

## Some Aspects of Unilateral Mistake

David Stewart Edgar Jr.

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## SOME ASPECTS OF UNILATERAL MISTAKE

### I

THE modern theory of contract, as expounded by Professor Williston<sup>1</sup> and others, that an actual meeting of the minds is not always necessary to a pact, but that expressed intention is the determining factor, solves many a difficult problem of mistake. The older theory, that true mental assent of both parties to all terms must accompany expressed intention and apparent assent in order that a contract might result, has caused considerable trouble. Among other things, it has led to an idea quite prevalent that unilateral mistake is *ipso facto* remediable by rescission (by act of the mistaken party, or by decree of equity on his petition in a proper case), and that only reformation requires a showing of mutual mistake.<sup>2</sup> If this were true, great injustice would frequently be done to persons with every right to insist on the continuance of performance of contracts negotiated.<sup>3</sup>

Suppose, for example, that A owns two yachts, one of which is a gasoline yacht worth \$5,000 and the other a sail boat worth \$2,500. The former is named "Sally" and the latter "Nancy." A leaves the "Nancy" at the XYZ Club landing, the "Sally" being at a boatyard. During the day, unknown to A, his boatmen bring the "Sally" to the Club landing from the yard and put the "Nancy" up at the yard. That evening A meets B whom he knows to have been at the club that afternoon, and asks B, "Will you buy my boat at the Club for \$2,500?" A means the sail-boat "Nancy." B, thinking that A means the gasoline yacht "Sally," replies "Yes." No one has been negligent, no one at fault, yet B is clearly entitled to the benefit of the contract. The mistake

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<sup>1</sup> Williston on Contracts (1924), Sec. 605.

<sup>2</sup> *Moffet v. Rochester*, 178 U. S. 373, 20 Sup. Ct. Rep. 957 (1900); *Board of School Commissioners, etc. v. Bender*, 36 Ind. App. 164, 72 N. E. 154 (1904); *Harper, Inc. v. City of Newburgh*, 159 App. Div. 695, 145 N. Y. Supp. 59 (2d Dept. 1913); 23 R. C. L. 328, Sec. 20, last sentence.

<sup>3</sup> *Tatum v. Coast Lumber Co.*, 16 Idaho 471, 101 Pac. 957 (1909); *Steinmeyer v. Schroepel*, 226 Ill. 9, 80 N. E. 564 (1907); *Bibber v. Carville*, 101 Me. 59, 63 Atl. 303 (1905); *Brown v. Levy*, 29 Tex. Civ. App. 389, 69 S. W. 255 (1902). In these cases are to be found statements in keeping with the theory of the article.

on A's part, though not due to his negligence or fault of any kind *originated with him* through the expression he chose to give his intention and he should be denied rescission. B is justified in concluding that when A, the owner of the boat, offers it to him with an identification of it by a statement of its whereabouts, he knows which of the boats is there. Even if B knew that A owned another boat, the result would be the same, in the absence of proof that B, in accepting, knew of A's mistake. This, of course, would change the aspect of the situation, for if A could show that when B accepted he knew that A did not have in mind selling the "Sally," the equities would all be in A's favor.

On the other hand, were B to seek out A and offer \$5,000 "for your boat 'Nancy'" meaning the "Sally," and were A, not knowing of B's mistake, to accept, B should be held to his contract. A was justified in concluding that when B came to him using in his offer the name of A's boat, he, B, knew what boat he was offering to purchase. And so, in this instance, even if B were not at fault, as, if he thought that A owned a gasoline yacht only and knew that A owned a "Nancy," so that B thereupon concluded that the "Nancy" was A's gasoline yacht, the result would be the same, for *B's mistake originated with himself*.

The Restatement of the Law of Contracts prepared by the American Law Institute sets forth its views in accord with the newer doctrine.<sup>4</sup> What governs is the intention or idea *expressed*, and the ordinary intendment thereof.<sup>5</sup> In the "Comment" following the statement of the abstract rule that expressed intention is the important thing, the Restatement continues as follows:

"The mental assent of the parties is not requisite for the formation of a contract. If the words or acts of one of the parties have but one reasonable meaning, his intention is material only in the exceptional case \* \* \* that an unreasonable meaning which he attaches to his manifestations is known to the other party. If the words or other acts of the parties have more than

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<sup>4</sup> Sec. 71.

<sup>5</sup> *Ibid.* Subd. (a).

one reasonable meaning, it must be determined which of the possible meanings is to be taken. If either party has reason to know that the other will give the words or acts, only one of those meanings and, in fact, the words or acts are so understood, the party conscious of the ambiguity is bound in accordance with that understanding. On the other hand, if a party has no reason to suppose that there is ambiguity, he may assert that his words or other acts bear the meaning that he intended, *that being one of their legitimate meanings*, and he will not be bound by a different meaning attached to them by the other party.”<sup>6</sup>

The cases offered as the New York annotations to Subdivision (a) of Section 71 of the Restatement do not shed light on our present problem.<sup>7</sup> In two of them it was taken for granted that the minds of the parties had not met and the methods by which the misunderstandings occurred were not stated sufficiently to aid us.<sup>8</sup> In two there was not even the appearance of agreement on the defendant's part as to the thing for which plaintiff, the mistaken party, contended, and so in each case the plaintiff failed to hold the defendant to the former's gratuitous understanding of the agreement.<sup>9</sup> In the remaining case the defendant's mistake was induced

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<sup>6</sup>This is supplemented in the Restatement with hypothetical cases to illustrate, one of which follows: "Illustrations: 1. A offers B to sell goods shipped from Bombay ex-steamer 'Peerless.' B expresses assent to the proposition. There are, however, two steamers of the name 'Peerless.' It may be supposed. (1) that A knows, or has reason to know the fact, and that B neither knows nor has reason to know it; (2) conversely, that B knows or has reason to know it and that A does not; (3) that both know or have reason to know of the ambiguity; or (4) that neither of them knows or has reason to know it at the time when the communication between them took place. In the first case supposed there is a contract from the steamer which B has in mind. In the second case there is a contract for the goods from the steamer which A has in mind. *In the third and fourth case there is no contract unless A and B in fact intend the same steamer.* In that event there is a contract for the goods from that steamer." (Italics ours.)

<sup>7</sup> 14 Corn. L. Q. (Supp.) 57 (1929).

<sup>8</sup> *Scranton v. Booth*, 29 Barb. 171 (N. Y. 1859); *Fullerton v. Dalton*, 58 Barb. 236 (N. Y. 1870).

<sup>9</sup> *Booth v. Bierce et al.*, 38 N. Y. 463 (1868); *Cutts v. Guild*, 57 N. Y. 229 (1874).

by the fact that he had been misled by the representative of the plaintiff, so that the right to rescind was clear.<sup>10</sup>

The writer does not intend to express disagreement with the cases which hold that gross inadequacy of consideration coupled with mistake is sufficient ground for rescission. Neither is it easy to quarrel with the view of Mr. Lawrence that relief may be granted for unilateral mistake standing alone or perhaps even coupled with negligence of the mistaken party, if the party not mistaken has not changed his position, and that retaining the benefits of a mistake is not to be permitted unless relief would be prejudicial to the one unfairly benefited.<sup>11</sup> Each case involving such considerations must be dealt with as a separate problem. Instances where there are questions of inadequacy of consideration may perhaps be disposed of by the test of whether the inadequacy is so great as to amount to implied notice to the party who has obtained the benefit of a mistake. Still others wherein the question of whether relief can be given to a mistaken party because the other has not changed his position necessitate a determination of what is sufficient change of position to justify a denial of rescission.

Furthermore, one must accord in principle with most of the cases in which specific performance is denied to plaintiffs because of unilateral mistake of defendants, for the reason that it is within the equitable discretion of the court to refuse to make an oppressive decree. Such cases, however, are not authority for any claim that rescission would have been permitted to such defendants to the denial of the possible legal remedies of the plaintiffs.<sup>12</sup>

An analysis of the subject would not be complete without a consideration of *Harper v. City of Newburgh*<sup>13</sup> and *Moffett v. City of Rochester*.<sup>14</sup> In *Harper v. City of New-*

<sup>10</sup> *Consumers Ice Co. v. Webster*, 32 App. Div. 592, 53 N. Y. Supp. 56 (4th Dept. 1898) and 79 App. Div. 350, 79 N. Y. Supp. 385 (4th Dept. 1903) (reported twice).

<sup>11</sup> Lawrence, *Equity Jurisprudence* (1929), Sec. 1072.

<sup>12</sup> *Mansfield v. Sherman*, 81 Me. 365, 17 Atl. 300 (1889); *Heneke v. Cooke*, 135 Md. 417, 109 Atl. 113 (1919); *Quincy v. Chute*, 156 Mass. 189, 30 N. E. 550 (1892); *Sullivan v. Jennings*, 44 N. J. Eq. 11, 14 Atl. 104 (1888).

<sup>13</sup> *Supra* Note 2.

<sup>14</sup> *Supra* Note 2.

burgh the plaintiff was granted rescission of a bid (and its consequences, arising out of the acceptance of the bid and the rights the City then had against the plaintiff on a certified check because of his refusal to perform) upon the ground of unilateral mistake. The fact thereof was not apparent on the face of the bid.<sup>15</sup> It can be said, therefore, that the expressed intention ought to have governed. The fact that the result may have been partly justified on the ground that the charter of the City required a written contract does not dispose of the fact that in justice the defendant ought at least to have had recourse against the plaintiff's certified check to cover the cost of advertising for new bids, nor does the charter provision justify the opinion, which, in its entirety, indicates and says that the ground for the award of relief was the unilateral mistake. The defendant was not at fault; on the contrary, it had every right to believe that the bid of the plaintiff was in all respects a true and real bid. The mistake originated with the plaintiff in the expression of its intention.

In the Moffett case, the facts were substantially the same with two exceptions: The charter of the defendant made it impossible to withdraw bids as and when the plaintiff attempted to do so, and it was shown in the facts and opinion that there was a considerable discrepancy between the amount of the plaintiff's bid and that of the nearest bidder. The result was the same, and the grounds stated to be the same as in the Harper case. The charter provision was stated to be effective, but was avoided as controlling upon the ground that the bid was not a bid at all, but a mistake! The discrepancy between the amounts bid by the plaintiff and his nearest competitor was clearly not enough to put the City upon notice that the plaintiff had made a mistake. At least the City should have had the right of recourse against the plaintiff for the cost of a new bidding.<sup>16</sup> Equal (if not

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<sup>15</sup> *City of New York v. Dowd Lumber Co.*, 140 App. Div. 358, 125 N. Y. Supp. 394 (1st Dept. 1910). (A mistake was apparent on the face of a bid submitted by defendant to the plaintiff; the Court therefore released the defendant from any obligation to the plaintiff.)

<sup>16</sup> *John J. Bowes Co. v. Inhabitants of Town of Milton*, 255 Mass. 228, 151 N. E. 116 (1926).

stronger) criticism can be made of this case as of the Harper case.<sup>17</sup>

Included among the utterances of the courts on this topic is the case of *Salomon v. North British & Mercantile Co.*, etc.<sup>18</sup> In it, for a purely unilateral mistake of the plaintiff (through his agent), not only did the Court award relief but designated as proper relief, reformation. Plaintiff was the assignee of a mortgage upon real property and of the mortgagee's rights under a policy of fire insurance upon the improvements. He instructed his broker to have the defendant insurance carrier endorse the policy to the effect that the loss was payable to the plaintiff. The broker erroneously asked an endorsement that the plaintiff was the owner, "loss payable as before" (*i.e.*, to the assignor). The defendant complied with the broker's request. A fire caused a loss and, upon the defendant's refusal to pay it, the plaintiff sought reformation. The Court, mindful of the formula that reformation is to be had only for mutual mistake, professed to see mutuality of mistake in that both parties were mistaken, the plaintiff as to what his broker had requested, the defendant as to what the plaintiff desired. "It is not essential, I think, to the right to the reformation of an instrument," said Mr. Justice Laughlin in the prevailing opinion concurred in by Miller and Dowling, *JJ.*, "that the mistake on the part of each party shall be with respect to precisely the same fact." Mr. Justice Laughlin overlooked not only the theory of reformation but the very essence of mutuality. There can be no doubt that to be mutually mistaken, parties must be laboring under the identical misapprehension.<sup>19</sup> No question as to which of the parties was the broker's principal was involved. It was taken for granted that the broker was the agent of the plaintiff. The mistake was clearly unilateral.

The dissenting opinion by Mr. Justice McLaughlin, concurred in by the Presiding Justice, indicates an uneasy feel-

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<sup>17</sup> Objectionable for like reasons is the case of *Board of School Commissioners, etc. v. Bender*, *supra* Note 2.

<sup>18</sup> 150 App. Div. 728, 135 N. Y. Supp. 806 (1st Dept. 1912).

<sup>19</sup> *Page v. Higgins*, 150 Mass. 27, 22 N. E. 63 (1889); *Botsford v. McLean*, 45 Barb. 478 (N. Y. 1866).

ing that the decision was violative of accepted principle, not to say of justice. It was there said:

“ \* \* \* if the policy can be reformed under such circumstances then I am unable to see why the court cannot reform any contract if it does not express what one of the parties intended, even though it does express precisely what the other party intended it should. Parties, not courts, make contracts. To reform the policy as asked by plaintiff is to have the court make a contract for the parties which they did not and never intended to make.”<sup>20</sup>

Neither in justice nor upon the ground of expediency can the decision be justified. That the minds of the parties had never met, so that there was nothing to be reinstated by a decree of reformation, should have been conclusive reason for denying that relief. That the mistake was but unilateral on the plaintiff's part with nothing by way of additional facts to constitute superior equities in his favor, should have been conclusive reason for denying any other relief.

The cases thus considered clearly illustrate the looseness of utterance and incorrectness of adjudication which is consequent upon the judicial failure to grasp the inherent equity of the newer theory and the potential injustice in the application of the older.

## II

It may not be amiss to consider some of the many cases of unilateral mistake remediable because of some peculiar equity, or combination of circumstances, excluding cases involving unilateral mistake induced by fraud or inequitable conduct.

The City of New York v. Dowd Lumber Co.<sup>21</sup> presents an illustration of the proper application of the newer theory. There the mistake was apparent on the face of the offer accepted by the plaintiff, consisting as it did of visible error

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<sup>20</sup> *Supra* Note 18 at 733, 135 N. Y. Supp. at 809.

<sup>21</sup> *Supra* Note 15.

in computation. If the plaintiff did not know of the mistake, it ought to have known of it. Rescission was inevitable and just, and in line with our thought, for the plaintiff ought to have known of the true construction the defendant was placing the expression of its intention.

The case of *Hathaway v. County of Delaware*<sup>22</sup> is one comparable to the payment of taxes on a wrong lot. In that instance, plaintiff (due to the representation of one Woodruff, who had been, but unknown to the plaintiff no longer was, the defendant's agent), thought he was loaning money by check to the County, while the defendant, because of the misrepresentation of the same Woodruff, thought the money was a payment by the plaintiff of Woodruff's debt to the County. It was held that the plaintiff could recover back the payment for the reason that the County had not lost its right of recourse against Woodruff. Some may argue that this is a case of mutual mistake, but to that must come the answer that the parties were not making the same mistake. The plaintiff was in error in thinking that the County was borrowing money from him, while the defendant's mistake was in thinking that the plaintiff's check was a means employed to satisfy Woodruff's debt to it.<sup>23</sup>

Similarly, no doubt, one who pays the tax on his neighbor's lot may have the payment applied to his own tax if he moves before the rights of the municipality against the true owner, have not been lost.<sup>24</sup> These thoughts are quite in accord with the previously mentioned statement of Mr. Lawrence that relief may be granted for unilateral mistake standing alone, or perhaps even coupled with negligence of the mistaken party, if the party not mistaken has not changed his position, and that retaining the benefits of a mistake is not to be permitted unless relief would be prejudicial to the one unfairly benefitted.

<sup>22</sup> 185 N. Y. 368, 78 N. E. 153 (1906).

<sup>23</sup> The plaintiff had drawn the check to the order of Woodruff. Had he drawn it to the order of the County, a different result would have been reached by the court. We may, then, consider the designation of Woodruff as payee to be an expression of the plaintiff's intention, obvious to the defendant, that the payment was to Woodruff and not to the County. Thus this case comes within the modern doctrine of expressed intention.

<sup>24</sup> Cf. N. Y. L. J., Feb. 24, 1930 at 2612.

*Martin v. McCormick*,<sup>25</sup> though involving mutual mistake, suggests a point worthy of discussion. In that case, the plaintiff's land, having been sold for taxes, had been redeemed, but plaintiff and defendant both believed that title to the premises was vested in the latter. Plaintiff thereafter purchased the "title" from the defendant, and upon discovery of the facts sued to recover the amount so paid.

Let us suppose that A agrees to sell B a life estate in Blackacre. Unknown to the parties, A's interest is a fee, but in performance of his contract A executes and delivers a quitclaim deed (though that is not that particular instrument called for by the agreement). Upon discovery of the mistake, A, unquestionably, could have reformation, under the reasoning of *Martin v. McCormick*.<sup>26</sup> Now let us change the facts in the *Martin* case, so that the facts become unilateral by supposing that the defendant knew that he had no title. Let us also change the facts of our "Blackacre" hypothesis to make the mistake there unilateral also, by assuming that B knew that A's interest was a fee. Would *Martin* succeed in recovering back his payment? Would A succeed in obtaining reformation? Clearly so, for the latter hypotheses present stronger cases than the former. Some might go so far as to say that the silence of *McCormick* and the silence of B constitute such inequitable conduct as to justify relief. The writer does not agree that this is so if the parties dealt at arm's length as do vendor and vendee, for then there would be no duty to speak imposed on the defendant. But in all fairness, relief should certainly be granted if there was on the part of these defendants knowledge of the plaintiff's mistaken notions.<sup>27</sup>

It has been consistently held that for mistake as to the contents of a written agreement (where there is no inequitable conduct) due to the failure to read it, relief cannot be

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<sup>25</sup> 8 N. Y. 331 (1854).

<sup>26</sup> *Supra* Note 25. See also Lawrence, etc., *supra* Note 10, Sec. 110, Note 50, in accord with this view. This is scarcely a debatable point for the minds in this instance met on a life estate only.

<sup>27</sup> This conclusion is characterized by the decision in the case of *City of New York v. Dowd Lumber Co.*, *supra* Note 14.

had.<sup>28</sup> But if the signing without reading was due to the inability of the mistaken party to read English<sup>29</sup> or if the mistaken person had left his glasses at home and could not read without them,<sup>30</sup> relief may be had. The equities in the last two situations are quite obvious. There is no need of further comment except to point out that in each instance the expression was chosen by the defending party and that the plaintiff had no available means of discovering to what expression he was assenting.

It has been held that a pleading of mistake in reducing to writing an apparent agreement need not contain an allegation of mutuality.<sup>31</sup> A reading of this case, however, will not show anything actually opposed to the newer theory. The Court, in a portion of the opinion, stated:

“It was not necessary for them to allege a mutual mistake in the reduction of the agreement to writing, there being no mistake as to the agreement. In such a case, if, by the mistake of the scrivener or by any other inadvertence, the writing does not express the agreement actually made, it may be reformed by the Court. It is only where the action is to reform the agreement itself that it is required that it should be alleged in the pleading and proved on the trial that the mistake was mutual.”<sup>32</sup>

Whatever was in the mind of the Court (other than the failure of the writing to express an agreement actually made) as a case justifying reformation for mistake in reducing an agreement to writing, does not appear. Indeed, to distinguish between seeking to reform an apparent agreement so as to reinstate an actual agreement on the one hand, and on the other seeking “to reform the agreement itself” is not easy to

<sup>28</sup> Metzger, etc. v. Aetna Ins. Co., 227 N. Y. 411, 125 N. E. 814 (1920); American T. & H., etc. v. Van Blerkom, 216 App. Div. 28, 214 N. Y. Supp. 753 (1st Dept. 1926); Wheeler v. Mowers, 16 Misc. 143, 34 N. Y. Supp. 115 (1896).

<sup>29</sup> Melle v. Candelora, 88 N. Y. Supp. 385 (App. Term 1904).

<sup>30</sup> Whipple v. Brown Bros. Co., 225 N. Y. 237, 121 N. E. 748 (1919).

<sup>31</sup> Born v. Schrenkeisen, 110 N. Y. 55, 17 N. E. 339 (1888).

<sup>32</sup> *Ibid.* at 59, 17 N. E. at 341.

appreciate. Perhaps the Court was overlooking the fact that actual agreements are not reformed, for they do not need reinstatement by reformation, and it is a trite observation that courts will not make new agreements for parties.

However, as a proposition of mere pleading the quoted dictum is probably correct, so nothing in the result conflicts with the newer theory. The decree awarded reformed an apparent agreement to reinstate an actual one, for the contract executed differed from that which the parties had intended. As a substantive matter then, in cases involving mistakes in reducing agreements to writing the expressed intention should govern as truly as in any other case of mistake, unless there was mutual mistake in the expression. This is well exemplified by the decision of the Court of Appeals in *Metzger v. Insurance Co.*<sup>33</sup> We have seen that the modern theory of expressed intention in the law of contracts precludes the possibility of obtaining rescission for unilateral mistake standing by itself. Nevertheless, not even that doctrine will prevent courts of equity from granting relief in a proper case where the ends of justice require it and where special circumstances are present to justify judicial distinction.

DAVID STEWART EDGAR, JR.

St. John's College School of Law.

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<sup>33</sup> *Supra* Note 28.