DEPARTMENT OF EQUITY.

EDITOR-IN-CHIEF,
RICHARD C. MCMURTRIE, LL.D.
Assisted by
SYDNEY G. FISHER, JOHN DOUGLASS BROWN, JR., ROBERT P. BRADFORD.

RIEGEL *v.* AMERICAN LIFE INSURANCE CO.[1] SUPREME COURT OF PENNSYLVANIA.

Rescission of Contract—Mutual Ignorance of Facts—When Ground for Rescission in Equity.

Where the holder of a policy of insurance upon the life of a third party for $6000, finding the payment of premiums burdensome, agrees with the insurance company to exchange this policy for a paid-up policy for $2500, upon the presumption that the third party was still living, and the party upon whose life the policy has been issued was, unknown to the holder of the policy and the company, actually dead at the time of such exchange of policies, a Court of Equity will decree that the contract of exchange be rescinded and the original policy be reinstated.

PAXSON, C. J., and MITCHELL, J., dissenting.

STATEMENT OF THE CASE.

Bill in equity to rescind a contract of exchange of life insurance policies and to reinstate a policy on the life of one Leisenring for $6000. The bill as amended averred that the plaintiff had surrendered to the defendant company a life insurance policy for $6000 on the life of one Leisenring, and received in return a paid-up policy for $2500. That she had done this because the premiums on the $6000 policy were burdensome, and because no information could be had whether the said Leisenring were alive or dead. That both parties to the exchange acted on the basis that the said Leisenring was then alive. The answer filed by the receiver of the company defendant denied this allegation, averring that the express understanding was that the transaction was not to be affected by the fact that Leisenring should be discovered thereafter to be alive or dead. The only evidence on this point was the

[1] Reported 31 W. N. C., 533; see also 140 Pa., 201.

testimony of the plaintiff and her agent who dealt with the company defendant. They both swore that they dealt upon the understanding that Leisenring was living at the time. Neither party knew of the termination of the life, until after the transaction was completed.

The reasoning upon which the Court reached its decision is set forth in the following extract from the opinion by STERRETT, J.:

OPINION OF THE COURT.

"The general rule is that an act done or contract made under mistake of a material fact is voidable or relievable in equity. . . Thus A buys from B an estate to which the latter is supposed to have an unquestionable title. It turns out, upon due investigation of the facts unknown at the time to both parties, that B has no title (as if there be a nearer heir than B who was supposed to be dead but is in fact living), in such a case equity will relieve the purchaser and rescind the contract. . . . MR. POLLOCK, in his excellent treatise on the Principles of Contract, 441, states the general principle thus: 'An agreement is void if it relates to a subject-matter (whether a material subject of ownership or a particular title or right) contemplated by the parties as existing but which in fact did not exist. . . It cannot be doubted that in exchanging the old for the new policy both parties acted on the basis that Leisenring was then alive.'"

IGNORANCE OF FACT AS GROUND FOR RESCISSION OF CONTRACTS.

In commenting on this case it is assumed that the fact was correctly decided. It is not proposed to inquire into that, but to assume as established by the evidence that both parties dealt with each other on the basis that the insured was living at the time of making the contract of exchange. In what way this was arrived at from the evidence under the pleadings may be a subject of interesting speculation, and was, probably, the ground of a dissent by two judges. Having arrived at this finding of fact, the decision followed as a logical consequence.

The rule invoked by the Court for its decision is identical with, if not derived from, that of the Roman law, which was founded on the broadest equity and justice.

The extinction of the obligation or contract by the extinction of the thing due was a well, defined rule of the Roman law. If a man owe to another a flock of sheep and they

die the man is not bound by his contract to deliver them, or if some of the flock die he stands excused as to those dead. I. Pothier on Obligations (Evans), 384.

This rule was adopted even by the English Common law; so that a man sued on a contract to return a horse was held to have made a good plea in setting forth that the horse had died and, therefore, he was unable to perform his contract. William *v.* Hide Palmer, 548 (Trin 4, Car. B. R.)

Stent *v.* Bailis, 2 P. Williams, 217, is an illustration of its enforcement in equity. In that case the Chancellor granted a perpetual injunction against the enforcement at law of a judgment on articles of agreement for the purchase of shares in the Lustring Company which were never issued, the company and all similar companies having been prohibited by act of Parliament. The Court, referring to the rule, remarked that the seller, Bailis, had sold moonshine.

Usually the rule is referred in equity to the well-recognized head of mistake. For most practical purposes this is unobjectionable. And yet it may be as well to at least remark a distinction logical and real, although possibly not easy of application to cases that may arise.

Where parties intend to put their contract in certain terms, and by mistake omit some terms, or put in different terms, or where they contract, supposing certain things to exist which do not exist, there occurs a true and proper mistake. But where parties make a contract complete in its terms, precisely as they intended, and having no understanding or opinion about the condition of affairs or the thing which by chance afterward turns out of great importance, it is scarcely accurate to refer the problem that then arises to the head of mistake. They have made no mistake, for that implies an opinion, and as likely as not they have had no opinion whatever. The problem is really one of interpretation of their contract, of ascertaining what, in a legal sense, the parties must be presumed to have intended regarding something about which, as a matter of fact, they simply had no intention at all, never having given it the slightest consideration. They may have been ignorant of it; may not have had any intention regarding it, or their intentions may have been so widely different as to be incapable of meeting in a contract.

It is not strictly accurate to designate as the result of mistake some unexpected turn of events that makes important this unmentioned thing, which their contract did not regard and was not intended to contemplate, and as to which it was ignorantly or intentionally silent. See 1 Story's Equity Jurisprudence, § 140. (Note.)

The real difficulty involved in cases of this sort is of quite a different character. It is not a question of whether there has been a mutual mistake, but what was the legal intention of the parties regarding the matter as to which their contract is silent. It is the question of the legal interpretation of their contract. Take for example the simplest case: One party contracts to sell his house to the other, and the house is burned at the time of the contract and unknown to both. The contract is void according to the rule, and the reason that it is void is that in every contract of sale

the parties are presumed, as a matter of law, to have contemplated the existence of the thing sold and to have made that existence a term of their contract. Pollock's Principles of Contract, 441.

The rule is thus put in its true light not as part of the equitable doctrine of mistake, but as a rule of interpretation of contracts.

The rule has been greatly broadened and made more comprehensive in the English law, so that logically and properly stated the Roman rule has become only a corollary to the general proposition, which may be stated somewhat in this form:

Whenever the contract is silent as to some thing or condition of things, and there is no positive evidence what the parties intended about it; if from all the circumstances of the parties, of the contract, of the subject-matter, it can be inferred that the parties must have contemplated such thing or condition of things as essential to their contract, then the non-existence of that thing or condition of things will avoid or rescind the contract.

It is a presumption of law that the parties contemplated the subject-matter of the contract as an essential, and its non-existence will always avoid or rescind the contract. Pollock on Contracts, 441.

Treating the rule, therefore, as a principle of interpretation of contracts, the cases easily divide themselves into:

(1) Where the subject-matter of the contract is non-existent. Hitchcock *v.* Giddings, 4 Price, 135, was the case of a bond given in 1810 for the purchase of a remainder expectant on a fee tail. Unknown to either vendor or purchaser, the remainder had been defeated by a recovery in 1808 and therefore had no existence at the time of the making of the bond. On this ground the bond was cancelled.

In like manner sale of a life annuity was held void, the life having dropped at the time of the sale unknown to both parties. Strickland *v.* Turner, 7 Ex., 208. So the purchase of shares of a company which is being wound up unknown to both parties will be held void: *In re* London, Hamburg & Continental Bank, 1 Ch. App. Cases, 433.

A contract to take bank shares created under a plan of amalgamation of two banks, which amalgamation was afterward declared illegal, was avoided for same reason: Bank of Hindostan *v.* Alison, L.R., 6 C. P., 54.

A contract for a cargo of corn shipped by A from Salonica to London was held void, the cargo at the time of the contract having been actually sold at Tunis on account of accidental damage suffered by it during the voyage. Neither party knew this fact until after the making of the contract: Couturier *v.* Hastie, 5 H. L. C., 673.

The same rule is applied to executory contracts which may be referred to here as shedding light on the reason of the rule.

Where a man buys 200 tons of potatoes to be raised on a particular farm and by reason of blight the crop fails so as to produce only 80 tons, the seller is excused from further performance of the contract, although it would seem that for the amount actually produced the contract might be valid: Howell *v.* Coupland, L. R., 9 Q. B., 462. Criticized in Anderson *v.* May, 52 Northwest. Rep., 530.

Where a man sold cotton in

specified bales designated by particular marks, and after a delivery of part the remainder was burned, the same doctrine was applied: Dexter *v.* Norton, 47 N. Y., 62.

Where a man rented a music hall and it was destroyed by fire after the contract but before performance by the use of the hall the contract was held void: Tyler *v.* Caldwell, 3 B. & S., 826. BLACKBURN, J., laying down as the principle of the decision that where the performance of a contract depends on the continued existence of a thing a condition is implied that impossibility of performance by reason of the perishing of the thing excuses performance. In other words, there is no contract; neither party is bound, and therefore it is to be presumed that money or any other valuable thing already paid by either party might be recovered in an action for money had and received.

So in Spalding *et al. v.* Rosa *et al.*, 71 N. Y., 40, a contract of the Wachtel Opera Company to perform operas was held void by reason of the illness of Herr Wachtel, the Court remarking that in all contracts for personal service the implied condition is always that the person shall be able at the time to perform them.

In Appleby *v.* Myers, L. R., 2 C. P., 651, a contract to erect machinery and keep it in repair for two years in a mill was held void by reason of the destruction of the mill by fire, and that no action would lie for the work already done, the contract being an entire one and not fully completed when avoided by the fire. Both parties were held absolved from further performance.

(2) Where something other than the subject-matter of the contract is non-existent.

The cases already cited present no great difficulty, and they are given chiefly to show that the rule is one of interpretation of the legal meaning of the contract and as evidence of how closely the rule of the Roman law has been followed. In the following cases there appears the difficulty of the rule in its application to matters other than the existence of the subject-matter of the contract.

The Courts seem to have adopted in a general way the principle already laid down, that the non-existence of anything which the parties contemplated as essential to their agreement will avoid the agreement. Of course the ascertaining by the Court of whether any particular thing was contemplated by the parties as essential has been a matter of much difficulty. Deprived of the guidance of the legal presumption which made the existence of the subject-matter an essential of the contract, they have been perforce compelled to examine the circumstances, the parties and all the *res gestæ*, so to speak, of the contract, in order to ascertain what other things were contemplated in a legal sense by the parties as existing and essential to their contract. The decisions have been as various as the circumstances of the contracts.

In March *v.* Pigott, 3 Burr, 2802, two sons contracted to pay each to the other a certain sum upon the death of their respective fathers. At the time of the contract the father of one, unknown to either party, had died. The Court held the contract or wager was binding because that was what the parties meant to do, to make a wager on the lives of their fathers in order that he who should first come to his

inheritance might aid the other who had not, and who would stand in need of the money. Observe the reasoning of the Court is entirely devoted to ascertaining what the parties intended.

In Bell *v.* Gardiner, 4 Man and G., 11, the defendant was relieved from payment of a note given for a bill of exchange upon which he was endorser, but which had been altered without his consent. He had no knowledge of the alteration at the time of giving the note.

In Bradford *v.* Symondson, 7 Q. B. Div., 456, a contract of re-insurance was made by the Phœnix Insurance Company upon a vessel insured by the company and over due, but which at the time of the contract, and unknown to both parties, was safe in port. The contract was held binding, and a suit for the premium was sustained.

In Ketchum *v.* Catlin, 21 Vermont, 191, the contract was for the sale of certain country produce, each party supposing that it was in a warehouse at Whitehall; in fact, it was in Boston, whither it had been sent and sold for the account of the seller. Held, that the *situs* of the property was a material fact and that the contract was void, that fact having been different from what had been supposed, and the purchaser was allowed to recover back the money he had paid on account.

In Gibson *v.* Pelkie, 37 Mich., 379, there was a contract concerning a judgment which appeared not to be a valid judgment, and the contract was held void.

In Allen *v.* Hammond, 11 Peters, 63, the contract was to pay a commission for procuring from the Portuguese government an allowance of a certain claim against it. The claim had been allowed at the time of the contract, although neither party was aware of it. The Court rescinded the contract.

In Walker *v.* Tucker, 70 Ill., 527, in defense to an action for rent of a coal mine, it was pleaded that the coal was so exhausted that it could not be profitably mined. The Court held the plea bad, remarking that in the lease the existence of coal in profitable quantities had not been made an express condition or basis of contract, although doubtless assumed by both parties. Had the plea set up that the coal was exhaused, that might have been a good defense.

Muhlenberg *v.* Henning, 116 Pa., 138, was a like case involving iron ore. Fritzler *v.* Robinson, 70 Iowa, 500, was a like case involving coal. The reasoning of the Court in all the cases was directed to ascertaining what the contract meant, finding there the chief and only difficulty of the case.

Fleetweed *v.* Brown, 109 Ind., 567, was case of suit on a note given for a quit claim deed of all the payee's interest in the real estate of his father, who had been absent for many years. The defense was that the father had since returned and sold the land, and it was held that the note was void. Here the basis of the contract was that the third party, the father, was dead, just the reverse of that assumed in the principal case, that the insured was alive.

Where the contract was for a patent, and the patent was found invalid, the contract was held void, GIBSON, C. J., remarking that the party intended to buy the patent under the notion that it was valid. Bellas *v.* Hays, 5 S. & R., 427. To

the same effect is Geiger *v.* Cook, 3 W. & S., 266, where the plaintiff was not allowed to recover for a note given for a patent which was invalid although the deed for the patent had been delivered in consideration of the making of the note, and the title to the patent, such as it was, had become the property of the maker.

In Sears *v.* Leland, 145 Mass., 277, the plaintiff purchased a mortgage which was invalid, although neither purchaser nor seller was aware of it at the time of the sale. The plaintiff sought to avoid the contract on the ground of the invalidity of the mortgage. But the Court held that the rule had no application to the facts of the case. "Where the subject of contract has no existence, as where two parties contract as to the sale of a horse which without the knowledge of either is dead, the contract may indeed be rescinded. But this principle has no application where one voluntarily purchases such right, title or interest as may exist." There was no express warranty of the mortgage, and the plaintiff got an assignment of all the defendant's title. In other words, the Court concluded that, looking at all the circumstances of the case, the parties could not be legally presumed to have made the validity of the mortgage an essential term of their agreement.

It is not easy to reconcile this decision with the preceding upon the validity of a patent.

In Irwin *v.* Wilson, 15 North-east Rep., 209, a contract of exchange of lands was rescinded, a certain value having been fixed upon one of the parcels of land by a third party, neither of the contracting parties having any knowledge of the value, and the valuation afterward having been discovered to be erroneous.

In Crist *v.* Dicey, 18 Ohio, 536, an exchange of farms was made, one farm having never been inspected by either party. A letter of a third person was shown which gave a favorable description of the unknown farm, but the owner refused to guarantee the truth of the letter. The farm was in fact unfit for cultivation, and the owner knew that the other party intended to occupy it for that purpose. The Court refused to rescind the contract of exchange.

In Griffith *v.* Sebastian County, 49 Ark., 24, a deed for $1.00 was made to the county for certain town lots, the grantor supposing that the county seat had been moved to the town and that the lots would be used for a court-house, and his other lots would be thus increased in value. Afterward the proceedings for the removal of the county seat were held void and illegal, and the deed was rescinded at the suit of the grantor.

With such a collection of cases it is not easy to even attempt an answer to the question of the practitioner; how in such a contract is it to be known what are contemplated by the parties as essential terms of their contract. On this point Chief Justice GIBSON has said that the thing must be such as "entered into the contemplation of both parties as a condition of their assent. If it related to a thing which was but a collateral matter to the ultimate object or motive of the one party, it will not prejudice the other, who was not influenced by it. On any other principle no one could be held to a bargain induced by a mistaken expectation of gain:"