

1948

## Ray W. Rosebraugh v. Rex G. Branch : Brief of Appellants

Utah Supreme Court

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Arthur Woolley; Howell, Stine & Olmstead; Attorneys for Appellant;

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7252

IN THE  
SUPREME COURT  
OF THE STATE OF UTAH

RAY W. ROSEBRAUGH, as Administrator  
of the Estate of Wesley D. Brown, deceased,

*Plaintiff and Appellant,*

VS.

REX G. BRANCH,

*Defendant and Respondent.*

Brief of Appellants

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*Plaintiff and Appellant,*

vs.

REX G. BRANCH,

*Defendant and Respondent.*

---

STATEMENT OF THE CASE

The parties to this appeal will hereafter be designated as they were in the Court below, where Appellant was plaintiff and Respondent was defendant. As plaintiff sued in a representative capacity as administrator with the will annexed of the Estate of Wesley D. Brown, deceased, and as the transaction involved was between defendant and said Wesley D. Brown, the latter will for convenience sometimes herein be referred to as the decedent.

Plaintiff brought this action against the defendant to recover an unpaid balance of \$2,659.67 assertedly due upon a promissory note signed by defendant and payable to decedent. The case was tried before the Court sitting without a jury on June 3, 1948, in the District Court of Weber County, Utah, the Honorable John A.

Hendricks, Judge, presiding. On July 9, 1948, the Court made and entered its Findings of Fact and Conclusions of Law, and thereupon gave judgment in favor of the defendant.

Thereafter, and within the time allowed by law, namely, on October 1, 1948, plaintiff filed his notice of appeal from the adverse judgment, and in due time filed the statutory undertaking on appeal.

## THE PLEADINGS

Plaintiff's action was based on the following Complaint:

### COMPLAINT

"Plaintiff complains of the defendant and alleges:

1. That on July 30, 1947, Wesley D. Brown died, and thereafter the will of said Wesley D. Brown was admitted to probate by the District Court of Weber County, Utah; and thereafter, by an order of said court duly given and made, the plaintiff was duly and legally appointed administrator with the will annexed of the estate of Wesley D. Brown, deceased; and that on the 16th day of October, 1947, he duly qualified as such administrator, and letters of administration with the will annexed of said estate were duly and legally issued to him; and that he has ever since been and now is the duly and legally appointed, qualified and acting administrator with will annexed of the estate of Wesley D. Brown, deceased.

2. That on the 23rd day of January, 1947, at Ogden, Weber County, Utah, the defendant for

value received, made, executed and delivered to the said Wesley D. Brown, his promissory note in writing, bearing date on that day, which promissory note reads in words and figures following, to-wit:

\$4,100.00

Ogden, Utah  
January 23, 1947

In installments after date, for value received, I promise to pay to the order of

WESLEY D. BROWN, of Ogden, Utah  
the principal sum of Four Thousand One Hundred (\$4,100.00) Dollars, without interest.

It is understood and agreed, however, that monthly installments of One Hundred Fifty and no./100 (\$150.00) Dollars, shall be paid on the principal of this note, the first of said installments to be paid on the 15th day of February, 1947, and one of said installments to be paid on the 15th day of each and every month thereafter, until the whole of the unpaid principal has been paid.

And in case default be made in the payment of any of said installments of principal at the times and in the manner aforesaid, or within a grace period of sixty (60) days, the entire unpaid balance of said principal sum shall, at the option of the holder of this note, and not otherwise, become due and payable, and notice of the exercise of such option is hereby expressly waived.

If this note be collected by an attorney, either with or without suit, the undersigned agrees to pay ten percent additional at attorney's fees.

Rex G. Branch

3. That at the time of the appointment of plaintiff as administrator with will annexed of

said estate, as aforesaid, said note was a part of the assets of said estate and the property thereof, and the same came into the hands of your plaintiff as administrator, as aforesaid, as the property of said estate, and plaintiff, as such administrator, has ever since been and now in the lawful owner and holder of said promissory note.

4. That defendant has not paid said note, or any part thereof, except that he paid the installments of \$150.00 each due thereon for and in the months of February, March, April, May, June, July and August, 1947, when due, in accordance with the terms of said note; and he failed to pay the installments which became due on September 15, October 15, and November 15, 1947, and the said note and said installments were in default, and said installment which became due on September 15, 1947, was and remained unpaid and in default for more than sixty (60) days, and that by the terms of said note, the entire unpaid balance of the principal sum of said note, to-wit: \$3,050.00 thereupon became and was, on and prior to December 3, 1947, due and payable; and that on said 3rd day of December, 1947, the defendant paid to the plaintiff the sum of \$393.93, which sum and amount plaintiff has applied upon said note as follows, to-wit: \$3.60 upon the interest which became due and owing and accrued upon installments then in default, and the balance of \$390.22 upon the principal, leaving a balance of \$2,659.67 due and owing and unpaid; and that the same, together with interest thereon from December 3, 1947, at the rate of six (6%) per cent per annum, is now wholly due and unpaid and justly owing from defendant to plaintiff as administrator, as aforesaid.

5. That on or about said December 3, 1947, defendant notified plaintiff that he would not

make any further payment upon said note and would not pay said note or any part or installment thereof, and wholly repudiated said debt.

6. That by the terms of said note the defendant agreed to pay ten (10%) per cent additional as attorney's fees in the event the note be collected by an attorney; that it has been and is necessary for plaintiff to institute this action for the collection of said note, and plaintiff has employed Arthur Woolley, Esq., an attorney of this bar, to institute and prosecute this action; that 10% of the unpaid principal amounts to \$265.97.

WHEREFORE plaintiff prays judgment against the defendant for the sum of \$2,659.67, together with interest thereon at the rate of 6% per annum from December 3, 1947, and for \$265.97 attorney's fees, and for costs of suit."

Defendant demurred generally thereto, which demurrer was overruled.

Thereafter defendant filed the following Answer:

## ANSWER

"COMES NOW the defendant and for answer to plaintiff's complaint admits, denies and alleges as follows, to-wit:

1. Admits Paragraph 1 of plaintiff's complaint.

2. Admits Paragraph 2 of plaintiff's complaint but alleges that the said note was made, executed and delivered by defendant to the said Wesley D. Brown by a mutual error of the said Wesley D. Brown and the defendant in that the amount of the said note should have been \$1,443.93, instead of the sum of \$4,100.00, as will hereinafter be set forth.



3. Defendant admits the allegation of Paragraph 3 of plaintiff's complaint.

4. Defendant admits that the only payments on the said note made by him were the ones listed in Paragraph 4 of plaintiff's complaint but denies that any part of the said note or any of said installments were in default at any time but alleges that the error of the defendant and the said Wesley D. Brown had been discovered by both of said parties and that when the same was discovered, that the said parties attempted to have the said error corrected and that the attorney for said Wesley D. Brown and the attorney for defendant were working on an agreeable settlement of the said note, and that the said parties were working on the said adjustment at the time of the death of the said Wesley D. Brown, and that the defendant paid the said sum of \$393.93 to the attorney for the said Wesley D. Brown and notified the said attorney that defendant claimed the said payment was in full and complete settlement of the said note after adjusting the error which had been made by the said Wesley D. Brown and this defendant. Defendant denies that there is any balance whatsoever due and owing and unpaid or due or owing or unpaid from him to the plaintiff and denies that the sum of \$2,659.67 or any sum, together with interest thereon from December 3, 1947, at the rate of 6% per annum or any interest whatsoever is now wholly due and unpaid or wholly due or unpaid or due or unpaid, and denies that there is anything that is justly owing from defendant to plaintiff as administrator aforesaid or at all.

5. Defendant admits the allegation of Paragraph 5 of plaintiff's complaint but alleges in connection therewith that he notified the attorney of the said Wesley D. Brown that the said Wesley

D. Brown and defendant had made an error, as hereinafter set forth, and that the said payment of \$393.93 was payment in full of all sums due from defendant on the said note.

6. Defendant denies that it has been and is necessary or has been or is necessary for the plaintiff to institute this action for the collection of said note, but alleges that the said note has been paid in full, and denies that there is any unpaid principal and denies that 10% of the unpaid principal amounts to \$265.97 or any sum or that there is any attorney fee due from defendant.

7. Defendant denies each and every allegation of plaintiff's complaint except that which has heretofore been expressly admitted or denied.

And as an affirmative defense to plaintiff's complaint, defendant alleges:

1. That on the 9th day of December, 1946, the defendant and the said W. D. Brown entered into a written contract wherein and whereby the said W. D. Brown agreed to sell to the said defendant the business of the said W. D. Brown known as the Brown Brokerage Company, with offices in the Kiesel Building at Ogden, Utah, for the sum of \$6,600.00; and it was mutually agreed by and between the two said parties that the total purchase price of the said sale and purchase would be the average income of the said W. D. Brown from the said Brown Brokerage business for the previous five years, and that the said W. D. Brown through an error on his part, stated that his total income from the said brokerage business for 1942, 1943, 1944, 1945, and 1946 amounted to the total sum of \$33,322.76, or an average per year of \$6,664.55, and that the said W. D. Brown stated to the defendant that in order

to make the account even that he would drop the \$64.55 and call the average for the five years \$6,600.00, and that the defendant, knowing that the said W. D. Brown was strictly honest and reliable, accepted the said figures, and, not knowing that the said W. D. Brown had made an error in the figures, submitted by the said W. D. Brown, defendant thereupon signed the said note referred to in plaintiff's complaint in the sum of \$4,100.00. And defendant alleges that the true and correct figures for the years 1942, 1943, 1944, 1945 and 1946 was the sum of \$19,719.63, or an average yearly income of \$3,943.93, which said sum was intended by both the said W. D. Brown and the defendant to be the purchase price for the said Brown Brokerage business. And defendant alleges that he paid the sum of \$2,500.00 to the said W. D. Brown, leaving the amount properly due the said W. D. Brown in the sum of \$1,443.93. Defendant further alleges that the said error of the said W. D. Brown had been caused by the said W. D. Brown inadvertently including a substantial number of receipts from other sources that were in no way connected with the Brown Brokerage business, as the books of account of the said W. D. Brown and the Brown Brokerage Company business clearly show and as the other records kept by the said W. D. Brown also show.

2. And defendant alleges that in addition to the said \$2,500.00 paid by him to the said W. D. Brown, he has paid on the said account the sum of \$1,443.93, making the total amount paid by the defendant of \$3,943.93, being the amount due on the said account of the full amount that defendant was to pay for the said business.

3. And defendant alleges that the said note referred to in plaintiff's complaint would not

have been signed by him and would not have been accepted by the said W. D. Brown had the two said parties known of the error, but that the said note would have been for the correct amount of \$1,443.93 and that the terms of the said note should now be corrected by this court to show the true and correct intention of the two said parties and the true and correct amount of \$1,443.93, and that after the correction of the said note, that the same should be declared by this court to be fully paid by this defendant and the same discharged.

WHEREFORE, the defendant prays that plaintiff take nothing by virtue of his complaint, but that the same be dismissed and that judgment be granted for the defendant for all costs of this action and for such further order and relief as should be just and equitable.”

## THE ISSUES

The execution and delivery of the contract of sale, and the promissory note given in completion of the contract is admitted. That while the promissory note was in the principal amount of \$4,100.00, only some fourteen hundred odd dollars were paid thereon, and defendant repudiated it as to the balance is likewise admitted.

Defendant's defense to the action lies solely in his assertion of a mutual mistake of himself and decedent as to the total price to be paid under the contract. His theory, as evidenced by his answer, and by his counsel's statement to the lower Court (Tr. 33), is that the agreement was that the “business” was to be sold for a price representing the average of its previous five years earnings, namely \$3,943.93; that decedent, in seeking to

ascertain what this average five year earning figure was, inadvertently included therein items of income other than from the brokerage business, and hence inadvertently arrived at the figure of \$6,600~~0~~.00, instead of \$3,943.93, and by reason thereof the figure of \$6,600~~0~~.00 was mistakenly used as the contract price, instead of \$3,943.93. That as defendant has paid the sum of \$3,943.93, he has discharged in full his obligations to decedent and decedent's estate.

It should be borne in mind that no claim of fraud or misrepresentation is made but only the claim of mutual mistake of the parties, *not of the scrivener*. Defendant did not seek rescission of the contract, but the case apparently was tried upon the theory of the defendant's seeking a reformation of the note to reflect the principal thereof as \$1,443.93, rather than \$4,100.00.

The lower court's pretrial order limited the issues as follows:

“It is therefore ordered that the only matter to be tried is whether or not there was a mutual mistake as to the price to be paid for the brokerage business.”

While under some circumstances there may be, in the case of mutual mistake, the alternative remedies of rescission or reformation, we need not here concern ourselves with legal principles involved in cases of rescission, because plaintiff neither sought such relief, nor took the fundamental steps of notice of rescission and restoration of statu quo essential to seeking relief by way of rescission. We are left, accordingly, with the single question of his right, under the evidence in this case, to reformation of the note sued upon to show the principal thereof as \$1,443.93, instead of \$4,100.00.

## THE FACTS

The decedent (who died on July 30, 1947) for many years prior to his death was the sole owner of a brokerage business in Ogden, Utah, which he operated under the name of Brown Brokerage Company, and which, at the time of the transaction we are here concerned with, had its office at 401 Kiesel Building, Ogden, Utah. The office was shared with one George Harding Horsley, who was engaged in an independent business. Decedent and Mr. Horsley had a common secretary, one Joan Klissinger (Tr. 5 and 6). Decedent had income other than that derived from his brokerage business, namely, salary as manager of Western Gateway Storage Company, a corporation, and various stock investments.

In the late fall of 1946, and primarily because of failing health, decedent decided to sell his brokerage business. Defendant became interested in purchasing the same, and on December 9, 1946, decedent and defendant entered into the following contract for the purchase by the defendant of the brokerage business, together with the furniture, furnishings and supplies used in connection therewith, for the total purchase price of \$6,600.00 (Exhibit 9):

## “C O N T R A C T

THIS AGREEMENT, made this 9th day of December, 1946, by and between W. D. BROWN of Ogden, Weber County, Utah, hereinafter called the First Party, and REX G. BRANCH of Lake Odessa, Michigan, hereinafter called the Second Party,



## W I T N E S S E T H:

WHEREAS, First Party is the owner of that certain brokerage business generally known and described as BROWN BROKERAGE COMPANY with offices in the Kiesel Building, Ogden, Utah; and

WHEREAS, Second Party is desirous of purchasing from First Party the business of the said Brown Brokerage Company upon the terms and conditions hereinafter set forth,

NOW, THEREFORE, IT IS HEREBY MUTUALLY AGREED by and between the parties hereto as follows:

1. Second Party hereby agrees to purchase from First Party, and First Party hereby agrees to sell to Second Party for the sum of Six Thousand Six Hundred (\$6,600.00) Dollars, First Party's brokerage business, which operates under the name and style of Brown Brokerage Company, together with the good will thereof, and all furniture, furnishings and supplies used by First Party in connection therewith and now located in the offices of said Company in the Kiesel Building in Ogden, Utah.

The said purchase price of Six Thousand Six Hundred (\$6,600.00) Dollars is to be paid as follows: Five Hundred (\$500.00) Dollars upon the execution of this agreement, and Two Thousand (\$2,000.00) Dollars on or before January 15, 1947, and the balance of Four Thousand One Hundred (\$4,100.00) Dollars in monthly installments of not less than One Hundred Fifty (\$150.00) Dollars each, payable on the 15th day of each month commencing with February 15, 1947. Upon the payment of the said sum of Two Thousand (\$2,000.00) Dollars on or prior to Jan-

uary 15, 1947, Second Party will be entitled to take possession of said business, and thereafter operate it as his own, and upon the payment of said sum of Two Thousand (\$2,000.00) Dollars Second Party agrees to execute and deliver to First Party his promissory note in the principal sum of Four Thousand One Hundred (\$4,100.00) Dollars representing the then unpaid balance on the purchase price of Six Thousand Six Hundred (\$6,600.00) Dollars, which said note shall, by its terms, be payable in monthly installments of One Hundred Fifty (\$150.00) Dollars, the first installment being payable on or before February 15, 1947. No interest will accrue upon any deferred payments.

2. As of the date of the payment of said Two Thousand (\$2,000.00) Dollars, First Party shall retain for his own benefit all of the then existing accounts receivable of said business, and shall pay and discharge all accounts payable as of that date.

3. As a further consideration for the purchase of said business by Second Party, First Party agrees that during the year 1947 he will hold himself available to Second Party for consultation and advice with respect to the operation by said Second Party of said business.

4. In the event of default by the Second Party in the performance of any of the covenants or agreement on his part to be performed, and such default continues for a period of sixty (60) days, then and in that event First Party may, at his option declare the entire amount then unpaid to be due and payable, and may avail himself of any remedy provided by law for enforcement thereof, or he may, at his option, declare this executory Contract of Sale forfeited and retake possession



of the said brokerage business, in which event all payments theretofore made by Second Party to First Party shall be retained by First Party as liquidated damages for breach by Second Party of this Contract.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands the day and year first above written.

W. D. BROWN           /s/  
FIRST PARTY  
REX G. BRANCH       /s/  
SECOND PARTY''

Pursuant to the terms of the contract defendant paid to decedent the cash amounts of \$2,500.00 therein referred to, and on January 23, 1947, gave his promissory note to decedent in the principal amount of \$4,100.00, as the balance of the purchase price of \$6,600.00 (Exhibit A.) The note is set out in full in plaintiff's complaint, Page 3 hereof. Upon delivery of the note, defendant took over the business in accordance with the terms of the contract, and thereafter paid upon the principal of the note \$1,443.93, and refused to pay the balance thereof in the principal amount of \$2,656.07. In the meantime decedent had died, and plaintiff appointed administrator with the will annexed of his estate. Demand was made by plaintiff for payment of the balance in accordance with the terms of the note, and defendant advised plaintiff he would make no other or further payments thereon. (See allegations and admissions in pleadings.)

Thereupon this action was brought. Defendant's only defense thereto was mutual mistake as to the amount. His contentions in this regard are quite detailed in his Answer, but it is the evidence in support thereof we are concerned with.

The witness Horsley, who shared office space with decedent, testified that in the latter part of December, 1946, decedent told him that he had signed a contract with defendant to sell him the business and he (the decedent) "said that they had gone back and were taking the earnings of the brokerage company during the past five year period and then dividing them by five to get them on a five year average, and on that basis he was selling the business to Mr. Branch." (Tr. 7 and 8).

The witness Joan Kruitmoes (formerly Klissinger) testified that "around the last of December, 1946," (Tr. 13) decedent asked her to take from the books (Exhibits 1 and 2) "some figures" (Tr. 12) for the years 1942, 1943, 1944, 1945, and 1946, "and then get the yearly average for five years." (Tr. 13) That decedent told her to take her figures from the "Bank" column which she did (Tr. 14). That she was unable to take the figures for 1942, but she did for the years 1943, 1944, 1945 and 1946, copied them on Exhibit 3, averaged them, and gave Exhibit 3 to decedent. Only the typewritten figures on Exhibit 3 were hers. (Tr. 14-15). No explanation of the pencil figures on Exhibit 3 was offered, but it is obvious they were added subsequently, to compare the "Bank" column figures with the "Brokerage" column figures. Who put them there or when was not shown.

The witness H. J. Corkey identified himself as an accountant who audited decedent's books (Exhibits 1 and 2) for income tax purposes, and from which books he prepared decedent's income tax returns. He gave it as his judgment that from Exhibits 1 and 2 the gross

earnings from the brokerage business for the years 1942 through 1946 was \$19,719.63, or an average of \$3,943.93 per year (Tr. 29).

The foregoing is, in effect all of the evidence in the case, and upon which the Findings, Conclusions, and Judgment in favor of defendant is based.

## STATEMENT OF ERRORS UPON WHICH APPELLANT RELIES

1. The lower Court erred in finding as facts the matters set out in that portion of Paragraph 1 of the Findings of Fact reading as follows:

“\* \* \*, but the court finds that the said amount is not owing, and that there is no interest owing, and that there is now nothing due and owing from defendant to the plaintiff as administrator, as set forth in plaintiff's complaint.”

2. The lower court erred in finding as facts the matters set out in Paragraph 2 of the Findings of Fact, and the whole thereof.

3. That the lower court erred in reaching its several conclusions of law, and each thereof.

4. The lower court erred in granting judgment against the plaintiff and dismissing his complaint.

## THE ARGUMENT

The several assignments of error can, in the interests of brevity, be considered, at least to a large extent, together, as they all relate to the insufficiency of the evidence to support the findings, the conclusions or the judgment.

The fundamental questions involved are (1) whether there is *sufficient* competent evidence in the record to establish that the contract price of \$6,600.00 was inserted in the contract through mutual mistake of the decedent and defendant; and (2) whether there is *sufficient* competent evidence in the record to show that the contract price the decedent and defendant mutually intended was \$3,943.93.

We use the phrase "*sufficient* competent evidence" advisedly, because in a case of this sort "*any* competent evidence" is not enough. In this regard we invite the attention of this court to the rule enunciated by it in the case of *Weight v Bailey*, 45 Utah 584, 147 P. 899, as follows:

"A comprehensive view of the whole evidence does not establish appellant's claim with that degree of certainty which, by all the courts of equity, has always been held essential to authorize the reformation of a written instrument upon the ground of fraud or mistake. In order to authorize a court to reform a written instrument, the presumption that the instrument correctly evidences the agreement of the parties, where reformation is resisted, must be overcome by proof which is clear and convincing. As is well said by the author in 2 Pomeroy, Eq. Jur. (3rd Ed.) section 859:

'Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of evidence, but only upon a certainty of the error.' "

Also to the case of *Cram et al vs Reynolds et al*, 55 Utah 384, 186 P. 100, as follows:

“Mutual mistakes can be corrected, and courts will reform a contract so as to express what the parties actually agreed upon and make it express the terms upon which the minds of both parties met. The law on the subject is well established in this jurisdiction. If the same mistake be made by both parties, the contract may be rectified, but the proof must be clear and distinct, as courts do not make contracts for parties. To secure reformation of a written contract which is presumed to be the real contract and to contain all the terms agreed upon, the party seeking relief and demanding reformation of the contract must establish the mutual mistake by evidence that is clear, satisfactory, and convincing, and not merely by a preponderance of the evidence. *Wherritt v. Dennis*, 48 Utah 309, 159 Pac. 534; *Weight v. Bailey*, 45 Utah, 584, 147, Pac. 899; *Deseret National Bank v. Dinwoodey et al*, 17 Utah, 43, 53 Pac. 215; *Ewing v. Keith*, 16 Utah, 312, 52 Pac. 4. The only question involved in this case is whether the proof produced by appellants, considered in connection with that offered by respondents, measures up to the required standard. The answer to this question necessitates a review of the testimony.”

However, before considering the evidence in this case to the end of ascertaining if it measures up to the standards there imposed, it is deemed advisable to have in mind other fundamental principles of law relating to the reformation of written instruments.

*First. The Mistake Must Be Mutual.*

This principle is well stated in 45 Am. Jur. at page 617 as follows:

“Indeed, when no question of fraud, bad faith, or inequitable conduct is involved and the right to reform an instrument is based solely on a mistake, it is necessary that the mistake be mutual, and that both parties understood the



contract as the complaint or petition alleges it ought to have been, and as in fact it was except for the mistake; and this is so whether the mistake is one of fact or one of law, or one of law and fact mixed. Otherwise stated, a unilateral mistake is not ordinarily ground for reformation, the remedy in the case thereof being rescission. The court cannot rewrite the contract which the parties have made so as to express an agreement which they did not enter into." (45 Am. Jur. page 617)

*Second. What Constitutes Mutual Mistake.*

"A mutual mistake is one which is reciprocal and common to both parties, each alike laboring under the same misconception in respect to the terms of the written instrument. A mutual mistake of their agents is not necessarily a mistake of the parties." (45 Am. Jur., Pg. 618)

*Third. Mistake of Fact.*

"A mistake of fact which is ground for appropriate relief in equity consists in (1) an unconscious ignorance or forgetfulness of a fact past or present and material to the contract; or (2) belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed. The essential element of mistake is a mental condition, conception, or conviction of the understanding either in a passive or active state. When passive, it may consist of unconsciousness, ignorance, or forgetfulness; and when active, there must be a belief. The first condition must always concern a fact material to the transaction, while in the second the belief may be that a matter or thing exists at the time which really does not exist or that it has existed at some past time, when it did not in fact exist. All particular errors which fall under either condition are mistakes of fact and grounds for equitable relief." (45 Am. Jur., Page 610).

#### *Fourth. Ignorance.*

“Where parties to an agreement are ignorant of facts which, if known, would have caused a different contract, the remedy is not reformation, but rescission. The difficulty in decreeing reformation in such case is that the minds of the parties did not meet upon the contract in the form in which it is sought to be put.” (45 Am. Jur., Page 611)

#### *Fifth. Real Agreement.*

“The high remedy of reformation is never granted on a probability, or on a mere preponderance of evidence. The strict requirements relate not only to the mistake and the mutuality thereof or to the fraud alleged, but also to the real agreement which is alleged to have been made.” (45 Am. Jur., Pg. 651).

While defendant in his affirmative defense pleaded many asserted facts relating to the questions involved, we are here only concerned with the evidence. As the two principal questions involved are (1) that the price of \$6,600.00 was inserted in the contract as a result of the mutual mistake of decedent and defendant, and (2) the intended figure was \$3,943.93, we view the evidence in its relationship to those two matters.

#### I.

THE EVIDENCE IS NOT SUFFICIENT TO SHOW THAT THE DECEDENT AND DEFENDANT MADE A MUTUAL MISTAKE IN FIXING THE PRICE AT \$6,600.00 IN THE CONTRACT.

Clear and convincing evidence of a mistake on the part of both decedent and defendant is necessary. What is the evidence in this regard?

Only two witnesses testified on this phase of the case, namely, Horsley and Kruitmoes. Horsley testified that long after the contract was signed, namely, in late December, 1946, decedent told him that

“they had gone back and were taking the earnings of the brokerage company during the past five-year period and then dividing them by 5 to get them on a five-year average, and on that basis he was selling the business to Mr. Branch.”  
(Tr. 8)

Such is the extent of Horsley's testimony as the basis of the sale. What is its effect? Bearing in mind that the written contract was signed some weeks prior thereto, what meaning can intelligently be given to this asserted statement by decedent? Certainly nothing more than that at that time, weeks after the contract was signed, he felt that the contract price of the business reflected an amount comparable to the average earnings of the business for its previous five years. No intimation can be derived therefrom that decedent was selling the business, *plus the other items covered by the contract of sale*, for such average of earnings. It simply reflects a then belief on decedent's part that the contract price of \$6,600.00 approximated the average earnings of the business. This is a far cry from clear and convincing proof that decedent, at the time the contract was signed some weeks before the conversation with Horsley, intended to sell the business for a price equaling such average earnings, rather than for the price stipulated in the contract.

The testimony of the other witness, Joan Kruitmoes, was simply to the effect that in late December, 1946, weeks after the contract was signed, decedent asked



her to take the total of the "Bank Column" figures from his books for the previous five years and average them. He said nothing to her of any sale of the business to defendant, or why he wanted them. The most obvious explanation of why he wanted them, and it, of course is purely speculative, as any other explanation must be, was that it was the end of the year and he wanted information as to how his 1946 income compared with that of previous years. Certainly there was no relevancy between the decedent's asking his bookkeeper for information as to his total income for the years, and the matter of price for which the brokerage business, plus furniture, furnishings, supplies and good will previously had been sold.

Of particular significance is the fact that no testimony whatever was offered by defendant himself. True it is that there might have been objection raised to testimony by him of matters equally within his knowledge and that of decedent, but, as such is an objection that might have been waived by plaintiff, it is strange that his testimony was not at least offered. Also, as we have pointed out, the mistake must have been mutual, and it is not enough that the decedent alone was in error. Without defendant's testimony there is a total blank as to mistake on defendant's part.

What was defendant's position in this regard? At the time the contract was signed was he laboring under the impression that the \$6,600.00 figure represented the average earnings from the business? Had he himself examined the books? Was he relying wholly on what decedent might have told him? As to these matters the record is entirely silent. Defendant alleged in his Answer that he relied on decedent's statements as

to earnings, but where is the proof thereof? Defendant's failure to testify as to these matters of necessity is fatal to his claim, for as the record stands, there is no proof whatever of mistake on defendant's part which is essential to his right of reformation.

We submit, accordingly, that there is not only lacking the clear and convincing evidence of mutual mistake necessary to invoke a reformation, but there is lacking any evidence whatever of mistake.

## II.

### THE EVIDENCE IS NOT SUFFICIENT TO SHOW WHAT THE REAL AGREEMENT WAS

As we have previously shown, the burden was on defendant to show by clear and convincing proof not only that the parties mutually made a mistake in the agreement as written, but also the real agreement as made.

It is not disputed that the property purchased consisted of the business, "together with the good will thereof, and all furniture, furnishings and supplies." Defendant's contention is that the agreed price for the whole thereof was \$3,943.93, and the lower court so found, although there is not a scintilla of evidence to support such finding. For the court to find that the agreed contract price for all of the property contracted for was \$3,943.93 is not only to find contrary to the express stipulations of the contract, but also contrary to the evidence.

## CONCLUSION

General principles of the law relating to reformation of instruments govern in this case. Those principles are (1) there must have been a mistake in inserting the figure of \$6,600.00 in the contract as the price for the business, plus the other items sold under the contract; (2) the mistake must have been mutual; (3) the intended figure of \$3,943.93 must be established; (4) proof of all of these matters must be clear and convincing.

Applying these principles to this case, the judgment of the lower court must be reversed.

First. Because there is no clear and convincing proof, or any proof, that decedent made any mistake.

Second. Because there is no clear and convincing proof that defendant made any mistake. (No evidence on this even offered);

Third. There is no clear and convincing proof, or any proof, that the truly intended price of both decedent and defendant was \$3,943.93 as found by the court.

The lower court in granting judgment as it did in effect made a new contract for the parties, with no evidence whatever before it that such was the contract the parties thereto truly intended. In doing so it wholly disregarded the written instrument the parties of their own volition signed, and by speculation based solely upon controverted assertions in defendant's answer, with no proof whatever in support thereof, determined

that decedent, who is dead and couldn't testify, and defendant, who was alive but wouldn't testify, intended other than as they themselves provided in their written instrument.

We submit that the judgment of the lower court must be reversed.

Respectfully submitted,

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