

APPENDIX A

PRICE THEORY AND APPLICATIONS

Decisions, Markets, and Information

SEVENTH EDITION

JACK HIRSHLEIFER

University of California, Los Angeles

AMIHAI GLAZER

University of California, Irvine

DAVID HIRSHLEIFER

Ohio State University

 **CAMBRIDGE**
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Market share by group size, medical practice

Group size	1965	1969	1975	1980
1-2	84.69%	78.25%	68.67%	67.45%
3-7	8.37%	11.53%	13.31%	13.14%
8-25	4.30%	5.09%	8.53%	7.78%
26-99	1.33%	3.00%	5.08%	4.66%
100+	1.31%	2.12%	4.42%	6.97%
Total	100%	100%	100%	100%

Sources: Frech and Ginsberg, p. 30; Marder and Zuckerman, p. 167.

The data in the table can be interpreted quite differently, depending on whether a *static* or *dynamic* viewpoint is adopted. From the static point of view, even in 1980 most of the market consisted of single-physician or two-physician groups. This suggests that small size must indeed be the most efficient in medical practice. On the other hand, these sizes declined relative to all others. So it appears that, *on the margin*, larger firms have been more profitable. New entrants have found it profitable to form larger groups, whereas exiting firms have come disproportionately from the one-to-two-physician category.

A possible explanation is that in any period there is an efficient *mixture* of firm sizes. Even though one-physician and two-physician firms may on the whole be most efficient, in recent years there may have been relatively too many firms of these sizes. So market shares have shifted in favor of the larger groups.

^a H. E. Frech III and P. Ginsberg, "Optimal Scale in Medical Practice: A Survivor Analysis," *Journal of Business*, v. 47 (January 1974), p. 30.

^b William D. Marder and Stephan Zuckerman, "Competition and Medical Groups: A Survivor Analysis," *Journal of Health Economics*, v. 4 (June 1985), p. 167.

7.3 THE BENEFITS OF EXCHANGE: CONSUMER SURPLUS AND PRODUCER SURPLUS

One of the most important principles of economics is *The Fundamental Theorem of Exchange*:

PROPOSITION: Trade is mutually beneficial.

Voluntary exchange benefits all parties involved. An alternative, mistaken view might be called "the exploitation theory" – the idea that what one side gains in exchange is a loss to the other side. The proof of the Fundamental Theorem of Exchange, and disproof of the exploitation theory, is elementary. In voluntary exchange between rational persons, both sides must expect to gain. True, owing to mistakes or trickery, one or both participants might lose out. However, if beliefs are not systematically mistaken, the proposition remains true.

But *how much* does each side gain from trade? As explained in Chapter 3, economists do not generally believe it possible to compare one person's utility with another person's. So it would be helpful to have a way of measuring the benefits of trade in objective units, independent of subjective utilities. Consumer Surplus and Producer Surplus are such measures. In Figure 7.7 the market supply-demand equilibrium is at price P^*

The Fundamental Theorem of Exchange – that buyers and sellers both gain from trade – was introduced in Chapter 7. Many economic fallacies, for example, the most common arguments for protective tariffs, overlook the point that voluntary trade benefits both sides.

Still, some objections might be raised. Suppose a buyer paid good money for a beachfront lot that proves to be miles out to sea. The answer is that the parties here did not truly agree on an exchange. Owing to trickery, there was no “meeting of the minds.” Another problem: a momentary want may misrepresent a person’s true preferences. Esau sold his birthright to Jacob for a mess of pottage (*Genesis*, Chapter 25) and regretted the transaction afterward. Third and most serious, many of us would be better off not satisfying even our most intense desires. Think of a drug addict. Getting what you wish for is often the worst thing that could happen to you. Still, it can always be said that rational participants in voluntary exchange *believe* they will both gain.

Mutual gain from trade involves two distinct elements. The first is an improved (mutually preferred) *allocation of consumption goods*. Suppose Ida and John are endowed with equal quantities of tea and coffee, but Ida prefers tea and John prefers coffee. The potential gain from trade is obvious. Alternatively, suppose Ida and John both prefer bread with butter, but Ida is initially endowed with all the bread and John with all the butter. Again, both can benefit from trade.

The second source of mutual gain is *rearrangement of production*. If Ida is better at baking bread and John at churning butter, trade permits each to concentrate on his or her area of superiority.

CONCLUSION

Voluntary exchange is mutually beneficial because (1) Each person obtains a consumption basket he or she prefers to the original endowment. (2) People can specialize in production, thereby increasing the totals of goods available.

This chapter will probe more deeply into these gains from exchange. It will also deal with *transaction costs* that limit the benefits from trade, and with money as a way of minimizing transaction costs. Later on the discussion will follow up a topic introduced in Chapter 11 – asymmetrical information in exchange. An important trade mechanism, auctions, for which asymmetrical information plays a crucial role, will then be analyzed.

14.1 PURE EXCHANGE: THE EDGEWORTH BOX

The first benefit of trade is that, through exchange, people can obtain baskets of goods that better match everyone’s desires.

In the mid-1800s, the United States exported wheat to Britain in exchange for manufactured goods. Using the notation X for manufactures and Y for wheat, typical citizens of the two countries are pictured in Figure 14.1. In Panel (a) Ida, the American, has an endowment at position E_i near the vertical axis. (She starts with a relatively large amount of wheat Y .) Panel (b) shows that John, the Briton, has an endowment at E_j , near the horizontal axis. (He starts with a relatively large amount of manufactures X .) The bold lines indicate the desired directions of exchange. If Ida moves down and to the right (giving up wheat for manufactures) while John moves up and to the left (giving up manufactures for wheat), each can attain a higher indifference curve.

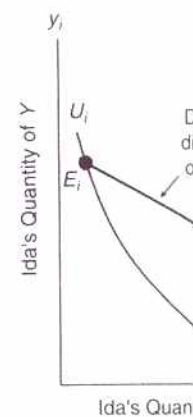


Figure 14.1. Describing the Edgeworth box.

In panel (a) Ida, a typical U.S. citizen, has a diversified preference for wheat and manufactures. In panel (b) John, a typical Briton, has a diversified preference for manufactures and wheat.

The Edgeworth box (b) of the previous figure shows the right corner of the endowment position up and to the right. The right corner of the endowment position up and to the right will confirm when referred to the Edgeworth box.

The size of the endowment point E_i is equal to the size of the endowment point E_j is equal to the amount of manufactures available.

Exchange is possible if the endowment point E_i and E_j generate a line segment. John's wheat in exchange for manufactures. If they agree to point T within the Edgeworth box, the preference directions from the endowment point T will be willing to trade.

Suppose that the endowment point T is generated as so as to arrive at a point T generated area. This means that the endowment point T is mutually advantageous.

APPENDIX B

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MISTAKE, DISCLOSURE, INFORMATION, AND THE LAW OF CONTRACTS*

ANTHONY T. KROMAN**

"The greater part of the writers on natural law] are of opinion, that the good faith which ought to govern the contract of sale, only requires that the vendor should represent the thing sold as it is, without dissimulating its defects, and not to sell it above the price which it bears at the time of the contract; that he commits no injustice in selling it at this price, although he knows that the price must soon fall; that he is not obliged to disclose to the vendee a knowledge which he may have of the circumstances that may produce a depression of the price; the vendee having no more right to demand that the vendor should impart this knowledge than that he should give away his property. . . ."

Pothier, *Traité du Contract de Vente****

INTRODUCTION

This paper attempts to explain an apparent inconsistency in the law of contracts. On the one hand, there are many contract cases—generally classified under the rubric of unilateral mistake—which hold that a promisor is excused from his obligation to either perform or pay damages when he is mistaken about some important fact and his error is known (or should be known) to the other party. On the other hand, cases may also be found which state that in some circumstances one party to a contract is entitled to withhold information he knows the other party lacks. These latter cases typically rest upon the proposition that the party with knowledge does not owe the other party a "duty of disclosure."

Although these two lines of cases employ different doctrinal techniques, they both address essentially the same question: if one party to a contract knows or has reason to know that the other party is mistaken about a

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**Assistant Professor of Law, University of Chicago Law School.

***As quoted in Laidlaw v. Organ, 15 U.S. (2 Wheat.) 187-88, note b.

particular fact, does the knowledgeable party have a duty to speak up or may he remain silent and capitalize on the other party's error? The aim of this paper is to provide a theory which will explain why some contract cases impose such a duty and others do not.

The paper is divided into three parts. In the first part, I discuss the problem of unilateral mistake and offer an economic justification for the rule that a unilaterally mistaken promisor is excused when his error is known or should be known to the other party. In the second part of the paper, I propose a distinction between two kinds of information—information which is the result of a deliberate search and information which has been casually acquired. I argue that a legal privilege of nondisclosure is in effect a property right and attempt to show that where special knowledge or information is the fruit of a deliberate search the assignment of a property right of this sort is required in order to insure production of the information at a socially desirable level. I then attempt to show that a distinction between deliberately and casually acquired information is useful in explaining why disclosure is required in some contract cases but not in others.

In the third, and concluding, part of the paper, I return briefly to the problem of unilateral mistake, in order to reconcile the apparent conflict between the two lines of cases described above. I argue that this apparent conflict disappears when the unilateral mistake cases are viewed from the perspective developed in the second part of the paper.

I. MISTAKE AND THE ALLOCATION OF RISK.

Every contractual agreement is predicated upon a number of factual assumptions about the world. Some of these assumptions are shared by the parties to the contract and some are not. It is always possible that a particular factual assumption is mistaken.¹ From an economic point of view, the risk of such a mistake (whether it be the mistake of only one party or both) represents a cost.² It is a cost to the contracting parties themselves and to

¹ In a strictly economic sense, not all predictive errors are mistakes. An individual may fail to correctly predict a particular outcome merely because his knowledge of the world is incomplete. But unless it would be cost-justified for him to reduce the incompleteness of his knowledge by acquiring new information about the world, it would be incorrect—from an economic point of view—to regard a predictive error of this sort as a genuine mistake. An economist would be likely to define a mistake as an error in prediction resulting from a state of uncertainty which the mistaken party himself would agree could have been cured at a reasonable cost (by augmenting his knowledge of the world). In ordinary parlance, however, the term "mistake" is often used in a much broader sense to mean simply an error which would not have been made if the mistaken party's knowledge of the world had been more complete. It is in this ordinary sense that I use the term here.

² Traditionally, academic writers have urged that a variety of different factors be considered in deciding when to excuse a mistaken promisor. The following have been thought especially important: 1) the "nature" of the mistake: Samuel Williston, 13 A. Treatise on the Law of

society as a whole since the actual occurrence of a mistake always (potentially) increases the resources which must be devoted to the process of allocating goods to their highest-valuing users.

There are basically two ways in which this particular cost can be reduced to an optimal level. First, one or both of the parties can take steps to prevent the mistake from occurring. Second, to the extent a mistake cannot be prevented, either party (or both) can insure against the risk of its occurrence

Contracts §§ 1544, 1569, 1570 (3d ed. 1970) [hereinafter cited as Williston]; Arthur Linton Corbin, 3 Corbin on Contracts § 597 (1960) [hereinafter cited as Corbin]; Restatement of Restitution § 9, comment c, § 16, comment c (1937); Restatement of Contracts § 502 (1932); 2) the likelihood of unjust enrichment if the promise is enforced: James Bradley Thayer, Unilateral Mistake and Unjust Enrichment as a Ground for the Avoidance of Legal Transactions, in Harvard Legal Essays 467-99 (1934); George E. Palmer, Mistake and Unjust Enrichment § 53, 96 (1962) [hereinafter cited as Palmer]; 3) the magnitude of the promisor's potential loss: Warren A. Seavey, Problems in Restitution, 7 Okla. L. Rev. 257, 267 (1954); Edward H. Rabin, A Proposed Black-Letter Rule Concerning Mistaken Assumptions in Bargaining Transactions, 45 Tex. L. Rev. 1273, 1288-91 (1967) [hereinafter cited as Rabin]; 4) the difficulty of compensating the promisee for any costs he may have incurred in reliance on the promise: Annot., 59 A.L.R. 809 (1929); Rabin at 1299; and 5) the allocation—to one party or the other—of the risk of the mistake: Rabin at 1292-94; Richard A. Posner, Economic Analysis of Law, 73-74 (2d ed. 1977) [hereinafter cited as Posner].

It has usually been assumed that each of these factors ought to be given some unspectifiable weight in deciding when to excuse a mistaken promisor. See Rabin at 1275. Recent treatments of mistake, however, particularly emphasize the importance of determining which party to the contract bears the risk of the mistake in question. This tendency to emphasize the importance of risk-allocation is quite apparent, for example, in the proposed chapter on mistake in the Second Restatement of Contracts. See Restatement (Second) of Contracts §§ 294-96 and Introductory Note (Tent. Draft No. 10, 1975).

The idea that the law often performs a risk-allocation function is of course not a new one. See Edwin W. Patterson, The Apportionment of Business Risks Through Legal Devices, 24 Colum. L. Rev. 335 (1924). But a growing and increasingly sophisticated literature on the subject has deepened our understanding of the concept of risk and has refined its use as an analytical tool. See, for example, Richard A. Posner & Andrew M. Rosenfield, Impossibility and Related Doctrines in Contract Law: An Economic Analysis, 6 J. Leg. Studies 83 (1977); Stephen S. Ashley, The Economic Implications of the Doctrine of Impossibility, 26 Hastings L. J. 1251 (1975); Paul L. Joskow, Commercial Impossibility, The Uranium Market and the Westinghouse Case, 6 J. Leg. Studies 119 (1977); Posner at 73-74; John P. Brown, Product Liability: The Case of an Asset with a Random Life, 64 Am. Econ. Rev. 149 (1974); Alan Schwartz, Sales Law and Indications, 50 S. Cal. L. Rev. 1 (1976); Kenneth J. Arrow, Insurance, Risk and Resource Allocation, in Theory of Risk-Bearing (1971). An older, but useful, book is Charles O. Hardy, Risk and Risk-Bearing (1923).

As yet, no one has employed the idea of risk-allocation to give a systematic account of the law of mistake as a whole. Posner and Rosenfield, however, offer such an account of the closely allied problems of omission and frustration. A theory of mistake based upon the notion of risk-allocation may easily be constructed by generalizing from what has already been said about these related subjects.

Since it rests upon the principle of efficiency and is inspired by the work of scholars writing in the so-called "law and economics" field, I often characterize the point of view adopted in this paper as the "economic" point of view. There is, of course, much more to the economic theory of law in general and contract law in particular than the notion of risk-allocation. See, for example, Posner at 65-69; and Richard A. Posner, Gratuitous Promises in Economics and Law, 6 J. Leg. Studies 411 (1977).

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by purchasing insurance from a professional insurer or by self-insuring.³ In what follows, I shall be concerned exclusively with the prevention of mistakes. Although this limitation might appear arbitrary, it is warranted by the fact that most mistake cases involve errors which can be prevented at a reasonable cost. Where a risk cannot be prevented at a reasonable cost—which is true of many of the risks associated with what the law calls “super-vening impossibilities”—insurance is the only effective means of risk reduction. (This is why the concept of insurance unavoidably plays a more prominent role in the treatment of impossibility than it does in the analysis of mistake.)⁴

Information is the antidote to mistake. Although information is costly to produce,⁵ one individual may be able to obtain relevant information more cheaply than another. If the parties to a contract are acting rationally, they will minimize the joint costs of a potential mistake by assigning the risk of its occurrence to the party who is the better (cheaper) information-gatherer. Where the parties have actually assigned the risk—whether explicitly, or implicitly through their adherence to trade custom and past patterns of dealing—their own allocation must be respected.⁶ Where they have not—and there is a resulting gap in the contract⁷—a court concerned with economic efficiency should impose the risk on the better information-gatherer. This is so for familiar reasons: by allocating the risk in this way, an

efficiency-minded court reduces the transaction costs of the contracting process itself.⁸

The most important doctrinal distinction in the law of mistake is the one drawn between “mutual” and “unilateral” mistakes. Traditionally, courts have been more reluctant to excuse a mistaken promisor where he alone is mistaken than where the other party is mistaken as to the same fact.⁹ Although relief for unilateral mistake has been liberalized during the last half-century,¹⁰ (to the point where some commentators have questioned the utility of the distinction between unilateral and mutual mistake and a few have even urged its abolition),¹¹ it is still “black-letter” law that a promisor whose mistake is not shared by the other party is less likely to be relieved of his duty to perform than a promisor whose mistake happens to be mutual.¹²

Viewed broadly, the distinction between mutual and unilateral mistake makes sense from an economic point of view. Where both parties to a contract are mistaken about the same fact or state of affairs, deciding which of them would have been better able to prevent the mistake may well require a detailed inquiry regarding the nature of the mistake and the (economic) role or position of each of the parties involved.¹³ But where only one party is mistaken, it is reasonable to assume that he is in a better position than the other party to prevent his own error. As we shall see, this is not true in every case, but it provides a useful beginning point for analysis and helps to explain the generic difference between mutual and unilateral mistakes.

The case of *Bowser v. Hamilton Glass Co.*¹⁴ provides a simple illustration. In *Bowser*, the plaintiff was a contractor working on a government project. He solicited bids from subcontractors for the production, among other things, of “variable reflector glasses.” In response to the solicitation, the defendant submitted a bid of \$.22 each for 1,400 glasses. The plaintiff sent the defendant a formal “purchase order,” which constituted his offer to enter a binding contract. Detailed specifications and blueprints were attached to the purchase order. The defendant acknowledged receipt of the purchase

³ Posner, *supra* note 2, at 74-79; Richard A. Posner & Andrew M. Rosenfield, *supra* note 2.

⁴ Many of the events which constitute supervening impossibilities cannot be prevented at a reasonable cost by either contracting party. For example, it is impossible to prevent the outbreak of war (*Paradine v. Jane*, 82 Eng. Rep. 897 (K.B., 1647), *Société Franco Tunisienne d'Arment v. Sidermar S.P.A.*, [1961] 2 Q.B. 278), a crop failure (*Howell v. Coupland*, [1874] 9 Q.B. 462, *Anderson v. May*, 50 Mfin. 280, 57 N.W. 530 (1892)), the establishment of a government regulation (*Lloyd v. Murphy*, 25 Cal. 2d 48, 153 P.2d 47 (1944)), or the cancellation of a coronation parade (*Krell v. Henry*, [1903] 2 K.B. 740 (C.A.)). Where an event cannot be prevented from occurring, the risk of its occurrence can be effectively reduced only through insurance. This is the principal reason why insurance plays a more important role in impossibility cases than it does in dealing with mistake. Richard A. Posner & Andrew M. Rosenfield, *supra* note 2, at 91.

⁵ George J. Stigler, *The Economics of Information*, 69 J. Pol. Econ. 213 (1961), reprinted in *The Organization of Industry* 171 (1968).

⁶ For a discussion of the way in which trade customs may affect the allocation of risk, see Harold J. Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 Colum. L. Rev. 1413 (1963), and Note, *Custom and Trade Usages: Its Application to Commercial Dealings and the Common Law*, 55 Colum. L. Rev. 1192 (1955).

⁷ Whether such a gap exists will depend upon the intentions of the parties as reconstructed by a process of judicial interpretation. The fact that a contract does not cover a particular point explicitly does not mean that the parties failed to reach an understanding with respect to the point in question. Only if no such understanding exists can the contract be said to contain a genuine gap or lacuna. The difficult problems of interpretation which are involved in identifying and then filling gaps are explored in two articles by Professor Farnsworth. See E. Allen Farnsworth, “Meaning” in the Law of Contracts, 76 Yale L.J. 939 (1967), and *id.*, “Disputes Over Omissions in Contracts,” 68 Colum. L. Rev. 860 (1968).

⁸ Posner, *supra* note 2, at 74-79; Richard A. Posner & Andrew M. Rosenfield, *supra* note 2, at 88-89.

⁹ Restatement (Second) of Contracts, § 295; Comment A (Tent. Draft No. 10, 1975).

¹⁰ *Id.*

¹¹ 3 Corbin, *supra* note 2, at § 608; Palmer, *supra* note 2, at 67, 96-98; Rabin, *supra* note 2, at 1277-79.

¹² Although it liberalizes relief for unilateral mistake, the Second Restatement of Contracts preserves the basic doctrinal distinction between unilateral and mutual mistake, and makes relief less freely available in the former case than in the latter. In this regard, compare Restatement (Second) of Contracts, §§ 294-95 (Tent. Draft No. 10, 1975) with Restatement of Contracts §§ 502-03 (1932).

¹³ Professor Posner's discussion of *Sherwood v. Walker* illustrates this point. See Posner, *supra* note 2.

¹⁴ 207 F.2d 341 (7th Cir. 1953).

order and produced the glasses. Upon learning that the finished glasses did not conform to the contract specifications, the defendant informed the plaintiff that it would "cancel" the agreement. The plaintiff obtained the glasses from another manufacturer and sued to recover the difference between what it eventually had to pay for them and what it had agreed to pay the defendant. The defendant asserted that it had been mistaken as to the nature of the goods to be produced. The court, in holding for the plaintiff, said that the defendant's mistake did not justify relief, asserting that a unilateral mistake will excuse only where it is known to the other party.

Clearly, the result in *Bowser* makes economic sense. The defendant was in the best position to guard against his own mistake by carefully reading the specifications and examining the blueprints. Although the plaintiff could have prevented the mistake by acquiring the necessary expertise himself, by supervising the defendant's own initial reading of the proposed contract, and by periodically checking to make sure that the produced goods conformed to the contract specifications, it would have been very expensive for him to do so. The joint costs of an error of this sort are minimized by putting the risk of the mistake on the mistaken party. This is the solution the parties themselves would have agreed to if they had been made aware of the risk at the time the contract was formed. It is also the solution which is optimal from a social point of view.

In the past, it was often asserted that, absent fraud or misrepresentation, a unilateral mistake never justifies excusing the mistaken party from his duty to perform or pay damages.¹⁵ This is certainly no longer the law, and Corbin has demonstrated that in all probability it never was.¹⁶ One well-established exception protects the unilaterally mistaken promisor whose error is known or reasonably should be known to the other party.¹⁷ Relief has long been available in this case despite the fact that the promisor's mistake is not shared by the other party to the contract.

For example, if a bidder submits a bid containing a clerical error or miscalculation, and the mistake is either evident on the face of the bid or may reasonably be inferred from a discrepancy between it and other bids, the bidder will typically be permitted to withdraw the bid without having to

¹⁵ 3 Corbin, *supra* note 2, at § 608; Restatement of Contracts § 503 (1932).

¹⁶ 3 Corbin, *supra* note 2, at § 608; "Statements are exceedingly common, both in texts and in court opinions, that relief will not be given on the ground of mistake unless the mistake is 'mutual'." Such a broad generalization is untrue. Seldom is it accompanied by either definition or analysis. . . . Cases do not always submit to be classified with either 'mutual mistake' or 'unilateral mistake'. And even when they do submit, the solution does not mechanically follow in accordance with a separate set of rules for each class. Very often relief has been and will be granted where the mistake is unilateral."

¹⁷ 3 Corbin, *supra* note 2, at § 610; Benedict I. Lubell, Unilateral Palpable and Impalpable Mistake in Construction Contracts, 16 Minn. L. Rev. 137 (1932) [hereinafter cited as Lubell]; Rabin, *supra* note 2, at 1279-81.

pay damages (even after the bid has been accepted and in some cases relied upon by the other party).¹⁸ Or, to take another example, suppose that A submits a proposed contract in writing to B and knows that B has misread the document. If B accepts the proposed contract, upon discovering his error, he may avoid his obligations under the contract and has no duty to compensate A for A's lost expectation.¹⁹ A closely related situation involves the offer which is "too good to be true." One receiving such an offer cannot "snap it up"; if he does so, the offeror may withdraw the offer despite the fact that it has been accepted.²⁰

In each of the cases just described, one party is mistaken and the other has actual knowledge or reason to know of his mistake. The mistaken party in each case is excused from meeting any contractual obligations owed to the party with knowledge.

A rule of this sort is a sensible one. While it is true that in each of the cases just described the mistaken party is likely to be the one best able to prevent the mistake from occurring in the first place (by exercising care in preparing his bid or in reading the proposed contract which has been submitted to him), the other party may be able to rectify the mistake more cheaply in the interim between its occurrence and the formation of the contract. At one moment in time the mistaken party is the better mistake-preventer (information-gatherer). At some subsequent moment, however, the other

¹⁸ "Suppose, first, a case in which a bidding contractor makes an offer to supply specified goods or to do specified work for a definitely named price, and that he was caused to name this price by an antecedent error of computation. If, before acceptance, the offerer knows, or has reason to know, that a material error has been made, he is seldom mean enough to accept; and if he does accept, the courts have no difficulty in throwing him out. He is not permitted to 'snap up' such an offer and profit thereby." 3 Corbin, *supra* note 2, at § 609. For a case in which a bidding contractor was permitted to withdraw his bid despite acceptance and reliance by the party to whom it was submitted, see *Union Tank Car Co. v. Wheat Brothers*, 15 Utah 2d 101, 387 P.2d 1000 (1964).

It would be irrational from an economic point of view to permit the party with knowledge (or reason to know) of the mistake to enforce the other party's promise on reliance grounds. A rule of this sort would encourage reliance precisely where it ought to be discouraged.

If the non-mistaken party has no reason to know of the error, however, the extent of his reliance is often a factor in determining the damages to which he is entitled. If he has substantially relied on the mistaken party's promise, the non-mistaken party will usually be given the right to enforce the contract (by suing to recover his lost expectation). If, on the other hand, the non-mistaken party has not substantially relied on the promise before the error is discovered, courts will often allow the mistaken party to withdraw from the contract on the condition that he compensate the non-mistaken party for any reliance expenses or incidental costs he has incurred (such as having to solicit new bids).

¹⁹ 3 Corbin, *supra* note 2, at § 607; Williston, *supra* note 2, at § 1577. See also Restatement of Contracts § 505, Comment A (1932) (dealing with the mistaken party's right to have the contract reformed).

²⁰ 1 Williston, *supra* note 2, at § 94. See *Bell v. Carroll*, 212 Ky. 231, 278 S.W. 541 (1925), *German Fruit Co. v. Western Union Tel. Co.*, 137 Cal. 598, 70 P. 658 (1902), *United States v. Braunstein*, 75 F. Supp. 137 (S.D.N.Y. 1947).

