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**“DON’T HAVE A COW” . . . OR THE RESTATEMENT (SECOND)**

DAVID G. EPSTEIN\* AND ROXANNE M. EASTES\*\*

“Don’t have a cow” is not only Bart Simpson’s<sup>1</sup> mantra but also the admonition of the Michigan Supreme Court in *Lenawee County Board of Health v. Messerly*.<sup>2</sup> For almost a hundred years, law students and lawyers had a cow to instruct them on the law of mistake: Rose II of Aberlone – the cow in *Sherwood v. Walker*.<sup>3</sup>

Most American lawyers and judges have read *Sherwood v. Walker* in their contracts casebook<sup>4</sup> and/or have heard their contracts professor talk about the Michigan Supreme Court decision in *Sherwood v. Walker* and Rose II of Aberlone. Lawyers of a certain age<sup>5</sup> remember Professor Brainerd Currie’s

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1. Cf. Brian L. Ott, *I’m Bart Simpson, Who The Hell Are You? A Study in Postmodern Identity (Re)Construction*, 37 J. OF POPULAR CULTURE 56, 63 (2003).

2. 331 N.W.2d 203, 208 (Mich. 1982).

3. 33 N.W. 919, 920 (Mich. 1887). Volume 1 of the Harvard Law Review included this “Recent Cases” summary: “Contract – Rescission – Mutual Mistake. – A bought a cow of B for \$80 both believing the cow to be barren. If she had been a breeder she would have been worth \$750 . . . [B]efore actual delivery B discovered that the cow was with calf, and refused to deliver because of the mistake. Held—That B could rescind the sale. ‘A barren cow is substantially a different creature than a breeding one. She is not in fact the animal, or kind of animal, the defendant intended to sell or the plaintiff to buy.’” *Contract – Rescission – Mutual Mistake*, 1 HARV. L. REV. 155, 155 (1887) (quoting *Sherwood*, 33 N.W. at 919).

4. Cf. Marvin Chirelstein, *Teaching Contracts*, 63 J. LEGAL EDUC. 429, 429 (2014) (“almost every casebook”).

5. Cf. Honorable Danny J. Boggs, *Rose Redux*, 1 GREEN BAG 2D 443, 443 (1998) (“learned well the legend of Rose”); Frederick Allen, *Five Classic Cases*, 37 AM. HERITAGE MAG. 1, 1-2 (1985) (identified *Sherwood v. Walker* as one of the five cases that every law student must know).

3,544-word rhymed verse poem, “*Rose of Aberlone*.”<sup>6</sup> Younger lawyers are more likely to recall Professor Carswell’s song on YouTube, “*My Rose*.”<sup>7</sup>

Regrettably, there are no corresponding law professor literary efforts devoted to popularizing *Lenawee County Board of Health v. Messerly*,<sup>8</sup> the 1982 case that took away the cow. In *Lenawee*, the same court that decided *Sherwood v. Walker* criticized the *cow case* opinion as “inexact and confusing,”<sup>9</sup> and limited the precedential value of the *cow case* to its facts.<sup>10</sup> *Lenawee* replaced the *cow case* with the Restatement (Second) Contracts sections 152 and 154,<sup>11</sup> which the Michigan Supreme Court described as “the better-reasoned approach.”<sup>12</sup>

We contend that the Michigan Supreme Court was correct in criticizing *Sherwood v. Walker* as “inexact and confusing,” but wrong in labeling the Restatement Second provisions on mistake as “the better-reasoned approach.” Indeed, we believe that, like the *cow case*, the Restatement (Second) does not offer a “reasoned approach” for the contract law of mistake.

This article has three parts. Part I compares *Sherwood v. Walker* and the Restatement (Second) of Contracts. Part II reviews the unstated mistaken factual assumption reported cases in the past ten years<sup>13</sup> that apply the Restatement

6. Brainerd Currie, *Rose of Aberlone*, 1 GEEEN BAG 2D 445, 445-57 (1998) (originally published in the HARVARD LAW SCHOOL REC., March 4, 1954, p. 3); see also Benjamin McMurtry, *A Tribute to Professor John Robin Bradley*, 82 MISS. L.J. 791, 793 (2013) (“[t]o illustrate the concept of mutual mistake, he would read Brainerd Currie’s ‘Rose of Aberlone,’ a poem about a cow made famous in the case of *Sherwood v. Walker*. He even wore a matching tie with little cows all over it.”).

7. Richard Craswell, *My Rose (Sherwood v. Walker)*, YOUTUBE (Dec. 26, 2011), <https://www.youtube.com/watch?v=pjjRBAQ7ET8> [<https://perma.cc/P35P-HEHF>]. And *Sherwood v. Walker* has inspired other less memorable poems and songs, too: e.g., Alan E. Garfield, *Basic Assumption*, 57 SMU L. REV. 137, 137 (2004) (“I’ll tell you how a man with a cow had a cow because his cow had a cow. Here’s how. The man with a cow had a cow because he sold his cow for just chow. How now? He sold his cow for just chow because he didn’t know his cow had a cow.”); Norman Otto Stockmeyer, *To Err is Human, To Moo Bovine: The Rose of Aberlone Story*, 24 T.M. COOLEY L. REV. 491, 498 (2007) (quoting from lyrics of “Just Like a Heifer” by Franklin Snyder set to the tune of Bob Dylan’s “Just Like a Woman”:

“She *moos*, just like a heifer

(Yes she does)

And she *chews* grass just like a heifer

(Yes she does)

And she *woos* bulls just like a heifer -

But she is priced just like a side of beef”).

8. 331 N.W.2d 203, 209 (Mich. 1982).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. We reviewed all cases from January 1, 2007 to December 31, 2017 included in either Westlaw or Lexis that reference the Restatement (Second) of Contracts provisions on mistake.

(Second) of Contracts. Part III explores whether the Restatement (Second) approach is the "better-reasoned approach" to unstated mistaken factual assumptions and suggests a still better approach to unstated mistaken factual assumptions.

#### I. ROSE AND . . . THE RESTATEMENT (SECOND)

Both *Sherwood v. Walker* and *Lenawee County Board of Health v. Messerly* involve alleged unstated mutual mistaken factual assumptions – i.e., each contracting party independently having an unstated incorrect understanding of an existing fact. Professor Farnsworth more eloquently described such a mistake as "a gap between the perception of reality on the one side and reality itself on the other side."<sup>14</sup>

In *Sherwood*, the parties' unstated incorrect perception that Rose's reproductive organs did not work resulted in a contract for the sale of Rose at a price that was a fraction of Rose's market value as a fertile cow. In *Lenawee*, the parties' unstated incorrect perception that the apartment house's sewage system did work resulted in a contract for the sale of the apartment building at a price that was far in excess of its actual market value as property with no income producing capacity.

The fact that *Sherwood* involved a sale of goods and *Lenawee* involved a sale of a building and land is not legally significant even after the adoption of the Uniform Commercial Code. The common law of mistake is a part of the Uniform Commercial Code.<sup>15</sup> And, the fact that the mistaken assumption of fact resulted in a financial windfall for the buyer of the cow and a financial shortfall

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14. E. ALAN FARNSWORTH, ALLEVIATING MISTAKES 24 (2004). Even "slicker" is the cryptic phrase used in the Comment to the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5 cmt. (Am. Law Inst. 2011): "divergence between anticipation and realization." We also really liked the term "counterfactual" used by Professor Birmingham until we tried to understand his explanation of the meaning of the term "counterfactual:" "A counterfactual is a sentence that has the form, 'If A were true, then B would be true.' Note the subjunctives: the form presupposes that the antecedent of the conditional is false. One determines the truth of a counterfactual by inspecting the possible worlds in which the antecedent is true. If the consequent is true in all of these worlds, the counterfactual is true. Jones observes that Antigone speaks counterfactually: 'Never, I tell you, if I had been the mother of children, or if my husband died, exposed and rotting—I'd never have taken this ordeal upon myself, never defied our people's will.' Antigone would bury her husband or children nowhere—in *no* possible world. The law uses counterfactuals all the time. Cause is often interpreted counterfactually: 'But for such and such, so and so.' Rose in *Sherwood v. Walker* was not the cow the parties tried to contract about because Rose is pregnant in no possible world." Robert Birmingham, *From Odysseus to Capgras: Seven Episodes of Personal Identity in Law*, 49 SYRACUSE L. REV. 99, 132 (1998).

15. U.C.C § 1-103 (Am. Law Inst. & Unif. Law Comm'n 2011) ("principles of law and equity . . . relative to . . . mistake . . . supplement its provisions.").

for the buyer of the apartment is not legally significant—at least not legally significant to judges.<sup>16</sup>

What is legally significant is that *Sherwood v. Walker* and *Lenawee County Board of Health v. Messerly* involve alleged mutually incorrect, unstated factual assumptions. All agreements are based on various factual assumptions. Sometimes, these assumptions can be found in the terms of the agreement, and the terms of the agreement sometimes spell out whether a party can cancel the agreement if such an express factual assumption turns out to be erroneous.

It is unlikely, however, that even the most comprehensive commercial agreement sets out all of the factual assumptions of the parties. And, agreements prepared by the parties themselves are likely to omit many, if not most, factual assumptions. This article focuses on such unstated factual assumptions that are incorrect, i.e., mistakes.

Contracting parties can make types of errors other than incorrect, unstated factual assumptions, such as: mistakes induced by the misrepresentations of others (e.g., mistaken purchase of a termite infested house because of the seller's innocent but untrue statement that there were no termites in the house<sup>17</sup>); performance mistakes (e.g., Jim Morrison's bad haircuts<sup>18</sup>); drafting mistakes (e.g., use of the term "ex Peerless" in a contract when there were two ships with that name sailing from Bombay<sup>19</sup>); mistakes in transcriptions (e.g., a 732 page contract stating that condo buyers have the option to get their deposit back if the first closing did not occur by "September 1, 2008," instead of "September 1, 2009," as the seller had intended<sup>20</sup>), or evaluative mistakes (e.g., the Philadelphia 76ers trading draft choices with the Boston Celtics, which resulted in the 76ers obtaining Markelle Fultz and the Celtics obtaining Jayson Tatum

16. Some professors argue for different legal analysis of mistakes that result in a loss to one party from mistakes that result in windfall to one party with no loss to the other party. *E.g.*, Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CAL. L. REV. 1573, 1637-41 (2003).

17. *Halpert v. Rosenthal*, 267 A.2d 730, 732-33 (1970).

18. *Jim Morrison Quote*, Quotefancy, Oct. 28, 2018, <https://quotefancy.com/quote/9889/Jim-Morrison-Some-of-the-worst-mistakes-in-my-life-were-haircuts> [<https://perma.cc/3Ezs-ZPFU>]; *see also* *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 890 (1921) (contractor's use of Cohoe pipe instead of Reading pipe as required by contract language).

19. *Raffles v. Wichelhaus*, 2 H. & C. 906, 907-08 (Ex. 1864); *see* Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 427-28 (1964) (describing *Raffles* as involving mutual mistake); *cf.* *Dadourian Export Corp. v. U.S.*, 291 F.2d 178, 187 n.4 (2d Cir. 1961) (opinion by Judge Friendly, the judge who had decided *Frigalment Importing Co., Ltd v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960) (the "chicken case") suggesting that *Frigalment* should have been decided as a mistake case).

20. *See* Josh Barbanel, *Attack of the Fine Print*, N.Y. TIMES (July 24, 2009), <http://www.nytimes.com/2009/07/26/realestate/26deal1.html?mtrref=www.google.com&gwh=29F5526FD71976DC8F34A2552A653052&gwt=pay> [<https://perma.cc/Y33K-KZW2>]; *see also* *Donovan v. RRL Corp.* 27 P.3d 702, 716, 724-25 (Cal.2001) (applying the Restatement (Second) of Contracts provisions on mistake to an agreement based on advertisement that described the "wrong" car).

and a first-round draft choice). Contract cases and commentators use the term "mistake" to refer to all of these fact patterns—to refer to any "erroneous belief."<sup>21</sup>

We believe that these different categories of mistake involve not only different facts from incorrect, unstated factual assumptions, but also raise different proof challenges and different policy concerns.<sup>22</sup> This article focuses on incorrect, unstated assumption of facts.<sup>23</sup>

#### A. *Sherwood v. Walker*

In *Sherwood v. Walker*, the unstated assumption of fact was that Rose, the cow that was the subject matter of the sale contract, was not fertile. *Sherwood* is often *seriously* described as a "seminal case" on the contract law of mistake.<sup>24</sup> The case has also been labelled "canonical,"<sup>25</sup> an "old chestnut,"<sup>26</sup> the "quintessential mistake case,"<sup>27</sup> and "outright silliness."<sup>28</sup>

In *Sherwood*, as in most litigation, the parties disagreed as to some of the important facts. Here are the undisputed facts from the Michigan Supreme Court opinion. "Replevin for a cow" was the beginning of the litigation.<sup>29</sup> Plaintiff's replevin claim was based on a writing signed by defendant.<sup>30</sup> The writing

21. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 151 cmt. a (Am. Law. Inst. 1981) ("[i]n this Restatement the word 'mistake' is used to refer to an erroneous belief. A party's erroneous belief is therefore said to be a 'mistake' of that party.").

22. See also Edward H. Rabin, *A Proposed Black-Letter Rule Concerning Mistaken Assumptions in Bargain Transactions*, 45 TEX. L. REV. 1273, 1276-77 (1967) (different rule for cases in which mistake has been induced by the other party's misrepresentations); but cf. Stephanie R. Hoffer, *Misrepresentation: The Restatement's Second Mistake*, U. ILL. L. REV. 115, 172 (2014) ("[b]ecause both doctrines seek to remedy the same failure of consent, the legal test for avoidance on grounds of misrepresentation should be the same as that for mistake."); see generally GEORGE E. PALMER, *MISTAKE AND UNJUST ENRICHMENT*, ch. 1 (1962).

23. See PALMER, *supra* note 22, at 13 ("[m]istake in assumptions is one of the most significant types, both because it happens so often and because it raises the most difficult problems in the law of mistake.").

24. E.g., *State of Fla., Dept. of State v. Treasure Salvors, Inc.*, 621 F.2d 1340, 1349 (5th Cir. 1980); *Briggs Tax Service, L.L.C. v. Detroit Public Schools*, 780 N.W.2d 753, 758-59 (Mich. 2010).

25. DOUGLAS G. BAIRD, *RECONSTRUCTING CONTRACTS* 96 (2013).

26. Charles L. Knapp, *Cases and Controversies: Some Things to Do With Contracts Cases*, 88 WASH. L. REV. 1357, 1359 (2013).

27. Gideon Parchomovsky, Peter Siegelman, & Steve Thel, *Of Equal Wrongs and Half Rights*, 82 N.Y.U. L. REV. 738, 741 (2007).

28. Marvin Chirelstein, *Teaching Contracts*, 63 J. LEGAL EDUC. 429, 429 (2014).

29. *Sherwood v. Walker*, 33 N.W. 919, 919 (Mich. 1887). "Replevin for a cow" was not only the beginning of the litigation but also the beginning of the Michigan Supreme Court's opinion. Dean Douglas describes this first sentence as "arguably second only to *Moby-Dick* in having the finest opening sentence in all of literature." Davison M. Douglas, *Attenuated Subtleties Revisited*, 1 GREEN BAG 2D 376 n.11 (1998).

30. *Sherwood*, 33 N.W. at 919-920.

confirmed the sale of a cow.<sup>31</sup> The cow was identified by name, “Rose 2d of Aberlone (‘Rose’).”<sup>32</sup> The sale price was “five and one-half cents per pound.”<sup>33</sup> Rose weighed 1,420 pounds, so that the contract price was less than eighty dollars.<sup>34</sup> The defendant had paid \$850 for Rose.<sup>35</sup> “If Rose was a breeder, she was worth at least \$750; if barren, she was not worth over \$80.”<sup>36</sup> “Before the plaintiff secured possession of the animal, the defendants learned that she was with calf,<sup>37</sup> and therefore of great value, and undertook to rescind the sale by refusing to deliver her.”<sup>38</sup>

In sum, there was no dispute as to what the real facts actually were. The dispute was over what the parties believed at the time of the contract that the real facts were.<sup>39</sup>

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31. *Id.* at 920.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Sherwood*, 33 N.W. at 920. This fact did not seem important to the court, but was very important to some law professors in their analysis of *Sherwood v Walker*. For example, Professor James Bradley Thayer emphasized this fact to categorize *Sherwood v Walker* as an unjust enrichment case. James Bradley Thayer, *Unilateral Mistake and Unjust Enrichment as a Ground for the Avoidance of Legal Transactions*, HARVARD LEGAL ESSAYS, 466, 480, 495 n.54 (1934). We do not see the relevance of the amount that Walker paid to acquire Rose in an earlier contract to whether *Sherwood*’s “enrichment” was unjust. Moreover, we have learned from Professor Frank Snyder’s study of cattle registry records that three years earlier Rose had given birth to a calf (although she apparently did not calve in the next two years). See Norman Otto Stockmeyer, *To Err is Human, to Moo Bovine: The Rose of Aberlone Story*, 24 THOMAS M. COOLEY L. REV. 491, 495-96 (2007).

36. *Sherwood*, 33 N.W. at 923.

37. Neither the Michigan Supreme Court’s opinion nor the Michigan Court of Appeals’ opinion states that Rose was “with calf” at the time of the contract. Some law professors “read” the facts differently. *E.g.*, James Gordley, *Mistake in Contract Formation*, 52 AM. J. COMP. L. 433, 442 (2004) (“pregnant at the moment of the sale”); Edward H. Rabin, *A Proposed Black-Letter Rule Concerning Mistaken Assumptions in Bargain Transactions*, 45 TEX. L. REV. 1273, 1292 (1967) (“time of the sale pregnant”).

38. *Sherwood*, 33 N.W. at 923.

39. *Cf.* E. ALLAN FARNSWORTH, ALLEVIATING MISTAKES 75 (2004) (“Controversies over proof of alleviating mistakes commonly center not on proof of reality, but on proof of a flawed perception of reality which tends to be more elusive and more likely to tempt prevarication.”). See also *Kirchgestner v. Denver & Rio Grande Western Railroad Co.*, 118 Utah 20, 31-32 218 P.2d 685, 691 (1950) (“There are two prongs to a mistake of fact: (1) the supposed true fact . . . and (2) the actual or true or real fact . . . The issue usually involves not the question of what is the true fact but whether both parties believed it be otherwise at the time the contract was made. In short, on the question of mutuality of mistake.”). The example that Holmes used in his lectures on contracts in *The Common Law* with the contract language establishing the flawed perception of reality is something of an anomaly: “Suppose that A agreed to buy, and B agreed to sell, ‘these barrels of mackerel,’ and that the barrels in question turn out to contain salt. There is mutual mistake as to the contents of the barrels, and no fraud on either side. I suppose the contract would be void.” OLIVER WENDELL HOLMES, *THE COMMON LAW* 243 (Mark DeWolfe Howe ed 1963).

The only direct evidence of whether the parties believed that Rose was barren was the parties' self-serving testimony. Accordingly, the Michigan Supreme Court looked to circumstantial evidence to determine the parties' beliefs. The majority of the Michigan Supreme Court Justices inferred from the disparity between the contract price and the value of Rose as a breeder that "[t]he parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding"<sup>40</sup> and that the plaintiff/buyer also perceived that Rose was barren.

A dissenting justice had a very different interpretation of the circumstantial evidence: "He [the plaintiff] believed that she would breed. There is no pretense that the plaintiff bought the cow for beef, and there is nothing in the record indicating that he would have bought her at all only that he thought she might be made to breed."<sup>41</sup>

While the Michigan Supreme Court was split as to whether a mutually mistaken assumption existed as to existing facts in *Sherwood v. Walker*, there was agreement as to the contract law governing mistake: if the mistake "affected the whole substance of the consideration," then "there was no contract."<sup>42</sup> And the two opinions agreed on the source of that law.<sup>43</sup> Both the majority opinion<sup>44</sup> and the dissenting opinion<sup>45</sup> looked to the English case of *Kennedy v. Panama New Zealand and Australia Mail Co.*<sup>46</sup>

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40. *Sherwood*, 33 N.W. at 923.

41. *Id.* at 925. A number of commentators support the dissent's view of the facts. E.g., DOUGLAS E. BAIRD, RECONSTRUCTING CONTRACTS 97 (2013) ("Sherwood did not intend to butcher the cow and thought that perhaps it would breed. He was taking a chance."); GEORGE PALMER, MISTAKE AND UNJUST ENRICHMENT 95 (1962) ("The whole sense of the matter suggested that . . . he thought there was a chance that Rose 2d would breed."). So did the jury that ultimately ruled in favor of the plaintiff buyer. The Michigan Supreme Court did not decide that the buyer and seller were mistaken in making the contract so that the seller could rescind the contract. Rather, the Michigan Supreme Court's decision was that the trial court was mistaken in its jury instruction: "The court should have instructed the jury that if they found that the cow was sold . . . upon the understanding of both parties that she was barren . . . then the defendants had a right to rescind." *Sherwood*, 33 N.W. at 924. So, instructed on remand, the jury found for the plaintiff buyer. See Norman Otto Stockmeyer, *The Tortuous History of the Mutual Mistake Defense in Michigan Contract Law*, XL MICH. ACADEMICIAN 169, 171 (2011).

42. *Sherwood*, 33 N.W. at 924. See also 33 N.W. at 926 ("right to rescind . . . different in substance.").

43. *Id.* at 924.

44. *Id.* at 923.

45. *Id.* at 926 ("*Kennedy v. Panama Mail Co.* . . . and the extract cited therefrom in the opinion of my brethren, clearly sustain the views I have taken.").

46. 2 L.R.Q.B. 580 (1867). See generally CATHARINE MACMILLAN, MISTAKES IN CONTRACT LAW 190-207(2010) (exploring not only the creative legal arguments in *Kennedy* but also the significant possible business and economic consequences of the decision).



Professor Atiyah describes the *Kennedy* case as the first “serious attempt . . . to lay down a general principle as to the effect of mistake in contracts.”<sup>47</sup> Until *Kennedy*, mistake was an equitable doctrine with relief for reasons of conscience, not for reasons of common law contract concepts such as consideration or consent.<sup>48</sup>

The *Kennedy* case involved a sale of 1600 shares of stock in Panama, New Zealand. The Australia Royal Mail Company (“The Company”), by means of a prospectus, stated that The Company had important mail contracts, which it did not have.<sup>49</sup> Thus, the shares were less valuable than the buyer believed, so the buyer initiated an action to rescind the contract.<sup>50</sup>

The Company included a statement about these valuable mail contracts in the prospectus because it mistakenly believed that the government official with whom it was dealing was authorized to bind the government of New Zealand.<sup>51</sup> Thus, the buyer and seller shared a mistaken assumption of fact. The fact that the seller’s misrepresentation caused the buyer’s mistaken assumption was not legally significant to Judge Blackburn, the Court of Queen’s Bench judge in the *Kennedy* case.<sup>52</sup>

Judge Blackburn is legally significant. Before *Kennedy*, Judge Blackburn decided *Taylor v. Caldwell*<sup>53</sup> (the “leading”<sup>54</sup> case on impossibility) and *Foakes v. Beer*<sup>55</sup> (an “influential”<sup>56</sup> case on consideration) and wrote the leading

47. PATRICK S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 436 (1979). See also Adrian Chandler, James Devenney & Jill Poole, *Common Mistake: Theoretical Justification and Remedial Inflexibility*, 2004 J.L. OF BUS. LAW 34, 39 (describing *Kennedy* as the “leading case” in “the later recognition of an independent doctrine of mistake”).

48. CATHARINE MACMILLAN, *MISTAKES IN CONTRACT LAW* ch. 3 “*Mistake in Equity Before 1875*”, p. 38-68 (2010).

49. *Kennedy*, 2 L.R.Q.B. at 583.

50. *Id.* at 579.

51. *Id.*

52. *But cf.*, CATHARINE MACMILLAN, *MISTAKES IN CONTRACT LAW* 205 (2010) (“for this author, the significance of the case lay in the distinction when a contract to shares could be rescinded for an honest misrepresentation.”); *Crislip, Guardian & C v. Cain*, 19 W. Va. 438, 472 (1882) (after discussing “mistake,” referring to *Kennedy* in portion of opinion dealing with innocent misrepresentation); JUDAH BENJAMIN, *A TREATISE ON THE LAW OF SALES OF PERSONAL PROPERTY* 328 (2d ed. 1873) (relying on the *Kennedy* case in discussion of innocent misrepresentation). See also Daniel Friedman, *The Objective Principle and Mistake and Involuntariness in Contract and Restitution*, 119 L.Q. REV. 68, 91-92 (Jan. 2003) (development of law of misrepresentation has “marginalized” the law of mistake).

53. 122 Eng. Rep. 309 (1863).

54. See Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 85, n. 7 (1977).

55. 9 App. Cas. 605, 622 (H.L. 1884).

56. Kevin M. Teeven, *A Legal History of Binding Gratuitous Promises at Common Law: Justifiable Reliance and Moral Obligation*, 43 DUQ. L. REV. 11, 51 (2004).

multivolume treatise on contracts.<sup>57</sup> Professor Williston labeled Judge Blackburn as “the most distinguished commercial judge of his generation.”<sup>58</sup>

Judge Blackburn labeled the incorrect statement about mail contracts “an honest mistake, and not a fraudulent misrepresentation”<sup>59</sup> and used the terms “innocent misrepresentation,” “misapprehension,” and “mistake” interchangeably.<sup>60</sup> He fashioned a rule for relief for innocent misrepresentation or mistake that was connected to the Roman law of mistake<sup>61</sup> and the English law of consideration:

It does not authorize a rescission, unless it is such to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a complete *failure of consideration*...; and the difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration.<sup>62</sup>

Judge Blackburn supports this principle with a cryptic reference to Ulpianus’s application of the Roman law *error in substantia* to incorrect assumptions of facts in contracts for the sale of a slave.<sup>63</sup> Professor Catharine MacMillan, an English law professor, provides this summary of Ulpianus: “[T]here was no *error in substantia* where a female slave was sold under the mistaken belief that she was a virgin but there was when she was sold under the mistaken belief that she was a male . . . Savigny explained this on the ground that there was an *error in substantia* because there was a complete difference in the work undertaken by slaves of different sexes.”<sup>64</sup>

Judge Blackburn then applied this “substance” test derived from Roman law and concluded “we do not think it [the mistake about whether The Company had

57. COLIN BLACKBURN, TREATISE ON THE EFFECT OF THE CONTRACT OF SALE ON THE LEGAL RIGHTS OF PROPERTY AND POSSESSION IN GOODS, WARES AND MERCHANDISE (1845). Truly astute law students will also connect Judge Blackburn to torts and his seminal strict liability opinion, *Rylands v. Fletcher*, 1 L.R.-Ex 265 (1866), *aff’d*, L.R. 3 H.L. 330 (1868).

58. Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 562 fn 3 (1950). See also Richard A. Epstein, *For a Bramwell Revival*, 38 AM.J. LEGAL HIST. 246 (1994) (“the greatest judges of the nineteenth century – Parke, Bowen, Blackburn, Jessel, and Herschell in England; Ken, Shaw, Holmes (of Massachusetts), Colley, and Mitchell in the United States.”).

59. *Kennedy*, 2 L.R.Q.B. at 586.

60. Compare *Kennedy*, 2 L.R.Q.B. at 586 (“innocent misrepresentation or misapprehension”) with *Kennedy*, 2 L.R.Q.B. at 587 (“mistake or misapprehension”).

61. Zechariah Chafee, Jr., *Book Review, A Treatise on the Rescission of Contracts and Cancellation of Written Instruments*, 30 HARV. L. REV. 300, 301(1917) (In *Kennedy*, Blackburn went straight to Roman law). The *Kennedy* opinion’s reliance on Roman law and American courts’ reliance on the *Kennedy* opinion provides a basis for dicta such as “the jurisdiction to relieve against mistakes appears to have its origin in Roman law.” *Ward v. Lyman*, 108 Vt 464, 188 A. 892, 895 (1937).

62. *Kennedy*, 2 L.R.Q.B. at 586-88 (emphasis added).

63. *Id.* at 587.

64. CATHARINE MACMILLAN, MISTAKES IN CONTRACT LAW 203, 203 n.138 (2010).

mail contracts] affected the substance of the matter, for the applicant actually got shares in the very company for shares in which he had applied.”<sup>65</sup> The Court of Queen’s Bench thus granted no relief for the mistake about whether The Company had valuable mail contracts in the *Kennedy* case.<sup>66</sup>

In granting relief in *Sherwood* because of the mistake about whether Rose was barren, the Michigan Court applied the “substance” test which it attributed to *Kennedy* and concluded, “The mistake affected the *substance of the whole consideration* . . . The thing sold and bought had in fact no existence.”<sup>67</sup> According to the Michigan Supreme Court, the “thing sold and bought” which the contract identifies as Rose II of Aberlone does not exist because “a barren cow is substantially a different creature than a breeding one.”<sup>68</sup>

In essence, *Sherwood v. Walker* “explains” that the mistake about whether Rose was barren was one of “substance” because Rose as a breeding cow was a “substantially” different thing.<sup>69</sup> One more time: there was “substance” because it was “substantial.” It is tempting to describe this explanation as like unto Gertrude Stein’s statement that “rose is a rose is a rose is a rose,”<sup>70</sup> with the added qualifier except when that rose is a fertile rose.<sup>71</sup>

*Sherwood*’s application of the substance test from the *Kennedy* case is even more problematic in light of other American cases applying *Kennedy*. In developing an American contract law of mistake, courts in various states looked to the substance test from the *Kennedy* case,<sup>72</sup> but the courts did not always “see”

65. *Kennedy*, 2 L.R.Q.B. at 589. Ulpianus’ “substance” test was also adopted by continental codes. See James Gordley, *Mistake in Contract Formation*, 52 AM.J. COMP. L. 433, 434 (2004) (“In France, an error warrants relief if it is in substance (substance), in Italy, if it is ‘essential’ (essenziale), in Germany, if it is in a characteristic ‘regarded in commercial dealings as essential’ (die im Verkehr als wesentlich angesehen werden)”).

66. *Kennedy*, 2 L.R.Q.B. at 590.

67. *Sherwood*, 33 N.W. 919, 923-24 (Mich. 1887). In dictum quoted by the Michigan Supreme Court in *Sherwood*, the Court of Queen’s Bench uses the phrase “substance of the whole consideration.” *Kennedy*, 2 Q.B. 580, 588.

68. *Id.* at 923.

69. *Id.* (“went to the substance . . . a barren cow is substantially a different creature than a breeding cow.”).

70. Gertrude Stein, *Sacred Emily*, in GEOGRAPHY AND PLAYS 187 (Something Else Press 1968) (1922).

71. At least one Michigan Supreme Court Justice, T.M. Kavanagh (not to be confused with Justice T.G. Kavanagh who served on the Court at the same time) gave into this temptation in In re Advisory Opinion re Constitutionality of P.A. 1 and 2, 211 N.W.2d 28, 35 (1973) (when he concluded that an unpaid operating expense is still an operating expense.).

72. “The *Kennedy* Case has been widely and approvingly cited by courts of last resort in this country.” *Costello v. Sykes*, 172 N.W.907, 908 (1919). There were other “courts of last resort” in this country that applied a “substance test” even before the *Kennedy* case. See Val D. Ricks, *American Mutual Mistake: Half Civilian Mongrel, Consideration Reincarnate*, 58 LA. L. REV. 663, 722-23 (1998) (describing the following dictum from *Tucker v. Cocke*, an 1823 Virginia case, as a “succinct statement of the doctrine of mutual mistake:” “There are cases in which the mutual error

the same things that the Michigan Supreme Court in *Sherwood v. Walker* saw when they looked to the *Kennedy* case to decide whether a mistaken assumption of facts is a basis for relief.<sup>73</sup>

For example, in *Wood v. Boynton*, the Wisconsin Supreme Court looked to the Queen Bench opinion in *Kennedy* in denying relief for a mistaken assumption of fact.<sup>74</sup> There, the plaintiff sold a stone to the defendant for a dollar.<sup>75</sup> When the plaintiff later learned that the stone was a diamond worth at least \$700, he sued to recover the stone.<sup>76</sup>

Even though the buyer defendant was in the jewelry business, the Wisconsin Supreme Court made the fact finding that “[b]oth were entirely ignorant at the time of the character of the stone and of its intrinsic value.”<sup>77</sup> The court then relied on the *Kennedy* case to limit rescission for mistake to situations where “there was a mistake made by the vendor in delivering an article which was not the article sold—a mistake in fact as to the identity of the thing sold with thing delivered upon the sale.”<sup>78</sup> The court concluded that there was no such mistake in *Wood v. Boynton*— “There is no pretense of any mistake as to the identity of the thing sold. It was produced by the plaintiff and exhibited to the vendee before the sale was made, and the thing sold was delivered to the vendee.”<sup>79</sup>

Just as the stone was “exhibited before the sale” in *Wood*, Rose was “exhibited before the sale” in *Sherwood*. Why did the Wisconsin Supreme Court conclude that the “thing sold was delivered” and the Michigan Supreme Court conclude that the “thing bought and sold had no existence?” The *Sherwood*

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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 what he bargained for. . . .”).

73. Cf. John Cartwright, *Solle v. Butcher and the Doctrine of Mistake in Contract*, 103 L.Q.R. 594, 597 (1987) (“It is evident that the interpretation of this test [*Kennedy* “substance” test] will be difficult.”).

74. 25 N.W.42, 44 (1885).

75. *Id.* at 43.

76. *Id.* at 44.

77. *Id.*

78. *Id.*

79. *Wood*, 25 N.W. at 44.

opinion does not answer these questions.<sup>80</sup> The Michigan Supreme Court does not even cite to *Wood v. Boynton*.<sup>81</sup>

For a time, it appeared that not even the Michigan Supreme Court would even cite to *Sherwood v. Walker* again. A year after issuing its opinion in *Sherwood v. Walker*, the Michigan Supreme Court in *Nester v. Michigan Land & Iron Co.*, a unanimous opinion authored by the dissenting judge in *Sherwood v. Walker*, seemingly limited the precedential impact of *Sherwood v. Walker* to later cases involving people named “Theodore Sherwood” and “Hiram Walker” and cows named “Rose II of Aberlone”: “the rule applied in that case can *never be resorted to* except in a case where all the facts and circumstances are *precisely the same* as in that.”<sup>82</sup>

Nonetheless, three years later, the Michigan Supreme Court, without mentioning its *Nester* opinion, cited to and relied on *Sherwood v. Walker*: “This case is ruled by the principles laid down in *Sherwood v. Walker*.”<sup>83</sup> And, even after the Michigan Supreme Court in its 1982 opinion in *Lenawee County Board of Health v. Messerly*,<sup>84</sup> disavowed *Sherwood v. Walker* a second time, Michigan courts have continued to rely on *Sherwood v. Walker*.<sup>85</sup>

In 2018, in *Gould Electronics, Inc. v. Livingston Road Comm’n*, a federal district court in Michigan stated that, “The doctrine of mutual mistake was

80. Latter day court and commentators have struggled to reconcile *Sherwood v. Walker* and *Wood v. Boynton*. E.g., Smith v. Zimbalist, 38 P2d 170, 173 (1934) (“An American case which in principle is clearly applicable to the facts herein is that of *Sherwood v. Walker* . . . But to the contrary of such ruling on practically similar facts, see *Wood v. Boynton*.”); Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1527 (1999) (“Professors and students have puzzled over which decision is correct and over whether there is a way to justify the seemingly contradictory outcomes.”). Professors Brown and Smith suggest that, as Woody Allen teaches us in the movie *Match Point*, it all turns on timing: “The distinctions the two courts make are not really distinctions. If Ms. Wood had waited until it was apparent that the stone was a diamond . . ., she would have been in the same position as Sherwood, who was lucky enough that Rose[sic.] show her true colors before he delivered her.” Edith M. Brown & Charlene L. Smith, *Match Point: All in the Timing, Luck and Mutual Mistake*, 32 OKLA CITY U. L. REV. 263, 266 (2007); See also Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 HASTINGS L. J. 1, 10 (1991) “The good answer is that in each case, when it appeared that the contract of sale was premised on a mutual mistake as to the value of the goods, the disputed property was left where it was.”).

81. The *Sherwood* opinion does cite to a number of other cases and to contracts and sales treatises. 33 N.W. at 923. Two of the treatises cited in *Sherwood* use *Kennedy* and Roman law to support the proposition that a mistake as to the substance of the whole consideration is actionable. JUDAH P. BENJAMIN, A TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY 328-39 (2d ed 1873); STEPHEN M. LEAKE, AN ELEMENTARY DIGEST OF THE LAW OF CONTRACTS 345 (2d ed 1878).

82. 37 N.W. 278, 280 (Mich. 1888) (emphasis added).

83. McKay v. Coleman, 48 N.W. 203, 203 (Mich. 1891).

84. 331 N.W.2d 203, 209 (1982) (“holdings of . . . *Sherwood* with respect to the material or collateral nature of a mistake are limited to the facts of those cases”).

85. E.g., Briggs Tax Serv., LLC v. Detroit Pub. Sch., 761 N.W.2d 816, 821 (2008) (quoting from *Sherwood* for the “substance of the transaction” test).

explained over a century ago in *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887), and has not changed since.”<sup>86</sup> The court then quoted from the cow case:

The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole contract, 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.<sup>87</sup>

The agreement in *Gould Electronics* was a tolling agreement, and the alleged mistake related to the proper administrative review material. The court concluded that any such mistake did not go “to the root of the matter,” or “to the substance of the Tolling Agreement.”<sup>88</sup>

The continuing impact of *Sherwood v. Walker* has not been limited to courts in Michigan and law school classrooms. Even after the publication of the Restatement (Second) and the Michigan Supreme Court’s rejection of *Sherwood* and endorsement of the Restatement (Second), courts in other states have looked to *Sherwood v. Walker* in determining whether to rescind a contract based on mistaken factual assumptions. For example, in 2011, an appellate court in Indiana quoted from and relied on *Sherwood v. Walker* in concluding that an agreement to sell a tractor was not enforceable:

Here, as in *Sherwood*, the undisputed evidence<sup>89</sup> shows that the sale was based upon a common, mistaken assumption about a vital fact regarding the ‘very nature of the thing.’ (citation removed) Both Tracy and Morell testified that they did not know that the tractor’s identification number had been altered. . . [A] tractor with altered identification number has no bona fide market value because it cannot be . . . sold without committing a crime . . . There was a mutual mistake of fact between them that went to the heart of the bargain, to the *substance* of the whole contract, and, as such, there was no contract, as a matter of law.<sup>90</sup>

A “root of the matter” test for relief for mistake? A “heart of the bargain” test for relief for mistake? Unquestionably, the tests derived from the cow case are “inexact and confusing.”

But the Michigan Supreme Court’s *Lenawee County* opinion said more than that the tests for relief for mistake derived from *Sherwood v. Walker* are “inexact and confusing.”<sup>91</sup> The *Lenawee County* opinion also endorsed the Restatement (Second) of Contracts provisions on mistake as a “better reasoned approach.”<sup>92</sup>

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86. No. 17-cv-11130, 2018 WL 1035714 at \*3 (E.D. Mich. Feb. 23, 2018).

87. *Id.* (quoting *Sherwood*, 33 N.W. at 923).

88. *Id.* at \*4.

89. Evidence was disputed in *Sherwood* as to whether the parties were mistaken and the dissenting opinion concluded that the buyer “believed that she (Rose II of Aberlone) would breed.” *Sherwood*, 33 N.W. at 925.

90. Tracy v. Morell, 948 N.E.2d 855, 865 (Ind. Ct. App. 2011).

91. *Lenawee Cty. Bd. of Health v. Messerly*, 331 N.W.2d 203, 209 (Mich. 1982).

92. *Id.*

We next address the question of whether the Restatement (Second) Contracts sections 152 and 154 provide a “better reasoned approach” to determining whether a court should grant relief for contracting parties’ incorrect, unstated assumptions of existing facts.

*B. Restatement (Second) of Contracts*

The American Law Institute began work on the Restatement (Second) of Contracts (the “Restatement (Second)”) in 1962.<sup>93</sup> Although the Institute’s work on the Restatement (Second) was completed in 1979, publication occurred in 1981.<sup>94</sup> According to Professor Lance Liebman, who served as Director of the American Law Institute for more than fifteen years, “[n]o ALI work comes closer to the goals of the Institute’s founders who sought in 1923 to promote the clarification and simplification of the law, and its better adaption to social needs.”<sup>95</sup>

In his praise of the Restatement (Second), Professor Liebman does not single out any specific sections relating to mistake.<sup>96</sup> In its praise of the Restatement (Second), the Michigan Supreme Court in *Lenawee County Board of Health v. Messerly*<sup>97</sup> does single out two specific sections of the eight sections in the Restatement (Second)’s chapter on mistake.

After describing *Sherwood v. Walker*’s substance test as “confusing and inexact,”<sup>98</sup> *Lenawee County Board of Health v. Messerly* looked to sections 152 and 154 of the Restatement (Second).<sup>99</sup> Let’s first look at the language of section 152(1).

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93. RESTATEMENT (SECOND) OF CONTRACTS, Foreword vii (1981).

94. *Id.*

95. Lance Liebman, *In Memoriam-E Allan Farnsworth*, 105 COLUM. L. REV. 1429-1430 (2005). We have no reason to doubt Professor Liebman’s sincerity in so praising the Restatement (Second) of Contracts. Or his sincerity in describing the Restatement (Third) of Restitution and Unjust Enrichment as “a finished work that is as high in quality and valuable as the best Restatements constructed in our 88 years.” RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT xiiii (AM. LAW. INST. 2011).

96. And, in his only article on the Restatement (Second), Professor Farnsworth does not single out (or even mention) the Restatement (Second) sections on mistake. *See* E. Allan Farnsworth, *Ingredients in the Redaction of the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1 (1981). Professor Liebman does, however, single out Professor Farnsworth’s last law review article on mistake, E. Allan Farnsworth, *Oops! The Waxing of Alleviating Mistakes*, 30 OHIO N.U. L. REV. 167 (2004), for praise. *Id.* This short article, like Professor Farnsworth’s later short book, ALLEVIATING MISTAKES (2004), deals with the effect of mistake in criminal law and tort law as well as in contract law.

97. *Lenawee Cty. Bd. of Health*, 331 N.W.2d at 207, 210.

98. *Id.* at 209.

99. *Id.* at 210.

## (1) The Language of Section 152(1)

## § 152 When Mistake of Both Parties Makes a Contract Voidable

(1) 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 unless he bears the risk of the mistake under the rule stated in § 154.<sup>100</sup>

Restatement (Second) section 152 replaces The Restatement of Contracts (the "Restatement (First)") section 502. The Reporter's<sup>101</sup> Note to section 152 begins: "This Section [152] is based on former § 502."

The Restatement (First), published in 1932, includes an entire chapter on mistake. Section 502 of the Restatement (First), entitled "when mistake makes a contract voidable" is the primary provision in that chapter. Section 502 provides in pertinent part: "[W]here parties on entering into a transaction that affects their contractual relations are both under a mistake regarding a fact assumed by them as the *basis* on which they entered into the transaction, it is voidable by either party if enforcement of it would be *materially more onerous* to him than it would have been had the fact been as the parties believed it to be."<sup>102</sup>

We are not certain that the Restatement (Second)'s substitution of the terms "basic assumption" and "material effect" for the words "basis" and "materially" in the Restatement (First) "make(s) clear" what is required for relief for a mutual mistaken assumption of fact. We are certain that the language of both Restatement (First) section 502 and Restatement (Second) 152 focus on the significance of the mistake.

However, we question whether the significance of the mistake is a significant factor in determining whether relief is appropriate under the Restatement (Second).<sup>103</sup> The disappointed party's incurring the costs of litigation is in and of itself strong evidence of the significance of the mistake.

100. RESTATEMENT (SECOND) OF CONTRACTS § 152(1) (1981) (emphasis added).

101. There were two Reporters for the Restatement (Second) of Contracts. Professor Robert Braucher served as Reporter until his appointment to the Massachusetts Supreme Judicial Court in 1971. Then, Professor E. Allan Farnsworth replaced Judge Braucher as Reporter. The Restatement (Second)'s review and revision of the chapter on Mistake done under Professor Farnsworth's leadership. See Karen Einsidler, *Gedenkschrift in Honor of E. Allan Farnsworth*, 10 PACE INT'L L. REV. 1, 3 (2007) ("My father's work on the Restatement (Second) . . . covered such topics as . . . Mistake.").

102. RESTATEMENT (FIRST) OF CONTRACTS § 502 (1932) (emphasis added).

103. The Restatement (Third) of Restitution and Unjust Enrichment virtually eliminates the significance of mistake as requirement for relief. RESTATEMENT (THIRD) OF RESTITUTION §5, cmt. a (AM. LAW INST. 2011) ("rarely a controversial element."). *But cf* Oakes v. Holly, 268 P.3d 1084, 1088 (Alaska 2012) (relief denied because mistake did not relate to a basic assumption).



Restatement (Second) section 152 includes six illustrations of “basic assumptions.”<sup>104</sup> All six are answered “contract is voidable.”<sup>105</sup>

(2) Lenawee County and Section 152

In *Lenawee County Board of Health v. Messerly*, the significance of the mistake was significant to the Michigan Court of Appeals but not the Michigan Supreme Court. There Mr. and Mrs. Pickles contracted to buy a three-unit apartment building from Mr. and Mrs. Messerly.<sup>106</sup> The contract provided that “[p]urchaser has examined this property and agrees to accept same in its present condition.”<sup>107</sup>

At the time of the contract, neither party was aware that the property had a septic system that was both illegal and defective.<sup>108</sup> After the contract date and before the closing date, raw sewage from the septic tank seeped out of the ground.<sup>109</sup>

When the Lenawee County Board of Health condemned the property, the Pickleeses<sup>110</sup> moved for rescission, alleging (1) failure of consideration, (2) willful concealment, and misrepresentation.<sup>111</sup> The trial court found that neither party was aware of the septic tank problem at the time of the contract and looked to the “as is” clause in denying relief for the Pickleeses.<sup>112</sup>

A divided Michigan Court of Appeals reversed,<sup>113</sup> ordering rescission because of a mutual mistake,<sup>114</sup> relying on Restatement First section 502,<sup>115</sup> and stating:

104. RESTATEMENT (SECOND) OF CONTRACTS § 152 Illus. 1-6 (1981).

105. These illustrations need to come with a statement such as “Warning. Carefully read all Comments to Restatement (Second) before relying on any of these Illustrations.” RESTATEMENT (SECOND) §152 Comment e, which appears after the Illustrations, states “[i]t is assumed in the illustrations to the present Section that the adversely affected party does not bear the risk of the mistake under the Rule stated in section 154.” RESTATEMENT (SECOND) §152, cmt. e, p. 389. *But cf* JACK GRAVES, LEARNING CONTRACTS 649-50 (2014) (explaining section 154’s “risk of mistake” test as “another way to view the foregoing [section 152] result”).

106. *Lenawee Cty. Bd. of Health*, 331 N.W.2d at 205.

107. *Id.* at 205.

108. *Id.* at 207.

109. *Id.* at 205.

110. That is how the court refers to Mr. and Mrs. Pickles and that is the proper plural for “Pickles.”

111. *Lenawee Cty. Bd. of Health*, 331 N.W.2d at 206.

112. *Id.*

113. *Lenawee Cty. Bd. of Health v. Messerly*, 295 N.W. 903, 909 (Mich. Ct. App. 1980).

114. While the Pickleeses did not allege mutual mistake as a ground for rescission in their trial court pleadings, the Court of Appeals characterized their failure of consideration argument as mutual mistake. *Id.* at 906.

115. *Id.* The court did not refer to the Restatement (Second) of Contracts. The American Law Institute began work on the Restatement (Second) in 1962. *See* RESTATEMENT (SECOND), Foreword vii (1981). Although the American Law Institute’s work on the Restatement (Second)

The issue presented here is whether the asserted mutual mistake went to a basic element of the contract or to a collateral matter. We are of the opinion that the mistake here went to a basic contractual element. The Messerlys intended to sell and the Pickleses intended to purchase rental income property. What the Pickleses received, however, was property with no value either as income property or as a single-family residence.<sup>116</sup>

Both the majority opinion and the dissenting opinion in the Michigan Court of Appeals focused solely on the significance of the mistake.

In reversing the Court of Appeals, the Michigan Supreme Court looked to the Restatement (Second) and not the Restatement (First).<sup>117</sup> The Michigan Supreme Court's *Lenawee County* opinion devoted only one paragraph to the significance of the mistake.<sup>118</sup> Without quoting from or even directly citing to the Restatement (First) section 502 or Restatement (Second) section 152, the court used the language of sections 502 and 152 in concluding "the parties' mistake as to a basic assumption materially affects the agreed performance of the parties."<sup>119</sup> Thus, the facts in the *Lenawee County* case meet the significance of mistake tests of both Restatement (First) section 502 and Restatement (Second) section 152.

While the Michigan Supreme Court agreed with the Michigan Court of Appeals as to the significance of the mistake, the Michigan Supreme Court concluded that the Pickleses were not entitled to rescission for mutual mistake.<sup>120</sup> In reversing the Michigan Court of Appeals, the Michigan Supreme Court looked to Restatement (Second) section 154.<sup>121</sup>

And before granting relief for a mutual mistaken assumption of fact, a court applying the Restatement (Second) must look at section 154. The last clause of section 152 requires the court to determine whether the contract party seeking relief because of a mutual mistake "bears the risk of the mistake under the rule stated in § 154."

### (3) Restatement (Second) Section 154

#### § 154 When a Party Bears the Risk of a Mistake

A party bears the risk of a mistake when:

- (a) the risk is allocated to him by agreement of the parties, or

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was completed in 1979, publication occurred in 1981. Lance Liebman, *In Memoriam – E Allan Farnsworth*, 105 COLUM. L. REV. 1429 (2005).

116. *Lenawee Cty. Bd. of Health*, 295 N.W. at 907.

117. *Lenawee Cty. Bd. of Health*, 331 N.W.2d at 209.

118. *Id.* at 210.

119. *Id.*

120. *Id.* at 211.

121. *Id.* at 210.

(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or

(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.<sup>122</sup>

*(a) Subsection (a) of Restatement (Second) Section 154*

The Reporter's Note to Restatement (Second) section 154 begins with the statement that "This section is new." Subsection (a) of section 154 dealing with agreement of the parties as to the effect of a mistake does not seem "new,"<sup>123</sup> not even new to the Restatement of Contracts.

While there is no reference to risk of the mistake in the text of section 502 or the text of any of the other eleven sections in the Restatement (First) chapter on mistake, Comment f to section 502 does describe one specific situation in which risk of mistake precludes relief:

*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.<sup>124</sup>

And, one of the ten illustrations of section 502 shows the application of this comment:

7. A contracts to sell and B to buy such title to Blackacre as A possesses. A has no title to Blackacre. The contract is not voidable, since B assumes this risk.

None of the other illustrations even mention risk.

Illustration 1 to Restatement (Second) section 154 seems almost identical to illustration 7 to former section 502. Illustration 1 to section 154 reads as follows:

"Illustration:

1. A contracts to sell and B to buy a tract of land. A and B both believe that A has good title, but neither has made a title search. The contract provides that A will convey only such title as he has, and A makes no representation with respect to title. In fact, A's title is defective. The contract is not

122. The 2011 Restatement (Third) of Restitution and Unjust Enrichment contains a very similar risk of mistake provision, section 5(3). See generally Helen Scott & Danie Viser, *Excess Baggage? Rethinking Risk Allocation in the Restatement Third of Restitution and Unjust Enrichment*, 92 B.U. L. REV. 859, 865-68 (2012).

123. See e.g., Edwin W. Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 COLUM. L. REV. 335, 355 (1924) ("The circumstance that rescission for mutual mistake developed chiefly in courts of equity should not obscure the fact that it is a doctrine under the guise of which risk-apportioning goes on.").

124. RESTATEMENT (FIRST) OF CONTRACTS § 502 (1932).

voidable by B, because the risk of the mistake is allocated to B by agreement of the parties."<sup>125</sup>

While neither former section 502 nor illustration 7 thereto uses the phrase "bears the risk" or "allocated to him by agreement," B in illustration 7 loses because he "bears the risk" as it is "allocated to him by agreement." Indeed, the Reporter's Note to section 154 goes on to say that "Illustration 1 is based on former section 502."

The holding in *Lenawee County* is based on Restatement (Second) section 154(a). The *Lenawee County* case labelled the language "accept same in its present condition" in the sale of the apartment complex contract to be an "as is" clause and found that such language "assigned the risk of loss to Mr. and Mrs. Pickles."<sup>126</sup>

This language from the *Lenawee County* opinion is somewhat problematic. It wrongly suggests that an "as is" clause in a contract allocates the risk of a mistake to a particular party and only that party. An "as is" contract provision means that both the buyer and the seller have agreed to assume the risk. The buyer is agreeing to the risk that the subject matter of the contract has unexpected burdens to them; the seller is agreeing to the risk that the subject matter of the contract has unexpected benefits to the buyer.

Assume, for example, that S contracts to sell Redacre to B "as is" at a low price that reflects their mutual incorrect assumption that there could not be a viable sewage system on the property. When B later discovers that there was a part of Redacre that was suitable for septic tank, S argues that the contract should be rescinded because of their mutual mistake. In *Dingement v. Refitt*,<sup>127</sup> a case with basically these facts, the Michigan Court of Appeals invoked Restatement (Second) section 154 in concluding that the sellers should assume the loss.<sup>128</sup>

The result in *Lenawee County*, the result in *Dingement*, and the result under Restatement (Second) section 154(a) in any case in which it can be found that the risk of mistake has been allocated by agreement makes sense.<sup>129</sup> And, based

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125. RESTATEMENT (SECOND) OF CONTRACTS § 154 Illus. 1 (1981).

126. *Lenawee Cty. Bd. of Health*, 331 N.W.2d at 211.

127. 393 N.W.2d 632, 634 (Mich. Ct. App. 1986).

128. *Id.* at 635.

129. Without challenging the result reached by the application of Sections 152 and 154(a), Professor Kenneth Schneyer labels the two provisions a "tautological impossibility" and explains: "On the one hand, we are told that the mistake is a "basic assumption" made by the parties, that is, an assumption that was, or would have been, a deciding factor in the determination to make the contract in the first place. Yet we are also told to imagine that the parties, in their contract, clearly indicated that if one of them was mistaken about this fact — *without which she would never have entered into the contract* — she was willing to allow herself to be bound to the contract anyway. We are asked to picture two mutually exclusive things simultaneously: First, that the adversely affected party would be unwilling to enter into the contract had she known of her mistake, but, second, that she was willing to remain bound to the contract in case of this mistake. This situation,

on illustration 7 to Restatement (First) section 502 a court *could* have reached the same result under the Restatement (First).

*(b) Subsection (b) of Restatement (Second) Section 154*

Restatement (Second) section 154(b) places the risk of mistake on a contracting party who is aware of their limited knowledge. There is also a possible Restatement (First) section 502 counterpart to Restatement (Second) section 154(b) even though Restatement (First) section 502 does not use the words “aware that he only has limited knowledge.” Again, Comment f to Restatement 502 provides:

*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.

In the words of Comment f to Restatement First section 502, how does a court know what the “parties know?” Or in the actual words of Restatement (Second) section 154(b), how does the court know what a party is “aware” of?

Restatement (Second) section 154(b) is the only section in the Restatement (Second) of Contracts that uses the inherently subjective word “aware.” In other sections, the Restatement (Second) of Contracts uses the inherently objective phrase “reason to know.” Notwithstanding the section 154(b)’s use of the word “aware,” Professor Clare Dalton labels section 154(b) an “unsatisfactory ‘objective fault’ model”<sup>130</sup> and argues “we can *never* know that someone is ‘aware’ of his limited knowledge; at best, we objectify the standard and ask whether the circumstances indicate awareness, or whether he should have been aware.”<sup>131</sup>

The word “doubt” in Comment f and the phrase “limited knowledge” in Restatement (Second) section 154(b) are equally problematic. At some level, every person knows that they don’t know everything about the deal that they are fixing to make. Or, as Professor Kull explains: “We form contracts in the knowledge that our information is imperfect. . . . At a profounder level than that addressed by the American Law Institute, *every* party to a contract is aware, at the time the contract is made, that he has only limited knowledge with respect

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expressed in these particular terms, seldom takes place.” Kenneth J. Schneyer, *The Culture of Risk: Deconstructing Mutual Mistake*, 34 AM. BUS. L.J. 429, 441 (1997).

130. Clare Dalton, *An Essay on the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1064 (1985).

131. *Id.* at 1064-65 (emphasis added).

to the facts to which the [transaction] relates;" being human, he necessarily "treats his limited knowledge as sufficient."<sup>132</sup>

What is the level of awareness that precludes relief for mistake? Professor Schneyer reads Restatement (Second) section 154(b) as "envisioning a situation in which a person is particularly or unusually aware of his own ignorance." The Restatement (Second) section 154 illustration of subsection (b) is consistent with Professor Schneyer's "unusually aware" standard.

In the Restatement (Second)'s illustration we actually know that the parties expressly recognized and consciously considered their limited knowledge in agreeing upon contract terms. It reads in pertinent part:

A proposes to B during the negotiations the inclusion of a provision under which the adversely affected party can cancel the contract in the event of a material error in the surveyor's report, but B refuses to agree to such a provision. The contract is not voidable by A, because A bears the risk of the mistake.<sup>133</sup>

The illustration obviously assumes that A made a bad bargain that they would not have made with a surveyor's report.<sup>134</sup>

Professor Farnsworth views *Wood v. Boynton* as another illustration of Restatement (Second) section 154(b):

[I]n *Wood v. Boynton*, if the seller who 'had the stone in her possession for a long time and . . . had made some inquiry as to its nature and qualities . . . chose to sell it without further investigation as to its intrinsic value . . . she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain.' It such cases it is sometimes said that there was no mistake but rather conscious ignorance.<sup>135</sup>

That is what Professor Corbin said and more fully explained in his treatise more than twenty years before the publication of the Restatement (Second):

"The same result [no rescissionary relief for mistake] obtains in any case where the risk of the existence of some factor or of the occurrence of an event is consciously considered in agreeing upon terms. There is no mistake; instead, there is awareness of the uncertainty, a conscious ignorance of the

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132. Andrew Kull, *Mistake, Frustration and the Windfall Principle of Contract Remedies*, 43 HASTINGS L.J. 1, 2 (1991).

133. RESTATEMENT (SECOND) § 154, illus. 2.

134. If, instead, we posit that it turned out that B made a bad bargain that they would not have made had there been a surveyor's report, then it would seem that the contract should not voidable by B. In our hypothetical, B was just as "aware" as A in the Restatement (Second)'s illustration of their limited knowledge when B entered into the contract.

135. 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 578-9 (1998). Professor John Murray has a similar view of *Wood v. Boynton* which he supports in part with the law student's favorite word, "clearly." See JOHN EDWARD MURRAY, JR., MURRAY OF CONTRACTS 496 (5<sup>th</sup> ed 2011) ("Clearly, the seller had assumed the risk . . .").

future...[t]hey were aware of the uncertainty, estimated their chances, and fixed the compensation accordingly.”<sup>136</sup>

That is what courts read the Restatement (Second) as saying.<sup>137</sup>

*(c) Subsection (c) of Restatement (Second) Section 154*

If the parties have not allocated the risk by agreement as in (a) or assumed the risk by conscious ignorance as in (b), the risk can still be “allocated by the court” under (c) if it is “reasonable in the circumstances.” We cannot find a Restatement (First) counterpart to subsection (c). Professor Farnsworth describes subsection (c) of Restatement (Second) section 154 as “the most common of the three situations.”<sup>138</sup> This description understates the importance of section 154(c).

Under the Restatement (Second), the court must always apply section 154(c) before granting relief for as mutual mistaken assumption of facts. Even if the disappointed party proves (1) a mutual “mistake” as defined in section 151 as to (2) a “basic assumption” as required by section 152, (3) that mistake has a “material effect” as required by section 152, (4) the agreement does not allocate the risk of mistake to him under section 154(a), and (5) he is not aware of his limited knowledge as required by section 154(b), he does not get relief unless the court also concludes that he has proved that it is not reasonable under the circumstances to allocate the risk of the mistake. Accordingly, it is important the court to understand how to apply section 154(c).

Comment d provides this explanation of the application of Restatement (Second) 154(c)

*d. Risk allocated by the court.* In some instances, it is reasonably clear that a party should bear the risk of a mistake for reasons other than those stated in Subparagraphs (a) and (b). In such instances, under the rule stated in Subparagraph (c), the court will allocate the risk to that party on the ground that it is reasonable to do so. . . . In dealing with such issues, the court will consider the purposes of the parties and will have recourse to its own general knowledge of human behavior in bargain transactions, as it will in the analogous situation in which it is asked to supply a term under the rule stated in § 204.”<sup>139</sup>

Note the reference to Restatement (Second) section 204 which is entitled “Supplying an Omitted Essential Term.” Section 204 uses the same language for

136. 3 ARTHUR CORBIN, CORBIN ON CONTRACTS 542-43 (1952).

137. *Armco, Inc. v. Southern Rock, Inc.*, 696 F.2d 410, 412-13 (5th Cir. 1983).

138. FARNSWORTH, *supra* note 135, at 579.

139. RESTATEMENT (SECOND) § 154, cmt. d.

supplying an omitted term that section 154(c) uses for allocating the risk of a mistake: "reasonable in the circumstances."<sup>140</sup>

However, the language of Comment d to Restatement (Second) section 204 is different from the language of Comment d to Restatement 154, and, possibly, more helpful. A court applying section 154(c)'s "reasonable in the circumstances" test in deciding whether mistaken parties bear the risk of their mistake might find the phrase "community standard of fairness" which appears in Comment d to section 204 more helpful than Section 154 Comment d's phrase "general standards of human behavior."<sup>141</sup>

*(d) Illustrations of Risk of Mistake*

Before we can determine whether the Restatement (Second) provides a "better reasoned approach" to the contract law of mutual mistaken factual assumptions, we need to see its application. The illustrations that follow Restatement (Second) section 152 apply that section's "basic assumption" and "material effect" tests. While most of these illustrations are answered with "the contract is voidable," that answer is, at best, incomplete. All these answers assume that the aggrieved party has proved that he should not bear the risk of loss under section 154.<sup>142</sup>

Restatement (Second) section 154 is followed by six different illustrations. In all six of the Restatement (Second)'s illustrations, the party seeking rescissionary relief for mistaken assumption of fact cannot avoid the contract because they bear the risk of the mistake.<sup>143</sup> There is not a single Restatement (Second) illustration in which a contracting party can avoid the contract,<sup>144</sup> nor a single example in which a contracting party does not bear the risk of their mistake. At the very least these illustrations lead to an inference that contracting

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140. RESTATEMENT (SECOND) § 204. When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.

141. RESTATEMENT (SECOND) § 204, cmt. d ("the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process.").

142. *See supra* note 104.

143. RESTATEMENT (SECOND) §154, illus. 1-6; *see also* Stephanie R. Hoffer, *Misrepresentation: The Restatement's Second Mistake*, 2014 U. ILL. L. REV. 115, 122-24 (2014) (all of the cases cited in the portion of the article on allocation of risk under section 154 deny relief because adversely affected party bears the risk).

144. Most of the illustrations following Restatement (Second) section 152 conclude "The contract is voidable. . . ." It would, however, be a mistake for you conclude that a contracting party did not bear the risk of the mistake in these illustrations. Before reading these illustrations, you need to skip ahead to this parenthetical statement at the end of Comment e to section 152: ("It is *assumed* in the illustrations to the present Section that the adversely affected party does not bear the risk of the mistake under the rule stated in § 154.") (emphasis added).



parties generally bear the risk of their mistakes and so are not able to get out of a contract because of a mistaken assumption of fact.<sup>145</sup>

(e) *Importance of Risk of Mistake*

The illustrations and comments accompanying Restatement (Second) sections 152 and 154 also create a meaningful inference as to the importance of “risk of mistake” in determining when a contracting party can avoid the contract because of their mistaken assumption of fact. And that inference is that risk of mistake is the most important element of the Restatement (Second)’s approach to mutual mistaken assumption of fact. Again, the answers to the illustrations in Restatement (Second) section 152 granting relief for mistaken assumption of fact are all conditioned on “that the adversely affected party does not bear the risk of mistake under the rule stated in section 154,” and the answer to all of the illustrations in Restatement (Second) section 154 is that the adversely affected party does bear the risk of mistake.

Professor Hoffman Fuller uses words of praise in describing the Restatement (Second) “risk of mistake” test:

One of the substantial contributions of the Second Restatement to the law of mistake is the articulation and emphasis of the concept of risk allocation. Decisions that might once have been expressed in terms of whether mistake as to value, for example, would permit relief are now seen as resting more

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145. Any such inference is, however, inconsistent with the inference from the structure of section 152. Under general concepts of sentence structure, section 152’s introducing “risk of mistake” with an “unless clause” is significant. An “unless clause” at the end of a sentence functions as an exception to the general rule created by the part of the sentence that precedes the “unless clause.” Section 152’s use of the “unless clause” thus suggests that (1) generally a mistaken assumption of facts that is a mistake as to a “basic assumption” and has the requisite material effect makes a contract voidable and (2) and, section 154 is in the nature of an exception to that general rule that a “basic/material” mistake is enough to make a contract voidable. *State Wholesale Grocers v. The Great Atlantic & Pacific Tea Company*, 258 F.2d 831 (7th Cir. 1958) supports such a reading of the language of Restatement Second. The language in *State Wholesale Grocers* was the language of § 2(d) of a statute: “It shall be unlawful for any person. . . to pay or contract for the payment of anything of value to or for the benefit of a customer of such person. . . for any services or facilities furnished by or through such customer in connection with the. . . sale. . . of any products. . . sold. . . by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products.” The Seventh Circuit explained this language as follows: “In effect, § 2(d) declares as a general rule what is unlawful and, by way of exception to the rule (not as a condition thereof), provides for an escape from its applicability. The burden is upon the party who seeks the protection of the exception, to prove that it applies to the presented facts.” *Id.* at 838. Applying the Seventh Circuit’s reasoning to language of Restatement (Second) section 152, the general rule is that a “basic” and “material” mistake is avoidable and the language in Restatement (Second) section 152 about the significance of the mistake preceding the “unless clause” is the general rule, and risk of the mistake and section 154 referenced in the “unless clause” is the exception.

appropriately on the determination that the complaining party undertook the risk as part of his bargain.<sup>146</sup>

Another prominent law professor, George Palmer, says essentially the same thing about "risk of mistake" test, but as a critique and not a compliment:

No doubt all of these problems could be stated in terms of deciding who bears the risk of the discrepancy between the actual facts and the supposed facts. This way of putting the matter has great appeal but a large part of the appeal is deceptive. In the broad form just suggested, the statement is simply another way of formulating the issue, and a decision that the risk is on one party of another is often merely a way of stating the conclusion.<sup>147</sup>

In the next part of this article, we see how judges view the role of "risk of mistake" in applying the Restatement (Second) mistake provisions. Regardless of whether law professors find determining whether the party seeking relief for mistake bears the risk of that mistake useful, the finder of fact in a jurisdiction that follows the Restatement Second's provisions on mistake must make a risk of mistake determination.<sup>148</sup> Thus, the next part of our paper reviews reported cases over a ten-year period that use the Restatement (Second) sections 152 and 154 with a focus on cases discussion and determination of "risk of mistake."

## II. CASES APPLYING RESTATEMENT (SECOND) SECTION 154

Our study looks at reported cases from all jurisdictions, federal and state, for a ten-year period, from January 1, 2007 to December 31, 2017, in which (1) a

146. Hoffman Fuller, *Mistake and Error in the Law of Contracts*, 33 EMORY L.J. 41, 59 (1984).

147. GEORGE E PALMER, MISTAKE AND UNJUST ENRICHMENT 53-54 (1962). Professor Palmer's comments bring to mind an argument used by high school debaters in Texas in the 1950s and 1960s and by high school debaters in South Africa today: there is a difference between "sound good" reasoning and "good, sound" reasoning.

148. Jury instructions are commonly based on the Restatement (Second). Consider for example the following Pennsylvania standard suggested jury instruction:

[Name of party] claims the parties did not enter into a contract because both parties were mistaken about an important fact.

[Name of party] must prove the following:

1. the parties were mistaken about an important fact at the time they entered into the contract;

2. the mistake substantially deprived [name of party] of what [he] [she] [it] expected to receive under the contract; and

3. [name of party] did not bear the risk of the mistake.

A party bears the risk of a mistake when:

1. [name of party] had the ability to protect [himself] [herself] [itself] from the risk of mistake, but did not; OR

2. [name of party] knew [he] [she] had only limited knowledge regarding the facts related to the mistake but treated that limited knowledge as sufficient when the contract was entered into; OR

3. the contract assigned the risk to [name of party].

PA-JICIV 19.230, Pa. SSJI (Civ), §19.230 (2017).

party is contending that it should be given relief from a contract because of mistake and (2) the court uses Restatement (Second) section 154 risk of mistake provisions in ruling on that contention. In the Westlaw “all cases” database, we did a search for cases with the terms “mistake of fact” and “section 154” and compared the results to a similar Lexis search. We also looked for relevant cases from that ten-year period in secondary sources such as law review articles, contracts treatises, American Law Reports and Corpus Juris Secundum.

Using this approach, we found just over seventy cases. On close reading, only forty-seven of those cases directly applied Restatement (Second) section 154.

#### A. *All the Cases Granting Relief*

Only five of those forty-seven cases applying Restatement (Second) section 154 granted relief – i.e., concluded that the mistaken party did not bear the risk of that mistake and granted rescission reformation. Three of those five cases involved unilateral mistake.

The Restatement (Second) provision on relief for unilateral mistakes, section 153, like section 152, precludes relief for a party that has “the risk of the mistake under the rule stated in section 154.” Although the same risk of mistake rules applies to mutual mistake and unilateral mistake, these rules are applied differently for unilateral mistakes. If David seeks to rescind a contract with Roxanne because David and only David made an incorrect, unstated assumption as to an existing fact, courts commonly focus on whether Roxanne knew or had reason to know of David’s mistake.<sup>149</sup> As Comment f to Restatement (Second) section 153 “explains,” “[i]t is, of course,<sup>150</sup> unusual for a party to bear the risk of a mistake that the other party had reason to know of . . .”

Nonetheless, because there are so few cases, we will discuss both the mutual mistake cases and the unilateral mistake cases. We will consider the five cases in chronological order.

##### 1. *City Life Dev., Inc. v. Praxus Grp.*

In *City Life Dev., Inc. v. Praxus Grp.*, the Court of Appeals of Ohio held that the defendant, Praxus, who significantly underquoted the amount of labor and building materials needed for a construction project, did not bear the risk of its

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149. RESTATEMENT (SECOND) § 154, cmt. f (“It is, of course, unusual for a party to bear the risk of a mistake that the other party had reason to know of.”); see generally Melvin Aron Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake and Nonperformance*, 107 MICH. L. REV. 1413, 1425-28 (2009) (separating unilateral mistake cases on the basis of whether the nonmistaken party had reason to know of the mistake).

150. “Of course” is almost as helpful an “explanation” as “clearly” or “obviously.”

mistake because City Life had provided the incorrect information that Praxus relied on.<sup>151</sup>

Praxus, a subcontractor, originally quoted City Life, the developer, \$80,000 to complete a construction project.<sup>152</sup> City Life's president, John Rocco, said the bid was too high and gave Praxus another contractor's bid for almost half the price as a guideline to adjust its bid.<sup>153</sup> Praxus subsequently lowered its bid using the other contractor's measurements for the project, without taking its own measurements, but informed City Life that it believed the measurements in the other subcontractor's quote supplied to them by Rocco as an example were too low.<sup>154</sup> Praxus was awarded the job, but soon thereafter submitted a quotation for another \$40,000 for materials and labor.<sup>155</sup> When City Life refused to make the subsequent payment, Praxus walked off the job.<sup>156</sup>

City Life sued Praxus for breach of contract. Praxus counterclaimed arguing, inter alia, that the contract should be reformed because of mistake.<sup>157</sup> The trial court ruled in favor of Praxus on all claims.<sup>158</sup> The appellate court affirmed, relying in part on Restatement (Second) sections 152 and 154.<sup>159</sup> It is interesting to note what the appellate court said and did not say.

The opinion did not directly address section 152's requirements of "basic assumption" and "material effect," instead the court simply stated "[t]he mistake was significant as the evidence established that the final material costs were roughly double the amounts initially contemplated."<sup>160</sup>

Similarly, the opinion did not reference any language in section 154 or even cite to a specific subsection. The court merely concluded that "the risk cannot be allocated to Praxus *under the unique circumstances of this case* since Rocco provided the bedrock bid to Praxus and this contained incorrect amounts."<sup>161</sup> If the court had decided to use language from section 154 to support this decision, it could have used the phrase "reasonable in the circumstances" and cited to section 154(c).

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151. *City Life Dev. Inc. v. Praxus Grp.*, No. 88221, 2007 WL 1290169, at \*6 (Ohio Ct. App. May 3, 2007).

152. *Id.* at \*2.

153. *Id.*

154. *Id.*

155. *City Life Dev. Inc.*, 2007 WL 1290169 at \*1.

156. *Id.*

157. *Id.*

158. *Id.* at \*3.

159. *Id.* at \*6.

160. *City Life Dev. Inc.*, 2007 WL 1290169 at \*6.

161. *Id.* (emphasis added).

## 2. *Land Grantors v. United States*<sup>162</sup>

A little less than a year later, the United States Court of Federal Claims in *Land Grantors v. United States* held that landowners who had sold their land to the government for a small amount did not bear the risk of their mistake when valuable minerals were later discovered on the land. During World War II, the United States government acting pursuant to the War Purposes Act condemned almost 36,000 acres of land in Kentucky for approximately \$3.7 million to build an Army training facility.<sup>163</sup> After the end of the war, the government discovered natural minerals and leased and sold the coal, gas, oil, and other mineral rights for more than \$34 million.<sup>164</sup> Congress recognized the “basic injustice of the Government’s actions” and passed a bill that allowed the landowners to pursue their claims in the United States Court of Federal Claims.<sup>165</sup>

In awarding restitution, the court looked to the Restatement (Second) of Contracts provisions on mistake, including section 154. The court first noted that selling landowners usually bear the risk of mistake for minerals buyer discover on their land,<sup>166</sup> but found it would be “unjust and unreasonable”<sup>167</sup> to allocate the risk of mistake to the selling landowners in this case. The “time and exigencies of war”<sup>168</sup> made it “impractical and impossible” for the landowners in this instance to learn more about whether their land had minerals or to accurately determine the value of their land.<sup>169</sup>

Just as the court in *Praxus* described that case as “unique,” the United States Court of Federal Claims described the case in *Land Grantor* as “unique and sui generis.”<sup>170</sup> And, like the opinion in *Praxus*, the opinion in *Land Grantor* did not reference any language in section 154 or even cite to a specific subsection. Again, the court could have used the phrase “reasonable in the circumstances” in section 154(c).

## 3. *Sumerel v. Goodyear Tire and Rubber Company*

The next case concluding that section 154 did not preclude relief for mistake, *Sumerel v. Goodyear Tire and Rubber Company*, involved a unilateral mistake,

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162. *Land Grantors v. United States*, 81 Fed. Cl. 580 (2008).

163. *Id.* at 582. The owners of the condemned property could either negotiate a contract a contract of sale or demand a jury trial to determine just compensation. *Id.* Based on these facts, there is of course an argument that this could be a “duress” or even an “unconscionability” case as well, and perhaps the court may even have been mistaken in the concepts it applied. However, that goes beyond the scope of this article and it a discussion for another article.

164. *Id.*

165. *Id.*

166. *Land Grantors*, 81 Fed. Cl. at 606.

167. *Id.* at 608.

168. *Id.*

169. *Id.*

170. *Id.*

not a mutual mistake.<sup>171</sup> Further, the mistake was a “mathematical or clerical error” rather than an incorrect assumption of facts.<sup>172</sup>

After a successful products liability case against Goodyear, the jury awarded plaintiffs \$1.3 million and found Goodyear to be thirty-six percent responsible for the “other costs and losses” of one set of plaintiffs and forty-eight percent liable for the “other costs and losses” incurred by another set of plaintiffs.<sup>173</sup> During settlement discussions after the trial, Goodyear’s lawyers provided plaintiffs’ lawyers with a final chart with the amounts they believed Goodyear owed the two plaintiffs.<sup>174</sup>

Lawyers for the plaintiffs noticed, and remained silent about, a mistake in Goodyear’s calculations in the chart: Goodyear had calculated the final sum to include a 100% payout of “other costs and losses” to both sets of plaintiffs instead of the thirty-six percent and forty-eight percent respectively awarded by the jury to each plaintiff.<sup>175</sup> This was an overstatement of more than \$550,000.<sup>176</sup>

Just before signing the agreement, lawyers for Goodyear realized their calculation error and sent corrected charts.<sup>177</sup> Plaintiffs’ lawyers, however, insisted that Goodyear adhere to its “settlement agreement” and pay the \$550,000 surplus to plaintiffs.<sup>178</sup>

The court concluded that no contract had been formed.<sup>179</sup> The court also concluded, by way of dictum, that under these circumstances, any such contract would be voidable.<sup>180</sup> Goodyear did not bear the risk of mistake because the calculations were in error and plaintiffs had knowledge of it.<sup>181</sup> The court noted it would be “unusual” for one party to bear the risk of a mistake of which the other party was aware.<sup>182</sup> Professor Baird provides a more complete explanation as to why a party should not bear the risk of a mistake that the other party was aware of: “It is like the doctrine of last clear-chance, which in tort law relieves someone of the consequences of negligent action because the other party had a subsequent opportunity to avoid the accident as little cost.”<sup>183</sup>

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171. 232 P.3d 128, 135 (Colo. App. 2009). The facts of this case could also be read as a misrepresentation case, and not a mistake case, if we look at the actions of the plaintiff’s lawyers. For the purposes of this article, however, we use this case only as an example of mistake.

172. *Id.* at 137.

173. *Id.* at 130.

174. *Id.* at 131.

175. *Id.*

176. *Sumerel*, 232 P.3d at 132.

177. *Id.*

178. *Id.*

179. *Id.* at 133.

180. *Id.* at 136.

181. *Sumerel*, 232 P.3d at 136.

182. *Id.* at 136-37.

183. DOUGLAS G. BAIRD, RECONSTRUCTING CONTRACTS 101 (2013).

#### 4. *Faivre v. DEX Corporation Northeast*

Similarly, in *Faivre v. DEX Corporation Northeast*, the court held that the plaintiff could not exploit the typographical error made by defendants in a severance agreement.<sup>184</sup> DEX had decided to terminate Faivre's employment and offered him a three-month severance agreement.<sup>185</sup> While reviewing the severance agreement at home, Faivre realized that "it stated that his employment would continue until November 30, 2007, not November 30, 2006" and thus pursuant to these terms he would receive fifteen months of salary and benefits, not only the three months as discussed in the meeting.<sup>186</sup> Faivre quickly signed the agreement and returned it to DEX.<sup>187</sup>

Upon review of the agreement, DEX realized for the first time that it had made a typographical error and telephoned, emailed, and sent a letter to Faivre pointing out the error and including a replacement page with the corrected date.<sup>188</sup> Faivre filed suit against DEX for breach of contract when DEX refused to pay out the fifteen months' severance pay.<sup>189</sup>

The trial court held that Faivre had a contract right to the three months of severance pay.<sup>190</sup> The appellate court reversed in part and remanded, ruling that DEX was entitled to rescission for its unilateral mistake under Restatement (Second) section 153.<sup>191</sup> In so ruling, the Ohio Court of Appeals considered and rejected Faivre's argument that DEX bore the risk of its mistake under 154, stating "Faivre had reason to know that the severance agreement contained a typographical error. . . . Faivre attempted to take advantage of DEX's error. Therefore, equity and reasonableness do not require us to place the risk of the mistake on DEX due to its negligence."<sup>192</sup>

#### 5. *Guggenheim v. Valerus*

Like the two cases previously referenced, *Guggenheim v. Valerus* also involved a unilateral mistake, not a mutual mistake.<sup>193</sup> In *Guggenheim*, the mistake involved a mistaken understanding of a contract provision, not an incorrect assumption of existing facts.<sup>194</sup>

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184. 913 N.E.2d 1029, 1039 (Ohio Ct. App. 2009).

185. *Id.* at 1032.

186. *Id.*

187. *Id.* at 1033.

188. *Id.*

189. *Faivre*, 913 N.E.2d at 1033–34.

190. *Id.*

191. *Id.* at 1039.

192. *Id.*

193. *Guggenheim Corp. Funding, LLC v. Valerus Compression Servs., L.P.*, 465 S.W.3d 673, 685 (Tex. App. 2015), *review denied* (Oct. 23, 2015).

194. *Id.* at 679.

The contract in question was a very complicated 2006 financing transaction.<sup>195</sup> In fact, it was so complicated that the outside professionals representing the borrower did not understand the deal,<sup>196</sup> or at least two years later did not remember the parties' intent with respect to the dilution protection provision.<sup>197</sup>

As part of the financing arrangement, the funder Guggenheim received warrants to purchase the borrower Valerus' shares at a fixed price and dilution protection, i.e., the right to receive additional warrants in the event Valerus obtained further financing before repaying the Guggenheim loan.<sup>198</sup> The contract language was at best ambiguous as to how to calculate the amount of such additional warrants.<sup>199</sup>

Two years later, (1) Valerus obtained further financing and (2) Dawn Cunningham, Valerus' in-house counsel, mistakenly interpreted the dilution protection provision in the 2006 contract allowing Guggenheim to exercise warrants to obtain 5,862,351 shares of Valerus's stock, instead of the 1,071,746 shares Guggenheim was entitled to under the 2006 agreement.<sup>200</sup>

Valerus discovered its mistake months after Guggenheim exercised the warrants and sued.<sup>201</sup> The trial court granted Valerus rescissionary relief on its mistake claim, reducing Guggenheim's shareholdings to 1,071,746.<sup>202</sup> In so ruling, the trial court made the following finding: "Guggenheim was very sophisticated with respect to warrants and was *fully aware of* the Valerus agents' unsophistication and *mistaken understanding*."<sup>203</sup> The trial court ruling was consistent with *Goodyear* and *Faivre*.

The appellate court affirmed the trial court's holding.<sup>204</sup> The opinion describes two earlier Texas cases as the governing law and its reference to Restatement (Second) section 154 is prefaced by "see also."<sup>205</sup>

The appellate court concluded that under section 154(a), the risk was not allocated to Valerus because there was no agreement about risk of mistake.<sup>206</sup> Valerus did not bear the risk of the mistake under section 154(b) either, because Valerus exercised "ordinary care" through Cunningham's efforts.<sup>207</sup> It was

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195. *Id.* at 683.

196. *Id.* at 677–78.

197. *Id.* at 678.

198. *Guggenheim Corp. Funding, LLC*, 465 S.W.3d at 677

199. *Id.*

200. *Id.* at 679–80.

201. *Id.* at 680.

202. *Id.*

203. *Guggenheim Corp. Funding, LLC*, 465 S.W.3d at 687 (emphasis added).

204. *Id.* at 693.

205. *Id.* at 690–91.

206. *Id.* at 691.

207. *Id.*



important to the court that Cunningham conducted nine weeks of research and negotiations before this mistake was made.<sup>208</sup>

Finally, the court concluded that the risk could also not be allocated to Valerus under section 157 because it would not be reasonable under the circumstances to do so.<sup>209</sup> The court found that “Valerus failed to act in good faith or in accordance with standards of fair dealing.”<sup>210</sup>

6. Section 154(a) - *Smith v. MJM Real Estate Inv.*

In *Smith v. MJM Real Estate*, Smith sold a parcel of land to MJM Real Estate (“MJM”) in 2006.<sup>211</sup> Five years later the Department of Environmental Quality determined that the land contained wetlands and the ways in which the land could be developed was limited.<sup>212</sup>

MJM stopped making payments in 2013, and Smith commenced a “summary proceedings action in the district court for possession of the property, claiming forfeiture of the land contract.”<sup>213</sup> MJM “counterclaimed for rescission of the land contract and reimbursement of amounts paid on the contract because of mistake.”<sup>214</sup>

Despite MJM’s protestations, the trial court found that the land could still be developed in other ways and that “the land contract explicitly provided that [MJM] agreed that [Smith] had not made any representations or warranties concerning the condition of the premises.”<sup>215</sup> MJM claimed that, at the time of the transaction, neither party was aware of the existence of wetlands and, if they were aware, the consideration for the property would be much lower or the deal would never have happened in the first place.<sup>216</sup> The trial court ruled for Smith.<sup>217</sup>

The Michigan Court of Appeals also rejected MJM’s claim for relief because of mutual mistake with respect to the value of the property.<sup>218</sup> Citing *Lenawee*, the Court of Appeals found that “[a] court need not grant rescission in every case in which the mutual mistake relates to a basic assumption and materially affects the agreed performance of the parties.”<sup>219</sup>

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208. *Guggenheim Corp. Funding, LLC*, 465 S.W.3d at 679.

209. *Guggenheim Corp. Funding, LLC*, 465 S.W.3d at 692.

210. *Id.*

211. No. 332353, 2016 WL 6039032, at \*1 (Mich. Ct. App. Oct. 13, 2016).

212. *Id.* at \*1.

213. *Id.*

214. *Id.*

215. *Id.* at \*2.

216. *Smith*, 2016 WL 6039032 at \*3.

217. *Id.* at \*1.

218. *Id.* at \*2.

219. *Id.* at \*3.

Like the Michigan Supreme Court in *Lenawee*, the Michigan Court of Appeals in *Smith* tried to determine whether the parties had perhaps allocated the risk between themselves.<sup>220</sup> Like *Lenawee*, *Smith* found an “as is” clause, although no clause in the contract used the phrase “as is.”<sup>221</sup> The *Smith* court focused on the following contract provision: “Purchaser agrees that the Seller has made no representations or warranties as to the condition of the premises. . . .”<sup>222</sup> and reasoned that “it would reflect an improper rewriting of the land contract, effectively indicating that plaintiffs *were* making representations or warranties concerning the property’s wetlands nature. The clause would be rendered meaningless were defendant successful in this litigation.”<sup>223</sup>

#### 7. Section 154(b) - *Land Baron Inv. v. Bonnie Springs*

In *Land Baron Inv. v. Bonnie Springs*, the Supreme Court of Nevada held that appellants bore the risk of their mistake because they did not secure access and water rights to their property before purchase and treated their limited knowledge of the matter as sufficient.<sup>224</sup> Land Baron contracted to purchase land on the outskirts of Las Vegas for \$17,190,000 from Bonnie Springs.<sup>225</sup> Land Baron “did not inquire into any water or access rights or do any other due diligence” and, besides stating that Bonnie Springs would allow Land Baron to use some of its treated waste water, the contract was silent on water and access rights.<sup>226</sup>

After signing the contract, Land Baron could not secure access to its property or find a viable source of water for the property.<sup>227</sup> Land Baron filed a subsequent complaint against Bonnie Springs alleging, among other things, that there was a mutual mistake to the contract regarding the access and water rights to the property.<sup>228</sup>

The Nevada Supreme Court held that Land Baron bore the risk of the mistake because Land Baron is a “sophisticated and experienced land buyer and developer” that drafted the contract and all its amendments and knowingly contracted to purchase undeveloped property on the outskirts of Las Vegas without inquiring into the water rights.<sup>229</sup> Land Baron’s mere “hope that things will work out” did not constitute a reasonable belief of the facts, and, by pursuing

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220. *Id.*

221. *Smith*, 2016 WL 6039032 at \*3.

222. *Id.*

223. *Id.* at \*4 (emphasis added).

224. *Land Baron Inv. v. Bonnie Springs Family Ltd.*, 356 P.3d 511, 514 (Nev. 2015).

225. *Id.*

226. *Id.*

227. *Id.* at 515.

228. *Id.*

229. *Land Baron Inv.*, 356 P.3d at 517 (Nev. 2015).

the contract despite its limited knowledge, Land Baron bore the risk.<sup>230</sup> The *Land Baron* opinion cited to and quoted from Restatement (Second) section 154(b): “If the party is aware at the time he enters the contract ‘that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient,’ that party will bear the risk.”<sup>231</sup>

8. Section 154(c) - *Grenall v. United States of Omaha Life Ins. Co.*

*Grenall v. United States of Omaha Life Ins. Co.*, involved an annuity contract.<sup>232</sup> Less than four months after buying an annuity that provided for monthly benefits for the duration of her life, Jean M. Simes died of cancer.<sup>233</sup> Simes had made a single premium payment of \$321,131 to United Omaha Life Insurance Company (“United”).<sup>234</sup>

After receiving three benefit payments, she was diagnosed with ovarian cancer and died less than a week later.<sup>235</sup> The administrators of her estate filed suit against United to rescind the contract based on mistake of fact—specifically that Simes “did not know she had a terminal illness when she entered the annuity contract.”<sup>236</sup>

The court decided, however, that Simes bore the risk of her mistake as a matter of law in this instance.<sup>237</sup> The court allocated the risk to Simes, because “it [was] reasonable under the circumstances” and found that “parties who contract for ‘life contingent’ benefits necessarily do so based on limited knowledge of the facts about which Simes was mistaken.”<sup>238</sup> The allocation of risk to Simes, the court reasoned, was reasonable under the circumstances because “such risks are an inherent part of life annuity contracts.”<sup>239</sup>

III. “BETTER REASONED APPROACH” TO MISTAKEN FACTUAL ASSUMPTION

We *can* read the cases from 2007 to 2017 to support the statement in the Introductory Note to Chapter 6 Mistake in the Restatement (Second): “The law of contracts supports the finality of transactions less *justifiable* expectations be disappointed. This Chapter deals with *exceptional* situations in which the law departs from this policy favoring finality and allows . . . avoidance . . . on the

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230. *Id.* at 518.

231. *Id.* At the end of that paragraph, the court also cites to RESTATEMENT (SECOND) §154(c). The facts that support a section 154(b) “limited knowledge” finding can also support a “reasonable in the circumstances” finding.

232. 165 Cal. App. 4th 188, 190 (2008).

233. *Id.*

234. *Id.*

235. *Id.* The facts of *Grenall* are markedly similar to RESTATEMENT (SECOND) §154, illus. 3.

236. *Id.* at 191.

237. *Grenall*, 165 Cal. App. 4th at 193.

238. *Id.*

239. *Id.* at 194.

ground of mistake.”<sup>240</sup> The Introductory Note thus provides a policy basis for denying relief because of mistake: finality of transaction. The Introductory Note, however, does not provide any policy guidance for granting relief because of mistake—for determining whether the facts present the “exceptional situation.”

*Praxus* and *Land Grantors* are clearly cases involving “exceptional situations,” but our reading of those cases does not clarify what constitutes the “exceptional situation” in which a court should depart from the policy of finality of transactions and grant relief for an incorrect, unstated assumption of fact. Accordingly, we cannot read the cases from 2007 to 2017 as supporting the statement in *Lenawee County Board of Health v. Messerly* that the Restatement (Second) provides a “better reasoned approach” than *Sherwood v. Walker*.<sup>241</sup> Indeed, from our reading of all of these cases and all of the Restatement (Second) material on mistake it is at least questionable whether: (1) the Restatement (Second)’s approach is “better” or even different in substance from the “substance” approach of *Sherwood*; and (2) the Restatement (Second)’s approach is even a “reasoned approach.”

In his multivolume treatise on contracts, Professor Farnsworth, the Restatement (Second)’s Reporter, concludes that “such [the Restatement (Second)’s] analysis in terms of risk candidly acknowledges the considerable discretion exercised by the court in mistake cases, and it is more likely to lead to sensible results than is the specious and artificial reasoning based on such criteria as ‘identity’ or ‘attributes.’”<sup>242</sup> The words “‘identity’ or ‘attributes’” are, of course, a reference to *Sherwood v. Walker*<sup>243</sup> and the later cases following *Sherwood v. Walker* that use those terms in explaining rulings on parties’ arguments for rescission because of mutually mistaken factual assumptions.<sup>244</sup>

Professor Farnsworth supports his conclusion by quoting a hypothetical from a law review article by Professor Rabin:<sup>245</sup> “If A buys an annuity on C’s life, he takes the risk that C may die soon after the annuity is issued. . . . But if C

240. RESTATEMENT (SECOND) OF CONTRACTS ch. 6 intro. note (AM. LAW INST. 1981) (emphasis added).

241. 331 N.W.2d 203, 209 (Mich. 1982).

242. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 580-81 (Aspen Publ’g, Inc. ed., 2d ed. 1998).

243. “[T]here is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal . . . .” *Sherwood v. Walker*, 33 N.W. 919, 920 (Mich. 1887).

244. See, e.g., *Gartner v. Eikill*, 319 N.W.2d 397, 399 (Minn. 1982).

245. Edward H. Rabin, *A Proposed Black-Letter Rule Concerning Mistaken Assumptions in Bargain Transactions*, 45 TEXAS L. REV. 1273, 1292-93 (1967). Professor Rabin’s 1967 article has been described as providing an approach to mistaken assumption of facts that “foreshadowed in almost complete detail” the Restatement (Second)’s sections of mistake.” Hoffman F. Fuller, *Mistake and Error in the Law of Contracts* 33 EMORY L. J. 41, 75 (1984); cf. Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CALIF. L. REV. 1573, 1632 (2003) (“This requirement [risk of mistake] was developed in a notable article by Edward Rabin and then embodied in Restatement Second § 154.”).

was already dead when the annuity was issued A could rescind the sale of the annuity because ordinarily A would not have assumed this latter risk.”<sup>246</sup>

Obviously, a court exercising what Professor Farnsworth describes as the “considerable discretion” afforded by the Restatement (Second) provisions on mistake could conclude that A has by clear and convincing evidence<sup>247</sup> established that the mistake was “basic” and “material”—as required by Restatement (Second) sections 152 or 153—and that the allocation to A of the risk that C was already dead would not be “reasonable in the circumstances”—as required by section 154. We think it is equally obvious that a court applying the “substance” language of *Sherwood v. Walker* could reach the same result and could conclude that a dead annuitant is as different in substance from a live annuitant as a barren cow is from a fertile cow. Indeed, Professor Rabin’s dead annuitant hypothetical is based on several such actual cases.<sup>248</sup> And, we think that a court using either the Restatement (Second) approach or *Sherwood’s* “substance” test could reach a different result. A court exercising the “considerable discretion” afforded by the Restatement (Second) could conclude that just as under the facts of the *Simes* case it is “reasonable in the circumstances” that a purchaser of an annuity assumes that the risk that the annuitant dies after the contract, it is also “reasonable in the circumstances” that that the purchaser of annuity assumes the risk that the annuitant is already dead.<sup>249</sup> Similarly, a court could conclude that an already dead annuitant is not different in “substance” from an annuitant with a deadly illness.

Thus, we question whether the Restatement (Second)’s approach to mutually mistaken assumption of facts is different in substance from the “substance” approach of *Sherwood v. Walker*. Consider also Professor Perillo’s comparison of the Restatement (Second)’s “risk of mistake” approach and *Sherwood v. Walker’s* “substance” approach: “A fire insurance binder issued when neither party knows that the insured premises are afire is avoidable

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246. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 580 (Aspen Publ’g, Inc. ed., 2d ed 1998). The Restatement (Second) of Contracts used a “fleshed out” version of this hypothetical as illustration 6 to section 152. Again, all of the illustrations to section 152 assume away any “risk of mistake” issues.

247. The party attacking the contract has the burden of proof and must present clear and convincing evidence of each element. *Nat’l Australian Bank v. United States*, 452 F.3d 1321, 1329 (Fed. Cir. 2006).

248. Rabin, *supra* note 245, at 1293 n.96 (citing *Allen v. Hammond*, 36 U.S. (11 Pet.) 63 (1837); *Reigel v. American Life Ins. Co.*, 140 Pa. 193, 21 A. 392 (1891); *Scott v. Coulson*, [1903] 2 Ch. 249 (C.A.); *Strickland v. Turner*, 155 Eng. Rep. 919 (Ex. 1852); *cf. Duncan v. New York Mut. Ins. Co.*, 138 N.Y. 88, 33 N.E. 730 (1893); *American Motorists Ins. Co. v. Reich*, 237 N.Y.S.2d 369 (Sup. Ct. 1963); *Grand Trunk Western R.R. v. Lahiff*, 218 Wis. 457, 261 N.W. 11 (1935)).

249. *Cf. Kenneth Schmeyer, The Culture of Risk: Deconstructing Mistake*, 34 AM. BUS. L. J. 429, 443 (1984) (describing the Restatement (Second) risk of mistake approach as “essentially an authorization for court to grant rescission for mutual mistake when it wants”).

because of mistake. That a fire was in progress is not a risk assumed by the insurer. Put another way, a house ablaze is as different in kind from a house not ablaze as a barren cow is from a pregnant cow."<sup>250</sup>

Thus, putting our question another way, is the Restatement (Second)'s risk of mistake approach anything more than a "put another way" approach to mutual mistaken assumption of facts? We have a problem in answering this question because we have a problem in determining the policy reasons underlying the Restatement (Second)'s approach to relief for mutual mistaken assumption of facts.

It is not surprising that we are not able to find the policy basis for the approach taken by the Restatement (Second) to mistaken assumption of facts because generations of judges and law professors<sup>251</sup> have been uncertain (or divided in their certainty) as to the policy basis for the common law approach to mistaken assumption.<sup>252</sup> Some have tried to base the law of mistake on outdated contracts concepts such as "meeting of the minds,"<sup>253</sup> lack of consideration,<sup>254</sup> or both.<sup>255</sup> Others have suggested new concepts such as "economic efficiency"<sup>256</sup> or "contextual purposive intent."<sup>257</sup> Still others have suggested

250. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 317 (6th ed. 2009).

251. Compare Roland R. Foulke, *Mistake in the Formation and Performance of a Contract*, 11 COLUM. L. REV. 197 (1911) ("The law relating to mistake is in a state of great confusion.") with CATHARINE MACMILLAN, *MISTAKES IN CONTRACT LAW* vii (2011) ("doctrine of contractual mistake is itself a mistake.").

252. Cf. Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND.L.REV. 205, 270 (2007) ("arguably unfair to criticize it [the Restatements] for mirroring the characteristics of the common law.").

253. E.g., *Brauer v. Central Trust Co.*, 433 N.Y.S.2d 304, 307 (2008) ("It is the general rule that where a mistake in contracting is both mutual and substantial, there is an absence of the requisite 'meeting of the minds' to the contract, and the relief will be provided in the form of rescission.") See, e.g., A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT* 535 (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.").

254. Val Ricks, *Consideration and the Formation Defenses*, 62 U. KAN. L. REV. 315, 353 (2013) ("the origin and logic of mutual mistake lie in the undercutting of consideration.").

255. Anon., *A Critical Analysis of the Law As to Mistake In Its Effect Upon Contracts*, 38 AM. L. REV. 334, 348 (1904) ("two totally different theories . . . never been any contract at all . . . and, second, . . . failure of consideration").

256. Anthony G. Kronman, *Mistake, Disclosure, Information and the Law of Contracts*, 7 J. LEGAL STUD. 4-5 (1978) ("court[s] concerned with economic efficiency should impose the risk on the better information-gatherer . . . [I]t could be either the buyer or the seller. . . . The buyer could just as easily hire a(sic) . . . expert . . . as the seller could."); See also Eric Rasmussen & Ian Ayres, *Mutual and Unilateral Mistakes in Contract Law* 22 J. LEG. STUDIES 309 (1993) (uses lots of formulae to conclude that law of mistake cannot be based on efficiency and other economic premises).

257. Nancy Kim, *MISTAKES, Changed Circumstances and Intent*, 56 U.KAN L. REV. 473 (2008).

that there is no policy supporting relief for mistake.<sup>258</sup> As Professor Ricks has observed, “The plethora of rationales offered indicates that no one knows the ‘true rationale’ for mutual mistake, or that one does not exist.”<sup>259</sup>

A reading of the Restatement (Second) sections on mutual mistake, the cases over a ten-year period applying those sections, and various law professors’ hypotheticals illustrating those sections supports the proposition that no rationale exists and that the Restatement (Second) is not a better-reasoned approach than *Sherwood v. Walker* because the Restatement (Second), like *Sherwood v. Walker*, is not a reasoned approach.

Under the language of the Restatement (Second) and the cases from 2007 to 2017 applying that language, a court can only grant relief for mistake if it has determined that the party seeking relief has established that they do not bear the risk of the mistake under any of the three subsections of sections 154. That means that the Restatement (Second)’s approach to granting relief always requires a determination that it is not “reasonable in the circumstances” to allocate the risk of loss to the party seeking relief.

The use of the word “reasonable” as part of Restatement (Second) section 154(c) does not mean that the Restatement (Second) approach to relief for incorrect, unstated assumption of facts is a “reasoned approach.” The decisions from 2007 to 2017 based on the Restatement (Second) approach to mistake, just like *Sherwood v. Walker* and its progeny,<sup>260</sup> are based on fact-specific, judge-specific notions of equity and fairness.<sup>261</sup>

The Restatement (Second)’s attempt to create “mistake rules” is a mistake.<sup>262</sup> Restatement (Second) sections 152 and 154 are at best misleading to lawyers contemplating possible litigation and law students confronting certain exams. The structure of the wording of Restatement (Second) section 152 – “the contract is voidable by the adversely affected party unless” – incorrectly suggests courts usually grant relief for mistake. Further, the three conditions in

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258. Cf John Cartwright, *Solle v. Butcher and the Doctrine of Mistake in Contract*, 103 L.Q.R. 594, 623 (1987)

(“The question is ultimately whether the principles of sanctity of contract should be adhered to in the face of what appears to be an unlucky bargain.”).

259. Val Ricks, *American Mutual Mistake: Half-Civilian Mongrel, Consideration Reincarnate*, 58 LA. L.REV. 663, 676 (1998).

260. The Introductory Note to the Restatement (Second)’s chapter on mistake states in part “The rules governing all of the situations dealt with in this Chapter have traditionally been marked by flexibility and have conferred considerable discretion on the court.”

261. See also BRIAN H. BIX, *CONTRACT LAW* 46 (2012) (describing mutual mistake under the Restatement as an “equitable defense” that provides relief in “those rare cases in which the court feels strongly from the circumstances that enforcement of the agreement would be deeply unfair”).

262. Cf CATHARINE MACMILLAN, *MISTAKES IN CONTRACT* Law 318 (2011) (“A final remark: English contract law recognizes a doctrine of mistake, constructed from various cases concerned with mistake, but the form of the doctrine is full of its own mistakes. The recognition of the doctrine came about by mistake. The problem which remains is how to rectify the mistake.”).

section 152 and section 154's three alternative tests for section 154's third condition, suggest a fixed structure that is inconsistent with the Restatement's own Introductory Note to the chapter on mistake and the reported mistake cases.

The American Law Institute was created "to promote the clarification and simplification of the law."<sup>263</sup> According to the American Law Institute's website, "The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law."<sup>264</sup> As Professor Hillman, a Restatement Reporter, has noted, "The main goal of restatements, it is therefore fair to say, is to clarify the law."<sup>265</sup>

The Restatement (Second) could clarify the contract law of mistake by taking the same approach to relief for incorrect, unstated assumption of facts as it does to relief for nonoccurrence of a condition. There are no Restatement (Second) rules, factors, or formulae for lawyers and judges to struggle with in determining whether to grant relief for nonoccurrence of a condition. Instead, Restatement (Second) section 229 provides: "To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence unless its occurrence was a material part of the agreed exchange."<sup>266</sup>

A comparable Restatement mistake provision might read "To the extent that the existence of facts inconsistent with an unstated assumption of the parties causes a disproportionate unanticipated loss or gain, a court may grant relief to the aggrieved party." The Comment to such a restatement section, like the Comment to section 229 the mistake case law from 2007-2017, should state "application is within the sound discretion of the court." Just as there are no Restatement (Second) rules, factors, or formulae for lawyers or judges to struggle with in determining whether to grant relief for nonoccurrence of a condition,<sup>267</sup> there should be no Restatement (Second) rules, factors, or formulae

263. William Draper Lewis, *How We Did It*, in RESTATEMENT IN THE COURTS: HISTORY OF THE AMERICAN LAW INSTITUTE AND THE FIRST RESTATEMENT OF THE LAW 3 (1945).

264. AMERICAN LAW INSTITUTE, <https://www.ali.org> [<https://perma.cc/39C8-B2W4>].

265. Robert A. Hillman, *Drafting Chapter 2 of the ALI's Employment Law Restatement in the Shadow of Contract Law: An Assessment of the Challenges and Results*, 100 CORNELL L.REV. 1341, 1359 (2015).

266. RESTATEMENT (SECOND) § 229.

267. See RESTATEMENT (SECOND) § 208. Similarly, there are no Restatement (Second) rules, factors, or formulae for lawyers and judges to struggle with in determining whether to grant relief for unconscionability. However, we believe that conditions is a more appropriate model for mistake than unconscionability. Neither relief for nonoccurrence of a condition nor relief for mistake is based on blame or fault—no "bad guys." Unconscionability, on the other hand, is inherently a pejorative concept. See Arthur Allen Leff, *Unconscionability and the Code: The Emperor New Clause*, 115 U. PA. L. REV. 485 (1967) ("nothing clear about the meaning of 'unconscionable' except perhaps that it is pejorative.").



for lawyers and judges to struggle with in determining whether to grant relief for an incorrect, unstated assumption of fact.

#### IV. CONCLUSION

The statement from the Michigan Supreme Court in *Lenawee County Board of Health v. Messerly* describing the Restatement (Second) of Contracts as providing “a better reasoned approach” to determining whether to grant relief because of an unstated incorrect assumption of fact, like so many of the statements of Bart Simpson in *The Simpsons*, is somewhat inaccurate and somewhat unrealistic. The restatement is intended to serve as a clarification and simplification of common law rules. No clarification and simplification of the common law rules can provide a “reasoned approach” to the law of mistake.

There are no common law rules regarding mistake for a Restatement to restate.<sup>268</sup> Even after the merger of law and equity, the law of mistake – the law of the effect of incorrect, unstated, mutual assumption of facts – looks to judicial discretion and equitable standards rather than to rules and reasoning. A court’s dilemma in determining whether to enforce Walker’s agreement to sell Rose II of Aberlone for one tenth of her actual value or the Pickleses’ agreement to buy a three-unit apartment building for more than ten times its actual value is striking the right balance between the general need for certainty and finality in contracts generally and the case-specific appeal of fairness and justice.<sup>269</sup>

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268. Ralph A. Newman, *Relief for Mistake in Contracting*, 54 CORN.L. REV. 232, 237 (1969). “It may be stated with assurance that our legal system has no firm test, even in the most general terms, for telling in what cases it is proper, and in what cases improper, to allow rescission for either mutual or unilateral mistake.”

269. Cf. Kevin K. Ho, *The Simpsons and the Law: Revealing Truth and Justice to the Masses*, 10 UCLA ENT. L. REV. 275, 288 (2003) (“Ultimately, ‘The Simpsons’ pushes a legal realist agenda. In Springfield, legal rules are meaningless, trivial and easily sidestepped.”).