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Article 14

# Specific Performance: Mistake of Law

E. D. G.

what terms the minds of the parties met with reasonable certainty from the nature and general contents of the contract itself, the rules of construction must yield to such determination.

From this case it appears that Wisconsin courts are striking a step forward and are allowing rules of construction to be prevailed over by the terms of the contract, upon which the minds of the contracting parties met, going almost entirely upon the intention of the parties. The marked distinction is the fact that, the minds of the parties, in the above case, did not correspond to the terms of the contract, and the court applied that construction which apparently was intended by the parties.

A. WATSON

**Specific Performance: Mistake of Law.**—In the case of *Rist* v. *Porter*,[1] both parties entered into oral agreements for conveyance of certain real estate. The plaintiff who is the father of the defendant agreed to convey certain lots to the defendant, and she agreed to convey property which she inherited as sole heir of the mother to the plaintiff. The deed to the defendant was defectively stated so as to omit 11½ feet which should have gone to the defendant under the oral agreement. The defendant subsequently refused to convey the land to the plaintiff which she inherited from her mother, the wife of the plaintiff.

Both parties at the time of making the oral agreement were of the opinion that the plaintiff had an estate by the courtesy in the premises owned by the daughter. The transaction was made with that understanding, although in the meantime and prior thereto, the plaintiff had remarried.

The action was begun to reform the deed given by the plaintiff to the defendant so as to correctly describe the premises to be conveyed thereby, and to require the defendant to convey to the plaintiff the property which she inherited from her mother.

Rosenberry, Justice, says in part regarding the aforesaid mistake of law:

> Here the controversy is between father and daughter, both of whom acted upon a mistaken notion as to the law governing their rights. While mistake of law does not of itself defeat the right of the opposite party to have a contract specifically performed, it may produce a situation which appeals very strongly to the conscience of the chancellor.

He then proceeded to change the deed so as to conform with the oral agreement and allowed the father only a life estate in the lands of the daughter, because of such mistake of law.

The general rule, of course, regarding mutual mistakes of law is that it does not give rise to any relief, as one is presumed to know the law. This presumption has been regarded, in modern decisions, as a violent one and the courts have, on one excuse or another given relief, placing such mistake wherever possible as one of mistake of fact. However, the court here has seen fit to depart from this principle and hold that a court of equity may grant relief for mutual mis-

[1] 212 N.W. 275 (Wis). Decided Feb. 8, 1927.

take of law as such. Just how far the courts will carry this departure is a matter of conjecture, but it certainly is a decided step away from the long established doctrine of relief for mutual mistake of fact but not for mutual mistake of law.

E. D. G.

**Wills: The Intention of the Testator, as Expressed in the Will, is Binding.**—The recent case of *In re Manderscheid's Will*[1] is the latest addition to the long line of Wisconsin cases holding that the will is conclusive evidence of the intention of the testator. In the instant case the testator made a will in which he treated as advancements various sums of money paid by him to his sons either for work and labor performed or as trust funds held by him in trust for his sons until they should have reached maturity. The testator, as shown by the evidence, had really intended to make an equal distribution of his property but had been in error as to method to be used.

The court in this case follows the rule laid down in the case of *Estate of Wills,*[2] that where the will had clearly and definitely prescribed the manner in which such amounts should be treated, the tenure of the will must be effectuated. The intention of the testator must be ascertained from the will itself and the court will not be allowed, simply because the will was not expressive of the testator's intention, to change the testimentary instrument.

The rule in the case seems, at first sight, to be extremely harsh, but nevertheless, it is one of the well settled principles of our law. The specific question has often been passed upon by the Wisconsin Supreme Court.

In *Hopkins* v. *Holt*[3] we find this statement of the rule: "When the language of a will, used in its ordinary sense, is clear and unambiguous, no exposition will be made contrary to the express words."

*Eastman's Estate*[4] and *Estate of Goodrich*[5] give us this version: "The intention of the testator as collected from the will itself must prevail, whenever effect can be given to it."

*In re Moran's Will*[6] together with many other cases[7] give us a rule similar to this: That, in construing a will, it is the duty of the court, when possible, to ascertain the intention of the testator from the will itself, giving the words there plain and ordinary meaning. When the intention of the testator is clearly expressed it is conclusive.

HOWARD KALUPSKE

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[1] — Wis. —, 212 N.W. 247.
[2] 184 Wis. 242; 199 N.W. 52.
[3] 9 Wis. 228.
[4] 24 Wis. 556.
[5] 38 Wis. 492.
[6] 118 Wis. 177, 96 N.W. 377.
[7] 133 Wis. 43, 113 N.W. 398, 133 Wis. 161, 111 N.W. 573, 135 Wis. 584, 116 N.W. 229, 126 Wis. 47, 105 N.W. 216.