Chancery[262]), and Roman and civilian sources.[263] They also had equity treatises such as Home and Ballows, both of which mentioned mistake as a ground for equitable relief.[264] English law is the primary source for American common law in the early nineteenth century. However, English law is at most only indirect evidence of the source of our mutual mistake. Direct evidence must come from American cases themselves. We would expect America to inherit England's mistake legacy of the late 1700s, however. Accordingly, we should find mutual mistake cases dealt with as in the action for money had and received and in chancery.

1. At Law: Money Had and Received

American courts granted relief for money had and received, paid as the result of mutual mistake.[265] In the 1820s, some early law courts employed the

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261. *See* Simpson, *supra* note 115, at 396-405.

262. *See* 2 Powell, *supra* note 75, at 196-99 (discussing Cocking v. Pratt, 1 Ves. Sr. 400 (1691), and Lansdown v. Lansdown, Mosely 364 (1732)); John Newland, A Treatise on Contracts, Within the Jurisdiction of Courts of Equity 432-34 (Farrand 1808) (discussing cases of mutual mistake in equity, the same this study discusses *supra* notes 248-249 and accompanying text, but not referring to them as such).

263. *See, e.g.*, William Hamilton Bryson, Census of Law Books in Colonial Virginia (1978); Michael H. Hoeflich, *Bibliographical Perspectives on Roman and Civil Law*, 89 L. Libr. J. 41 (1997). In fact, Roman law books existed in Virginia in colonial times, though probably not in great numbers. Bryson, *supra*, at 27-30. Various authors have discussed the English legal education received by colonial lawyers. *See generally* Beverly Zseiben, How Blackstone Lost the Colonies (1990); W. Hamilton Bryson, Legal Education in Virginia 1779-1979, at 1-63 (1982).

264. Ballow, *supra* note 241; Home, *supra* note 7.

265. Suits for money had and received were brought before the Revolutionary War. *See, e.g.*, Newman v. Homans, Quincy 5 (1762); Tyler v. Richards, Quincy 195 (1765) (argued for the plaintiff, who lost, by Samuel Quincy and John Adams). Another early case, Morris v. Tarin, 1 Dall. 147 (Pa. Common Pleas 1785), referred to assumpsit for money had and received, paid by mistake as if it were available, *id.* at 148, but refused to grant relief. *Id.* at 149. *Morris* cited only English cases for the point. *Id.* at 148. Many other early cases granted relief for money had and received as a result of a mistake, citing English cases. *See, e.g.*, Smith ex rel. Taylor v. Seaton, 1 Minor 75 (Ala. 1822) (counsel for plaintiff citing *Morris v. Tarin* and Moses v. MacFerlan, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760)); Markle v. Hatfield, 2 Johns. Rep. 455 (N.Y. 1807) (opinion of court delivered by Kent, Ch. J.); Bours v. Watson, 1 Mill Const. 393 (S.C. 1817) (quoting the "*ex equo et bono*" language from *Moses v. MacFerlan*, quoted *supra* text accompanying note 135, at 1 Mill

term "mutual mistake."[266] American courts usually cited English authorities.[267] In most ways, early American cases for money had and received are continuations of the English doctrine. American law imported England's "failure of consideration" doctrine, for instance.[268] Moreover, the tendency to equate failure of consideration with mistake, impossibility, and other doctrines appears also in American cases.[269]

One early money-had-and-received case, *Markle v. Hatfield*,[270] stands apart. In *Markle*, the defendant paid the plaintiff with a counterfeit bank note. The defendant was as mistaken as the plaintiff about the note's false nature.[271] The court, in an opinion by James Kent, then Chief Justice of New York's

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Const. at 394, but not citing to *Moses*). Some early cases were mutual mistake cases. *See, e.g.*, Watson v. Cresap, 40 Ky. (1 Monroe) 195 (1841); Markle v. Hatfield, 2 Johns. Rep. 455 (N.Y. 1807).

266. Smith v. Goddard, 1 Ohio 178, 183 (1823) (tying "mutual mistake" to impossibility).

267. *See supra* sources cited note 265.

268. *See, e.g.*, Pettibone, 2 Root 258 (Conn. 1795); Spring v. Coffin, 10 Mass. 31 (1813) (dicta: "If the defendant has paid the note, which was the consideration for the sale [which was later rescinded], he has his remedy against Salter for the money, as paid for a consideration which has failed."); Wharton v. O'Hara, 2 Nott & McCord 65 (S.C. 1819) (citing English authorities); Duncan v. Bell, 2 Nott & McCord 153 (S.C. 1819) (citing English authorities); Lacoste v. J. Flotard & Co., 1 Mill Const. 467 (S.C. 1817) (granting relief for money had and received upon a failed consideration).

269. *See, e.g.*, Claflin v. Godfrey, 21 Pick. 1 (Mass. 1838); Spring v. Coffin, 10 Mass. 31 (1813) (implying in dicta that an action for money had and received for failure of consideration could also be fraudulent); McGoren v. Avery, 37 Mich. 119 (1877) (ordering judgment entered on an "[a]ssumpsit to recover money paid by mistake and without consideration"); Rheel v. Hicks, 25 N.Y. 289 (1862) (a case in which money was paid to the government for the support of an illegitimate child on the mistaken belief, shared by both parties, that a woman was pregnant with an illegitimate child; she was not, it was later learned); Briggs v. Vanderbilt, 19 Barb. 222, 235-36 (N.Y. 1855) (stating in dicta that money paid under the mistaken notion that performance by the other party was possible, when it was not, could be recovered in an action for money had and received; counsel for defense argued that the contract was the result of a mutual mistake and that money paid under it could be recovered back for failure of consideration); Murray v. Richards, 1 Wend. 58 (N.Y. 1828); Merrit v. Clapp, 2 Cai. R. 117, 120 (N.Y. 1804) (holding a note failed as consideration when its maker became insolvent); Smith v. Goddard, 1 Ohio 178, 183 (1823) (tying "mutual mistake" to impossibility); Champlin v. Laytin, 6 Paige Ch. 189 (N.Y. Ch. 1836); Wharton v. Hudson, 3 Rawle 390 (Pa. 1832); Bellas v. Hays, 5 Serg. & Rawle 427, 440 (Pa. 1819) (Gibson, J.: "Mistake [is] perhaps not very different from want of consideration."); Keener, *supra* note 130, at 244; *see also* Lakeman v. Pollard, 43 Me. 463, 467 (1857) (quantum meruit case); Wolfe v. Howes, 20 N.Y. 197, 202 (1859) (quantum meruit); Fenton v. Clark, 11 Vt. 557 (1839) (quantum meruit); *cf.* Woodward v. Cowing, 13 Mass. 215 (1816) (dicta: the case was resolved against the plaintiff on assumption-of-risks grounds). American counsel argued both mistake and failure of consideration when both appeared applicable. *See, e.g.*, Mowatt v. Wright, 1 Wend. 355, 357-59 (1828) (arguments of Troup and Raymond). The New York courts of appeals opined in 1889: "The action for money had and received to the use of another is the form in which courts of common law enforce the equitable obligation. The scope of this remedy has been gradually extended to embrace many cases which were originally cognizable only in courts of equity." Robers v. Ely, 20 N.E. 606, 607 (N.Y. 1889).

270. 2 Johns. Rep. at 455.

271. *Id.*

Supreme Court of Judicature, held that the plaintiff could recover. Kent followed English mistake doctrine generally but declined to cite English sources. Instead, he cited civil law. Says Kent:

> The reasonable doctrine, and one which undoubtedly agrees with the common sense of mankind, is laid down by *Paulus* in the *Digest*; and has been incorporated into the *French* law. He says, that if a creditor receive by mistake any thing in payment, different from what was due, and upon the supposition that it was the thing actually due, as if he receive brass instead of gold, the debtor is not discharged, and the creditor, upon offering to return that which he received, may demand that which is due by the contract. *Se quum aurum tibi premisissem, tibi ignoranti quasi aurum aes solveim, non liberabor.* (*Dig.* 46. 3. 50. *Pothier, Traite des Obligations, No.* 495.)[272]

Kent noted English authorities placing the risk of a counterfeit note on the person receiving it, but Kent rejected English risk law in favor of the mistake doctrine he saw outlined in the civil law.[273] *Markle* was followed in other cases.[274] *Markle* is more significant as an indicator of Kent's opinion of mistake law, however, for Kent's role in the development of mutual mistake later became more significant.[275]

2. In Equity

Many early American references to mistake arise in equity. Unfortunately, early American equity cases are no more clear than those of early English equity. Perhaps the earliest reference to mistake generally is in *Swift v. Hawkins* (1768).[276] The reference is cryptic, perhaps because the case holds only that evidence of "mistake or want of consideration" is admissible; what evidence of mistake was subsequently admitted in the case is unknown.[277] *Swift* indicates

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272. 2 Johns. Rep. at 459. Kent's quote from the Digest is translated in Mommsen, Krueger, and Watson as "I promise you gold and then, you being unaware of the fact, I give you copper as being gold, I will not be released." 2 Mommsen's Digest, *supra* note 90, at XL.3.50.

273. *Id.* at 459-62.

274. *See* Watson v. Cresap, 40 Ky. (1 Monroe) 195 (1841); Young v. Adams, 6 Mass. 181 (1810).

275. *See infra* discussion at text accompanying notes 344-358.

276. 1 Dall. 17 (Pa. 1768). *Swift* is something of an anomaly because it is not an equity case, Pennsylvania having no equity courts in 1768. *Id.* The case explicitly incorporated equitable principles into the common law, however. *Id.*

277. Very little about *Swift* describes mistake. The entire entry in 1 Dallas can be set forth here:

JOHN SWIFT V. HAWKINS and others

Equitable defense.

In Pennsylvania, on the plea of payment, to debt on bond, the defendant may give in evidence want of consideration.

that evidence of mistake had been admissible since 1729.[278] That mistake is tied to consideration in *Swift* is significant, however. A Pennsylvania commentator in 1826 tied the reference in *Swift* to Mansfield's description of money had and received in *Moses v. McFerlan*:[279]

> There can be no doubt of the principle, that in a suit on a bond in Pennsylvania, the defendant under the plea of payment, may prove *mistake* and want of consideration: and that in such case, the jury may and ought to presume everything to be paid, which *ex aequo et bono*, in equity and good conscience ought to be paid.[280]

DEBT SUR OBLIGATION. On the plea of payment, Defendants offered to give no Consideration in Evidence. Objected, that the Consideration of a Bond is not Inquirable into, the passing the bond being a gift in Law of the money. To this it was answered, and so ruled BY THE COURT, that there being no Court of Chancery in this province, there is a necessity in order to prevent a failure of Justice, to let the defendants in, under the plea of payment to prove mistake or want of consideration: And this, the Chief Justice said, he had known to be the constant practice of the Courts of Justice in this province, for thirty-nine years past.

For the plaintiff, the following cases were cited: Plowd. 308.b; Gilb. Rep. 154; Hard. 200; 3 P. Wms. 222.

Lawyers of the twentieth century might question why Chief Justice Allen mentioned mistake. The defendant offered to prove "no consideration," not mistake. The objection itself did not mention mistake. None of the cases cited by the plaintiff discuss mistake, though they all discuss consideration, some with respect to bonds. Sharington v. Strotton, 1 Plowden 297, 75 Eng. Rep. 454, 470 (K.B. 8 Eliz.) (discussing, however, at 308-09, assent and the care and thoughtfulness the consideration requirement is supposed to impose on the promisor: "And because Words are oftentime spoken by Men unadvisedly and without Deliberation, the Law has provided that a Contract by Words shall not bind without Consideration."); Lardner v. Pashem, Gilb. Rep. 254, 93 Eng. Rep. 321 (12 or 13 Anne) (Gilb. Rep. 254 must be meant; Gilb Rep. 154 is a page in the middle of a *quo warranto* case, whereas *Lardner* actually discusses a condition in a bond); Turner v. Binion, Hardres 200-01, 145 Eng. Rep. 452 (13 Car. II); Lechmere v. Carlisle, 3 P. Wms. 210, 24 Eng. Rep. 1033 (1733) (though intent was an issue here, however, *see* 212-13, 228-29). I suggest a reason for mentioning mistake in the text: that mistake reflects the same concerns consideration did in 1768. Perhaps Chief Justice Allen was thinking of justice as that term was used in the action for money had and received. Moses v. MacFerlan, 2 Burr. 1005, 97 Eng. Rep. 676 (1760) (holding that money had and received was available in cases of either mistake or failure of consideration), was only eight years old at the time, and possibly fresh in Allen's mind.

Alternatively, perhaps Chief Justice Allen remembered that equitable arguments are sometimes allowed in chancery and said "mistake," intending by that to mean "all appropriate equitable arguments." Later statements by the same court indicate that: "[*Swift*] may be called the *Magna Carta* of this branch of equity, and has been ever since followed; and rules of court universally established, requiring notice of the special matter, fraud or failure of consideration, intended to be given in evidence *in avoidance of the bond;* this notice answering to a bill in equity for relief, on the ground of fraud, accident or mistake . . . ." (emphasis added). Mackey v. Brownfield, 13 Serg. & Rawle 239, 240 (Pa. 1825). If *Mackey*'s tribute to *Swift* is justified, then *Swift*'s mention of mistake is all the more significant, because it meant that Chief Justice Allen considered "mistake" to be representative of all categories of equity.

278. 1 Dall. at 17; *see* Steinhauer v. Witman, 1 Serg. & Rawle 437, 443 (Pa. 1815).

279. Moses v. MacFerlan, 2 Burr. 1005, 1012, 97 Eng. Rep. 676 (K.B. 1760).

280. Anthony Laussat, An Essay on Equity in Pennsylvania 72 (1826).

Similarly obscure references to mistake appear in several cases around the beginning of the nineteenth century.[281] A Virginia court of appeals case of that time period, *Quesnel v. Woodlief*,[282] involved a mistake in acreage, and the court specifically noticed that "*both parties were mistaken* in the quantity and number of acres contracted for."[283] Another decision of about that time, *Alexander v. Muirhead* (S.C. 1802),[284] mentions that a mistake must be material.[285] Both *Quesnel* and *Alexander* were mutual mistake cases,[286] but neither recites all three elements later courts consider necessary.

Quesnel[287] probably illustrates the development of mutual mistake as well as any other early authority. In fact, *Quesnel* may be the true beginning of our mutual mistake. Quesnel was a native Frenchman relocated to America and did not speak English well.[288] He came to place "great confidence" in Woodlief.

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281. *E.g.*, Bundy v. Sabin, 2 Root 209 (Ct. 1795); Matson v. Parkhurst, 1 Root 404 (1792); Gay v. Adams, 1 Root 105 (1789); Warder v. Tucker, 7 Mass. 449 (1811) (mentioning mistake of law); Freeman v. Boynton, 7 Mass. 483 (1811) (involving an issue similar to that in *Warden*, 7 Mass. at 449); Smith v. Evans, 6 Binn. 101, 112 (1813) (dissenting opinion of Yeates, J.); Alexander v. Muirhead, 2 Desaussure 162 (S.C. Ch. 1802) (reciting the purpose of a bill in equity, "To set aside the agreement . . . upon the principle that it was founded in mistake, viz.—That all the cases on the policies were similarly circumstanced: Whereas the truth is, that they were materially different . . . ."); Mosby v. Leeds, 7 Va. (3 Call) 439, 445 (1803) (opinion of Lyons, J.).

282. 10 Va. (6 Call) 218 (1796).

283. *Quesnel*, 10 Va. (6 Call) at 240 (emphasis added).

284. Alexander v. Muirhead, 2 Desaussure 162 (S.C. Ch. 1802).

285. *Id.* at 164-65 (reciting the purpose of a bill in equity, "To set aside the agreement . . . upon the principle that it was founded in mistake, viz.—That all the cases on the policies were similarly circumstanced: Whereas the truth is, that they were materially different . . . .").

286. In *Alexander*, an insurance company insured a ship *Juno*'s voyage to Cuba. After the *Juno* sank, its owners sued the company and other insurers who had insured the voyage. The company thought to defend itself on the ground that the ship owner's agent had materially misstated the *Juno*'s departure date. Thinking all other insurers could claim the same defense, the company agreed to stipulate to judgment if any other insurer was liable. *Id.* at 164. The company wanted to save on litigation costs. *Id.* One of the other insurers, Kirke & Lukens, was found liable at a trial. In the process, however, all parties involved learned that only Kirke & Lukens had been told the correct departure date. After judgment was entered against the company based on the agreement, the company filed a bill in equity seeking to have the agreement set aside. *Id.* at 163-68.

The ship owners actually appear not to have learned that Kirke & Lukens did not suffer under a misrepresentation until trial. Their answer in chancery stated:

> The defendants swear that Messrs. Kirke & Lukens's case was not selected as being more favorable to the defendants than any other on the policies; that they did not know until the trial of the cause, that Denoon the broker [who stated the departure date correctly] had himself called on Kirke & Lukens, and that the clerks' of Denoon [who misstated the *Juno*'s departure date] called on the other underwriters to have the policies subscribed; nor did the defendants give any instructions to their attorney who should be sued.

Id. at 166. The *Alexander* court sent the case to the law courts for trial because the case involved misrepresentation, *id.* at 169, so the opinion does not report whether mutual mistake doctrine was actually applied.

287. *Quesnel*, 10 Va. (6 Call) 218 (1796).

288. One witness testified that Quesnel needed an interpreter in his commercial transactions. *Id.* at 227. Another testified that Quesnel "appeared to understand very little of the English

In 1788, Woodlief advertised a farm for sale, called Sion Hill. Woodlief said publicly and privately that Sion Hill contained 800 acres. Woodlief offered to sell at £4,000, or £5 per acre, but accepted Quesnel's offer to buy at £3,200, or £4 per acre. Sion Hill had been in Woodlief's family for generations, and Quesnel thought Woodlief would be correct that it contained 800 acres. So Quesnel did not have the property surveyed before obtaining a deed. He later learned that Sion Hill contained about 608 acres. Quesnel sued in equity for fraud, but the evidence showed that Woodlief's misrepresentation was innocent; he was as mistaken as Quesnel.[289]

The chancery court dismissed Quesnel's suit, and Quesnel appealed. Wickham for Quesnel argued fraud, innocent misrepresentation, lack of consent, inadequacy of the bargain, and defect of title.[290] Call, for Woodlief, countered Wickham's arguments and asserted *Chandelor v. Lopus*[291] and assumption of risk. As to inadequacy, Call claimed:

> it was a bargain of hazard, and fair upon both sides. If the land held out more than 800 acres, the purchaser was to gain; if it fell short of that quantity, he was to lose. It was what the civilians call . . . a purchase of the contingency as to the excess; which, according to several authorities, is a good ground of contract; for the hazard is mutual . . . .[292]

Judge Lyons for the court opined that mistake warrants relief in equity "which adjusts and equalizes contracts, according to the exigencies of the case."[293] The court's order carefully set forth that "*both parties were mistaken*" as to the acres.[294] The court reformed the contract to reduce the number of acres for which Quesnel was to pay.[295]

Quesnel was not published when it was decided, but later in 1825. A brief recitation of facts and a copy of the order was published in 1808 in Munford's reports,[296] but in the meantime lawyers disputed *Quesnel*'s meaning. In *Jollife v. Hite* (1798),[297] Judge Roane said that *Quesnel* allowed the purchasers to "retain money contracted to be paid, under a mistake, and, consequently, so far without a consideration."[298] Judge Lyons' opinion in *Jollife* gives more detail:

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language." *Id.*

289. *Id.* at 218-20, 240.

290. *Id.* at 233-34.

291. Cro. Jac. 4, 79 Eng. Rep. 3 (K.B. 1603), discussed *supra* notes 120-124 and accompanying text.

292. *Quesnel*, 10 Va. (6 Call) at 237.

293. *Id.* at 238.

294. *Id.* at 240.

295. *Id.*

296. Nelson v. Mathews, 12 Va. (2 Hen. & Mun.) 164, 173-74 n.(1) (1808).

297. 5 Va. (1 Call) 301 (1798).

298. *Id.* at 311, 312.

> The general rule, as laid down by civilians, is that if there be not a full knowledge of all the circumstances, it is ground for avoiding the contract, [*Gee v. Spencer*,] 1 Vern. 32; [*Mildmay v. Hungerford*,] 2 Vern. 243; and the reason is, because the buyer proceeds upon the supposition of a quality, which, if the thing does not contain, the contract should not oblige the party, who contracts under a misapprehension. For, in this case, the party is not conceived to have agreed absolutely, but upon supposal of the presence of a thing or quality, on which, as on a necessary condition, his consent was founded; and, therefore, the thing or quality not appearing, the consent is understood to be null and ineffectual. Grotius, lib. 2, c. 12, [sections] 8, 9; [*Gwynne v. Heaton* . . .] 1 Bro. C.C. 9; [*Heathcote v. Paignon*,] 2 Bro. C. C. 175; Puffendorf, Bk. 1, c.2 [section] 12. . . .
>
> It was upon these grounds, according to my recollection, that *Quesnel v. Woodlief* was decided. For in that case, . . . both parties had acted under mistake; and therefore, they [the courts? the mistakes?] relieved the plaintiff.[299]

Gee and *Mildmay* were older English equity cases mentioned *supra*.[300] The substance of Grotius' and Pufendorf's views appear in the margins *supra*.[301] None of these authorities mentions "mutual" mistake. The passages cited in *Gwynne*[302] and *Heathcote*[303] do not discuss mistake but only the chancery's concern with fairness in exchange.[304] Perhaps Lyons thought that if consent

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299. *Id.* at 316-17. Judge Lyons uses *both parties*. This term is a fair translation of *ambo*, the Latin term used in the Digest passages that refer to the parties who share a mutual error. Ulpian uses the word *ambo*, 2 Mommsen's Digest, *supra* note 90, at XVIII.1.14, commonly translated as "two of a pair or together," "both," or "both parties," Oxford Latin Dictionary *ambo* (1982). In Julian, the parties are not referred to together, but their ignorance is handled separately with two descriptive words, one for each party. 2 Mommsen's Digest, *supra* note 90, at XVIII.1.41.1. Though the grammar does not require it, the context tells us that the parties shared the same mistake. Paul refers to the parties as *ego et uenditor*, *id.* at XVIII.1.57, translatable quite literally as "I and the vendor." The passage in Gauis is likewise unrevealing. *See id.* at XLIV.7.1(9)-(11). It appears, therefore, that *ambo* is the source of *common* or *of both parties*. The Latin word closest to *mutual* might have been *mutuo*, its ancestor, *see, e.g.* Oxford Latin Dictionary *mutuo* (1982), but *mutuo* does not appear in the Digest passages relevant to mutual mistake. Nor does it appear in the passage from Pothier discussing mutual mistake. Pothier uses the word *même*, which means "same" or self-same. Cassell's French-English English-French Dictionary *même* (1981). Thus, Evans translated the phrase including it as "being in equal error yourself." Pothier, *supra* note 105, at 11.

300. *See supra* notes 248-249 and accompanying text.

301. *See supra* notes 107-108.

302. 1 Bro. C. C. 1, 28 Eng. Rep. 949 (Ch. 1778).

303. 2 Bro. C.C. 167, 29 Eng. Rep. 96 (Ch. 1787).

304. *Gwynne*, 1 Bro. C.C. at 9, 28 Eng. Rep. at 953 ("To set aside a conveyance, there must be an inequality *so strong, gross, and manifest*, that it must be *impossible to state it* to a man of common sense, *without producing an exclamation at the inequality of it*."); *Heathcote*, 2 Bro. C.C. at 175, 29 Eng. Rep. at 100 ("*If there is such inadequacy as to shew that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its*

to a contract did not occur when based on a mistaken assumption and both parties were mistaken, then neither consented and rescission of the contract was clearly warranted. Lyons and three other *Jollife* judges found that assumption of risk precluded relief for mistake on *Jollife*'s facts.[305] They distinguished *Quesnel* partly on grounds that Quesnel was a foreigner who knew little English, was unfamiliar with American conveyancing, and therefore assumed no risk.[306]

Later courts developed *Quesnel*'s doctrine. In 1813, the Pennsylvania Supreme Court in a similar case of "mutually erroneous impressions" implied that relief would be granted.[307] The Pennsylvania court cited *Quesnel* in another part of the opinion.[308] In 1819, the Virginia Supreme Court in *Armstrong v. Hickman*[309] extended the doctrine of mutual error to cases other than acreage mistakes.[310] Chancellor Carr's opinion, affirmed by the court of appeals without comment, discusses in some detail the elements of mutual mistake, mentioning mistakes of both parties and asking explicitly of the mistake, "was it an *important* one?"[311] As authority for this doctrine, Chancellor Carr cited *Powell on Contracts*, *Newland on Contracts*, Pothier, and *Jollife*.[312]

From *Armstrong*, it was but a short leap to a complete, succinct statement of the doctrine of mutual mistake. The Virginia Supreme Court so stated in *Tucker v. Cocke* (1823):[313]

> There are cases in which the mutual error of the parties, without default in either, may be a just ground for rescinding a contract. As, if the error be in a matter which is the cause of the contract, that is, in the *substance* of the thing contracted for, so that the purchaser cannot get

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inadequacy, it will shew a command over him which may amount to fraud. If the transaction . . . be such a situation, as to shew that it could not have taken place without superior powers on the one side over the other.").

305. *Jollife*, 5 Va. (1 Call) at 312-29; *see especially id.* at 326-27 (Pendleton, President: "But, if [the sale] was meant to change or set aside a real contract for the sale of a tract of land in gross, at the risk of the purchaser for gain or loss, by a deficiency or excess in the quantity it was supposed to contain by both parties, . . . I do not hesitate to say, that it was carried too far; being an interference with fair contracts . . . .").

306. *Id.*

307. Smith v. Evans, 6 Binn. 101, 111 (Pa. 1813).

308. *Id.* at 112.

309. 20 Va. (6 Mun.) 287 (1819).

310. *Armstrong* involved the sale of notes. The parties learned after the sale that one of the signers of the notes was bankrupt and that the other was likely to have fallen on bad times with the first. *Id.* at 287-90, 297-300.

311. *Id.* at 296-97.

312. *Id.* Powell cited English cases discussed above, most notably Cocking v. Pratt, 1 Ves. Sr. 400, 28 Eng. Rep. 493 (Ch. 1749); Landsdown v. Lansdown, Mosely 364 (1732), discussed *supra* note 249 and accompanying text. Newland discussed these and Bingham v. Bingham, 1 Ves. 126, 78 Eng. Rep. 934 (K.B. 1748); Gee v. Spencer, 1 Vern. 32 (1681), and Luxford's Case, cited in *Gee*, 1 Vern. at 32, 18 Vin. Abr. 370, all cited *supra* note 249 and accompanying text.

313. 23 Va. (2 Rand.) 51 (1823).

> what he bargained for . . . . In such cases, the contract ought to be vacated, even if it has been executed . . . .[314]

By 1823, the Virginia Supreme Court no longer considered the *Quesnel* note in Munford's 1808 reports to be fully authoritative,[315] but by then the *Quesnel* principle had become established in the law. After about 1823, mutual error begins to appear in reported cases regularly.[316]

Remarkably, this development of the doctrine in the Virginia Supreme Court reveals as grounds for mutual mistake both lack of consent and notions about the substantive consideration for the promise. Though Lyons' opinion in *Jollife* cited civilian discussions of consent, Lyons also noted that equity "adjusts and equalizes contracts."[317] Judge Roane's opinion in *Jollife* tied mistake to failure of consideration.[318] *Tucker* required that the error be "in a matter which is the cause of the contract" and equated *cause* with *substance*.[319] Thus, though the form of the doctrine became largely Roman, the substance of mistake remained related to consideration. This development also appears in the writings of prominent commentators Joseph Story and James Kent.

3. *Early American Commentators*

Several influential American importers of civil law emerged in the 1820s and 1830s. Most celebrated of all are James Kent and Joseph Story.[320] Each

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314. *Id.* at 66. The court cited as authority Armstrong v. Hickman, 20 Va. (6 Mun.) 287 (1819), and Chamberlayne v. Marsh, 20 Va. (6 Mun.) 283 (1819), a land case decided with *Armstrong* and, without citing any authority, following *Quesnel*, 20 Va. (6 Mun.) at 286-87.

315. *Tucker*, 23 Va. (2 Rand.) at 67 ("[T]he grounds of [*Quesnel*] are so uncertain, some of the Judges who decided it, the Reporter and the counsel on both sides, who argued the cause, differing so materially in their statements of the reasons upon which the judgment was founded, that it cannot be considered an obligatory authority to the point now under consideration . . . .").

316. *See, e.g.*, Harrison & Gibson v. Stowers, 2 Miss. (Walker) 165, 168 (1824) (discussing "mutual error and mistake" and the seriousness of the error); Hunter v. Goudy, 1 Ohio 449, 451 (1824) ("A court of equity never interferes to relieve against a contract, made in good faith, where both parties are mistaken as to the value."); Smith v. Goddard, 1 Ohio 178, 183 (1823) (tying "mutual mistake" to impossibility in an action for money had and received). Prior to that time, mistake was mentioned but often in the vague terms used in older English equity. *See, e.g.*, Perkins v. Gay, 3 Serg. & Rawle's 325, 331 (Pa. 1817) (dicta) ("[I]t is a principle of equity that the parties to an agreement must be acquainted with the extent of their rights and the nature of the information they can call for respecting them, else they will not be bound. The reason is, that they proceed under an idea that the fact which is the inducement to the agreement is in a particular way, and give their assent, not absolutely, but on conditions that are falsified by the event."); Drew v. Clarke, 3 Tenn. (Cooke) 373 (1813) ("[I]f a man is clearly under a mistake in point of law, which mistake is produced by the representation of the other party, he can be relieved as well as if the mistake were to as to a matter of fact.").

317. 10 Va. (6 Call) 218, 238 (1796).

318. Jollife v. Hite, 5 Va. (1 Call) 301, 311-12 (1798).

319. Tucker v. Cocke, 2 Rand. 51, 66 (Va. Ct. App. 1823).

320. Gulian Verplanck wrote on mutual mistake but was not as influential. In 1825 Verplanck

published influential treatises, Kent on the common law in 1827 and Story on equity in 1836.[321] Kent's chapter on "Contract of Sale" quotes freely from

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published Gulian C Verplanck, An Essay on the Doctrine of Contracts: Being an Inquiry How Contracts Are Affected in Law and Morals by Concealment, Error, or Inadequate Price (G. & C. Carvill 1825). Verplanck's essay was written in response to the United States Supreme Court decision in Laidlaw v. Organ, 15 U.S. (2 Wheaton) 178 (1817). In that case a national enemy blocked America's eastern ports, making trade with Europe impossible. As a result, prices were depressed. News of peace, when it came, did not reach every trader at the same time. Organ, hearing the news, promptly bought a large quantity of tobacco, at depressed prices, from Laidlaw, who had not heard. When news of the peace reached all ears, the price of tobacco jumped fifty percent. Verplanck, *supra*, at 2-3. The Supreme Court said in dicta that the buyer had no duty to share the news of peace before purchasing. *Laidlaw*, 15 U.S. (2 Wheat.) at 195.

Verplanck was disappointed with the reasoning of the decision and used it as a springboard for discussing his own ideas concerning nondisclosure and related problems. He ultimately rejected both civil and common law, and advocated his own principles. In the course of his essay, Verplanck discussed "mutual mistake" at length. *See, e.g.*, Verplanck, *supra*, at 46-47, 65, 141-52, 224, 229-30, 232.

Verplanck's statement of the mutual mistake issue reflects his civilian understanding of the elements:

> Another question now presents itself. In a purchase or sale, one party gains, and the other is a serious loser in consequence of the common mistake of both as to some essential fact, of which the intentional concealment by either would have been dishonest. How does this affect the contract?

Id. at 141; *see supra* text accompanying notes 90-99. From these words, Verplanck shifts to *mutual* and uses that word for nearly all the rest of his discussion. Verplanck writes as if he had always referred to mistake of both parties as "mutual mistake."

Verplanck presents mutual mistake wholly as a civil law doctrine. Verplanck, *supra*, at 144. He emphatically claimed that he could find it nowhere in the common law. *Id.* He thus suggests that the doctrine was civil in origin and remained civil until the common law explicitly began to adopt it. Professor Hamburger agrees generally with Verplanck that mutual mistake has a civil source. *See* Hamburger, *supra* note 61, at 283-84. The development outlined in the *Quesnel* line of cases, however, shows that the doctrine is as much English and American as civil.

Modern commentators have applauded Verplanck's knowledge of the law. Verplanck was "a notable Federalist politician, practiced law in New York, wrote extensively on politics, religion, and law, and . . . authored a serious of satires which number amongst the best published during the nineteenth century." M.H. Hoeflich, Laidlaw v. Organ, *Gulian C. Verplanck, and the Shaping of Early Nineteenth Century Contract Law: A Tale of a Case and a Commentary*, 1991 U. Ill. L. Rev. 55, 59. According to Hoeflich, Verplanck showed a "deep understanding of both the Anglo-American and the civilian legal traditions." *Id.* at 60. Verplanck was incorrect about mutual mistake, however. It was available both at common law in 1825 (at least in Virginia), in *indebitatus assumpsit*, and in equity. Perhaps to his credit, Verplanck admitted "some hesitation and variance" in the common law's application of *caveat emptor* to mutual mistakes as to the existence of the item sold. *Id.* at 144.

Verplanck opined that mistake should apply in certain hypothetical cases. Verplanck, *supra*, at 142-52. In some of them mutual mistake would still apply, though in most the Uniform Commercial Code would force an allocation of the risks of such mistakes. Verplanck's essay was subject to scathing reviews. *See, e.g.*, II U.S. Law Journal 72-120 (1826) (mentioning mutual mistake only impliedly in passing at 106-08). At least Verplanck placed "mutual error" language before the legal public one more time.

321. 2 James Kent, Commentaries on American Law 367-436 (1827); 1 Story, *supra* note 14.

Roman and civil law sources, especially Pothier.[322] Story draws heavily on both Kent and the Digests.[323]

a. Story

In his 1837 treatise, Story wrote exhaustively regarding the general equitable doctrine of mistake; discussion continues for seventy-two pages.[324] Dividing his explication into mistakes of law[325] and mistakes of fact,[326] Story extensively examines numerous English cases. His exposition was in 1836 probably the most exhaustive available. Story was a thorough scholar who pushed doctrinal discussion of mistake further than ever before, citing his propositions carefully with detailed analysis of English cases. Story himself decries the scarcity of English commentary discussing mistake.[327] Story's work stands in contrast to Fonblanque's,[328] whose discussion fills five pages.[329]

Story's work specifically on mutual mistake is curt by comparison, taking only a few paragraphs. In 1820, Story had identified "mutual and innocent mistake" in connection with English equity.[330] In 1837, Story's discussion looks more civilian. Story explicitly describes "mutual mistake"[331] and requires that the mutual mistake be "material."[332] Story illustrates the principle by citing Paulus (rather than Gauis) on the burnt house case (thereby avoiding the mention of a natural law foundation for mutual mistake).[333] Story also

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322. Pothier, *supra* note 105; *see* 2 Kent, *supra* note 321, at 468-77.

323. See in particular Story's chapter titled "Mistake" in 1 Story, *supra* note 14, at 121-93 (citing to the Digests on the title page).

324. 1 Story, *supra* note 14, at 121-93, § 110-83. Contrast Story with Fonblanque, who treated all forms of mistake as one. *See supra* note 242. Story noted Fonblanque's failure to discuss the distinction between mistakes of law and fact. 1 Story, *supra* note 14, at 156-57 n.3 ("[B]ut [Fonblanque] has not attempted to expound the true principles, on which [the cases] turn, or the reason of the differences."). The same could also be said of Maddock, whose equity treatise suffers from the same deficiency. Henry Maddock, A Treatise on the Principles and Practice of the High Court of Chancery 47-84 (Hartford 1827). Maddock cites many of the same cases Fonblanque cites. *E.g., id.* at 74.

325. 1 Story, *supra* note 14, §§ 110-39, at 121-54.

326. *Id.* §§ 140-83, at 155-93.

327. *Id.* at 152 n.1 (discussing Maddock, Jeremy, Fonblanque, and Milford).

328. Fonblanque's Equity, *supra* note 75. Fonblanque's second American edition was published in 1820, but was adapted from his fifth English edition. *Id.*

329. *Id.* at 116-22. Fonblanque's unique contribution was to gather the cases from English and American equity, however. *Id.*; 1 Story, *supra* note 14, at 152 n.1 ("Mr. Fonblanque has collected many of the cases in his valuable notes."). Story cited to Fonblanque freely, *see id.*

330. Joseph Story, *Chancery Jurisdiction*, 11 North American Rev. 140, 149 (1820).

331. 1 Story, *supra* note 14, at 157-58 ("The same principle will apply to all other cases, where the parties mutually bargain for and upon the supposition of an existing right. . . . The same principle will apply to cases of purchases, where the parties have been innocently under a mutual mistake . . . .").

332. *Id.* at 156-57.

333. *Id.* at 157-58 (quoting Paulus' resolution of the burnt house case at Digests XVIII.1.57 as

cites the case of *Hitchcock v. Giddings*, discussed *supra*.[334] Story thus connects the civilian form of mutual mistake to the principles of English equity noted in *Hitchcock*.[335] The proper application of mutual mistake principles remains otherwise uncertain in Story's treatise, however.[336] Aside from *Hitchcock* and another English case, Story cited in support of mutual mistake Kent, the Digests, Pothier, and Grotius.[337] Consistently, Story claims that equity and the civil law hold the same principle of mutual mistake.[338]

Story's influence was substantial.[339] General contracts cases routinely cited Story.[340] Story's equity treatise went through fourteen American and three British editions from 1836 through 1920. Undoubtedly Story's position as a United States Supreme Court Justice elevated the status of his treatise.[341] In fact, Story's position on the United States Supreme Court may have allowed him to influence mutual mistake doctrine more effectively than he did through his

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an example of a mutual mistake, and stating that "The Civil Law holds the same principle [as the common law].").

334. 4 Price 135, 146 Eng. Rep. 215 (1817), discussed at length *supra* notes 212-224 and accompanying text. Story also cites to Calverly v. Williams, 1 Ves. Jr. 210, 30 Eng. Rep. 306 (Ch. 1790), a misunderstanding case which mentions "mutual mistake" but means by that "misunderstanding."

335. *See supra* note 216 and accompanying text for a discussion of citation to English equitable principles in *Hitchcock*.

336. 1 Story, *supra* note 14, at 155-59.

337. *See* 1 Story, *supra* note 14, §§ 141-44 and accompanying notes. Oddly, Story cites not to Grotius' section on error in promises but his section on promises made under the influence of fear. *Id.* at 158 n.1 (citing to Grotius, *supra* note 107, at II.XI.VII). Possibly this is a misprint, Story meaning to cite "§ 6" instead of "§ 7" as he does later in the same footnote. Story omits most American sources. 1 Story, *supra* note 14, at §§ 141-42 & nn. 1 & 103. Story does cite Pearson v. Lord, 6 Mass. (1 Tyng) 81 (1809), and Garland v. Salem Bank, 9 Mass. (1 Tyng) 408 (1812), *see* 1 Story, *supra* note 14, at 155-56 n.1, and Story does cite Smith v. Evans, 6 Binn. 101 (Pa. 1813); and Mann v. Pearson, 2 Johns. R. 37 (1806), as examples of specific cases in which mistake principles were applied, *see* 1 Story, *supra* note 14, at 157 n.2. Story's discussion of fundamental mutual mistake principles omits several American cases that would have been helpful, including the *Quesnel* line of cases, and Harrison & Gibson v. Stowers, 2 Miss. (1 Walker) 165 (1824) (discussing "mutual error or mistake" and the seriousness of the error in this case); Hunter v. Goudy, 1 Ohio 449 (1824); Perkins v. Gay, 3 Serg. & Rawle 325 (Pa. 1817); Drew v. Clarke, 3 Tenn. (Cooke) 373 (1813).

338. 1 Story, *supra* note 14, § 142. A later commentator, John Bouvier, in John Bouvier, *Institutes of American Law* (Peterson 1851), agreed substantially with Kent and Story, citing Pothier and giving an example from the Digests. *Id.* at 226; *see also* Digest XVIII.I.14.

339. *See generally* Bernard Schwartz, Main Currents in American Legal Thought 132-43 (1993).

340. *E.g.*, Peters v. Florence, 2 Wright 194, 198 (Pa. 1861); Smith v. Fly, 24 Tex. 345 (1859) (discussing equitable mistake). As to mutual mistake cases, *see, e.g.*, Ladd v. Chaires, 5 Fla. 395, 400 (1854) (also citing Fonblanque and *Hitchcock v. Giddings*) Fritzler v. Robinson, 70 Iowa 500, 503 (1886) (also citing to Kent); Martin v. McCormick, 8 N.Y. (4 Seld.) 331 (1853) (stating, "where there is mutual error as to the existence of the subject-matter of the contract, a rescission may be had," and citing Story's treatise and *Hitchcock v. Giddings*).

341. Story was appointed to the United States Supreme Court in 1811 and remained on it until 1845.

treatise. Story was a member of the Court in 1837 (the year after Story's treatise was published) when the Court decided its first mutual mistake case, *Allen v. Hammond*.[342] The opinion was written by Justice M'Lean,[343] so we can only speculate regarding Justice Story's influence. But the case is worth discussion in its own right (and this study discusses it *infra*) because it appeared explicitly to combine mutual mistake with the older consideration doctrine.

b. Kent

Combination of mutual mistake with consideration-related doctrine was advocated by Kent earlier, in 1827, in Lecture 39 of his *Commentaries*.[344] In this exceptional lecture, Kent first discourses briefly on the nature of consideration, which he describes as "something given in exchange, something that is mutual, or something which is the inducement to the contract."[345] But, Kent continues, consideration must be "valuable," and "[a] valuable consideration is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made."[346] In hindsight, lawyers now see Kent holding to old benefit-detriment law but elevating "exchange" to the forefront of consideration analysis, a position Powell did not maintain in 1790.[347]

Kent moves from consideration directly to mistake, which he describes entirely in Roman terms:

> If A. sells his horse to B., and it turns out that the horse was dead at the time, though the fact was unknown to the parties, the contract is necessarily void. So, if A., at New-York, sells to B. his house and lot in Albany, and the house should happen to have been destroyed by fire at the time, and the parties equally ignorant of the fact, the foundation of the contract fails, provided the house and not the ground on which it stood, is the essential inducement to the purchase. The civil law comes to the same conclusion on this point.[348]

Kent's hypotheticals are Gauis' dead slave and burnt house.[349] Taking Story

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342. 36 U.S. (11 Pet.) 63 (1837).

343. *Id.* at 68.

344. 2 Kent, *supra* note 321.

345. *Id.* at 364.

346. *Id.* at 365.

347. *See* discussion *supra* notes 177-191 and accompanying text.

348. 2 Kent, *supra* note 321, at 367.

349. *See* Dig. XLIV.7.1 & XVIII.I.57. Some argument can be made as to whether these examples illustrate mutual mistake, impossibility, or a contract contrary to the Law of Nature under Roman law. *See supra* notes 100-106 and accompanying text. Kent cited Roman law deliberately. He continues:

> But if the house was only destroyed in part, then if it was destroyed to the value of only half or less, the opinion stated in the civil law is, that the sale would remain good, and

and Kent together, one could conclude that equity, common law, and civil law all reached the same result in mutual mistake cases.

Kent explains at length how mutual mistake should be applied, however. In this discussion he ties mistake directly to inducement to promise:

> But if the house was only destroyed in part, then if it was destroyed to the value of only half or less, the opinion stated in the civil law is, that the sale would remain good, and the seller would be obliged to allow a ratable diminution of the price. Pothier thinks, however, that in equity the buyer ought not to be bound to any part or modification of the contract, when the inducement to the contract has thus failed; and this . . . is certainly the more just and reasonable doctrine. The code Napoleon has settled the French law in favour of the opinion of Pothier, by declaring, that if part of the thing sold be destroyed at the time, it is at the option of the buyer to abandon the sale, or to take the part preserved, on a reasonable abatement of price; and, I presume, the principle contained in the English and American cases tend to the same conclusion, provided the inducement to the purchase be thereby materially affected.[350]

With this introduction, Kent begins discussing cases in which a mistake results in an exchange which is grossly undercut or a performance which is impossible. *Farrer v. Nightingal*[351] is a good example. There, defendant thought he owned an 8.5-year interest in a public-house. Defendant sold that interest to plaintiff, the parties writing the 8.5-year length of the interest into

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> the seller would be obliged to allow a rateable diminution of the price. Pothier thinks, however, that in equity the buyer ought not to be bound to any part of the modification of the contract, when the inducement to the contract had thus failed.; and this would seem to be the reasoning of Papinian [citation to Digest XVIII.I.58], from another passage in the Pandects. . . .

2 Kent, *supra* note 321, at 367-68. Kent relies on the civil law often. In another place, Kent explained:

> [U]pon subjects relating to private rights and personal contracts, and the duties which flow from them, there is no system of law [like the civil] in which principles are investigated with more good sense, or declared and enforced with more accurate and impartial justice. . . . . [For instance,] the rights and duties flowing from personal contracts, express and implied and under the infinite variety of shapes which they assume in the business and commerce of life, are defined and illustrated with a clearness and brevity without example.

1 *id.* at 507.

350. Kent, *supra* note 321, at 367-68. The Napoleonic Code section, 1601, to which Kent cites reads as follows:

> If at the moment of sale the thing sold has perished intirely, the sale shall be null.
>
> If a part only of the thing has perished, it is at the option of the purchaser to abandon the sale, or to demand the part preserved, on having the price determined by estimation.

The Code Napoleon § 1601 (Bryant Barrett, trans., Reed, 1811, reprinted by Gryphon 1983).

351. 2 Esp. 639, 170 Eng. Rep. 481 (1798).

their agreement. Plaintiff paid a £5 deposit but then learned that the 8.5-year term was only a 6-year term. The plaintiff sued for money had and received. Lord Kenyon ordered it returned and declared that "where a person sells an interest, and it appears that the interest, which he pretended to sell, was not a true one . . ., the buyer may consider the contract as at an end."[352] Kenyon explicitly referred to the parties' actions as a "mistake" (though not "mutual mistake").[353] The other law cases Kent discusses are similar assumpsits in which consideration was missing (because products were defective, for instance), although the parties mistakenly thought it existed when they formed their contracts.[354]

Kent next discusses chancery cases in which title to the item sold does not exist. Kent notes English and American precedent coming to opposite conclusions on whether this defect allows a rescission.[355] Kent then ties these defective title cases to *Farrer* and the defective goods cases: Abatement of price for defective title "is analogous in principle to the case of goods sold as of a certain quality, and they turn out to be of an inferior quality . . . ."[356] But Kent would hold all these cases to be mutual mistake (and, by implication, failure of consideration):

> The good sense and equity of the law on this subject is, that if the defect of title, whether of lands or chattels, be so great as to render the thing sold unfit for the use intended, *and not within the inducement to the purchase*, the purchaser ought not to be held to the contract, but be left at liberty to rescind it altogether. This is the principle alluded to by Pothier, and repeatedly by . . . Lord Kenyon. . . . It is to be regretted, that the embarrassment and contradiction which accompany the English and American cases on this subject, cannot be relieved by the establish-

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352. *Id.* at 639-41; 170 Eng. Rep. at 481-82. Precedent for this decision, *id.* at 641 n.*, 170 Eng. Rep. at 482 n.*, was Berry v. Young, 2 Esp. 640 n.*, 170 Eng. Rep. at 482 n.* (1788). In *Berry*, a sale of land was made conditioned on a showing of good title. When the purchaser called on the vendor to show title, the vendor could show only an abstract, but no deed. The purchaser sued for the money had and received, and Lord Kenyon granted the action on the ground that "the seller . . . has here failed in completing his engagement. . . ." *Id.* Thus, in *Farrer*, breach in *Berry* was translated into failure of consideration which resulted from mistake, which warranted relief.

353. *Farrer*, 2 Esp. at 640, 170 Eng. Rep. at 481.

354. *See, e.g.*, Tye v. Gwynne, 2 Camp. 346, 170 Eng. Rep. 1179 (1810) (discussing whether defendant could prove mitigation of damages so as to reduce the amount of a note, because the defendant had received bad cheese for the note and therefore consideration had failed); Morgan v. Richardson, 1 Camp. 40 n.*, 170 Eng. Rep. 868 (breach in that the ham ordered was "almost quite unmarketable"; court reasoned that consideration had failed), reported as a note to Farnsworth v. Garrard, 1 Camp. 38, 170 Eng. Rep. 867 (1807); Fleming v. Simpson, 1 Camp. 40 n.*, 170 Eng. Rep. 868 (c.1806) (breach in that wine ordered was "very bad quality"), reported as a note to Farnsworth v. Garrard, 1 Camp. 38, 170 Eng. Rep. 867 (1807); Curtis v. Hannay, 3 Esp. 82, 170 Eng. Rep. 546 (1800) (assumpsit because warranty failed and the horse sold was not sound); Towers v. Barrett, 1 T.R. 133, 99 Eng. Rep. 1014 (1786) (money had and received for failed condition).

355. 2 Kent, *supra* note 321, at 370-73.

356. *Id.* at 372-73.

> ment of some clear and definite rule, like that declared in France, which shall be of controlling influence and universal reception.[357]

Kent's influence was substantial.[358]

F. The Climax: Kent's Regret Relieved, or How Consideration Came to Guide Mutual Mistake's Application

In the period of time in which all of the previous developments took place, the substantive forms of relief for a litigant at law remained bound in pleading forms. The common law theories for money had and received were reflected in the pleading and proof requirements for a writ of indebitatus assumpsit, for instance. Failure to plead correctly would result in nonsuit.[359] Recovery in contract when the plaintiff had paid no money was generally obtained in an action pleading an assumpsit, though sometimes a covenant or debt. In equity, only one form of pleading was required,[360] but the ambiguous equitable heads

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357. *Id.* at 373-74 (emphasis added).

358. *See generally* Schwartz, *supra* note 339, at 143-51. Kent is cited in, for example, the mutual mistake cases of Fritzler v. Robinson, 70 Iowa 500, 503 (1886) (also citing to Story); Gibson v. Pelkie, 37 Mich. 379, 381 (1877) (citing also to Pothier); *see also, e.g.*, Smith v. Fly, 24 Tex. 345, 351 (1859). Kent may have taken his cue from the translator of Pothier, William David Evans. Evans described at length the tie between consideration or cause and mistake:

> It may be stated as a general principle, that . . . when the only cause of payment is a mistake . . ., the adequacy or inadequacy of such cause is the important point . . .; and if no other cause of payment appears, and it is established that money paid under a mistake, whether of law or of fact, may . . . be reclaimed, and it is doubtful whether such mistake did or did not exist, there can be no injustice in adopting the proposition of Pothier, that when it is uncertain whether a man has paid what was not due from him knowingly or erroneously, it ought to be presumed that the payment was made erroneously, and that he should be allowed to reclaim it . . . .

William David Evans, in *Of Mistakes of Law*, 2 Pothier, *supra* note 105, at 341; *see also id.* at 345-53. Readers should recall that cases of defective title with respect to acreage are now handled under the rubric of mutual mistake, just as Kent recommended. *See supra* notes 355-358 and accompanying text.

359. In Briggs v. Vanderbilt, 19 Barb. 222 (N.Y. 1855), the court explained in a mistake case brought at law that the plaintiff's complaint "contains charges for money lent and advanced, and for money paid, laid out and expended for the use of the plaintiff, neither of which was sustained by proof; but it omits the usual claim for money had and received, which, if preferred, would have sustained a [referee's] report in favor of the plaintiff." *Id.* at 236. This language is dicta, as the plaintiff did succeed before the referee in getting its money back, *id.* at 228, and the defendant failed to appeal and therefore abandoned the argument that the plaintiff had failed to plead the cause of action on which the plaintiff had won at trial. *Id.* at 236.

360. Spence described the proceeding in Chancery thus:

> [T]he party who desired relief applied as he would to Parliament, or the Council, by a petition, which afterwards, as in Parliament, was called a Bill. This Bill commenced the Suit.
>
> . . . . The plaintiff in his bill simply detailed the facts; it was not necessary that the bill should use any particular phraseology, or that it should define or describe the cause of suit

of jurisdiction, of which mistake was one, were so general they gave little precedential guidance.

Courts in England and America kept mistake in money had and received and mistake in equity separate, at least formally.[361] Chancery traditionally refused relief to the plaintiff who had an adequate remedy at law.[362] Thus, if money had and received was available to correct a mistake, chancery would deny jurisdiction.[363] Though this formal distinction largely remained part of the law through the early 1800s,[364] English law courts were anxious to extend the jurisdiction of *indebitatus assumpsit* for money had and received, so they construed their jurisdiction broadly.[365] By 1760 Lord Mansfield could ground the action for money had and received on "ties of natural justice and equity to refund the money."[366] Fonblanque thought this statement of relief at law preempted chancery jurisdiction over all cases of money had and received.[367] These and similar developments in other parts of the law caused Spence to report in 1848 that the common law courts had developed an "equitable jurisdiction."[368]

> in any set or definite terms, as in a declaration at law: . . . it frequently sought relief against some rule of law. All that the plaintiff had to show was that his was a case which ought to be entertained under the powers given by the general delegation [of authority to the Chancery].
>
> The bills almost universally pray a subpoena, sometimes a writ of *Habeas Corpus cum causa*, or a writ of *Certiorari* alone . . . . The bills always conclude in terms of supplication, as "for the reverence of God and for work of Charity," the plaintiff sometimes adding, "and he shall ever pray for you;—"and your petitioner shall ever pray, &c.," is still appended to every petition to the Chancellor.

1 Spence, *supra* note 140, at 367-68; *see also generally* John Newland, Practice of the High Court of Chancery (Backus 1818).

361. *See, e.g.*, Lesslie v. Richardson, 60 Alabama 563, 568 (1877) ("When there is a complete and adequate remedy at law, the Chancery Court has no jurisdiction . . . ."); Ramsay v. County of Clifton, 92 Ill. 225, 228-29 (1879) (refusing to grant a bill in equity for mistake because "the action at law for money had and received is . . . a full and complete remedy"); Smith v. Fly, 24 Tex. 345 (1859) (discussing the differences between money had and received by mistake and mistake in equity; treating the various legal and equitable jurisdictions as settled).

362. *See, e.g.*, Bowen v. Waters, 3 F. Cas. 1058, 1061 (C.C. S.D. N.Y. 1827); 1 Spence, *supra* note 140, at 420 ("It was a principle, that if the matter were properly cognizable, and relievable in any established court of ordinary jurisdiction, and no assistance was required from the court to effectuate a fair trial, the parties should be dismissed from the Court of Chancery. . . ."); Ballow, *supra* note 241, at 3 ("But if the law has determined a matter with all its circumstances, equity cannot intermeddle.").

363. *See supra* cases cited notes 359 and 361; Fonblanque's Equity, *supra* note 75, at 361-66 n.(g) ("if it be true, that an action for money had and received will lie in all cases in which a bill in equity could be sustained . . ., it seems to afford this conclusion, that a bill in equity, in such case, could not have been sustained").

364. *See supra* cases cited note 361.

365. Holt resisted this. 8 W.S. Holdsworth, A History of English Law 90-92 (Little, Brown 1926).

366. Moses v. MacFerlan, 2 Burr. 1005, 1012, 97 Eng. Rep. 676, 681 (K.B. 1760).

367. Fonblanque's Equity, *supra* note 75, at 361-66 n.(g).

368. 1 Spence, *supra* note 140, at 699-700.

American courts accepted the broad, equitable notion of money had and received. Pennsylvania's Justice Bradford in 1792 stated typically:

> This is an equitable action; the defendant . . . may go into all the equity of the case; and unless it appears, that he cannot in conscience and equity retain the money, unless, *ex aequo et bono*, he is bound to refund it; the verdict must be for him.[369]

This doctrine blurred the line between equity and law. Other facets of American law made the line harder to distinguish. America's highest courts of appeals, state and federal, often reviewed both equity and law decisions.[370] Most early American decisions explicitly recognizing "mutual mistake" come from chancery-like trial courts.[371] But if the court of appeals reviewing the decision hears both law and equity appeals, is it a court of law or a court of equity?[372]

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369. Barr v. Craig, 2 Dall. 151, 154 (Pa. 1792) (Bradford, J., concurring); *see* Guthrie v. Hyatt, 1 Del. [1 Harr.] 446, 447 (1834) ("The action of assumpsit has been likened to a bill in equity."); Dupuy v. Johnson, 4 Ky. 562 (1809) ("According to the modern doctrine, there is no difference at law or in equity with respect to [the defendant's] liability. The action for money had and received . . . is an equitable action, and is held to lie wherever money has been paid to the use of another, which, *ex equo et bono*, he ought to refund. The defense allowed to this action is equally liberal, every thing being permitted to be given in evidence . . . which may tend to destroy or diminish the equity of the plaintiff's claim."); Wiseman v. Lyman, 7 Mass. (1 Tyng) 286, 288 (1811); Wright v. Butler, 6 Wend. 284, 290 (N.Y. 1830) ("These actions on the money counts are resorted to as substitutes for bills in chancery, and ought to be encouraged whenever the law affords no other remedy, and where a court of equity would compel the defendant to repay to the plaintiff a sum of money which the latter had been compelled to pay for his benefit."); Morris v. Tarin, 1 Dall. 158, 159 (Pa. 1785) ("This is a liberal kind of action, and will lie in all cases where by the ties of natural justice and equity the defendant ought to refund the money paid to him . . . .").

370. *E.g.*, Harrison & Gibson v. Stowers, 2 Miss. (1 Walker) 165 (1824) (Mississippi Supreme Court reviewing the decision of a superior court in chancery); Hunter v. Goudy, 1 Ohio 449 (1824) (Ohio Supreme Court reviewing a bill in equity); Drew v. Clarke, 3 Tenn. (Cooke) 373 (1813) (Tennessee Supreme Court reviewing a bill in equity). An early contemporary commentator, Anthony Laussat, reports that in Connecticut, North Carolina, Georgia, Ohio, Indiana, Illinois, Kentucky, Tennessee, and Alabama some trial courts had both legal and equitable jurisdiction. Laussat, *supra* note 280, at Appendix. In addition, some equity jurisdiction was committed to the trial-level law courts in New York, Maryland, Virginia, and Missouri. *Id.* Only Delaware, New Jersey, South Carolina, and Mississippi kept law and equity entirely separate at the trial level, but in Mississippi, as in *Stowers*, appeal was to the Supreme Court, which heard both law and equity appeals. *Id.*

371. *E.g.*, Allen v. Hammond, 36 U.S. (11 Pet) 63 (1837); Harrison & Gibson v. Stowers, 2 Miss. (1 Walker) 165 (1824) (appeal from a superior court of chancery); Hunter v. Goudy, 1 Ohio 449 (1824) (reviewing a bill for relief from a judgment in a law court, sitting as "[a] court of equity"); Drew v. Clarke, 3 Tenn. (Cooke) 373 (1813) (reviewing a bill in equity); Alexander v. Muirhead, 1 S.C. Eq. (2 Des.) 162 (1802); Tucker v. Cocke, 2 Rand. 51 (Va. Ct. App. 1823) (appeal from "the Lynchburg Chancery Court").

372. Perhaps this blurring accounts for Wilkins v. Woodfin ex rel. Pearce, 19 Va. (5 Munf.) 183 (1816), in which the Virginia Supreme Court of Appeals held that the chancery could order the repayment of money received by the defendant, notwithstanding that the plaintiff had a remedy under the common law. *Id.* at 184-85. It must have seemed pointless to the Supreme Court to send the

Pennsylvania had no chancery,[373] so its mistake decisions, *Swift v. Hawkins* (1768)[374] and *Perkins v. Gay* (1817),[375] came from law courts hearing both law and equity. Undoubtedly this kind of mixing of law and equity influenced the movement to merge law and equity to succeed in part at a faster pace in the United States than it did in England.[376]

This merging eventually contributed to the development of our mutual mistake, as Kent advocated. By 1819, at least, all the elements of our American mutual mistake were present in early American equity cases. Yet application of the equitable doctrine of mutual mistake remained uncertain outside of a few limited cases, and little could be gained from the English chancery cases but that some of them concerned the fairness of the contract. In the mistake and related failure-of-consideration applications of the action for money had and received, courts had preserved the early notion of consideration as a ground for making a promise, a promise's basic assumption, as it were. Moreover, countless decisions regarding money had and received had explicated various situations in which a mistake could be said to occur. Finally, the older consideration doctrine was disappearing slowly and being replaced by the new view of consideration as exchange.

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action back down to the chancery court only so that it could arise anew in the law court. Home reports that this same blurring of common law and equity occurred in Scotland, where there existed a "union of common law with equity in the supreme court." Home, *supra* note 7, at 24. "That inferior courts are confined to common law," Home continued, but had developed the custom of hearing equitable defenses:

> Imitation of the supreme court, which judges both of law and equity, and the inconvenience of removing to another court a process that has perhaps long depended, paved the way to this enlargement of power. Another thing already taken notice of, tends to enlarge the powers of our inferior courts more and more; which is, that many actions, founded originally on equity, have by long practice obtained an establishment so firm as to be reckoned branches of the common law.

Id.

373. *See* Swift v. Hawkins, 1 Dall. 21 (Pa. 1768), discussed *supra* notes 276-280 and accompanying text; Mackey v. Brownfield, 13 Serg. & Rawle 239, 240 (Pa. 1825) ("there being no court of chancery," citing *Swift*); Perkins v. Goy, 3 Serg. & Rawle 327, 329 (Pa. 1817) ("[W]hat we have to do with is the direction of the court in matters of law."); Steinhauer v. Witman, 1 Serg. & Rawle 437, 443 (Pa. 1815); Smith v. Evans, 6 Binn. 101, 110 (Pa. 1813); *see generally* Laussat, *supra* note 280, at 20-26 (relating the story of how Pennsylvania both gained and lost its pre-revolutionary chancery courts). Laussat reported that Massachusetts also lacked chancery courts, but its law courts exercised some equitable powers. *See id.* at Appendix.

374. 1 Dall. 21 (Pa. 1768).

375. 3 Serg. & Rawle 327 (Pa. 1817).

376. Law and equity merged in the United States generally with the passage of various versions of the Field Code, in some states prior to the civil war. Lawrence M. Friedman, A History of American Law 391-98 (Simon & Schuster 2d ed. 1985). In United States federal courts, however, law and equity was always administered in the same court, though through different forms. In England, law and equity did not merge until the Judicature Acts of 1873 and 1875. *Id.* at 397 ("Field's work influenced the English Judicature Act of 1873."); Fleming James, Jr., Geoffrey C. Hazard & John Leubsdorf, Civil Procedure §§ 1.5-1.6 (4th ed. 1992).

Equity courts looking to money had and received for guidance in application of mutual mistake doctrine would combine chancery's mistake and mistake in money had and received in such a way that the older consideration doctrine stayed vital. Now, mutual mistake doctrine rather than consideration doctrine would look to the inducement to the contract. This is more or less the result Kent had recommended. It is also the result foreshadowed by the *Quesnel* line of cases. This development occurred generally after Kent's *Commentaries* and *Tucker v. Cocke* were published, in the late 1820s and 30s, during a period of civil law renaissance exemplified by the writings of Kent, Story, and others.[377] The doctrine of mutual mistake would retain its Roman, consent-based form but be applied so as to guard the reasons for promising. The result is a combination of the elements discussed in this study: our mutual mistake.[378] *Allen v. Hammond*[379] illustrates the point.

G. The Climax Illustrated: Allen v. Hammond

Hammond hired Allen on January 27, 1832 to prosecute against the Portuguese government a claim arising from the capture and condemnation by Portugal of Hammond's ship. Unbeknownst to Hammond or Allen, Portugal had on January 19th, one week before, granted Hammond's claim.[380] Thus, Hammond and Allen's contract was founded on a mutual mistake of fundamental fact. The Court granted relief on this ground, using familiar mutual mistake language: "The contract was entered into through the mistake of both parties; it imposes great hardship and injustice on [Hammond] . . . . [This] ground . . . is held sufficient for relief in equity . . . ."[381] The language clearly shows the Court recognized all of the elements of mutual mistake now common in American law—a sufficiently serious mistake common to both parties.[382]

Allen could have been handled as a mutual mistake case only.[383] (*Allen* was a suit "in chancery."[384]) But *Allen* was not handled this way. The court gave an alternate ground: lack of consideration. Obviously the facts show a

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377. Courts continue today to allow money had and received to inform equity, and vice versa. *See, e.g.*, Sarbro IX v. State of New York Office of General Services, 645 N.Y.S.2d 212 (N.Y. App. Div. 1996) (plaintiffs seeking quasi-contract damages and rescission based on mutual mistake).

378. Both Foulke and Palmer recognized a connection between mutual mistake and unjust enrichment, a descendant of the action in indebitatus assumpsit for money had and received; neither explained how such a connection might have arisen. Foulke, *supra* note 22, at 221-23; Palmer, *supra* note 32, at 35-39.

379. 36 U.S. (11 Pet.) 63 (1837).

380. *Id.* at 67.

381. *Id.* at 70.

382. The Court also held that neither party assumed the risk of the mistake. *Id.*

383. *Allen* could have followed the numerous American chancery decisions already on the books dealing with mutual mistake. *See, e.g.*, cases cited *supra* notes 276-319.

384. Allen v. Hammond, 36 U.S. (11 Pet.) 63, 67 (1837); *see also id.* at 64 (reporter's note: "This was a case in equity . . . .").

bargain, and mutual promises exchanged.[385] But a bargaining process was insufficient to show consideration. The Court explained:

> That this agreement was without consideration is clear. Services long and arduous were contemplated as probable, by both parties, at the time the contract was executed. But the object of pursuit was already attained. No services were required under the contract . . . . [N]o one can for a moment believe that Hammond intended to give to his agent nearly ten thousand dollars, on the contingency of his claim having been allowed at the time of the contract. . . . Suppose a life estate in land be sold, and at the time of the sale, the estate has terminated by the death of the person in whom the right vested; would not a court of equity relieve the purchaser? . . . If a horse be sold which is dead, though believed to be living by both parties, can the purchaser be compelled to pay the consideration? These are cases in which the parties enter into the contract, under a material mistake as to the subject matter of it. . . . If in either of these cases, the payment of the purchase money should be required, it would be a payment without the shadow of consideration . . . . And so in the case under consideration; if Hammond should be held liable to pay the demand of [Allen], it would be without consideration.[386]

This holding reflects textbook pre-classical consideration theory: Consideration for the promise is the benefit received, the reason for the performance promised, not a bargaining process.[387] If Allen could have performed as he had promised, Hammond would have received a benefit. But because Hammond had already received the benefit contemplated by the contract, Allen's performance could not have benefitted Hammond. Without a possible benefit from Allen's work, Hammond would have no duty, and no reason existed to hold Hammond to the promise. *Allen* combined this older consideration analysis with mutual mistake: "These grounds . . . unite in favor of [Hammond]."[388]

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385. *Id.* at 69 ("[T]he parties entered into a contract, under seal, in which Hammond agreed to pay Allen ten per centum on all sums which he should recover, up to eight thousand dollars, and thirty-three per cent. on any sum above that amount, as commissions. And Allen agreed to use his utmost efforts to recover the claim.").

386. *Id.* at 70-71 (This quoted material is taken from several paragraphs on page 70, but formal ellipses for omitted material are omitted in this reproduction so that the reader is not distracted by them.).

387. *See supra* text accompanying notes 141-206.

388. *Allen*, 36 U.S. (11 Pet.) at 71. Earlier American mutual mistake cases contained, and were sometimes decided, on this same rationale. *E.g.*, Conner v. Henderson, 15 Mass. (15 Tyng) 319, 321 (1818) (counselling the plaintiff to "demand his money as paid without consideration"); Woodward v. Cowing, 13 Mass. (13 Tyng) 215, 216 (1816) (dicta) ("Where money has been paid upon a consideration which has failed, it may certainly be recovered back by the party who shall have paid it.").

Allen by its facts also unites frustration with this analysis. *Allen* is a frustration case. Had Portugal granted Hammond's claim after Allen promised to seek it but before he had begun performance, the American doctrine of frustration would arguably have relieved Hammond from Allen's claim.[389] Because the case is one of present frustration rather than a later supervening event, it can also be handled as a mistake case or as a failure-of-consideration case.[390]

One more thread is sewn into the *Allen* decision, typified by *Allen*'s cite to *Hitchcock v. Giddings*.[391] *Allen* summarizes *Hitchcock* as follows:

> [A] vendor is bound to know that he actually has that which he professes to sell. And even though the subject matter of the contract be known to both parties to be liable to a contingency, which may destroy it immediately; yet if the contingency has already happened, the contract will be void.[392]

This terse summary of *Hitchcock* preserves in American mutual mistake law an important line of English cases: those holding that the contract is void if its subject matter has been destroyed before the time of contracting.[393] To illustrate this line of cases, *Allen* cites the dead horse hypothetical:

> If a horse be sold which is dead, though believed to be living by both parties, can the purchaser be compelled to pay the consideration?
>
> [This is a case] in which the parties enter into the contract, under a material mistake as to the subject matter of it. . . .
>
> [A] horse was believed to be living, but which was in fact dead. If . . . the payment of purchase money should be required, it would be a payment without the shadow of consideration.[394]

In this passage, *Allen* incorporates into both mutual mistake law and failure-of-consideration law the Roman hypothetical which Gauis resolved by reference to natural law.[395] In *Allen* though, the dead horse hypothetical is a mutual

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389. *See, e.g.*, Restatement (Second) of Contracts § 266(2) (1981):

> Where, at the time a contract is made, a party's principal purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty of that party to render performance arises, unless the language or circumstances indicate the contrary.

See also id. at cmt. a, illus. 6 (illustration in which government action renders a party's performance of a contract pointless to that party).

390. Regarding the dual applicability of mistake, frustration, and failure of consideration, *see supra* notes 194-206 and 269 and accompanying text.

391. 4 Price 135, Daniell 1, 146 Eng. Rep. 418 (1817); *Allen* cited only Daniell 1.

392. *Allen*, 36 U.S. (11 Pet.) at 71.

393. *See* discussion *supra* at text accompanying notes 125-127.

394. *Allen*, 36 U.S. (11 Pet.) at 71.

395. *See* Dig. XLIV.7.1 and authorities cited *supra* note 100-106 and accompanying text. The

mistake case.[396] Present impossibility had become part of the law of mutual mistake.

Allen was an influential case in mutual mistake law; undoubtedly it helped bring about the point this study uses it to illustrate.[397] A discussion of *Allen* exemplifying all three strands of mutual mistake's primary contemporary application—impossibility, frustration, and undercutting of the exchange—was included in a later edition of Story's equity treatise[398] and later in Story's son's popular contracts treatise.[399] But *Allen* remains primarily illustration. Hundreds of mutual mistake cases were decided in the nineteenth century and thousands since without reference to *Allen*.

Lawyers continue to mix mistake and failure of consideration today.[400] More importantly, however, lawyers continue to apply mutual mistake, primarily

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Court was familiar with civil law sources; it also cited Fonblanque and Pufendorf. *Allen*, 36 U.S. (11 Pet.) at 71, citing to Fonblanque's Equity, *supra* note 75, at 114, and Samuel Pufendorf, *supra* note 108, at I.IX.12, at which Fonblanque and Pufendorf, respectively, speak of mistake as a defect in assent.

396. *Allen*, 36 U.S. (11 Pet.) at 71.

397. *Allen* was cited often with respect to its substantive holdings well into this century. *See, e.g.*, Jacksonville, M., P. Ry. & Navigation Co. v. Hooper, 160 U.S. 514, 527, 16 S. Ct. 379, 384 (1896); Galloway v. Finley, 37 U.S. (12 Pet.) 264, 277 (1838); United States v. Garland, 122 F.2d 118, 121-22 (4th Cir. 1941); Ontario Paper Co. v. Neff, 261 F. 353, 354 (7th Cir. 1919); United States v. Charles, 74 F. 142, 144 (8th Cir. 1896); Columbian Nat'l Life Ins. Co. v. Black, 35 F.2d 571, 573 (10th Cir. 1929); United States v. Golden, 34 F.2d 367, 374 (10th Cir. 1929) (quoting the dead horse hypothetical); Universal Leaf Tobacco Co. v. American Fidelity Fire Ins. Co., 388 F. Supp. 323, 325-26 (D.V.I. 1974); United States v. D'Olier Eng'g Co., 215 F. 209, 211 (E.D. Pa. 1914); United States v. Gridley, 186 F. 544, 550 (D. Idaho 1911) (quoting the dead horse hypothetical); John J. Gorman v. United States, 102 Ct. Cl. 260 (1944); Waples's Case, 16 Ct. Cl. 126 (1880); Woodman's Case, 15 Ct. Cl. 541 (1879); Burnside's Case, 3 Ct. Cl. 367 (1867); Harding v. Robinson, 166 P. 808, 811 (Cal. 1917); Trans World Airlines, Inc. v. Skyline Air Parts, Inc., 193 A.2d 72, 75 (D.C. App. 1963); Stern v. Ace Wrecking Co., Inc., 38 A.2d 626, 627 (D.C. 1944); Ladd v. Chaires, 5 Fla. 395, 400 (1854) (also citing Story, Fonblanque, and *Hitchcock*); Fritzler v. Robinson, 70 Iowa 500, 503 (1886) (also citing to Story and Kent); Edward Rose Co. v. Globe & Rutgers Fire Ins. Co., 160 N.E. 306, 308 (Mass. 1928); Gibson v. Pelkie, 37 Mich. 379, 381 (1877) (citing also to Kent and Pothier); Navarette v. Travis-Ziegler Co., 194 N.Y.S. 832, 836 (N.Y. Mun. Ct. 1922) (quoting the dead horse hypothetical); Martin v. McCormick, 8 N.Y. (4 Seld.) 331, 335 (1854) (also citing Story's treatise and *Hitchcock v. Giddings*), and by counsel but not the court in Byers v. Chapin, 28 Ohio 300, 301 (1876); Riegel v. American Life Ins. Co., 25 A. 1070, 1073 (Pa. 1893); Cummings v. Williams, 269 S.W. 845, 847 (Tex. Civ. App. 1925); Ross v. Harding, 391 P.2d 526, 523-33 (Wash. 1964); Kelsey v. Mackay, 117 P. 714, 715 (Wash. 1911) (citing also to Story and Kent); Adams v. Washington Brick, Lime & Mfg. Co., 80 P. 446, 449 (Wash. 1905); Enrico v. Overson, 576 P.2d 75, 77 (Wash. Ct. App. 1978).

398. *See* 1 Story, *supra* note 14, §§ 143a & 143b, at 160-61.

399. Story, *supra* note 34, § 107 & 107 nn. 4 & 5, at 69.

400. Cottonhill Inv. Co. v. Boatmen's Nat'l Bank of Cape Girardeau, 887 S.W.2d 742, 743 (Mo. Ct. App. 1994) (counsel's assertion that because of a mutual mistake, "a substantially total failure of consideration occurred"); Reggio v. Warren, 93 N.E. 805, 807 (Mass. 1911) ("[T]he important question was . . . whether the particular mistake was such as a court of equity will correct, and this depends upon whether the case falls within the fundamental principle of equity that no one shall be allowed to enrich himself unjustly. . . ."); *see also generally, e.g.*, cases cited *supra* note 205.

as it was set forth in the *Allen* decision, to cases of present impossibility and frustration, and cases in which the consideration otherwise fails without the fault of either party—in which the exchange of the parties is grossly undercut.[401]

III. DENOUEMENT: AN EXECUTIVE SUMMARY OF CONCLUSIONS

A. Mutual Mistake and Consideration

Mutual mistake's genealogy and current use lead to the surprising conclusion that mutual mistake plays in our law a role played by consideration, particularly benefit-based consideration, in the older common law. This is again the role Kent advocated for it and the role foreshadowed by the *Quesnel* line of cases. Briefly reviewing some history of consideration, to see its tandem development away from the role now played by mutual mistake, makes this conclusion clearer.

When contract law first formed in assumpsit actions, consideration doctrine kept parties from error, as St. Germain said:

> But yf hys promyse be so naked that there is no maner of consyderacyon why yt sholde be made/ than I thynke hym not bounde to perfourme it/ for it is to suppose that there was som errour in the makyng of the promyse . . . .[402]

Under this notion of consideration, what would look like a mistake was actually void for lack of consideration.[403] To take an example of the older form of consideration that has survived, if one party promises a payment of money in exchange for another's forbearance from suit, consideration exists for the first's promise only if the second's claim has some actual validity or reasonable basis.[404] If the claim is completely invalid, then no reason exists for the promise; indeed, the promisor gains no benefit and the promisee no detriment from the forbearance.[405] Without a valid claim, the purpose of the promised

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401. *See supra* cases cited notes 26-28.

402. St. Germain, *supra* note 152, quoted *supra* text accompanying note 152.

403. Professor Simpson presciently stated in his history of assumpsit:

> The requirement of consideration renders the recognition of an independent doctrine of mistake otiose. The requirement of consideration excludes irrational promise, and granted that only promises given with a good reason are actionable there is no place for a doctrine of error.

Simpson, *supra* note 115, at 535.

404. *See, e.g.*, Duncan v. Black, 324 S.W.2d 483, 486-87 (Mo. Ct. App. 1959) (opining that the disputed claim must be a "discernible mole hill" from which a mountain might be made); *see also, e.g.*, Rosyer v. Langdale, Style 248 (K.B. 1650); Pecke v. Lovedon, Cro. Eliz. 804 (1602); John W. Smith, The Law of Contracts 182 n.(a) (Rothman 1992) (1853) ("The forbearance to prosecute an action is not a valid consideration for a promise to pay a sum of money to the plaintiff, unless there be a good cause of action.").

405. *See, e.g.*, Stone v. Withipoll, 1 Leon. 113, 74 Eng. Rep. 106, Cro. Eliz. 126, 78 Eng. Rep. 383, Owen 94, 74 Eng. Rep. 924, Latch, 82 Eng. Rep. 254 (1588). Owen reports Coke's winning

payment would be frustrated. Consideration doctrine keeps the promisor from error.[406]

As contract law developed, consideration's function remained the same but its mechanism changed. This change happened gradually throughout the eighteenth and nineteenth centuries.[407] Originally a doctrine which made sure good reason existed for making a promise, consideration came to disregard the reasons for a promise. Instead, it came to let the parties evaluate the reasons for themselves and examined only the form in which a promise was made or contained. The form, later recognized as the "bargain" or "bargained-for exchange" was supposed to insure that no error occurred, though consideration had (and probably developed during that time) other functions.[408] Thus, Mansfield and Wilmot could suggest that any writing imported a consideration.[409] (Mansfield made this move only five years after establishing in *Moses v. MacFerlan* a broad basis of relief for "failure of consideration" and mistake.[410])

Powell could by 1791 find consideration sufficient in a sealed, formal writing.[411] By the end of the eighteenth century, Holmes could argue that "[c]onsideration is a form as much as a seal," and that mere form was sufficient.[412] Legislation later held that a writing would raise a presumption of consideration.[413] By 1931, the American Law Institute omitted any reasons for

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argument in this case involving a promise to pay a void debt: "The consideration is the ground of every action on the case, and it ought to be either a charge to the plaintiff or a benefit to the defendant." *Stone*, Owen at 94, 74 Eng. Rep. at 924.

406. This situation, too, could easily be handled as a case of mistake, as noted by William David Evans. William David Evans, *Of Mistakes of Law*, at 2 Pothier, *supra* note 105, at 345-46.

407. *See, e.g.*, Atiyah, *supra* note 115.

408. *See, e.g.*, Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799 (1941) (separating to some extent consideration's evidentiary and "channeling" functions from its cautionary function).

409. Pillans v. Van Mierop, 3 Burr. 1663, 97 Eng. Rep. 1035 (K.B. 1765).

410. Moses v. MacFerlan, 2 Burr. 1005, 1012, 97 Eng. Rep. 676, 680-81 (K.B. 1760).

411. *See* discussion *supra* notes 186-191 and accompanying text.

412. Holmes, *supra* note 53, at 215. Holmes elaborated:

> It is said that consideration must not be confounded with motive. It is true that it must not be confounded with what may be the prevailing or chief motive in actual fact. A man may promise to paint a picture for five hundred dollars, while his chief motive may be a desire for fame. A consideration may be given and accepted, in fact, solely for the purpose of making a promise binding. But, nevertheless, it is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.

Id. at 230. Suppose a well-known, up-and-coming painter contracted with the family of the United States president to paint the chief executive but when the contract was signed the president had died. Wouldn't mutual mistake let the painter out of this contract? Wouldn't consideration fail?

413. Many states now have statutes specifying that a writing raises a presumption of

promising from its first Restatement definition of consideration and instead held a promise actionable merely if the prescribed bargain form of deliberation had occurred.[414] Whether the law could ever turn its back that far on its past is doubtful.[415] The Restatement (Second) retreated, but not much.[416]

Consideration as form no longer protected against error, so common law lawyers found cases of error arising in already-formed contracts. Doctrines of failure of consideration and mistake arose in the late 1600s and early 1700s to reach a just result in these cases, at least those in which one party had already transferred money.[417] During the same period, litigants would occasionally obtain relief in equity. By the nineteenth century, as consideration doctrine looked more and more to the form of the promise rather than the reasons for it, failure of consideration and mistake had already filled in largely where consideration no longer supplied, at least when they took account of frustration

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consideration. *See* Restatement (Second) of Contracts, Chapter 4, Topic 3, Introductory Note (1981) (listing 13 states with such statutes).

414. Section 84 of the Restatement of Contracts provides, "Consideration is not insufficient because of the fact . . . that obtaining it was not the motive or a material cause inducing the promisor to make the promise . . . ." Restatement of Contracts § 84(a) (1932). This supposedly meant that merely following the form was sufficient to create a binding obligation: "the motive or the cause is immaterial." *Id.* § 84 cmt. b.

415. Even the example the first Restatement used to illustrate that motive was irrelevant displayed a clear motive that had historically played a role as consideration:

> A wishes to make a binding promise to his son B to convey to B Blackacre, which is worth $5000. Being advised that a gratuitous promise is not binding, A writes to B an offer to sell Blackacre for $1. B accepts. B's promise to pay $1 is sufficient consideration.

Id. § 84 cmt. b., illus. 1. Could the first Restatement plausibly suggest that $1 would bind *A* to his promise were *A* and *B* not related? Most lawyers would, or should, be skeptical of such a position, knowing the hesitancy of courts to hold *A* to something that clearly appears irrational.

416. The Restatement (Second) abandoned the notion that having a good reason for making a promise is irrelevant. Still, the Restatement (Second) remains not far from the first Restatement's position. The comments to new § 81 imply that the promise must be induced by more than "mere pretense." *See* Restatement (Second) of Contracts § 81 cmt. b ("Unless both parties know that the purported consideration is mere pretense, it is immaterial that the promisor's desire for the consideration is incidental to other objectives and even that the other party knows this to be so."). The Restatement (Second) also reversed the hypothetical used to illustrate that reasons for promising were irrelevant:

> A desires to make a binding promise to give $1000 to his son B. Being advised that a gratuitous promise is not binding, A offers to buy from B for $1000 a book worth less than $1. B accepts the offer knowing that the purchase of the book is a mere pretense. There is no consideration for A's promise to pay $1000.

Id. § 71 cmt. b, illus. 5.

417. Could these doctrines have arisen even earlier in some cases? Sheppard reports that in order to have an assumpsit action on a promise, the "thing promised . . . must be possible to be done [and] . . . must be co-hering, and agree in itself, and with the consideration." Sheppard, *supra* note 176, at 84 (1663). This requirement sounds remarkably like Holmes' (and Pufendorf's) description of a mutual mistake. *See supra* note 60.

of contract and undercutting of the parties' exchange. Cases of mistake multiplied, both in England and America.

In the 1990s mutual mistake protects parties in somewhat the same way the older doctrine of consideration did (particularly benefit-based consideration), but from a different procedural posture.[418] This function of mutual mistake accounts for the various descriptions of the seriousness requirement, the most telling of which actually requires a showing that the mistake was as to "the substance of the whole consideration" or the "*sine qua non* or efficient cause" of the agreement.[419] Inasmuch as this older consideration doctrine is unclear to us now (or, additionally, to the extent it was unclear at common law), we will remain unclear about which mistakes meet the seriousness requirement.

Mutual mistake doctrine can be applied to the actual cases to which consideration doctrine was once applied. If a benefit or detriment to one of the parties was a principle reason or purpose for making a promise, then such benefit or detriment is probably a basic assumption, or material, fundamental, substantial, essential, or vital fact. If that reason or purpose is frustrated or its fulfillment is impossible, then mutual mistake doctrine will allow the party whose purpose it was to rescind. When a perceived mutual benefit provides reasons for a bilateral contract, a mutual mistake that grossly undercuts the parties' exchange will frustrate that purpose and remove the benefit, and the injured party may rescind.[420] Originally a good reason for making a promise was both necessary and sufficient for enforcement; it remains necessary under mutual mistake doctrine.

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418. I have not read every older consideration case and every newer mutual mistake case to determine if there is an exact fit. But the theory and lines of application fit remarkably well. Moreover, the fit is strongly suggested by the history. Of course, this theory of the origin of mutual mistake does not account for later-developed lines of cases, such as those dealing with mutual mistake in plea agreements, which are founded in part on constitutional concerns. *See, e.g.*, United States v. Lewis, 964 F. Supp. 1513 (D. Kan. 1997); United States v. Barron, 940 F. Supp. 1489 (D. Alaska 1996).

419. *See supra* authorities cited notes 11-21.

420. Whereas the judges of the late 1500s might have found a reason to enforce the promise-in-the-blood relationship, the judges of the 1990s could find a reason not to enforce the promise-in-the-lack-of-the-blood relationship. Scottish equity also addressed blood relationships. Home gives the following illustration:

> My brother having died in the East Indies, leaving children, a boy is presented to me as my nephew, with credentials in appearance sufficient. After executing a bond in his favour for a moderate sum, the cheat is discovered. The moral sense would be little concordant with the fallibility of our nature, did it leave me bound in this case. And supposing the cheat not to be discovered till after my death, a court of equity, directed by the moral sense, will relieve my heir. Here the relief is founded on error solely; for the boy is not said to have been privy to the cheat, or to have understood what was transacting for his behoof.

Home, *supra* note 7, at 201. Probably a blood relationship was more likely to be a basic assumption of a promisor in the 1500s, when one's home and income often depended on blood. Mutual mistake's impossibility application would also prevent the enforcement of a promise of an executor regarding a non-existent asset deliverable to an heir.

We should not be surprised by the connection between mutual mistake and the older understanding of consideration.[421] The civil law analogue of consideration is cause, and the civil law contains a doctrine called error in the principal cause, which means to mistakenly think cause exists when it does not.[422] F.H.

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421. Gulian Verplanck said, "The incongruities of our law are more a matter of regret than of surprise. The reason of their existence is to be found in its history." Verplanck, *supra* note 320, at 59.

422. *See, e.g.*, Barry Nicholas, The French Law of Contract 125 (Clarendon 1992); Saul Litvinoff, *"Error" in the Civil Law, in* Essays on the Civil Law of Obligations 222, 235-36, 259-69 (Joseph Dainow, ed., LSU 1969).

Nicholas describes the French doctrine of *erreur sur la cause* as follows:

> In the context of synallagmatic contracts [(those involving mutual exchange)], where cause has an objective meaning, it is merely another way of expressing absence of cause, as [where, unknown to the parties the thing sold did not exist when the contract was made]. The buyer of a thing which does not exist can be said to be mistaken as to the existence of the cause for his obligation. Where, however, cause bears a subjective meaning . . ., the term indicates that the cause for the promise, in the sense of its determining reason or motive, is unfounded. Where, for example, a man undertakes to maintain a child in the mistaken belief that he the natural father, or to compensate for damage caused by a fire in the mistaken belief that he is responsible for it, or where a testator gives his property to charity in the mistaken belief that he has no heirs, the courts, in declaring the transaction void, commonly speak of "mistake as to the cause" or "mistake as to the legal validity of the cause" or "mistake as to the determining reason" (*motif déterminant*).

Nicholas, *supra*, at 125-26. French law also retains an *erreur sur la substance*, derived from the Digest passages we have been studying, however. *Id.* at 83-95. This can also mean mistake as to that which motivated the promise. *Id.* at 91.

Professor Litvinoff further explains:

> As a matter of tradition, the internal will is that which is regarded as the essential element in France. However, French doctrine did not remain unconcerned with the serious problem of the security of transactions which is better accounted for by the theories that make the declared will prevail upon the internal one. Thus, the question was raised whether the internal will should be taken into account by the law in all its psychological complexity, and, as a result, the doctrinal discussions of error were oriented towards a clearer definition of the measure in which the internal will explains and justifies the party's obligation. With respect to this, the assertion was made that a contract should be annulled on grounds of error whenever the error affects the *cause* of the obligation. In this view, the precept contained in article 1110 of the French Civil Code becomes a particular instance of application of the more general rule contained in [another article] where the nullity of agreements for absence of cause, or false cause is prescribed. As a result, the problem of warranty of hidden defects was brought very close to the problem of error, and both were framed within the concept of absence of cause.
>
> On the basis of this connection between cause and error, the doctrinal developments have been so profuse and profound that everything has apparently already been said. Nevertheless, from the viewpoint of the theory of error, many problems are still unsettled. Questions come up very often as to whether an error on the simple motives is a ground for nullity; the relation of error with cause, warranty of defects and lesion is far from being clearly defined. Above all, the question still exists as to whether psychological elements and behavior of *both* parties have to be scrutinized. Indeed, so many are the problems related to the theory of error that not all of them can be touched upon here.

Lawson, a British commentator reviewing English mutual mistake cases, opined that:

> the natural and rational explanation of the effect given to *error in substantia* is that the law is prepared in certain cases to save a party from the results of a mistaken motive. The three leading continental systems have been unable to avoid subjective tests. Once they are adopted, *error in substantia* really glides into *error in causa*, and whatever *causa* may have been in the past, it now contains a strong admixture of motive, and when it is worth considering is almost indistinguishable from it.[423]

Lawson suggested that the requirement that the mistake be mutual acts as a check to prevent the law of contract from entirely disintegrating into concern for subjective motives.[424]

The relationship of mutual mistake to reasons for promising prompts questions about the evolution of consideration doctrine. Professor Atiyah has noted the paternalism that existed under the older consideration law.[425] The courts' saying they will enforce only those promises made with good reason seems paternalistic. Now our consideration doctrine allows parties to make their own bargains; reason is not considered in contract formation. But if the law will undo a promise which does not comply roughly with the older notions of consideration, has the law become less paternalistic? Of course, mutual mistake never took account of a promise to pay for forbearance to sue when the claim later turned out to be invalid. In allowing such a promise to bind without a valid claim, but on a good faith claim only,[426] the law may become less paternalistic. Moreover, accompanying mistake doctrine has always been a host of corollaries assigning the risk of some mistakes to the parties. Assumption of risk doctrine had no place in the substance-based doctrine of consideration. Perhaps free market assumptions allowing reasonable persons to determine their own fate show up more in our assumption of risk doctrines than in our newer consideration doctrine. Even more importantly for mutual mistake, when courts allocate risk that the parties have not expressly or impliedly allocated themselves, as they

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Litvinoff, *supra*, at 235-36. Litvinoff also notes a relationship in certain cases between error in substance and error in the principle cause. *Id.* at 239-46.

423. F.H. Lawson, *Error in Substantia*, 52 L.Q. Rev. 79, 102 (1936).

424. *Id.* at 103:

> To insist that the mistake shall be shared by both parties . . . almost inevitably leads to an acceptance of *error in causa*, which is naturally treated as including assumptions other than those relating to *substantia*.
>
> The operation of common error will be far too uncertain and capricious unless knowledge of the other party's error is treated as equivalent to sharing it.

425. Atiyah, *supra* note 115, at 64-65, 340-41.

426. Dyer v. National By-Products, Inc., 380 N.W.2d 732, 734-36 (Iowa 1986); Restatement (Second) of Contracts § 74 (1981).

occasionally do, courts preclude an examination of the substantive reasons for promising and instead force parties to allocate those risks in the future.[427] Paradoxically, this move more than any other relating to mutual mistake perhaps indicates judicial promotion of personal autonomy in contract law.

On the other hand, perhaps Americans do not want less paternalism. Or maybe we want the possibility of paternalism to remain with us. No one has yet suggested we do away with mutual mistake. Moreover, as noted above, commentators continue to suggest rationales supporting its existence and (at least occasional) use.[428] We want our courts to protect us not just from other parties but also from the inherent unpredictability of the world. Perhaps only on this basis can our trust in our society and each other continue to the degree necessary to maintain that society.

Mutual mistake's application to cases of present impossibility is perhaps less related to older consideration doctrine than is present frustration and undercutting of the parties' exchange.[429] Even so, the rise of impossibility relief as a replacement for consideration theory has some consistency with this discussion. What good reason could a promisor have for promising to do something that is impossible? Such a promise would be contrary to good sense as understood by the English and natural law as explicated by the Romans. The Roman hypotheticals comes back again and again in applications of mutual mistake to cases of present impossibility. At least four courts cite the dead horse case, and many, many more refer to Kent's and Story's discussions of it.[430] We can no more expect a seller of a dead horse to provide the horse live than we can expect him to fly (unassisted) to the moon. Perhaps natural law stays with us to some extent.

Undoubtedly other legal developments besides the decline of the older consideration doctrine spurred on mutual mistake's dealing with impossibility. One development was the reluctance of the common law to grant relief for impossibility generally.[431] The hesitancy of the common law to release a party

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427. Farnsworth, *supra* note 25, § 9.3; Henry St. George Tucker, Commentaries on the Laws of Virginia 405 (Winchester 1837).

428. *See, e.g.*, Rasmusen & Ayres, *supra* note 23 (allowing mutual mistake to be used when efficient); Schneyer, *supra* note 49 (recognizing that we need mutual mistake's existence to make contracting viable as a mechanism for ordering life).

429. I have also suggested that mutual mistake law fills in to protect executors from promising to deliver assets of the deceased that do not exist. To suppose that only this need prompted mutual mistake law to apply to cases of present impossibility would be ludicrous.

430. Allen v. Hammond, 36 U.S. (11 Pet.) 63, 71 (1837); United States v. Golden, 34 F.2d 367, 374 (10th Cir. 1929); United States v. Gridley, 186 F. 544, 550 (D. Idaho 1911); Navarette v. Travis-Ziegler Co., Inc., 194 N.Y.S. 832, 836 (N.Y. Mun. Ct. 1922). The Restatement (Second) of Contracts also employs the dead horse hypothetical. *See supra* note 206. For cites to Kent and Story, *see supra* notes 339 and 69.

431. *See generally* G.H. Trietel, Frustration and Force Majeure (Sweet & Maxwell 1994); John D. Wladis, *Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law*, 75 Geo. L.J. 1575 (1987) (describing carefully the piecemeal fashion in which the defense of impossibility or impracticability developed in English common law and why the history has confused many).

from a contractual liability on grounds of supervening impossibility or impracticability is well-documented, if slightly misunderstood.[432] Yet this hesitancy explains only why impossibility was not dealt with elsewhere, not why it comes out in mutual mistake cases.

Of course, I do not suggest mutual mistake could take the place of the older consideration doctrine. Its different procedural posture makes that impossible. Also, *mistake* as a concept can only be stretched so far. It does not cover future events, generally, nor does it cover events about which the parties have assumed the risk. Wise parties explicitly allocate risks of which they are aware, making mutual mistake inapplicable. Surely other limitations exist which prohibit it from replacing exactly the older doctrine. These limitations do not mean mutual mistake does not fulfill the same function, however, in this more limited manner. Other doctrines, namely frustration and impracticability, deal with future contingencies. I am also not suggesting that replacing the older doctrine of consideration is mutual mistake's only function, though it appears to function that way very often.

B. Rationale of Mutual Mistake

That mutual mistake comes to us with part of ancient consideration doctrine embedded in it should affect any discussion of a proposed rationale for mutual mistake. Attempts to give a rationale for mutual mistake have thus far focused on present policy concerns, relationships between mutual mistake and present doctrines such as unjust enrichment and unconscionability, or present theories of contract enforcement. These explanations fail to take account of mutual mistake's history, which has affected and continues to affect its application. Holmes' explanation (or any assent-based explanation), a product or part of the rise of classical contract law, is in some ways contrary to this history. Rather than looking for theoretical explanations for mutual mistake only in classical contract law or contemporary jurisprudential theory, perhaps a look at the foundations of consideration would once again be helpful, or other influences on the writ of indebitatus assumpsit for money had and received. Perhaps the fact we lawyers of the twentieth century have forgotten these roots tells why we are unable to explain mutual mistake. These searches for rationales should not be confined to mutual mistake. Failure of consideration, impracticability, frustration, and doubtless other doctrines carry the facial features of mutual mistake's parents.

Of course, the original rationale for mutual mistake may have changed but a new, yet undiscovered reason might justify the rule's use. I think this possible in the case of mutual mistake. The market economy rationales that seem to underlie much of bargain theory break down in a mutual mistake case. Free market justifications for contract law presume that people act rationally and have

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432. *See generally* authorities cited *supra* note 431.

access to perfect information.[433] Neither rational action nor access to perfect information occurs when parties act under a mutual mistake. That courts' application of mutual mistake takes place without concern for efficiency[434] suggests that these ideas do not animate mutual mistake doctrine, however. Even if they did, any explanation of mutual mistake should account for the decline of the principles which created the need for mutual mistake in the first place. Historically, these needs appear to have been the same principles that created the need for the original doctrine of consideration. Only a look back to them will resolve conclusively why we keep mutual mistake in service today.

IV. EPILOGUE: THE FAMILY TREE

John Salmond once wrote that, though "forms of action are dead, . . . their ghosts still haunt the precincts of the law."[435] Edwin Patterson said, "The doctrine of consideration still rules us, and not from the grave."[436] Consideration lives on in mutual mistake because mutual mistake is haunted by the form *indebitatus assumpsit* and its applications. Mutual mistake brings forward other ghosts from the past, too. Its ancestors include Roman hypotheticals, civil law as interpreted by Pothier and others, English thinking about which promises should be enforceable and why natural law, English public conscience manifest in the decisions of England's chancellor, the English chancery's failure to publish detailed reasons for its decisions, the books found in law libraries at the time of America's independence, our federal system which allowed mutual mistake to develop in many different states concurrently, our early merger of law and equity, St. Germain, Plowden, Coke, Grotius, Pufendorf, Holt, Mansfield, Fonblanque, Lyons, Carr, Kent, Story, M'Lean, Holmes, Foulke, Williston, Corbin, Palmer, Rabin, Braucher, Farnsworth, the American Law Institute, thousands of lawyers and judges who have argued and decided mutual mistake cases, the rise of classical contract law, desire on the part of American scholars to look for substantive principles as opposed to mere patterns of application, et cetera.

At least with regard to mutual mistake, history connects form to substance in contract law. Mutual mistake's diverse ancestry explains its doctrine and applications. Mutual mistake's genesis in older doctrines and legal systems explains its family resemblance to impracticability, frustration, and failure of

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433. Robin P. Malloy, Law and Economics: A Comparative Approach to Theory and Practice 54-55 (1990).

434. Some applications of mutual mistake are efficient, and some are not. Rasmusen & Ayres, *supra* note 23, at 339.

435. John W. Salmond, *Observations on Trover and Conversion*, 21 L.Q. Rev. 43 (1905). Maitland said about the same time, "The forms of action we have buried, but they still rule us from their graves." F.W. Maitland, The Forms of Action at Common Law 2 (A.H. Chaytor & W.J. Whittaker eds., 1936) (1909).

436. Edwin W. Patterson, *An Apology for Consideration*, 58 Colum. L. Rev. 930 (1958).

consideration. Finally, this history explains the unique character of American mutual mistake. Our mutual mistake is neither Roman, nor civil, nor English. Like America and most Americans, it is a melting pot of authorities, influences, and people who have helped shape its life. Surely it will grow and change with the people it serves.