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REFORMATION OF INSTRUMENTS

AT COMMON LAW, when contracts or conveyances had been reduced to writing, the written instruments were conclusive as to the terms of such contracts or conveyances, especially in the case of instruments under seals. Social interest in the security of transactions required that great importance be attached to these instruments. However, to hold such an instrument absolutely invulnerable was often unjust, if it did not express the actual intent of the parties. Therefore, equity offers relief from such injustice by rectifying, or reforming, the written instrument to make it conform to the actual intent. Having taken jurisdiction to reform, equity will give whatever further relief is necessary to settle the whole case.¹

Rather than define reformation, Texas decisions distinguish it from other remedies.² So does Professor Pomeroy, who, however, states the following rule:

Reformation is appropriate, when an agreement has been made, or a transaction has been entered into or determined upon, as intended by all the parties interested, but in reducing such agreement or transaction to writing, either through the mistake common to both parties, or through the mistake of the plaintiff accompanied by the fraudulent knowledge and procurement of the defendant, the written instrument fails to express the real agreement or transaction.³

A common instance of mutual mistake is that of a conveyance which, because of a mistake of the scrivener not discovered by grantor or grantee, describes too much or too little property. In the leading case of *Cole v. Fickett*⁴ the right to reformation, and the corresponding duty to submit to reformation, passed to subsequent grantees when the mistake was innocently repeated in subsequent deeds. Relief is also given for mutual mistake when the parties to a deed have used quitclaim language, intending

¹ CLARK, PRINCIPLES OF EQUITY (1919) §331.

² 36 TEX. JUR., *Reformation of Instruments*, § 2, p. 713.

³ POMEROY'S EQUITY JURISPRUDENCE (5th ed. 1941) § 870, p. 384.

⁴ 95 Me. 265, 49 Atl. 1066 (1901).

thereby to convey a definite interest in a larger tract in the mistaken belief that such interest is all the grantor owns, whereas the fact is that the grantor owns a larger interest and the grantee learns this but remains silent prior to delivery of the deed.⁵

Reformation for mutual mistake has been given of a written contract intended to cover the entire production of the plaintiff, in which the parties mistakenly used a term covering the exact amount of anticipated production instead of the term "entire production," the plaintiff's later crop failure having made it impossible for him to deliver the specified amount.⁶ Also, where a note for \$10,000 was given by one partner to another, in their mistaken belief that this was the correct amount to cover a previous loan of \$10,000 from partnership funds, the note was reformed to cover only the correct amount of \$5,000.⁷

While reformation may be secured for mutual mistake, as illustrated by the foregoing examples, it is not usually possible to obtain reformation for unilateral mistake. Most courts hold that the unilateral mistake of one party, in the absence of fraud or imposition on the part of the other party, is insufficient ground for reformation.⁸ Some courts have held, however, that reformation may be had for unilateral mistake alone if an unconscionable advantage has been gained and there was no gross negligence on the part of the petitioner, either in falling into the error or in not sooner claiming redress, and no intervening equities have accrued.⁹ A suggestion of this possibility is to be found in one Texas case where, however, the court indicates rescission, not reformation, would be the likely remedy.¹⁰ This is criticized by at least

⁵ Cleghorn v. Zumwalt, 83 Cal. 155, 23 Pac. 294 (1890).

⁶ Snipes Mountain Co. v. Benz Brothers & Co., 162 Wash. 334, 298 Pac. 714, 74 A. L. R. 1287 (1931).

⁷ Gould v. Emerson, 160 Mass. 438, 35 N. E. 1065 (1894).

⁸ By-Fi Building & Loan Association v. New York Casualty Co., 116 N. J. Eq. 265, 173 Atl. 90 (1934); New York Life Insurance Co. v. Kimball, 93 Vt. 147, 106 Atl. 676 (1919).

⁹ Brown v. Lamphear, 35 Vt. 252 (1862).

¹⁰ Arden v. Boone, 187 S. W. 995 (Tex. Civ. App. 1916), *aff'd*, 221 S. W. 265 (Tex. Comm. App. 1920).

one writer, who wonders how far the court would carry the doctrine in granting reformation.¹¹ The overwhelming majority of jurisdictions give reformation for unilateral mistake when the defendant is guilty of fraud whereby the terms of the instrument are suppressed or misrepresented so that the instrument executed does not accurately state the agreement actually made.¹²

The petitioner is denied reformation when he and the defendant originally intended the contract as written, although the petitioner would not have executed the written contract if he had not made a mistake as to some collateral or extrinsic fact.¹³ The same result is reached even though the petitioner's mistake about an extrinsic fact is coupled with the defendant's knowledge of the mistake and fraudulent nondisclosure, so long as the fraud does not result in the instrument's failing to state accurately the contract intended and made.¹⁴ Williston states the rule as follows:

If, because of mistake as to an antecedent or existing situation, the parties make a written instrument which they might not have made, except for the mistake, the court cannot reform the writing into one which it thinks they would have made, but in fact never agreed to make.¹⁵

In voluntary transactions, the donor may have the instrument reformed so as to convey the lesser amount he may have intended. However, if a conveyance conveys less than the donor intended, a donee (who is a mere volunteer) may not have the deed reformed against the donor.¹⁶

The right which a petitioner might otherwise have to reformation is subject to the limitation that it is never conferred against

¹¹ Patterson, *Equitable Relief for Unilateral Mistake*, 28 Col. L. Rev. 859, 898 (1928).

¹² Russell v. Shell Petroleum Corporation, 66 F. 2d 864 (10th Cir. 1933); Cleghorn v. Zumwalt, 83 Cal. 155, 23 Pac. 294 (1890); Hitchins v. Pettinghill, 58 N. H. 3 (1876).

¹³ Isaacs v. Schmuck, 245 N. Y. 77, 156 N. E. 621, 51 A. L. R. 1454 (1927); Curtis v. Albee, 167 N. Y. 360, 60 N. E. 660 (1901).

¹⁴ Russell v. Shell, cited *supra* note 12.

¹⁵ 5 WILLISTON, CONTRACTS (Rev. ed. 1937) § 1549.

¹⁶ Andrews v. Andrews, 12 Ind. 348 (1849).

a subsequent bona fide purchaser for value and without notice.¹⁷ Consistent with this rule appears to be the case of *Rea v. Wilson*,¹⁸ in which a mortgagee, who had received the mortgage to secure a past debt, was permitted reformation of the mortgage and was held to be prior to other creditors of the mortgagor who had established attachment liens subsequent to delivery of the unrecorded defective mortgage and without notice. The pre-existing debt was sufficient to give the mortgagee an equitable mortgage, including the right to reform the written instrument to conform with the parties' intention, and this was superior to the intervening rights of creditors who paid no "fresh money" for their liens and were not, therefore, bona fide purchasers for value. The same result appears likely in Texas, despite the provisions of a statute,¹⁹ because judgment creditors' liens are inferior to equitable titles or rights to which the registration laws do not apply, even though the creditor has no notice of them at the time when his lien attaches.²⁰ The right to reform, being a constructive trust, would not be recordable.

Laches and the statute of limitation are frequently important defenses in suits for reformation. Clark summarizes the general rules as follows:

If the plaintiff has all the time been in undisturbed possession of the tract which was mistakenly omitted from the conveyance, no length of delay will bar him. In cases where the statute of limitations is applied by way of analogy, the statutory period is usually considered as beginning when the plaintiff found out the mistake or could have discovered it by the exercise of ordinary care. In applying the equitable doctrine of laches the courts . . . will take into consideration the entire facts of the case in determining whether, on the whole, the delay of the plaintiff

¹⁷ *Op. cit. supra* note 3, at 387.

¹⁸ 112 Iowa 517, 84 N. W. 539 (1900).

¹⁹ TEX. REV. CIV. STAT. (Vernon, 1948) art. 6627: "... [M]ortgages shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless . . . recorded. . . ."

²⁰ 36 TEX. JUR., Records and Registration Acts, § 102, p. 590, citing many cases.

has been such as to render the giving of reformation inequitable to the defendant.²¹

A review of Texas cases indicates the importance of the petitioner's burden in matters of evidence. On the party seeking reformation rests the burden of proving the alleged mistake, and that it was mutual between the original parties to the instrument; also of proving the true terms of the agreement and the facts which entitle the pleader to reformation.²² Parol evidence is admissible as to the terms of the real agreement.²³ But, there must be a finding upon evidence that is "clear, exact, and satisfactory" that the mistake of fact was mutual. Also, the party seeking reformation must prove by such evidence not only "what the true agreement was," but "must go further and establish the fact that the terms or provisions of the writing which differ from the true agreement made were placed in the instrument by mutual mistake."²⁴ But while the evidence must be clear, exact, and satisfactory, the court must determine, as a matter of law, whether this test is met and the jury is not to be instructed in such terms.²⁵ This review of cases discloses that the rules are the same when the petitioner seeks reformation for unilateral mistake mixed with fraud of the opposite party.

In the great majority of Texas reformation cases reported in the last five years, the petitioners sought to reform deeds. The general rules previously discussed were recognized and applied. Relief in several cases depended solely on whether the fact-finders (usually the judge) believed the petitioners had proved that

²¹ *Op. cit. supra* note 1, § 355.

²² *Ascher v. Bird*, 209 S. W. 2d 637 (Tex. Civ. App. 1948) *er. ref.*

²³ *Olvey v. Jones*, 137 Tex. 639, 156 S. W. 2d 977 (1941), *aff'g* 134 S. W. 2d 845 (Tex. Civ. App. 1939).

²⁴ *Pegues v. Dilworth*, 134 Tex. 169, 132 S. W. 2d 582 (1939), *aff'g* 104 S. W. 2d 558 (Tex. Civ. App. 1937); *Lander Lumber Co. v. Williams*, 250 S. W. 2d 317 (Tex. Civ. App. 1952) *er. ref.*

²⁵ *Reliance Ins. Co. v. Pruitt*, 94 S. W. 2d 833 (Tex. Civ. App. 1936) *er. dism.*

mutual mistake caused the alleged misdescriptions or omissions in the deeds.²⁶

The defense of laches and statute of limitations has occurred frequently in other recent cases involving reformation of deeds. In two cases the courts have applied the rule that the statute of limitations does not begin to run against a suit to reform a deed for mutual mistake until the mistake has been discovered or should have been discovered by the exercise of reasonable diligence; furthermore, the four-year statute of limitations²⁷ is said to apply.²⁸ In *Cox v. Clay*²⁹ these rules were applied where the petitioner had quitclaimed, to his brother, his undivided interest in a certain described tract of land, each believing that the petitioner had only a 1/20th interest. Previously, unknown to both the petitioner and his brother, their mother gave her one-half interest, by recorded deed, to the petitioner. After continuous absence from the state for nearly twenty years following the conveyance to his brother, the petitioner returned, discovered the prior deed, and sued to reform. Concerning the defense of statute of limitations, the court said that if petitioner was in complete ignorance of the deed from his mother prior to the time of his alleged discovery, then he had not failed in the exercise of reasonable diligence to discover the mistake in his own deed. He was not bound to search for such a deed as his mother's and was not given constructive notice of it. Not being a conscious purchaser of the land, he did not come under the class of persons required to search the records or to whom such records constitute constructive notice.

The defense of statute of limitations was successfully overcome by the plaintiff in *Hutchins v. Birdsong*.³⁰ There the plaintiff,

²⁶ *Hardin v. State*, 254 S. W. 2d 898 (Tex. Civ. App. 1952); *Lander Lumber Co. v. Williams*, cited *supra* note 24; *Gaither v. Gaither*, 234 S. W. 2d 135 (Tex. Civ. App. 1950) *er. ref. n.r.e.*; *Enos v. Leediker*, 214 S. W. 2d 694 (Tex. Civ. App. 1948); *Sunderman v. Roberts*, 213 S. W. 2d 705 (Tex. Civ. App. 1948).

²⁷ TEX. REV. CIV. STAT. (Vernon, 1948) art. 5529.

²⁸ *Clopton v. Cecil*, 234 S. W. 2d 251 (Tex. Civ. App. 1950) *er. ref. n.r.e.*; *Gaither v. Gaither*, cited *supra* note 26..

²⁹ 237 S. W. 2d 798 (Tex. Civ. App. 1950) *er. ref. n.r.e.*

³⁰ 258 S. W. 2d 218 (Tex. Civ. App. 1953).

Birdsong, advanced the purchase price of a tract of land to Ward, the defendant's husband, taking vendor's lien notes thereon. Later Birdsong bought a one-half mineral interest in the same tract from Ward. Still later, one Belitsky, acting as agent for Ward, arranged to repay the notes and obtained Birdsong's agreement to execute a warranty deed, as technical grantor, to release the lien. When he was first consulted by Belitsky, and at the time the deed was presented to him by Belitsky for signing, Birdsong clearly indicated that he did not want the deed to affect his one-half mineral interest. Assured by both Belitsky and Ward that the mineral interest would not be affected, and not having his reading glasses at the time, Birdsong signed the deed. Immediately, Belitsky executed and delivered an identical warranty deed to Ward, who recorded. Neither deed reserved the mineral interest. Birdsong gave it no further thought until twelve years later when the drilling of a nearby oil well caused him to inquire of an abstractor, only to learn that his mineral interest had been conveyed in the deeds to Belitsky and Ward. Immediately Birdsong sued for reformation for mutual mistake, naming Ward's widow, Mrs. Hutchins, as defendant. The defendant cited *Kennedy v. Brown*³¹ and *Kahanek v. Kahanek*³² for the rule that, as a matter of law, if the grantor is the party seeking reformation, he is charged with knowledge of the contents of his deed from the date of its execution, and limitation begins to run against his action to reform it from that date. The court distinguished those two cases in that the grantor in each case had either prepared the deed himself or the deed was prepared at his behest, whereas Birdsong was induced to sign a deed prepared by the grantee. Considering this, and the other circumstances, the court held that the evidence was sufficient to excuse Birdsong from the duty to investigate sooner.

An interesting fact situation, involving a deed, was presented

³¹ 113 S. W. 2d 1018 (Tex. Civ. App. 1938) *er. dismiss.*

³² 192 S. W. 2d 174 (Tex. Civ. App. 1946).

in *Chanoux v. Mesa Corporation*.³³ In building on two of its adjoining lots, Mesa's contractor inadvertently placed, on a triangular strip of lot 12, the garage and driveway belonging to lot 13. Lot 12 had been platted as a "pie-shaped" lot (with the front end of the pie cut off). The triangular strip, on which the lot 13 encroachment was built, did not affect the front footage (of fifty-five feet) but reduced the rear footage from eighty-one to fifty-five feet. A rock wall was built between the houses in the subdivision such that the triangular strip of lot 12 was enclosed with lot 13. A map from a subsequent erroneous survey, on file with the deed records, failed to show such encroachments. It was at this time that Mrs. Chanoux was shown the lot 12 house by the an agent who referred to the erroneous survey and said lot 12 had an average width of 64 feet. Mrs. Chanoux relayed this data to her husband in Chicago, with the earnest money contract prepared for his signature. The contract described only "Lot 12 of Block 5. . . ." The contract was signed, the Chanouxs moved into the house, and the deed was later executed and delivered, bearing the description, "Lot 12 of Block 5 . . . according to the map of Block 5 on file in front of Book 573, Deed Records. . . ."

Discovering the discrepancy, Mesa brought suit to reform the deed to exclude that portion of lot 12 walled in with lot 13. In a trial without a jury, the district court entered judgment reforming the Mesa-Chanoux deed because of mutual mistake in including a description in the deed of all of lot 12, "Plaintiff not intending to convey (the lands lying outside the boundary wall) and Defendants Chanoux not intending to acquire them. . . ." The court of civil appeals reversed and rendered judgment for the Chanouxs, partly on the ground that the lower court's finding of mutual mistake (in the insertion of the deed description) was not supported by the evidence. More significant, however, was the court's opinion that Mesa Corporation could not recover if the case were remanded. This opinion was based on the holding that, as Mr.

³³ 241 S. W. 2d 741 (Tex. Civ. App. 1951) *er. ref. n.r.e.*

Chanoux had never seen the property at the time he signed the contract, he could not have believed that he was buying less than all of lot 12 and that, in this absence of mutual mistake, Mesa had the legal duty to carry out its contract by executing a deed the terms of which were the same as the contract. The court appeared to say: it does not matter that Mrs. Chanoux and the agent of Mesa were contemplating sale of the lot as bounded by the two rock walls. The important point is that Mr. Chanoux had only the knowledge that he was contracting for the purchase of lot 12, of an average width of sixty-four feet. Nor does it matter that Mr. Chanoux later saw the lot, before the deed was executed, and might then have had the undisclosed intent that his purchase consist only of what was bounded by the two rock walls. The court said, "A mere unexecuted intention to waive rights under the contract on the part of said appellant (Chanoux) would not entitle appellee to reformation of this instrument and recovery of the land theretofore conveyed to appellant." Thus, the startling result is had that the Chanouxes have an extra driveway and an extra garage, separated from their house by a rock wall! On principle, the decision appears to be correct and consistent with the leading California case of *Cleghorn v. Zumwalt*,³⁴ cited by the court, although the result seems unreasonable.

A few reported Texas cases of the last five years involve reformation of instruments other than deeds. An insurance contract suit emphasized the importance of pleading and proving sufficiently that the alleged error in the contract occurred as a result of mutual mistake of the parties or that there was fraud mixed with the plaintiff's unilateral mistake.³⁵ In a suit to reform a contract for sale of realty, the court held: when the parties to a written contract understand that part of their previous agreement has been omitted from the writing and rely on an oral agreement

³⁴ Cited *supra* note 5.

³⁵ *West American Ins. Co. v. First State Bank of Rio Vista*, 213 S. W. 2d 298 (Tex. Civ. App. 1948).

to vary or add to the written agreement in certain respects, equity cannot reform the writing by inserting the oral agreement.³⁶

The case of *Mason v. University of the South*³⁷ presents an interesting situation. In 1930 an executor conveyed a parcel of land in trust to a bishop of the Protestant Episcopal Church and his successors in office, as required by a will which directed that the estate be given to various charitable purposes. The bishop and the executor immediately executed a written trust declaration providing, in part, that upon sale of the land, The University of the South would receive \$250,000 if 70 per cent of the proceeds amounted to \$700,000 or more, the balance to be paid to various other beneficiaries. The University received a copy of the trust declaration with the verbal information that it had priority as to \$250,000. In 1946 the University brought suit to reform the declaration of trust on the ground of mutual mistake, alleging that it was the intention of the executor and the bishop that the University should have priority under the trust instrument, receiving \$250,000 out of 70 per cent of the proceeds of sale before distribution to other beneficiaries. The successor bishop and other beneficiaries defended the suit and denied mutual mistake. Judgment was entered for the plaintiff in a non-jury trial wherein both the parties to the trust declaration testified that they intended the priority claimed by the plaintiff. The defendants vigorously contended that the four-year statute of limitations barred the suit. The court of civil appeals affirmed the judgment, holding the evidence sufficient to support a finding that neither the executor, bishop, nor University were non-diligent in not having discovered the mistake sooner.

While the applications of rules concerning mistake and the statute of limitations in the *Mason* case are not unique, it seems unusual that reformation should be granted to a donee where the effect is to give the donee more than the term of the instru-

³⁶ Taylor *et ux.* v. Gill, 211 S. W. 2d 363 (Tex. Civ. App. 1948).

³⁷ 212 S. W. 2d 854 (Tex. Civ. App. 1948) *er. ref. n.r.e.*

ment provided. The court does not discuss this aspect of the case, leaving open to implication that the rule is different when a donee is seeking reformation, not against the donor or one of his personal representatives but against another donee.

Conclusions warranted are: (1) Texas courts apply the general rules in effect in most jurisdictions; (2) most of the recent reported cases involve deeds; and (3) there is a discernible tendency of the fact-finders to give the benefit of doubt to seemingly negligent petitioners against the operation of the statute of limitations.

Joseph T. Nance.