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Mistake and the Contractual Interests

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IT IS reasonable to assume that the theory which the law adopts as the basis for imposing on the parties to a contract a legal obligation to perform the contract will have an important influence in the determination of the extent to which those obligations will be enforced where the contract has been entered into the influence of a mistake by one or both parties. Professor Williston states[1] as the first cause he discusses for the confusion in the cases dealing with mistake in contracts the confusion concerning the elements of the contract and points out that in some cases, at least, mistake would have the effect of preventing the formation of a contract if the legal obligation is based on the theory that the law is giving effect to the mutual assent of the parties to the terms of the contract sued upon, but will not affect the enforceability of the promise if the obligation is imposed because of an exchange of expressions which indicate a mutual assent. If the law is giving effect to the will of the parties to the agreement, logic would induce the adoption of a rule that in any case where the enforcement of the promise of a party to the contract would not accord with his will in the situation, because he made the promise under the influence of a mistake, the promise should not be enforced. On the other hand it would seem that where the law imposes the obligation because the party has performed a designated act which the law says will bind him to the performance of the contract, the fact that he is laboring under a mistake at the time he performs the act should have very little, if any, bearing upon the extent of his legal obligation.

Under any theory, the law must recognize that some kinds of mistake prevent the enforcement of the contract. The clearest example is where there is an ambiguity in the terms used, either in themselves, or in their application to the particular circumstances, and the parties understand them differently[2] In such a

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[1] 3 Williston on Contracts, (1920) Secs. 1535, 1536.

[2] The "Peerless Ship Case" Raffles v. Wichelhaus (1864) 2 H. & C. 906, 159 Eng. Repr. 375, Williston, Sales of Goods (1909) p. 5. Even under the formal Roman contract by *stipulatio* a mistake of this character prevented the formation of a contract. Radin, Roman Law, (1927) Sec. 58.

case there is no way by which the law can logically or practically decide what the contract was and, therefore, it cannot determine what obligation to impose on either party.

Where the obligation of the contract is based, not on the will of the parties, nor on some purely formal act, such as the affixing of a seal to a document, but upon the exchange of expressions by the parties which indicate that the minds have met on the terms of the contract, which, according to Professor Williston,[3] and the Restatement of Contracts,[4] is the case with our legal system, the effect of a mistake may be expected to be less of a bar to the enforcement of the contract than where the obligation is based on the will of the parties, but it has been given the effect of preventing the enforcement of the contract in many cases not coming within the group where it prevents the law from determining what the terms of the contract were. The law has made a distinction between the latter type of mistake, which prevents the formation of any contract, and other types, which merely make the contract which was formed by the exchange of expressions of assent subject to avoidance by one of the parties, or lead to the modification of the expressed terms. The uniform holding of our courts, both of law and equity, that where the mistake is mutual with respect to the substance of the contract, or where it is unilateral, but caused by the innocent act of the other party, or one of which at the time the other party to the contract was aware, or reasonably should have been aware, the contract is voidable may be reconciled with the theory of meeting of objective expressions, since here the law does not deny that the expressions created the contract, but merely provides a means by which the obligation may be avoided under certain circumstances.[5] But a court influenced by that theory of contracts would be apt to be more strict in the application of these rules to specific cases, and we might, therefore, expect that relief against contracts for mistake could be obtained less easily now than formerly when the courts professed to be enforcing the will of the parties in giving binding effect to a contract. We are not here dealing with precise rules whose origin can be traced to a specific case, as was the case with the rules governing the necessity for communication of an accep-

[3]Williston, Mutual Assent in the Formation of Contracts, (1919) 14 Ill. L. Rev. 85, Selected Readings on the Law of Contracts, 119.

[4]American Law Institute, Restatement of the Law of Contracts, (1932) Secs. 20, 21.

[5]3 Williston on Contracts, (1920) Sec. 1579.

tance, or of a revocation, of an offer,[6] and we cannot with reference to the inconsistencies in the law of mistake assert either that they are due, or are not due, to the theory of contract prevailing when the rule was established. But a general survey of the mistake cases does not indicate that the theory of expressed assents has had any influence in lessening the liberality with which relief for mistake has been given. The cases in which it was held that the presence of the gravel, which was actually on the land sold, as assumed by the parties, in such accumulations as to permit it to be commercially excavated, went to the subject matter of the contract, and not merely to its characteristics,[7] and the one most frequently criticized for allowing relief for a purely unilateral mistake, not caused by or known to the other party,[8] were both decided after it had become settled in other cases that a man was bound by the expression of his assent, regardless of his subjective will.[9]

Since the parol evidence rule is one of the strongest arguments for the doctrine that the obligation of a contract is based on the exchange of expressions of assent, not on the subjective meeting of the minds,[10] the remedy of reformation of contractual instruments to make them conform to the actual intent of the parties, which necessarily rejects the rule, is difficult to reconcile with the doctrine, especially where there has been no previous exchange of expressions to which the instrument may be made to conform, but only a general understanding between the parties. The explanation that in these cases the court of equity "subjects one who has made no legal contract or conveyance, to the same obligations as if he had,"[11] was difficult to maintain when law and equity were administered as separate systems of remedies, and becomes impossible when they are fused in one system and when now in an

[6]Williston, Mutual Assent in the Formation of Contracts, (1919) 14 Ill. L. Rev., 85, 87, Selected Readings on the Law of Contracts 119, 121.

[7]Edwards v. Trinity & B. V R. Co., (1909) 54 Tex. Civ. App. 334, 118 S. W 572.

[8]St. Nicholas Church v. Kropp, (1916) 135 Minn. 115, 116 N. W 500, L. R. A. 1917D 741.

[9]Williston, Mutual Assent in the Formation of Contracts, (1919) 14 Ill. L. Rev. 85, 87, Selected Readings on the Law of Contracts 119, 121, dates this doctrine from the second half of the Nineteenth Century. He cites as clear judicial expressions of it Hotchkiss v. National City Bank, (1911) 200 Fed. 287, 293, and O'Donnell v. Clinton, (1888) 145 Mass. 461, 463, 14 N. E. 747

[10]Williston, Mutual Assent in the Formation of Contracts, (1919) 14 Ill. L. Rev. 85, 89, Selected Readings on the Law of Contracts, 119, 122.

[11]3 Williston on Contracts, (1920) Sec. 1537

action for damages for breach of contract, defendant can plead as a defense that the instrument sued on does not correctly embody the agreement of the contract, and prevail if the court finds the facts accordingly.[12]

It is quite evident that if we are to explain the confusion in the cases dealing with mistake, and discover some principle which will bring more harmony in this field of the law, we must seek some explanation other than the doctrinal theories as to the basis for the legal obligation of parties to a contract.

In recent years jurists have not been content with explanations of law in the form of doctrines deduced by generalizations from the cases with the rejection, as "bad law" of those cases which do not fit the doctrine, but have sought rather to ascertain the social policy or purpose underlying the particular doctrines and to determine the factors that led the courts to refrain from applying an apparently applicable doctrine to the particular case before it. According to the jurisprudence developed by Dean Pound,[13] the court in any case where it has to develop a new doctrine of law, or adapt an old doctrine to a new set of circumstances, seeks to assign to the interests asserted by the respective parties a social value or weight, and then to balance these social values or interests against each other and to develop a doctrine which will preserve the greatest possible weight of social interests. Under this formula, the doctrine of the will theory of contracts accords with our social policy of free enterprise and, therefore, is adopted by the courts. But in those cases where the expression of one of the parties does not accord with his unexpressed intent, this social interest comes in conflict with the social interest in the "security of transactions" which is also an interest of very great importance in a social system based on a credit economy which can operate only if men can rely with reasonable certainty on the expressed commitments of other men; particularly when they are expressed in a written document. In these cases the courts have held that the social policy which protects an individual against the imposition of a contractual obligation which does not accord with his will, must yield to the general social policy that men must be able to rely on the promises made by others when the other factors to

[12]Susquehanna S. S. Co. v. O. A. Andersen & Co., (1925) 239 N. Y. 285, 146 N. E. 381, Hinton, Equitable Defenses Under Modern Codes, (1920) 18 Mich. L. Rev. 717

[13]A brief summary by Dean Pound of his juristic philosophy of balancing the interests is set forth in Pound, Interests of Personality, (1915) 28 Harv. L. Rev. 343-346.

make such promises binding are present.[14] But the formula does not require, or even suggest, that the doctrine so adopted will have to be applied in every situation,[15] but rather that it may be modified so as not to apply in those occasional cases where this particular interest is outweighed by the interests which would have to be sacrificed if the expressed agreement were to be enforced. Perhaps an examination of the social interests involved in the mistake cases, where rescission[16] of a voidable contract or reformation of the terms of an agreement is sought may be of some assistance in clearing up the confusion in the law with regard to these cases.

The interests of parties to a contract have been exhaustively analyzed with respect to the rights of such parties to recover damages or restitution upon the non-performance by the other party.[17] The claim to have the contract performed according to its terms is designated as the expectation interest and, where it is recognized by the law as valid, is protected by an action at law for damages measured by the value of the lost performance, or

[14]Even Jerome Frank who bases his book Law and the Modern Mind, (1930) largely on the hypothesis that the "myth" of certainty in the law is the result of the persistence of the father-complex of childhood into adult years, concedes in a footnote on p. 11 that the demand for a predictable law in part arises from practical needs but considers that the practical aspect of it has been exaggerated. A lawyer who is assisting in the negotiation of a war contract on the baasis of which his client will have to contract for supplies and conduct his entire business in the future, or one who is advising as to a merger of businesses which may violate the anti-trust laws, discovers that the practical aspects of his client's demand that he be informed as to the legal effect of the contemplated transactions can scarcely be exaggerated.

[15]"Another point in the program of sociological jurists is the importance of reasonable and just solutions of individual causes, too often sacrificed in the immediate past to the attempt to bring about an impossible degree of certainty. * * * they conceive of the legal rule as a general guide to the judge, leading him toward the just result, but insist that within wide limits he should be free to deal with the individual case, so as to meet the demands of justice between the parties and accord with the general reason of ordinary men." Pound, Scope and Purpose of Sociological Jurisprudence, (1912) 25 Harv. L. Rev. 489, 515.

[16]The text of the Restatement of Contracts uses the term "avoidance" for the act of terminating a voidable contract by the act of the party, reserving the term "rescission" for termination by agreement of the parties. Secs. 406-409. But the courts almost always use the term "rescission" to cover both methods of termination, the Contracts Restatement is not consistent, for its index includes all of the sections dealing with termination of voidable contracts under the heading "Rescission," limiting the heading of "Avoidance" merely to cross references, and the American Law Institute's Restatement of Restitution, (1937) also designates the termination of a voidable contract by the act of the party as "rescission." The more usual term of rescission is, therefore, used in this article.

[17]Fuller and Perdue, The Reliance Interest in Contract Damages, (1936, 1937) 46 Yale L. Journ. 52, 373.

by a suit in equity for specific performance of the contract if the recovery of damages is not an adequate remedy for the non-performance. In those cases where the law does not give protection to this expectation interest, either party may assert a restitution interest by seeking to recover what he has paid or delivered to the other party under the contract, or a reliance interest by seeking to recover for other losses which he may have sustained because of his action under the agreement with the expectation that it would be enforced. What is attempted here is an application of the analysis of Fuller and Perdue to the avoidance and reformation cases.

The Contracts Restatement condenses its provisions with respect to mistake in entering into contracts into one chapter of only twelve sections.[18] It permits the avoidance of contracts by the party injured by the mistake in cases where the mistake is mutual and relates to a "fact assumed by them as the basis on which they entered into the transaction," unless the party seeking avoidance can obtain reformation, or performance according to the actual intent of the parties, or he may receive compensation which will put him in as good a position as if the contract had been what he supposed it to be.[19] If the mistake is that of only one of the parties, the contract is not thereby made voidable unless the mistake was induced by the misrepresentation of the other party, or was known to him to exist when he entered into the contract.[20] These rules can unquestionably be sustained by the decisions of most of the courts which have dealt with the problem of rescission for mistake, but they are of little aid in dissolving the confusion of the law on the subject unless we say that the multitudinous cases which have qualified them, or made exceptions to them, are all bad law.

Where the mistake is mutual and its effect is to make the contract something substantially different from that intended by the parties, there is no difference of opinion in the cases, all agree that the contract is voidable. In that situation neither party has a valid expectation interest in the contract as actually made, since neither intended it to have that effect, and the interest of one party to gain an unexpected advantage at the expense of the other because of their common mistake is one that the law clearly ought not to recognize. But difficulty arises when the mistake does not

[18]American Law Institute, Restatement of the Law of Contracts, (1932) Chapter 17, Secs. 500-511.

[19]Sec. 502.

[20]Sec. 503 and comment (a) referring to secs. 476, 472 (b).

completely alter the intended effect of the contract. As the deviation of the effect of the contract under the facts as they acually exist from that which was intended by the parties becomes less, the claim of the expectation interest to legal recognition and protection becomes stronger until the situation is reached where the effect of the mistake is only trivial and it may be assumed that the privilege of avoiding the contract on account of it is claimed as a means of escaping from the obligations of the contract because for some other reason it has become burdensome rather than advantageous. It has been the attempt of the courts to fix the line at which the mistake ceased to be of sufficient importance to outweigh the expectation interest of the party who still seeks the enforcement of the contract, by the formulation of some rule that would accomplish the result automatically that has caused most of the confusion in the law with respect to mutual mistake. One attempt to formulate such a rule was made by the cases which held that the mistake did not make the contract voidable where it did not relate to the essence of the subject matter of the contract but only to its characteristics.[21] This rule certainly gives protection against rescission of the contract for merely trivial mistakes, and so gives ample protection to the expectation interest, but in many cases it was felt that it went too far in that direction and the courts therefore began to allow rescission in many cases where the mistake was clearly only as to the characteristics by the bare assertion that those characteristics were of the essence of the contract.[22] As a result the rule has become one of little value as a means of determining where the line between valid and voidable contracts will be drawn. Another method by which the courts have limited the cases of rescission for mutual mistake has been

[21]Hecht v. Batcheller, (1888) 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708, Costello v. Sykes, (1919) 143 Minn. 109, 172 N. W 907, 5 A. L. R. 250; Richardson v. Chicago, M. & St. P R. Co., (1924) 157 Minn. 474, 196 N. W 643, 2 Pom. Eq. Jur. (4th ed., 1918) Sec. 856 and cases cited in note 1, therein.

[22]Hannah v. Steinman, (1911) 159 Cal. 142, 112 Pac. 1094, (ignorance of zoning ordinance that prevented erection of intended building on property involved), Baker v. Fitzgerald, (1903) 204 Ill. 325, 68 N. E. 430 (walls of building involved too weak to permit erection of intended additional stories), Sherwood v. Walker, (1887) 66 Mich. 568, 33 N. W 919, 11 Am. St. Rep. 531 (contract to sell thoroughbred cow for her value as beef, thinking she was barren, when in fact she was fertile and worth at least ten times that amount), Edwards v. Trinity & B. V R. Co., (1909) 54 Tex. Civ. App. 334, 118 S. W 572 (mistaken belief that gravel on land sold for gravel pit was in bodies large enough for excavation by a power shovel), Bedell v. Wilder, (1893) 65 Vt. 406, 26 Atl. 589, 36 Am. St. Rep. 871 (ignorance of restrictions on the use of water power which prevented the use the buyer intended).

by the doctrine that the mistake must be as to a matter of fact, not as to a matter of law.[23] Again the rule was found to give too much protection to the expectation interest at the expense of the party injured by the mistake, and again the rule was substantially destroyed by qualifications and restrictions,[24] principally by the restriction that a mixed mistake of law and fact would be treated as a mistake of fact, and that all mistakes as to the legal rights of the parties were of that character.[25] It is true, of course, that any legal right depends on the application to the facts involved of some doctrine of law, and may, therefore, be considered a mixed question of law and fact, but in many of the cases, if not in most of them, where this qualification was applied, it was clear that the mistake did not relate to the facts but only to the application to the facts of a mistakenly assumed rule of law. Some modern cases have rejected the rule altogether and give relief for a mistake of law as freely as for a mistake of fact.[26]

The Contracts Restatement gives little aid in the solution of the problems here under consideration. It states that the mistakes made by the parties must be as to a "fact assumed by them as the basis on which they entered into the transaction."[27] The comment to this section rejects the rule that the mistake must relate to the essence, "identity" of the subject matter of the contract, and apparently makes the test of whether the fact as to which the mistake related a subjective one by the statement that: "The

[23]Hemphill v. Moody, (1879) 64 Ala. 468, Fowler v. Black, (1891) 136 Ill. 363, 26 N. E. 596, 11 L. R. A. 670; Stafford v. Fetters, (1881) 55 Ia. 484, 8 N. W 322; Jordan v. Stevens, (1863) 51 Me. 78, 81 Am. Dec. 556; Bowen v. Pursel, (1931) 109 N. J. Eq. 67, 156 Atl. 649. Very frequently the courts give as the reason for this rule the policy of the law against permitting a party to plead ignorance of the law, but whatever the reason for its adoption, the effect of its application has been to protect an interest in the performance of the contract which is not justified because it is not what was intended by either party when the contract was entered into.

[24]Even in the case of Jordan v. Stevens, (1863) 51 Me. 78, 81 Am. Dec. 556, where the court said: "It is impossible to uphold the government, and so to maintain its administration as to protect public and private rights, except upon the principle that the rights and liabilities of everyone shall be the same as if he knew the law," the decision was to give relief against the enforcement of the contract because of themistake.

[25]Lansdowne v. Lansdowne, (1730) Mos. 364, 2 Jac. & W 205, Bingham v. Bingham, (1748) 1 Ves. Sr. 126, 27 Eng. Repr. 934, In re Swift (U. S. D. C., Mass., 1901) 111 Fed. 503, Morgan v. Dod, (1877) 3 Colo. 551, Renard v. Clink, (1892) 91 Mich. 1, 51 N. W 692, 30 Am. St. Rep. 458, Gerdine v. Menage, (1889) 41 Minn. 417, 43 N. W 91.

[26]Peterson v. First Nat. Bank of Ceylon, (1925) 162 Minn. 369, 203 N. W 53, 42 A. L. R. 1185.

[27]American Law Institute, Restatement of the Law of Contracts, (1932) Sec. 502.

materiality of the fact is weighty evidence that the parties made this assumption."[28] It is very doubtful whether this formulation of the rule gives sufficient recognition to the legitimate expectation interest of the party refusing to rescind the contract, under some circumstances. Suppose, for example that V and P have contracted for the sale of a residence to P During the course of the negotiations, and after the price had been agreed upon, P stated that he assumed from certain characteristics of the architecture that the house was designed by the well known architect X. V replied that he did not build the house and did not know who the architect was, but that he now was persuaded by P that it was X. Before the contract was performed, an economic depression reduced the values of all houses in that community by 50% and P then made an investigation which disclosed that the house was not designed by X, and thereupon gave notice that the contract was at an end because of the mutual mistake. It would seem that V could not insist upon the performance under these circumstances. Certainly there could be no reformation or performance by him which would make the bargain accord with what the parties thought that it was, nor would the recovery of compensation measured by the increase in value which the fact that X designed it would give to the house "put him in as good a position as if the transaction had been what he supposed it to be;"[29] for one thing that increase probably could not be ascertained by any standard, and for another, whatever increase the parties thought that fact would give to the value of the house was probably not included in the price fixed since that price had been agreed upon before any consideration was given to the fact. Both parties knew that the fact was material in the mind of P, and it was assumed by both as a basis on which the parties bargained. If it be material under the Restatement rule, it is probable that not even P himself could say whether he would have made the contract if he had known the house was not designed by X. But should the law deny all recognition to V's expectation interest because of this relatively immaterial mistake, which did not, so far as the facts show, add anything to the amount which he was to receive under his contract? If it appears also that because of his having made the contract with P, he lost a chance to sell the house to another before the collapse in values, he may assert a reliance interest which ought to receive some recognition from the law It may be predicted with considerable confidence

[28]Comment (a) to Sec. 502.

[29]American Law Institute, Restatement of the Law of Contracts Sec. 502 (c).

that under these circumstances the court would hold P to a performance of his contract, notwithstanding the apparent authority of the Restatement to the contrary.

The Restatement states that the mistake must relate to "a fact."[30] Neither the comment nor the illustrations under this section indicate the meaning of the term "fact" in this connection, but it may be assumed that it was here used in the same sense that it is used in the chapter on fraud and misrepresentation, where it is stated that the word "facts" in that section is given its broadest meaning, which includes a rule of law.[31] With this meaning the Restatement is in harmony with the recent cases which have rejected the rule that a mutual mistake of fact does not make the contract voidable.

Where the mistake was unilateral and not induced by the misrepresentations of the other party, or known to him under circumstances which required him to correct it before making the contract, the law gave recognition to the expectation interest of the other party by the adoption of the rule that the contract could not be avoided for a unilateral mistake.[32] This rule is still stated by the courts as a reason for denying rescission,[33] and is approved by the Restatement[34] and by writers on the subject.[35] The Explanatory Notes of the Reporter[36] cite more cases in which rescission was allowed for a unilateral mistake, than those

[30]Rescission is allowed where the parties are "both under a mistake regarding a fact assumed by them." American Law Institute, Restatement of the Law of Contracts, (1932) Sec. 502.

[31]Sec. 470, Comment (b).

[32]3 Williston on Contracts, (1920) Secs. 1573-1578.

[33]Steinmeyer v. Schroeppel, (1907) 226 Ill. 9, 80 N. E. 564, 10 L .R. A. (N.S.) 114, 117 Am. St. Rep. 224, Tatum v. Coast Lumber Co., (1909) 16 Idaho 471, 101 Pac. 957, 23 L. R. A. (N.S.) 1109; John J. Bowes Co. v. Milton, (1926) 255 Mass. 228, 151 N. E. 116; Wheeler v. Holloway (Tex. Comm. App., 1925) 276 S. W 653.

[34]American Law Institute, Restatement of the Law of Contracts, (1932) Sec. 503.

[35]3 Williston on Contracts, (1920) Sec. 1573, Lubell, Unilateral Palpable and Impalpable Mistake in Construction Contracts, (1932) 16 Minn. L. Rev. 137, 142. This article is a study of the variation in bids for construction contracts to determine the variation that may be expected in them in the absence of any claim of mistakees, in order to determine what variation makes the mistake "palpable," that is, one which the other party should have known to have existed. The conclusion is that the courts frequently find that the receiver of the bid ought to have known of the mistake, when the evidence does not sustain that finding. May this not be a device by the courts to give relief for a unilateral mistaken when the injury to the bidder from it is greater than the law ought to require him to bear?

[36]American Law Institute, Restatement of the Law of Contracts, Tentative Draft No. 9, (1931) p. 226.

where it was refused, but adopts the rule of the latter group as more consistent with the objective assent theory of contracts, and with the policy of stability and definiteness which were the best reasons for the adoption of the objective theory Where the mistake is only unilateral, it is unquestionably proper that the courts should relieve the party making the mistake from his obligation less freely than where the mistake is mutual, because the other party to the contract gets from the mistake nothing in addition to that for which he bargained. His expectation interest has a much stronger claim to recognition than that of a party who will obtain from the performance of the contract an unexpected advantage.

But the interest in stability of contracts should not outweigh all other interests. In the Minnesota case[37] which has become a leading case for the rescission of a contract for a purely unilateral mistake, the action was brought on a certified check for $1,000 deposited by the lowest bidder for the construction of a church, whose bid was accepted. Before any action had been taken by the church trustees in reliance on the acceptance of the bid, the bidder discovered that in making his bid he had omitted to include the cost of the structural steel work in the building, an item which he estimated at $2,350. Defendant's bid was $30,973, which was about $3,900 below the next higher bid, but a belated bid was accepted after defendant refused to enter into the contract which was only about $1,300 higher than defendant's bid, so the church lost nothing because of defendant's mistake except the opportunity to have the structure built for less than any builder thought he could profitably build it. The court in that case accepted the jury's finding, approved by the trial court, that defendant was guilty of no negligence in making the mistake, a finding which it is hard to reconcile with the admitted facts as to how it was made, but even if there were negligence, should the law impose what amounts to a penalty of $1,000 for negligence which resulted in no injury? If the recovery is not to be allowed as a penalty for negligence, the only other basis for sustaining it would be the desirability of "stability and definiteness," but it is doubtful if many modern courts would rate this interest so highly in the particular situation. The interest of certainty is much more important in dealing with sales contracts and commercial paper, but even with respect to them, where the interests of no third person are affected and the

[37]St. Nicholas Church v. Kropp, (1916) 135 Minn. 115, 160 N. W 500, L. R. A. 1917D 741.

innocent party has suffered no loss by the mistake, that interest should yield to the manifest injustice of subjecting the defendant to a heavy penalty for an omission which has injured no one.

Where there is no expectation interest, as where the unilateral mistake results in the payment of money which is not owing,[38] and where the expectation interest is not legally protected because no consideration has been given, as in the case of a gift made under a unilateral mistake of the donor,[39] the law permits relief, which seems pretty strong indication that its reason for refusal of relief in the case of a unilateral mistake by a party to a bilateral contract is based rather on the principle of protecting that interest than on the principle of securing stability and certainty in the law.

The Contracts Restatement says that different mistakes of the parties relating to the same matter permit rescission but that different mistakes of the parties with respect to different matters do not.[40] The comment merely restates the latter proposition without giving any reason for it, and there is no illustration of what is considered separate mistakes relating to different matters. It would be a very unusual situation which would raise such a question in court. If the mistake of each party was such as to make that party anxious to be relieved of the obligation of the contract, the contract would be terminated by mutual consent. If either party chose to abide by the contract, notwithstanding the mistake on his part, the knowledge of that mistake would probably never reach the other party or the court and the case would appear to be one of simple unilateral mistake. If the question did reach the court, there is no apparent reason why it should not be treated as a case of mutual mistake, unless we regard the verbal argument that the rule for rescission is limited to cases of "mutual" mistake as enough, and even then it seems just about as difficult to call separate mistakes as to the same matter "mutual" as to apply the same designation to separate mistakes as to different matters. In either event, neither party expected the contract to give him what it will give him if enforced according to its terms, and neither, therefore, has a valid expectation interest which the law should protect by holding the other party to the contractual terms.

The confusion in the cases as to the right to reformation of an instrument to make it conform to the actual agreement of the parties, is very largely due to the tendency to argue from rescission

[38]3 Williston on Contracts, (1920) Secs. 1574, 1575.
[39]3 Williston on Contracts, (1920) Sec. 1573.
[40]American Law Institute, Restataement of the Law of Contracts, (1932) Sec. 503.

cases to reformation cases, as the courts often have done. The remedy of reformation by which the expression of the agreement in a written instrument is made to conform to the actual agreement between the parties, is so radically different from the remedy of rescission by which the obligation of the contract is terminated, that any attempt to use the latter as analogy for the former is bound to result in confusion and injustice. A common example of this confusion is in the discussion of the requirement of mutuality of the mistake.[41] Where the written instrument fails to embody the terms agreed to by the parties, there can be no unilateral mistake, unless the other party notices the discrepancy and seeks to take advantage of it, which is uniformly considered as a fraud for which reformation may be granted.

The granting of the remedy of reformation never defeats the expectation interest of either party to the instrument, but makes it effective to protect that interest. The instrument, as reformed, expresses the true agreement. The only possible basis for refusal of relief in cases where the agreement is not correctly expressed in the instrument is, therefore, to be found in the policy of the law, for reasons of certainty and stability, to refuse to permit the language of the instrument to be contradicted by other evidence as to what the agreement really was, a policy embodied in the parol evidence rule. Courts of equity have conformed to this rule where there is no attempt to obtain reformation of the instrument, and, where reformation is sought, they have sustained the policy so far as they thought desirable by requiring the mistake to be proved by clear and convincing evidence.[42] But when the mistake has been admitted by the pleadings, or has been proved with the required certainty, they have felt that the policy of protecting the expecta-

[41]See Salomon v. North British & Merc. Ins. Co., (1915) 215 N. Y. 214, 109 N. E. 121, L. R. A. 1917C 106 where reformation of a clause for payment of loss to plaintiff as mortgagee was refused for the reason that the mistake was not shared by the insurer, the clause as written expressed just what it intended the agreement to be. The court overlooked the fact, which was pointed out in Hemphill v. New York Life Ins. Soc., (1922) 195 Ky. 783, 243 S. W 1040, that in these cases where reformation of such a clause of the policy is sought, there is no real contract negotiated by the parties, but the clause is inserted at the request of insured, and as he desires it, under the rights given him by the contract. In such a case the transaction should be treated like the reformation of a gift, in which cases only the mistake of the donor is material. Mitchell v. Mitchell, (1869) 40 Ga. 11, Crockett v. Crockett, (1884) 73 Ga. 647, Ferrell v. Ferrell, (1903) 53 W Va. 515, 44 S. E. 187 In other gift cases reformation is allowed for the mistake of the donor without considering whether the donor shared in the mistake, as in Andrews v. Andrews, (1859) 12 Ind. 348.

[42]American Law Institute, Restatement of the Law of Contracts, (1932) Sec. 511.

tion interests of the parties outweighs the policy of certainty, and have granted the relief of reformation. The practice of some code courts to submit the issue of mistake to the jury in cases where a mistake entitling the defendant to reformation is pleaded as an equitable defense to an action for damages for breach of the contract may endanger this interest of certainty,[43] because the jury is not so apt as a court to give proper weight to that general interest as against the interest of the individual parties to the particular case, but the preservation of the interest in the certainty of instruments ought not to defeat reformation when there is no doubt that the instrument fails to incorporate the true agreement of the parties.

The refusal of reformation because of the negligence of the plaintiff in failing to read the instrument before he signed it, is another instance of application of rescission principles to reformation cases.[44] There may be some question as to whether the law should penalize a man for negligent unilateral mistake in entering into the contract by requiring him to perform the contract even at a serious loss, but there would seem to be no equitable basis for saying that his negligence bars the right to reformation when the other party must have been either equally negligent in failing to observe that the terms of the instrument varied from those of the agreement, or else be seeking to take advantage of that mistake which he did notice.

There are some situations in which the right to reformation may not be clear, even though the facts are admitted. One of these is illustrated by the well known case in which some of the justices of the United States Supreme Court stated that reformation could

[43]American Law Institute, Restatement of the Law of Contracts, (1932) Sec. 507, and Comment.

[44]In Reid, Murdoch & Co. v. Bradley, (1898) 105 Ia. 220, 74 N. W. 896, the court refused reformation of an instrument because of negligence in failing to read it before signing. The court relied on Glenn & Pryce v. Statler, (1875) 42 Iowa 107, a rescission case, and McCormack v. Molburg, (1876) 43 Ia. 561 where the mistake was set up as a defense to recovery on the instrument. It did not consider whether the other party in the principal case was equally negligent, or whether he knew of the terms of the instrument. The latter was probably the case because he presented a form of guaranty of all debts, past and future, to Bradley, and when the latter refused to guarantee past debts, told him to strike out one clause, without mentioning other clauses which had the effect of including the past debts. The result of this case was to impose on the guarantor a large liability which the other party knew he had expressly refused to assume, merely because he negligently failed to read the instrument and did not know that he should have stricken out other clauses than those pointed out to him, an outstanding case of injustice resulting from the blind application of general rules.

not be granted for a mistake of law [45] In that case the parties had consulted counsel for advice as to the security of a loan made to the owner of an interest in a ship. They were advised as to the relative merits of a bill of sale, and of a power of attorney to sell the borrower's interest in the ship, and chose the latter to avoid the necessity of changes in the register of the ship. Before the loan was repaid, the borrower died, and it was held that the power was not one coupled with an interest and, therefore, ended with the death of the creator of the power. The borrower's estate was insolvent and the lender sued for reformation, which was properly denied because there was no agreement for the execution of the bill of sale to which the instrument could be made to conform. In many cases it may be difficult to determine on similar facts whether the agreement between the parties was for adequate security, the choice of form to be left to the draftsman of the instrument, in which case reformation might be given, or whether it was for the specific form drafted.

In those cases where there has been no specific formulation of the terms of the agreement before the instrument is drafted, there may be a similar close question as to whether the agreement was to use the terms embodied in the instrument, under a mistaken belief that they had a meaning other than their legal meaning, in which case the remedy, if any, can only be rescission, or whether they agreed upon the idea which they mistakenly supposed was expressed by those terms, in which case reformation can be allowed.[46] The ordinary rule as to the degree of proof required would

[45]Hunt v. Rousmaniere's Administrator, (1828) 1 Pet. 1, 7 L. Ed. 27 In this opinion Washington, J. stated that reformation could not be given for a mistake of law, though in a previous opinion in the same case on appeal from a ruling on demurrer, (1823) 8 Wheat. 174, 5 L. Ed. 589, Marshall, C. J., who wrote the opinion of the court, had stated that there was no rule that a plain and acknowledged mistake of law was beyond the reach of equity. The statement of Washington, J., has been frequently cited as establishing the proposition that reformation cannot be given for a mistake of law. American Law Institute, Restatement of the Law of Contracts, (1932) Sec. 504, does not mention mistake of law, but it does allow relief wherever the instrument executed by the parties is "materially at variance with that intention." 3 Williston on Contracts, (1920) Sec. 1585, expressly states that reformation may be allowed for a mistake of law, and that is now the general rule. For a time Illinois adhered to the contrary rule, but it expressly rejected it in Darst v. Lang, (1937) 367 Ill. 119, 10 N. E. (2d) 659.

[46]In Pittsburgh Lumber Co. v. Shell, (1916) 136 Tenn. 466, 189 S. W 879, the parties intended to convey to the purchaser all of the vendor's land in a stream watershed, and employed a surveyor to run the line. He ran the line along Sheep Rock Ridge, and the deed was drawn accordingly, both parties understanding that the boundary of the land conveyed ran along that ridge, but thinking the ridge was the divide between the watersheds, whereas in fact it was not. Reformation was properly denied on a finding

lead to the denial of the relief unless it was clear that the agreement was as to the idea, not as to the terms.

In some of the reformation cases, it seems to be apparent from the facts, though not considered by the court, that the difficulty arises from a lack of agreement as to terms. The parties have agreed generally as to the object to be attained and have left to the draftsman, usually an attorney, the task of framing an instrument which will express this agreement. Very often in such work, he will be compelled to insert many provisions as to which the parties reached no agreement because they were never considered, but which provisions are usual in a complete instrument. In these cases, the courts may properly hold that the failure of a party to read the instrument, or to object to the inclusion of such a term bars his right to object after the execution of the instrument.[47] In that situation the other party may have read and understood the terms of the instrument without being guilty of any fraud in accepting it as the embodiment of the agreement, and, therefore, he has a justifiable expectation interest in the enforcement of the instrument as drafted. In any event reformation to include a different term on that subject would be clearly erroneous, and the only alternatives are to enforce the instrument as drafted, or to permit its cancellation.

This very general and brief survey of the law of mistake as a ground for rescission or reformation of a contract, indicates that the confusion in the cases on these questions is due primarily to the inadequacy of the rules as formulated to meet the needs of particular cases, and that it cannot be lessened, either by a reassertion of those rules, or by the formulation of new ones. Much of the confusion in the cases when they are considered as applications of the rules of law which they profess to follow, is eliminated when they are considered as efforts to find a correct balance of the conflicting interests involved. It is probable that even more of the confusion would be eliminated if the courts consciously sought to balance the interests rather than to follow specific rules. But it is idle to hope that all of it would disappear even then, for we have as yet no accurate scales for weighing the relative social values of the several interests advanced by the respective parties

that they intended to convey the land as described, but mistakingly thought it was all in one watershed. A slight variation in facts might have led to reformation to make the conveyance conform to the understanding with respect to the watershed.

[47]Isaacs v. Schmuck, (1927) 245 N. Y. 77, 156 N. E. 621, 51 A. L. R. 1454.

in this, or any other, field of the law It is undoubtedly idle to hope that any such instrument will ever be devised and we will have to be content with the best approximation that can be reached by intelligent judges, advised by intelligent counsel, and made aware of the precise issues involved. But the fact that we cannot hope for complete success is no excuse for not undertaking the task and progressing as far as we can.

Some of the difficulty in balancing the interests will be eliminated if we keep in mind the power of the court to adapt the remedy to the particular needs of the situation. Very often the court is not limited to a choice of recognizing the interests of one party and denying protection to the interests of the other, but may, contrive a remedy which will give a large degree of recognition and protection to both. One form of this adaptation of remedy is recognized in the provision of the Contracts Restatement that rescission will be denied in cases of mutual mistake if the party who suffers from the mistake can have reformation of the contract to make it conform to what he intended it to be.[48] It is not expressly so stated, but probably is intended that this relief can be given only with the consent of the one who benefited by the mistake, as the cases generally provide.[49] Surely it cannot be meant that the court can substitute for the agreement actually made by the parties one which it assumes or finds they would have made if they had not made the mutual mistake. The effect of such a rule would be to eliminate the distinction between the kind of mistake that permits reformation, and that which permits only rescission in all cases where such a change in the terms of the contract could be made. Even more clearly, there is no basis on which to sustain the imposition on the benefited party of an obligation to compensate the other for the loss he suffers because of the mistake which they mutually made. But it is clearly in accord with justice that the benefited party, if he desires to obtain those benefits received under the contract which are not affected by the mistake, may do so by consenting to the elimination of the effects of the mistake from the terms of the contract, or by compensating the other party for the loss which the mistake has caused to the expectation interest of the other.

When the courts recognize the expectation interest as entitled to protection, they give such protection by either an action at law

[48]American Law Institute, Restatement of the Law of Contracts, (1932) Sec. 502.

[49]See, for examples Lawrence v. Staigg, (1866) 8 R. I. 256, Brown v. Lamphear, (1862) 35 Vt. 252.

for damages, or by a suit in equity for specific performance. So long as law and equity were separately administered systems of remedies, it was clear that the law would often protect the expectation interest, and would be permitted by the court of equity to do so, even though the latter court regarded the mistake as one which would prevent the protection of that interest in equity. In other words, the courts of equity frequently have refused to grant to one party to a contract specific performance of the contract, even though the remedy at law for the breach is inadequate, because of a mistake by the defendant in entering into the contract, and at the same time they have refused to grant the other party's request for cancellation of the contract, the effect of which is to permit the recovery of damages against him in an action at law.[50] In many of the cases where this result has obtained in the past it has been due to differences of opinions of the respective courts as to the weight to be given to the various factors which have entered into the making of the contract, and to that extent we may agree with the contention that where the two forms of remedies are now administered by the same courts, in the same form of action, the distinction should be abandoned and rescission allowed in any case where specific performance would be denied because of the mistake.[51] But insofar as the refusal of specific performance is based on the fact that that remedy will impose on the defendant a greater hardship than would be caused by compelling him to pay the damages suffered by the other party because of his breach, the greater strictness in the allowance of the former remedy performs a valuable social function. For example, a railroad company, believing that the best location for its line is across the land of A, enters into a contract with A for the purchase of a right of way, necessarily paying therefor more than the value of the strip taken for ordinary uses. The company then discovers that its engineer was mistaken in believing that a river along that line could be economically bridged at that point, and it is, there-

[50]Chute v. Quincy, (1892) 156 Mass. 189, 30 N. E. 550; Baker v. Polydisk, (1919) 144 Minn. 72, 174 N. W 526; Twining v. Neil, (1884) 38 N. J. Eq. 470.

[51]Patterson, Equitable Relief for Unilateral Mistake, (1928) 28 Colum. L. Rev. 859, 900. In St. Nicholas Church v. Kropp, (1916) 135 Minn. 115, 160 N. W 500, L. R. A. 1917D 741, where plaintiff's complaint was based on the certified check deposited by defendant with his bid, the court held that the answer setting up the unilateral mistake "rested on the proposition that a court of equity may, in certain cases where a court of law is powerless, grant relief" and that a jury trial was, therefore, properly denied, recognizing that even in rescission cases the rules of law and equity are different.

fore, obliged to relocate the line. Clearly this is a unilateral, impalpable mistake and it is unlikely that many courts would find in the facts any basis for refusing to give effect to A's expectation interest to the extent of awarding him as damages the amount by which the contract price exceeded the value of the land. But if the court goes further and decrees specific performance of the contract, the railroad company will be compelled to pay the full price for the land and will find itself the owner of a narrow strip of land running across the land of A, of which it can make no use, and for which there will be no market, and it will probably be compelled to sell the strip back to A for whatever price the latter is willing to give, thus permitting A to reap a benefit from the company's mistake in addition to the full value of his expectation interest under the contract.[52] In all such cases where the hardship is in the performance of the contract, the courts in code states should, and probably will, retain the distinction between the consequences of a mistake in a suit for specific performance, and those in an action for damages.

Whenever the case is one in which the expectation interest of the parties cannot be protected by the law, each one of them will assert a restitution interest by claiming the right to recover whatever he has delivered to the other party under the contract, and the law gives full effect to this restitution interest, even to the extent of forbidding rescission of the contract if the party entitled to rescind will not, or cannot, restore what has been delivered to him under the contract.[53] But in many cases the party against whom rescission is sought asserts a claim to recover not only what he has delivered under the contract but also other losses suffered because of acts performed in reliance on the contract. So far, this reliance interest has received very little protection in our law Fuller and Perdue have demonstrated that a greater recognition of this interest would simplify many of the problems in determining the proper award of damages for breach of a contract.[54] Such a recognition would likewise give to our system of remedies for mistake a greater flexibility that is much to be desired. Almost the

[52]Specific performance was refused to the vendor in such a case even though the railroad's change of line was apparently due to its free choice, uninfluenced by mistake, in Detroit & I. R. Co. v. Murry, (1925) 21 Ohio App. 97, 152 N. E. 771.

[53]American Law Institute, Restatement of the Law of Contracts, (1932) Sec. 480, stating the requirement of restitution as a condition to rescission for fraud, which is made applicable to rescission for mistake by Sec. 510.

[54]Fuller and Perdue, The Reliance Interest in Contract Damages, (1936, 1937) 46 Yale L. Journ. 52, 373.

only protection that is generally given by our law to this interest in cases of mistake in entering into a contract is to forbid rescission if the delay in seeking it has resulted in a change of situation by the other party which will be prejudicial to him if the rescission is now allowed.[55] If our courts had the power to award against the party rescinding the contract a judgment for all losses sustained by the other party in reliance on the contract, they could more freely permit rescission for negligent, unilateral mistakes. Such a result has been reached in a jurisdiction where the statute permitted recovery of the loss suffered by reliance on a contract, and where the facts showed clear negligence on the part of the party who made the mistake.[56] Under the general practice, the only protection to the reliance interest in those jurisdictions where unilateral mistake may be the basis for rescission lies in the rule that the right to rescind exists only while the contract is executory, and while the other party has made no detrimental change of position in reliance on it.

Where the mutual mistake of the parties is caused by the conduct of the party who has benefited by the mistake, the right to rescission is especially clear, but how about the cases where it is caused by the conduct of the injured party? Such cases would seldom arise because it is not customary for parties to negotiations for a contract to call attention of the adverse parties to factors which will strengthen the bargaining position of the latter, but such a case as that previously supposed of the mistake as to the architect who designed the house might arise.[57] If, in such a case it were clear that the mistake was as to a fact assumed as the basis for the contract it is probable that the court would say that the reliance interest of the vendor could not be protected any more than could his expectation interest since the misconduct of the purchaser has not been such as to justify imposing on him the loss which one or the other must suffer because of the diminished value of the house. But if, as in that case, it is doubtful whether

[55]American Law Institute, Restatement of the Law of Contracts, (1932) Secs. 483, 510.

[56]Goodrich v. Lathrop, (1892) 94 Cal. 56, 29 Pac. 329, 28 Am. St. Rep. 91, where purchaser selected and inspected a lot which she desired to purchase, and which she mistakenly thought belonged to vendor, then went to vendor and made an offer to purchase the lot which he did own in the vicinity. He accepted the offer and the contract was signed, but the purchaser was allowed to rescind on discovering the mistake, the court stating that if the vendor has lost anything in reliance on the contract because of the decrease in price values, he could recover it under the California Code. That seems to be a better solution in such a case, than the requirement that the purchaser complete the purchase of a lot which she did not desire.

[57]Ante, p. 468.

the mistake was sufficiently material, so that the court could not say with assurance that rescission was being sought because of the mistake and not because the bargain had, for other reasons, become an unprofitable one, might not the court, as a condition to allowing the rescission, require that the reliance interest be protected by the payment of the loss the other sustained by reason of his reliance on the contract? If the courts were to be empowered to protect this reliance interest, either by a judgment for the recovery of losses suffered in reliance on the voidable contract, or by making the payment of such losses a condition to the rescission of the contract, it is probable that the skill of counsel and the experience of the courts would develop many other situations in which the device might be used to solve problems in the balancing of the interests of the parties in mistake cases which now present extreme difficulties.

This study has considered only a very small portion of the numerous cases that have been decided in the field of rescission and reformation for mistake. Perhaps they do not represent a fair sample of all of the cases, but most of them may properly be considered leading cases[58] because of the frequency with which they have been cited by other courts and by writers, and may, therefore, be recognized as marking the general trends of the decisions. A consideration of them indicates, if it does not demonstrate, that, on the whole, the cases which have caused the confusion in this field reached results which were more just than would have been achieved by the application of the recognized rule to the facts involved. Unless we are prepared to hold that the interest of certainty in the law is great enough to justify frequent injustice to the individual litigant, it would seem to follow that we ought to abandon the pretense that this field is governed by any of these rules and instead frankly admit that the decision in each case will be made largely by balancing the interests of the respective parties in the particular case, including as an interest of great, but not paramount, weight the interest all parties have in assurance that the contracts into which they enter will be given effect.

[58]Most of the cases appear in one or more of the leading case books on the subject.