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THE EFFECT OF NEGLIGENCE ON REFORMATION OF WRITTEN INSTRUMENTS

In considering the reformation problem many of the courts conclude that negligence, not excused by fraud and mistake and without qualification as to its degree, precludes reformation.¹ As those familiar with the law would expect, there are points within this general view upon which some courts take leave to disagree.

The first point of divergence is on the question of the degree of negligence which vitiates a right to reformation. To indicate the disunity on the degree aspect, it is well to first consider the situation wherein the party seeking such relief has failed to read the instrument before signing. For a revelation of the tenor of those courts disregarding degree, a very early Iowa case² is illustrative. In this case the court stated that all negotiations preliminary to or contemporaneous with the written instrument are merged therein, and that the party signing such instrument without having read it or taken precautions to ascertain its contents is bound thereby. In contrast, a later New Jersey decision³ set forth the opinion, that where a grantee paid consideration his acceptance of a deed containing covenants inconsistent with the contract of sale, without reading the same, did not disentitle him to a reformation.

To emphasize that this variance is not merely a product of the courts around the turn of the century, a Federal case in 1939⁴ and an Iowa case of 1937⁵ show a continued incompatibility on the same question. The Federal case⁶ decided that the failure of a party to read the instrument before signing is negligence, thereby precluding the relief of reformation. On the other side of the question, the Iowa court⁷ decreed that the negligence of a party to a contract in not familiarizing himself with the contents of the instrument signed by him, will not always

¹ *Hope v. Barham*, 28 F. Supp. 561 (W.D. La., 1939); *Schweickhardt v. Chessen*, 329 Ill. 637, 161 N.E. 118 (1928); *Work v. Wagner*, 76 Colo. 407, 231 Pac. 1110 (1925); *Kearns-Gorsuch Bottle Co. v. Hartford-Fairmount Co.*, 1 F. 2d 318 (S.D. N.Y., 1921); *Houchin v. Auracher*, 194 Iowa 606, 190 N.W. 3 (1922); *In re Miller's Estate*, 226 S.W. 302 (Mo. App., 1920); *Hart v. Jopling*, 146 S.W. 1075 (Tex. Civ. App., 1912); *Grieve v. Grieve*, 15 Wyo. 358, 89 Pac. 569 (1907); *Minneapolis & St. Louis Railway Co. v. Cox*, 76 Iowa 306, 41 N.W. 24 (1888); *Fitzpatrick v. Ringo*, 9 Ky. L. Rep. 503, 5 S.W. 431 (1887); *Davenport v. Lowry*, 78 Ga. 89 (1886); *Johnston v. Dunavan*, 17 Ill. App. 59 (1885); *First Nat'l Bank v. Gough*, 61 Ind. 147 (1878).

² *Minneapolis & St. Louis Railway Co. v. Cox*, 76 Iowa 306, 41 N.W. 24 (1888).

³ *Lloyd v. Hulick*, 69 N.J. Eq. 784, 63 Atl. 616 (1906).

⁴ *Hope v. Barham*, 28 F. Supp. 561 (W.D. La., 1939).

⁵ *Conrad v. Farmer's Mutual Hail Ins. Association of Iowa*, 223 Iowa 828, 273 N.W. 913 (1937).

⁶ Note 4 *supra*.

⁷ Note 5 *supra*.

preclude reformation, and the court stated that the degree of negligence is the point to be considered. Although the courts in these cases where the degree of negligence is not considered, in no way indicate that their decision is controlled by the facts of the individual case, some cases lead one to conclude that their view will not be indiscriminantly applied to all analogous factual situations. This is most apparent in two cases,⁸ wherein the idea prevails that the negligent conduct of failing to read an instrument before signing may be excused, even in the absence of fraud or mistake. In the one case,⁹ the party seeking reformation had his bank prepare a mortgage, and relied on them to draw it according to its terms. They made a detrimental error of one thousand dollars and he failed to read the instrument. The court expressed the belief that relying on one's bank in such situations is commonly done and the negligence would be excused. Likewise, in the second case,¹⁰ the court excused the failure to read after the parties had dictated the terms which were written by a third person. Thus, what appears to be an irreconcilable split on substance, may only be a variance dictated by the facts.

The next point upon which some of the courts take an opposing stand is the effect of mutual mistake or fraud on the negligence of the party seeking relief. The majority of the courts considering the problem have held that mutual mistake will nullify the negligence of the party seeking relief. An exemplification on this result of mutual mistake is to be found in a rather recent Georgia decision.¹¹ It was stated therein, that the negligence of the complaining party does not necessarily preclude reformation, if by reason of a common or mutual mistake the instrument does not express the true agreement.

The contrary view, having but slight support,¹² stands forth most clearly in the case of *Great Western Manufacturing Company v. Adams*.¹³ In this case a lessee subleased to another with a covenant of warranty without providing for a right of reversion in the grantor which was contained in the master lease. He alleged mutual mistake and sought reformation thereof. The court very strictly stated that since the instrument did not express the complainant's true intent due to his own negligence, he is not entitled to reformation on the grounds of either mistake, fraud or accident. Such a decision surely does not seem reasonable in view of the fact that the presence of a mutual mistake discloses the

⁸ *Pickard v. Farmers' & Merchants' Bank*, 171 Wis. 167, 176 N.W. 782 (1920); *West v. Suda*, 69 Conn. 60, 36 Atl. 1015 (1897).

⁹ *Pickard v. Farmers' & Merchants' Bank*, 171 Wis. 167, 176 N.W. 782 (1920).

¹⁰ *West v. Suda*, 69 Conn. 60, 36 Atl. 1015 (1897).

¹¹ *W. P. Brown & Sons Lumber Co. v. Echols*, 200 Ga. 284, 36 S.E. 2d 762 (1946).

¹² *Rushton v. Hallett*, 8 Utah 277, 30 Pac. 1014 (1892).

¹³ 176 Fed. 325 (C.A. 8th, 1910).

nonexistence of a manifestation of mutual assent which was thought to be present. To subscribe to this holding would be to support the party who seeks no change, and is content to perform a contract where the mutual mistake was to his benefit—and punish the party who is willing to perform the agreement originally intended to be carried out.

With regard to those cases wherein a fraud was perpetrated by the party now defending the request for reformation, a 1942 California decision¹⁴ is a lucid presentation of the view more readily accepted. This court decreed that a person who has been induced to enter into a contract by fraud may rescind or reform the contract, and his negligence in failing to read the contract does not bar his right to relief. *Rushton v. Hallett*,¹⁵ in contrast, gives a holding not reconcilable with the foregoing view. The complainant in this case alleged that the defendant granted fraudulently included in the deed a second parcel of land that the grantor did not intend to convey. This court concluded that no relationship of confidence or trust existed between them, and if the complainant was imposed upon or defrauded it was through his own negligence, and the fault rests on him entirely.

As for a unilateral mistake, generally it does not give the erring party a right to reformation.¹⁶ In California however, certain types of unilateral mistake and negligence in failing to perceive it, do not prevent the maintaining of a reformation suit. As set out in one decree,¹⁷ under the Civil Code of California, reformation of a contract, made through mistake of one party which at the time of execution the other party knew of or suspected cannot be defended on the ground that the mistaken party was negligent in not reading the contract.

Inherent in all the preceding considerations was the prevailing idea that negligence, in itself, is invariably a bar to reformation. But in addition to those cases disagreeing minutely on the question of degree, we have many cases which stand in conflict as to whether negligence in itself is sufficient.

Thus some courts have taken the position that mere negligence will not preclude a party from receiving reformation of his instrument. A representative case in this group is that of *McMahon v. Tamer*,¹⁸ in which the grantor of two tracts of land to a brother and sister deeded each the other's tract. The brother failed to read his deed at the time

¹⁴ *Security-First Nat'l Bank of Los Angeles v. Earp*, 19 Cal. 2d 774, 122 P. 2d 900 (1942).

¹⁵ 8 Utah 277, 30 Pac. 1014 (1892).

¹⁶ *Hyde v. Kirkpatrick*, 78 Ore. 466, 153 Pac. 41 (1915); *Pope v. Hoopes*, 84 Fed. 277 (C.A. N.J., 1898).

¹⁷ *Wilson v. Moriarity*, 88 Cal. 207, 26 Pac. 85 (1891).

¹⁸ 249 P. 2d 502 (Utah, 1952).

he accepted and sought to have the deeds reformed. The court held that the negligence must amount to a violation of a positive legal duty. It concluded that even clearly established negligence may not of itself be a sufficient ground for refusing relief, if it appears that the other party has not been prejudiced thereby. The courts adhering to this rationale are few in number.¹⁹ However, it does seem to be a very equitable and logical solution, for it would appear that as long as the other party is in no way prejudiced by the negligence, there is no reason for denying to the negligent, but innocent party, the right to a reformation.

This requirement that the negligence amount to a violation of a positive legal duty before the right to reformation is lost, together with the other equitable attitude of allowing reformation even then if no prejudice has resulted, first appeared around the early 1930's. One of the earliest cases setting forth this view was an Illinois Appellate decision.²⁰ In this decision the defendant (mortgagor), when applying for a mortgage from the complainant (mortgagee), gave a description of his land which excluded one quarter of a section by mistake. Complainant sought to have the one quarter included in the mortgage. The defendant alleged that since complainant failed to read the description and discover the error his negligence precluded his right to relief. The court concluded that the negligence must amount to a violation of a legal duty, and that the party against whom the reformation is sought to be enforced must have suffered a loss because of such negligence, before reformation will be denied.

The present Illinois view must not be assumed to be that set forth in this decision however, for subsequently the Illinois courts did undergo a few changes of mind. Prior to 1931, the Illinois case precedent was a very early Illinois Appellate decision.²¹ This case was in conformance with decisions looking upon negligence in itself as a bar, and the court, without considering the degree of negligence, stated that negligence on the part of the complaining party destroys his right to reformation. This attitude was again substantiated in an Illinois Supreme Court decision in 1928,²² wherein the court stated that to justify reformation of a written contract it must appear that the party seeking such relief was free from negligence.

The first change was brought about in 1931,²³ when the Illinois Ap-

¹⁹ *Meyer v. Young*, 23 Wash. 2d 109, 159 P. 2d 908 (1945); *Greenfield v. Aetna Cas. & Sur. Co.*, 75 Ohio App. 122, 61 N.E. 2d 226 (1944); *Ward v. Lyman*, 108 Vt. 464, 188 Atl. 892 (1937); *Fed. Land Bank of St. Louis v. Kenshalo*, 258 Ill. App. 1 (1930).

²⁰ *Fed. Land Bank of St. Louis v. Kenshalo*, 258 Ill. App. 1 (1930).

²¹ *Johnston v. Dunavan*, 17 Ill. App. 59 (1885).

²² *Schweickhardt v. Chessen*, 329 Ill. 637, 161 N.E. 118 (1928).

²³ *Fed. Land Bank of St. Louis v. Kenshalo*, 258 Ill. App. 1 (1930).

pellate Court, as noted above, subscribed to the requirement that the negligence must be a violation of a legal duty with prejudice resulting to the defending party. This view was immediately altered by the Illinois Supreme Court in the following year.²⁴ Therein, the court reaffirmed the concept that negligence to vitiate reformation must amount to a violation of a legal duty; however, the Supreme Court did not adhere to the Appellate Court's conclusion that relief would nevertheless be granted if no prejudice was present. The court merely stated that to constitute such negligence as will be sufficient to prevent reformation of an instrument, it must be shown to have been of such a gross nature as to amount to a violation of a legal duty.

This holding was applied in a subsequent case,²⁵ and recently in *Korosic v. Pearson*.²⁶ In this latter case, two brothers, Steve and Edward Korosic, owned a parcel of land in joint tenancy—thirty-three feet of which had been dedicated for street purposes. The brothers decided to divide the land, each to take one half. In so doing they ignored the thirty-three feet of dedicated land and divided only the remaining portion. Edward Korosic received the half abutted by the dedicated thirty-three feet. Through subsequent conveyances the defendant Pearson became owner and had a survey made. This survey brought to light the forgotten thirty-three feet. Steve Korosic then sought reformation of the original partition so as to give him an extra sixteen and one half feet. The defendant alleged negligence on complainant's part as a bar to relief. It was stated by the court that to constitute such negligence as would be sufficient to prevent reformation of an instrument it must be shown to have been of such a gross nature as to amount to a violation of a legal duty.

At present, the last mentioned case appears to be the Illinois view. However, there are really too few Illinois cases in point upon which to predicate a definite stand. Also, it would be difficult to attempt an analysis of the cause of all the foregoing variations, since reformation is a child of equity and the results in equity are the offspring of the chancellor's mental discretion. In light of this, the transition in the courts of any jurisdiction cannot necessarily prognosticate a possible trend, as it may well only indicate equity's vacillation with the times—negligence today being of far more common occurrence than in by-gone days, the present attitude may merely be *de minimum non curat lex*.

²⁴ *Pearce v. Osterman*, 343 Ill. 175, 175 N.E. 416 (1931).

²⁵ *Anderson v. Pettigrew Foundry Co.*, 297 Ill. App. 14, 17 N.E. 2d 60 (1938).

²⁶ 377 Ill. 413, 36 N.E. 2d 744 (1941).