Chapter 5
No Longer Taken to be Cognisant of the Law?
Mistake of Law in Contract and Restitution
in Canada and England

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For some considerable period the common law of both Canada and England barred the recovery of money paid under a mistake of law.¹ In the last decades of the twentieth century, both removed the bar. While the bar was removed because it prevented the restitution of an unjust enrichment,² the decisions have also been recognised as authority to allow the vitiation of a contract for mistake of law.³ This paper has two purposes. The first is to consider the relationship between mistake of law in restitution and in contract. The second is to examine the extent to which the Canadian cases concerned with mistake of law are

¹ Bilbie v. Lumley (1802) 2 East 469, 102 ER 448; Kelly v. Solari (1841) 9 M & W 54, 152 ER 24.
of assistance to the development of the English law. Canadian law developed more rapidly than English law in this area and the Supreme Court of Canada has recently reconsidered it in *Pacific National Investments Ltd. v. Victoria.*

The paper is arranged in three sections. The first considers the general role of mistake in contract and restitution. The second examines the development of the law which recognises the efficacy of a mistake of law. The final section seeks to ascertain what, if any, guidance for contract law in this area can be extracted from restitution law.

1) **THE ROLE OF MISTAKE**

In both Canadian and English common law, mistake stands at the boundary between contract and restitution. It is integral to the complex relationship between these two areas of law. Mistake is both an unjust factor allowing restitution and a factor which can vitiate a contract. In addition, a mistake operative in one area of law may take the parties into the other area. For example, a mistake which affects the formation of a contract renders the contract void or voidable. If there is, thus, no contract one or more of the parties are likely to have a claim for the restitution of an unjust enrichment. Absent the binding obligation of a contract, an unjust enrichment may well have been conferred.

In the words of Professor Waddams: ‘If the contract is enforceable, then the enrichment cannot be unjust. But if the enrichment is unjust then the contract must be unenforceable. The circle is inextricable.’ This ‘dual’ role of mistake

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6 To state the possibility that the contract may be voidable for mistake is necessarily to question whether the decision in *Great Peace Shipping Ltd. v. Tsavliris Salvage (International) Ltd.* (‘The Great Peace’) [2002] EWCA Civ 1407, [2003] QB 679 has effectively removed the equitable relief for a mistake which renders the contract voidable according to the principle identified by Lord Denning in *Solle v. Butcher* [1950] 1 KB 671.