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MISTAKE OF LAW—REFORMATION OF A DEED—INTENTION OF GRANTOR—RELIEF IN EQUITY.—*Atherton et al.* v. *Roche et al.*, 61 N. E. Rep. 357 (Supreme Court of Illinois, October 24, 1901). The point of the decision in this case was that ancient and often mooted question—will equity relieve against a mistake of law? As usual there was a difference of opinion and the final decision was rendered, by four to three, in favor of the negative.

The grantor, by deed, conveyed certain property to his daughter, Margaret Atherton, and her husband, Byron Atherton, and "*their* bodily heirs." The deed was a voluntary grant, and the grantor's intention was to provide equally for all the children of his daughter Margaret, and he was under the impression that this would be accomplished by the use of the word *their*. It was shown by the evidence that the deed was read to the grantor before he executed it, and that he discussed the meaning of the terms and insisted that he knew the legal effect thereof, which, he contended, would carry out his intention to provide for *all*

of his daughter's children. Margaret Atherton, the daughter, had one child by a previous marriage, and by her marriage with Byron Atherton she had one more, Homer Atherton, the defendant. Subsequent to the execution of this deed, Byron Atherton died, and Margaret Atherton married again, and had three children by this third marriage. This bill was filed to have the word *their* in the deed of conveyance changed to *her*, in order that all five of the children of Margaret Atherton might share equally according to the intention of the grantor, instead of the entire estate passing to the defendant, Homer Atherton, the only child of her marriage with Byron Atherton.

That it was the intention of the grantor to provide for *all* of his daughter's children was clearly proved beyond a reasonable doubt, and the question for the court to determine was whether his desire should be made effectual, or whether the technical word used by him in the deed should be allowed to cause an entirely different disposition of the property, merely because it was a *mistake of law.*

It is admitted that when a mistake of fact has occurred, a court of equity will grant relief without question, but when the mistake is one of law there is a grand marshaling of authorities on both sides, and a battle royal ensues. The majority opinion, as delivered by Judge Hand, declared that "the mistake complained of is not a mistake as to what words were contained in the deed, but simply as to the meaning and legal effect of the word *their*. This, manifestly, is not a mistake as to any fact, but purely a mistake of law, and such as equity will not relieve against." Three members of the court objected to this view of the law and their dissent is expressed by Judge Boggs on the ground "that a mistake as to the legal principles which control the subject-matter of the transaction cannot be corrected; but mistakes as to the legal meaning and effect of words selected by the parties in drafting written instruments to evidence the agreements into which they have entered, though mistakes of law, do not enter into and become part of the contract, and such instruments may be reformed so as to declare the true intention of the parties."

In considering this question of mistake of law, it will be necessary to limit the discussion to the law as applied to relief against the terms of written instruments, and a review of the decisions would seem to indicate that there are three possible views.

The first holds that, where the parties to the agreement, with full knowledge of the facts, use terms or language having a definite legal effect, and that effect is different from their intention, such misuse is a mistake of law which equity will not relieve against. The second view is merely the converse of the first and holds that though a mistake of law, equity will grant relief and reform the instrument according to the true intent of the parties.

The third view is that such a mistake is not a mistake of law in any sense, but rather a mistake of fact and should be treated as such by a court of equity.

The first is expressed in the majority opinion and seems to have been the view taken by the court of Illinois in a long line of cases upon the subject, commencing with *Sibert* v. *McAvoy,* 15 Ill. 106 (1853); and followed by *Gordon* v. *Downing,* 18 Ill. 492 (1857); *Fowler* v. *Black,* 136 Ill. 363 (1891); *Reymour* v. *Bowles,* 172 Ill. 521 (1898); *Butterfield* v. *Sawyer,* 187 Ill. 598 (1900).

The second view is that held by the minority opinion and is the view accepted in the majority of the jurisdictions in this country, and in England—the distinction being made between a mistake or misunderstanding of a principle of law and a mistake as to the legal meaning and effect of words. This distinction is clearly set forth by Beck, J., in *Stafford* v. *Fetters,* 55 Iowa, 484 (1881), where he states that "the mistakes of law against which equity will not relieve are those which pertain to the subject-matter of the agreement, and were inducements thereto, or consideration therefor, but the rule can have no application to mistakes in the language used, or in the choice of a form of instrument, whereby it has an effect different from the intention of the parties." The position taken by the Supreme Court of Iowa is in accord with *Beardsley* v. *Knight,* 10 Vermont 185 (1838); *Evants* v. *Strode,* 11 Ohio Rep. 480 (1842); *Clayton* v. *Freet,* 10 Ohio St. 545 (1860); *Burdette* v. *Simons,* 3 J. J. Marsh (Ky.) 190 (1830); *Sparks* v. *Pittman,* 51 Miss. 511 (1875); *Kennedy* v. *George,* 44 N. H. 440; *Canedy* v. *Marcy,* 13 Gray, 373 (1859); *Stockbridge Iron Co.* v. *Hudson Iron Co.,* 107 Mass. 290 (1871).

It is generally admitted that where, by a mistake on the part of the draftsman, or by an oversight of the parties to the instrument, words have been inserted or terms omitted, contrary to the intentions of the parties interested, in such cases equity will step in and make the necessary alteration even though, as some courts hold, the mistake be a mistake of law. This rule is adopted even in Illinois: *Dinwiddie* v. *Self,* 145 Ill. 290 (1893); *Kyner* v. *Boll,* 182 Ill. 171 (1899). But it is submitted that such insertion or omission is not a mistake of law, but a mistake of fact, and that is the ground taken by the New York courts for granting relief: *Gillespie* v. *Moon,* 2 Johns, Ch. 585 (1817); *Champlin* v. *Laytin,* 18 Wend. 407 (1837); although they expressly refuse to relieve against a mistake of law. There is an excellent argument advanced by Senator Paige in *Champlin* v. *Laytin,* where he dissents from the position taken by the court—his contention being that the same rule should be applied to mistakes of law as to mistakes of fact. The New York rule is affirmed in Pennsylvania by Mr. Justice Sharswood in *Huss* v. *Marris,* 63 Pa. 367 (1869).

Finally it is submitted that in such cases as this the maxim *juris ignorantia non excusat* is altogether inapplicable; that it should be confined to mistakes in regard to the general principles of the law of the land, and not to private rights; and that the true interpretation of the law, and a doctrine that would work justice and equity in every case, is to be found in the opinion of Goldthwaite, J., in *Larkins* v. *Biddle,* 21 Ala. 252 (1852), under facts very similar to these. That was a case where the terms used in the deed were not sufficient for the purpose of the grantor, and the court held that equity would reform the deed so as to express the true intention. And "although the error occurred through a mistake or ignorance of the law, *the error itself might be more properly considered as a mistake of fact.*"

It is submitted that in such a case it is the intention of the grantor which should be effectuated, and where the words used in the deed vitiate that intention it is clearly within the power of a court dispensing equitable relief to reform the deed, in the same manner as though it were a mistake of fact, in order to accomplish the result desired by the person making such mistake.

W. C. M.

SURETY AND GUARANTY—NOTICE—*Hall's Ex'r* v. *Farmers' Bank of Kentucky, Hedges* v. *Same, Penn* v. *Same, Graves* v. *Same,* 65 S. W. Rep. 365. (Court of Appeals of Kentucky, 1901.)

The plaintiff in each of the above cases had attached his signature to an instrument as follows: "P. T. Pullen, of Georgetown, Ky., contemplating the leasing of the Tompson Mills and carrying on the milling business, and being in need of capital with which to buy stock and run the same as it should be run successfully. Now, in order to aid him, we, W. E. Pullen, George Carley, George V. Payne, T. T. Hedges, J. M. Penn, James W. Craig, Buford Hall, whose names are hereto signed, agree to become his security to an amount not exceeding $10,000 in the aggregate. After this instrument in writing has been signed by all of us (ten in number) it may be used by the said P. T. Pullen in the nature of collateral for a sum or sums not exceeding $10,000 in the aggregate; and we the said signers shall be bound jointly and severally as sureties upon any note or notes not exceeding in the aggregate said sum, to which said Pullen shall sign his name and deposit this as collateral." Armed with this P. T. Pullen obtained an advance of $10,000 from the Farmers' Bank, giving his notes for the amount and depositing the paper as security. No formal notice of this transaction was given by the Bank to W. E. Pullen and his co-signers, but it appeared that all had actual notice within a short time except one named Gano, who lived in the country. When P. T. Pullen's

notes fell due he failed to meet them and the bank promptly demanded the amount of his indebtedness from W. E. Pullen and the others. Gano was the only man who refused to pay his proportionate share and in a suit which the Bank instituted for the amount alleged to be due the court held he was under no legal liability to pay as under his contract he was entitled to notice of advances made and the failure to give him such notice discharged him. (*Gano* v. *Bank,* 45 S. W. 519). After this decision was handed down, W. E. Pullen and the others brought separate actions against the Bank to recover the money paid by them. The court said that owing to the doubt attending the interpretation of the contract the case presented one of money paid under mistake of law which could not be recovered, citing in support *Storr* v. *Barker,* 6 John, S., Ch. 169; *Underwood* v. *Brockman,* 34 Ky. 317. The contract in this case is an example of those which are difficult to classify because the parties have not clearly expressed their intention, for there is a well-defined legal distinction between the contract of suretyship and that of guaranty. "The contract of the surety is a direct original agreement with the obligee that the very thing contracted for shall be done. The other (*i. e.,* the guarantor) enters into a cumulative collateral engagement by which he agrees that his principal is able to and will perform a contract which he has made or is about to make and that if he fails he will, upon being notified thereof, pay the resulting damages." *La Rose et al.* v. *Logansport Nat. Bank et al.,* 102 Ind. 332 (1885). See also *Reigart* v. *White,* 52 Pa. 438 (1866); *Kearnes* v. *Montgomery,* 4 W. Va. 29 (1870); *Sugar Mfg. Co.* v. *Littler,* 56 Ia. 601 (1881), and *Abbot* v. *Brown,* 131 Ill. 108 (1889). It is also well settled that a surety, being from his contract practically identified with his principal, is not entitled to notice of acceptance or advances under his contract. A guarantor, however, is entitled to notice: (1) Of acceptance, where his guaranty amounts to a mere offer or proposal, and (2) of any advances made under it or defaults in payment made by his principal if his guaranty be conditional, in order as said in *Thompson* v. *Glover,* 78 Ky. 193 (1878), "that the guarantor may have an opportunity of arranging his relations with the party for whose benefit or in whose favor the guaranty is given," and it is added that "when the whole of the transaction is connected and of such a nature as to give the guarantor this information no specific or formal notice is necessary." In support of this may be cited: *Wright* v. *Griffith, et al.,* 121 Ind. 478 (1889); *Doud* v. *Bank,* 54 Fed. 846 (1893); *Davis* v. *Wells,* 104 U. S. 159 (1881); *Powers* v. *Bumcratz,* 12 Oh. St. 273 (1861); *Bishop* v. *Eaton,* 161 Mass. 496 (1894); *Bank* v. *Phelps,* 86 N. Y. 484 (1881); *Evans* v. *McCormick,* 167 Pa. 247 (1895); *Crittenden* v. *Fiske,* 46 Mich. 70 (1881).

R. J. G.