Missouri Law Review

Volume 37
Issue 1 *Winter 1972*

Article 8

Winter 1972

Reformation of Written Instruments in Missouri

William H. Thomas Jr.

Comment

REFORMATION OF WRITTEN INSTRUMENTS IN MISSOURI

I. INTRODUCTION

We all make mistakes. The remedy of reformation has developed to facilitate the correction of errors made in committing aggreements to writing. The availability of the remedy is the subject of this article. The legal doctrines will be treated generally with the primary focus on the Missouri decisions. This comment begins with a general discussion of the remedy, and then analyzes the theories for relief, the instruments and defects which may be reformed, the parties to the action, and four defenses—the Statute of Frauds, the petitioner's negligence, the statute of limitations and laches.

At the outset it is important to define some basic terms. The phrase "complete agreement" is used herein to describe the underlying agreement which is the "true," "actual" or "real" agreement of the parties. The adjective "complete" implies that the agreement has all of the elements necessary for it to be enforceable, for a court cannot supply a term which is essential to an enforceable contract.[1] The use of this phrase will provide consistency in this comment, although the courts often describe the complete agreement with any or all of the adjectives indicated above. The instrument in which the parties have attempted to write down the terms of the complete agreement will generally be referred to as the "written instrument." The party seeking reformation will often be referred to as the "petitioner."

A. *History*

The forerunner of the reformation remedy developed in Roman law was the *stipulatio*.[2] Its civil law counterpart is the correction theory.[3] More important is the remedy of rectification, developed in the English courts of equity.[4] The early common law courts did not offer affirmative relief for errors made in reducing an agreement to writing, and even refused to accept parol evidence of prior or contemporaneous agreements or negotiations offered to show that the contract sued upon was not the complete agreement made by the parties. To counteract the law courts' refusal to look beyond the written word, the English equity courts fashioned the remedy of rectification. In time the remedy was widely available:

---

1. 76 C.J.S. *Reformation of Instruments* § 11 (1952). Reformation depends on the existence of a valid contract. McReynolds v. Grubb, 150 Mo. 352, 51 S.W. 822 (1899).

2. Comment, *Reformation of Instruments in Louisiana*, 30 TUL. L. REV. 486 (1956). The author relied heavily on this commentator's historical discussion at 486.

3. *Id.* at 486-87. It is interesting that Louisiana, a civil law jurisdiction, has adopted the Anglo-American remedy of reformation for all instruments except compromises, for which the correction theory is provided by the Louisiana Civil Code. *Id.* at 487.

4. *See generally* Keeton, *Rectification of Instruments for Mistake in England*, 14 N.Y.U.L. REV. 319 (1937).

> The jurisdiction was exercised originally mainly in respect of marriage settlements which did not correspond with marriage articles.
>
> . . . [B]ut it has also been applied to leases and conveyances and even to voluntary deeds . . . .[5]

Today, American courts call this equitable remedy reformation.

B. *Nature and Effect of the Remedy*

1. Equitable in Nature

Despite the modern merger of law and equity in Missouri and in most states, the fact that the remedy of reformation was a creation of equity is significant because it means that the issues of fact in a reformation action will be decided by the court, not by a jury.[6] A jury has no power to grant reformation of a written instrument.[7] Moreover, the equitable nature of the remedy may also effect the litigants' rights to a jury trial on any non-equitable issues in the lawsuit.[8] Finally, the litigant seeking reformation should always remember that the equitable remedy is discretionary. This principle underlies many of the defenses available against the petitioner, such as laches or petitioner's negligence. The Supreme Court of Missouri has made the discretionary nature of the remedy very clear:

> A court of equity interferes to correct a mistake in a written instrument, only for the furtherance of justice; and it is not under any obligation to correct a mistake, although the fact of mistake appear ever so plainly, unless it also appear that its interference is necessary to prevent the perpetration of a fraud or some injustice: and the party asking relief must stand upon some equity superior to that of the party against whom he asks it.[9]

2. Effect of a Decree Granting Reformation

A decree granting reformation of a written instrument relates back to the time the instrument was executed. In other words, the reformed instrument replaces the written instrument effective at the time the written instrument was executed.[10] This relation back of the reformed instrument

---

5. *Id.* at 319 (footnotes omitted).

6. O'Neill, *Law or Equity: The Right to Trial by Jury in a Civil Action,* 35 Mo. L. Rev. 43 (1970); *reprinted in condensed form,* 27 J. Mo. B. 14 (1971).

7. In Sloss v. Farmers Mut. Auto. Ins. Co., 350 S.W.2d 446 (St. L. Mo. App. 1961), the plaintiff sought to recover on a fire insurance policy for damage to a house at 914 Dunklin Street. However, the application and the first duplicate of the policy showed 906 Dunklin Street as the address of the insured house. Plaintiff owned houses at both addresses. Plaintiff sued on the policy and obtained a jury verdict and judgment. But the appellate court reversed, holding that the plaintiff could not recover on the policy as written and that a jury could not reform the policy even if the plaintiff had made out a prima facie case for reformation.

8. For an analysis of this problem, *see* O'Neill, *supra* note 6.

9. Henderson v. Dickey, 35 Mo. 120, 126 (1864).

10. The decision in Bank of Aurora v. Linzee, 166 Mo. 496, 65 S.W. 735 (1901), was dependent on this principle. In 1890 defendant executed a deed of trust in favor of the plaintiff. In 1896 the plaintiff successfuly reformed the description in the deed of trust. Plaintiff later instituted an action in ejectment. The trial resulted

is the basis for allowing damages for *past* breaches of the instrument *as reformed, i.e.,* past breaches of the complete agreement. Consider this hypothetical situation. *A* and *B* entered into a contract. The complete agreement provided that *A* would service and repair *B*'s automobile for twelve months for a stated consideration; however, the written contract stated the time period was two months. *A* refused to repair *B*'s car after two months had passed, but he retained the consideration which was paid in advance. Since any decree granting reformation would relate back to the date the written contract was executed, *B* could recover damages for *A*'s failure to repair and service his automobile for the last ten months. This is a common-sense result since *A* knew or should have known of his obligation *vis-a-vis* the written contract.

3. Utility of the Remedy

Reformation may be asserted affirmatively or defensively.[11] More often than not, the petitioner will seek to reform the instrument and enforce it as reformed. This may happen in several ways. First, an action for reformation and for damages for past breaches is possible as illustrated above.[12] It is also possible to obtain specific performance of the agreement as reformed.[13] In some cases the party seeking reformation will be the defendant in the original action brought by the plaintiff on the written instrument. The defendant may, of course, join counterclaims for damages or specific performance along with his counterclaim for reformation. Or, he may simply rest his defense on the reformation of the written instrument.[14]

C. *Reformation Versus Rescission*

The failure of courts to differentiate between reformation and rescission has caused a great deal of confusion.[15] First, the theories of relief are much different. For example, in a rescission action whether the "mistake" was unilateral or mutual is very important, while it is not important, or at least

---

in judgment for the plaintiff, and the defendant appealed, contending *inter alia,* that the trial court incorrectly ignored the homestead right of defendant's wife. However, any homestead right was derived from a statute passed in 1895, *before* reformation was actually granted but *after* execution of the original deed. The Supreme Court of Missouri rejected defendant's contention, holding that "the decree of the court, though rendered in 1896, related to the date of the deed of trust which it reformed, to wit, 1890, and left in defendant only an equity of redemption" since his wife could not have had a homestead right before the statute was passed in 1895. *Id.* at 500, 65 S.W. at 736. *See also* Hampton School Dist. v. Phillips, 470 S.W.2d 934, 936 (Ark. 1971).

11. Leitensdorfer v. Delphy, 15 Mo. 160, 167, 55 Am. Dec. 137, 140 (1851). *See* pt. I, § B (2) of this Comment.

12. Smith v. Githens, 271 S.W.2d 373 (Spr. Mo. App. 1954). *See* Annot., 66 A.L.R. 763, 780 (1930). The rationale for allowing the action for damages in conjunction with the action for reformation seems self-evident: "He [petitioner] ought not to be put to the trouble first to bring a separate action to reform the instrument, when a simple averment in a direct action on the instrument would seem to meet all reasonable requirements." State *ex rel.* School Dist. v. Delaney, 122 Mo. App. 239, 246, 99 S.W. 1, 2 (K.C. Ct. App. 1906).

13. Henley v. Sullivant, 248 Mo. 672, 154 S.W. 706 (1913).

14. Net Realty & Inv. Co. v. Dubinsky, 94 S.W.2d 1108 (St. L. Mo. App. 1936).

15. *See* text accompanying note 51 *infra.*

should not be important, in a reformation case.[16] Second, the effect of the two remedies is very different. The reformation of a contract involves an effort to enforce it as reformed, whereas rescission involves an effort to abandon and recede from a contract.[17]

Equity courts have traditionally been very flexible in shaping relief.[18] Thus, in cases where rescission is the proper remedy and a decree cancelling the instrument and placing the parties in the status quo is proper, the court may offer to the party against whom rescission is sought the option of accepting reformation of the contract "to make the contract conform to what the other party thought it should be."[19] That a court of equity has this flexibility should not lead one to confuse the two remedies and the differing bases for relief.

D. *Reformation versus Interpretation*

It is also important to distinguish reformation from interpretation. When a petitioner seeks reformation of a written instrument, he is asking the court to re-write the instrument. When a party seeks interpretation of a written instrument, he is asking the court to read the instrument and ascertain its meaning, not to change the words mechanically.[20] However, the same end may be reached via these two different means. In *Herrick Motor Co. v. Fischer Oldsmobile Co.*,[21] the plaintiff tried to reach the same end by both means. However, he failed to distinguish between interpretation and reformation, and this proved fatal on appeal. In Counts I and II of his petition, the plaintiff sought reformation of a lease to change the word "or" to "and." He failed to ask the trial court to interpret the word "or" so as to mean "and." The trial court gave judgment for the defendant, and on appeal the plaintiff sought interpretation of the instrument rather than reformation. The court of appeals precisely discussed the differences between reformation and interpretation[22] before affirming the decision because plaintiff had switched theories on appeal.

As pointed out later, courts have traditionally refused to reform some types of instruments.[23] As *Herrick* illustrates, however, they may reach the same result if asked to interpret the instrument.

II. Theories for Relief

As usual, the party seeking the aid of equity must show that the remedy at law is inadequate. In the vast majority of reformation cases this presents no problem whatever. However, in *Berger Manufacturing Co. v. Phillips Hotel Operating Co.*,[24] the court reversed a judgment granting

16. 12 C.J.S. *Cancellation of Instruments* § 27 (1938). *Compare* pt. II, § A (1) of this Comment.

17. 12 C.J.S. *Cancellation of Instruments* § 6 (1938).

18. H. McClintock, Principles of Equity § 30 (2d ed. 1948) [hereinafter cited as McClintock].

19. *Id.* at 258-59.

20. *See* the extensive discussion in 3 A. Corbin, Contracts § 540 (1960).

21. 421 S.W.2d 58 (Spr. Mo. App. 1967).

22. *Id.* at 63-64.

23. *See* pt. III, § A (2) (b) of this Comment.

24. 228 Mo. App. 341, 67 S.W.2d 997 (K.C. Ct. App. 1934).

reformation of a contract because the plaintiff could successfully sue on the contract as written. It is a rare case when the legal remedy is adequate. Interpretation of the instrument might be an adequate remedy when the words are ambiguous, but in most cases the words are clear and leave no room for interpretation. Certainly, the petitioner should give the court an opportunity to interpret the written agreement;[25] if the court does so, it will never reach the reformation issues.

A. *When There is a Complete Agreement and the Written Agreement Varies Materially Therefrom*

1. The Analysis

Traditionally, courts have said that the ground for relief is that "the parties came to an understanding, but in reducing it to writing, through mutual mistake or mistake and fraud, some provision was omitted or mistakenly inserted."[26] The Missouri courts have generally followed this view.[27] When the courts analyze a fact situation in this manner, they focus on the *cause* of the error which appears in the written instrument. Relief is predicated on the occurrence of mutual *acts*—or a fraudulent *act* by one party—which *caused* the error. Many scholars have criticized this "cause-act" analysis because it is misleading.[28] They argue that the real basis for relief in a classic reformation case is that there is a complete agreement and the written agreement varies materially from it. Therefore, the cause of the variance is unimportant. This argument is put forth very well by Professor Malone:

> If judged by the objective standard of contracts, a true preliminary agreement has come into being and persisted unimpaired throughout the negotiations until its reduction to written form is attempted; such an agreement, and such only, can serve as a standard in determining the accuracy of the contents of the writing. Under these circumstances, any document which purports to embody this agreement and which is nevertheless at variance therewith, must necessarily be the result either of a mistake shared by all of the parties, or the mistake of one party and the fraud of the other.[29]

---

25. *See* text accompanying notes 21-22 *supra.*

26. 45 AM. JUR. *Reformation of Instruments* § 2, at 584 (1943). In this section the so-called "classic" reformation cases are considered. The less common types of cases are discussed in pt. II, § B of this Comment.

27. *But see* Long v. Greene County Abstract & Loan Co., 252 Mo. 158, 158 S.W. 305 (1913). The court stated that the remedy of reformation would not be available when there was a unilateral mistake by the party seeking reformation and fraud by the other party. Later cases have made it clear that unilateral mistake plus fraud is a ground for relief. *See* Citizens Bank v. Frazier, 352 Mo. 367, 177 S.W.2d 477 (1944); Strothcamp v. Sandy Ford Ranch, Inc., 440 S.W.2d 193 (St. L. Mo. App. 1969).

28. Covington, *Reformation of Contracts of Personal Insurance,* 1964 ILL. L.F. 548, 549-50; Malone, *The Reformation of Writings for Mutual Mistake of Fact,* 24 GEO. L.J. 613 (1936).

29. Malone, *supra* note 28, at 618.

The "mistake," in Malone's analysis, rests in the *assumption* by one or both parties that the written instrument accurately reflects the complete agreement. And if there is a variance between the complete agreement and the written instrument, it follows that either both parties erroneously assumed that there was no variance (mutual mistake) or one party so assumed while the other party knew that there was a variance (unilateral mistake plus fraud). Predicating relief on the grounds of mutual mistake or unilateral mistake plus fraud is merely a roundabout way of saying that there must be a complete agreement and the written instrument must vary materially from it. In short, the courts seem to have made the theory of relief unnecessarily complicated. This would be of no concern if the courts correctly applied this cause-act analysis. However, many courts have not done so.[30] The source of confusion has been the failure of the courts to recognize that the "mistake" may be an erroneous assumption rather than an overt act:

> Unfortunately, . . . there have crept into opinions statements seeming to require . . . that the variance between the bargain [complete agreement] and the written instrument result from certain fixed types of causes . . . . Such a statement treats "mistake" as if it is of necessity an act—placing a decimal point in the wrong place, or transposing words when drafting the instrument reflecting the bargain. This kind of "mistake" is indeed frequently the cause of variance between the [complete] agreement and the written instrument. But "mistake" can also denote a condition, as when one says "I am mistaken."[31]

In two different types of situations this cause-act analysis has caused Missouri courts to reach incorrect results. The first situation is where the variance was introduced into the written instrument by the act of a scrivener. Since the courts said that in the absence of fraud, the mistake had to be mutual, and since the courts required that the mistake be an act, it logically followed that the scrivener who made the mistake had to be acting as the agent of both parties in order for either party to get reformation of the instrument. If he was not, the mistake could not be mutual. On the face of it, this requirement is unsound; the agency of the scrivener is immaterial. It does not matter who caused the written instrument to vary from the complete agreement. Nevertheless, this requirement—that the scrivener must have acted as agent of both parties—was stated in many early Missouri decisions.[32]

---

30. The author recognizes that the Missouri courts have almost always reached "correct" results in the reported cases. However, in the more difficult cases it is submitted that the correct result is often reached in spite of, not because of, the analysis employed.

31. Covington, *supra* note 28, at 549-50.

32. As a matter of historical interest, it should be noted that the very early decisions in this state correctly disregard this issue. For example, in Cassidy v. Metcalf, 66 Mo. 519 (1877), the supreme court assumed that reformation was possible when the variance was introduced into the written instrument by the plaintiff-scrivener:

> The paper drawn up by the scrivener, who, in this case was the plaintiff himself, did not correspond with the verbal agreement previously made, . . .

Apparently, the first decision denying relief because the scrivener was not the agent of both parties was *Meek v. Hurst*,[33] decided in 1909. The Supreme Court of Missouri affirmed the trial court's dismissal of the petition, holding that mutuality was not pleaded by the plaintiff since he alleged only that the scrivener made an error in reducing the agreement to writing. The court said that mutuality was required and that it "might arise from the fact that the mistake was the mistake of the scrivener, who acted as mutual agent of both parties in drafting the contract . . . ."[34] In reaching this result the court relied on three previous decisions. However, two involved rescission, not reformation,[35] and the third was a reformation case which said in dictum that the scrivener had to act as the agent of both parties, but found that the scrivener *did* so act.[36] The court also cited Story's commentary on equity jurisprudence; but a careful reading of the passage cited shows that it does not support the court's decision.[37] Thus, the *Meek* decision was based on prior cases not really applicable; and it certainly had no basis in logic or public policy. Nonetheless, the decision was destined to bother Missouri courts for many years.[38]

The *Meek* doctrine has been rejected in the later decisions. In *Snider v. Miller*[39] the Springfield Court of Appeals stated that the "only sound rule" is that "it is immaterial who employed him [the scrivener], or even that the draftsman is one of the parties."[40] The court discussed three Missouri cases cited as holding that the scrivener must have been the agent of both parties,[41] but found that in each case the evidence of a complete agreement was held insufficient.[42] The court did not discuss *Meek*. The *Snider* decision is clearly in line with the other modern decisions in this state,[43] although *Meek* has never been expressly overruled.

The second situation in which the courts have met with difficulty in applying the cause-act analysis involves cases where the parties entered into

---

It is immaterial how or why, this was so, whether by a misunderstanding of the words or sheer carelessness. The real agreement between the parties has never been reduced to writing. *Id.* at 531-32.

33. 223 Mo. 688, 122 S.W. 1022 (1909).

34. *Id.* at 696, 122 S.W. at 1024.

35. Castleman v. Castleman, 184 Mo. 432, 83 S.W. 757 (1904); Benn v. Pritchett, 163 Mo. 560, 63 S.W. 1103 (1901).

36. Williamson v. Brown, 195 Mo. 313, 333, 93 S.W. 791, 797 (1906).

37. 1 J. STORY, EQUITY JURISPRUDENCE § 155 (13th ed. 1886). The pertinent language is as follows:

[E]quity interferes in cases of written agreements where there has been an innocent omission or insertion of a material stipulation contrary to the intention of both parties and under a mutual mistake.

38. One commentator on the Missouri decisions noted that the "agency of the scrivener has been a source of difficulty in an action for reformation." Lehr, *Reformation of Deeds for Omission—Mutual Mistake*, 23 Mo. L. REV. 97, 98 (1958).

39. 352 S.W.2d 161 (Spr. Mo. App. 1961).

40. *Id.* at 164.

41. Hood v. Owens, 293 S.W. 774 (1927); Dougherty v. Dougherty, 204 Mo. 228, 102 S.W. 1099 (1907); Brocking v. Straat, 17 Mo. App. 296 (St. L. Ct. App. 1885).

42. Snider v. Miller, 352 S.W.2d 161, 164 (Spr. Mo. App. 1961).

43. Ethridge v. Perryman, 363 S.W.2d 696 (Mo. 1963); Zahner v. Klump, 292 S.W.2d 585 (Mo. 1956).

the detailed written agreement under an erroneous belief with respect to the existing state of facts. Two parallel cases are illustrative. *General Refractories Co. v. Howard*[44] and *General Refractories Co. v. Sebek*[45] were argued by the same counsel, and the same judge wrote both opinions. Nonetheless, the results are not consistent. In *Howard* the court allowed reformation of the description in a deed. The court cited the following passage from *Leitensdorfer v. Delphy:*

> It is not necessary, in order to establish a mistake in an instrument that it shall be shown that particular words were agreed upon by the parties as words to be inserted in the instrument. It is sufficient that the parties had agreed to accomplish a particular object by the instrument to be executed, and that the instrument as executed is insufficient to effectuate their intention.[46]

In *Sebek* the plaintiff lessee sought reformation of a lease which gave plaintiff the right to mine and remove certain materials, including fire clay, on the defendant's land except within 200 *yards* of any building. Plaintiff contended that it should have read 200 *feet* therefrom, arguing that the object of the lease was to give plaintiff the right to remove clay from an existing pit and that said pit was more than 200 feet but less than 200 yards from a building. The Missouri Supreme Court affirmed the trial court's decision to deny reformation. The court first said that the evidence offered to establish the complete agreement was contradictory and ambiguous and that it did not believe the parties intended to lease the rights to the clay pit. This would have been enough for the decision, but the court went on to show its confusion:

> It may be true that both . . . [plaintiff's agent] and Sebek intended that the particular clay pit just referred to should be included in the lease. But, even so, it does not follow that the lease as written does not correctly set forth the contract actually entered into by the parties. They may have assumed that the pit was not within 200 yards of any building . . . . And if the lease was written just as the parties intended it should be written, that is, correctly embodies the terms of the contract actually entered into, there is no ground for its reformation.[47]

If the court relied upon the above analysis, the decision is undoubtedly incorrect. At any rate, the court's statement is incorrect. If the parties agreed that the clay pit was to be included in the lease, reformation would have been proper despite the fact that the parties mistakenly assumed that the pit was not within 200 yards of any building. The court needed only to read its opinion in *Howard:* "It is sufficient that the parties had agreed to

---

44. 328 Mo. 1139, 44 S.W.2d 65 (1931).
45. 328 Mo. 1143, 44 S.W.2d 60 (1931).
46. General Refractories Co. v. Howard, 328 Mo. 1139, 1143, 44 S.W.2d 65, 66 (1931), *citing* Leitensdorfer v. Delphy, 15 Mo. 160, 167, 55 Am. Dec. 137, 140 (1851).
47. General Refractories Co. v. Sebek, 328 Mo. 1143, 1153, 44 S.W.2d 60, 64 (1931).

accomplish a particular object by the instrument to be executed, and that the instrument as executed is insufficient to effectuate their intention."[48] In cases similar to *Sebek* reformation has been properly allowed when the petitioner produced sufficient evidence to establish the complete agreement.[49]

Sebek and *Howard,* together with the scrivener-agency problem, illustrate the confusion which can arise from the cause-act analysis. Moreover, as the *Meek* case shows, the use of the phrase "mutuality of mistake" has sometimes caused the courts to confuse reformation and rescission and to rely improperly on rescission precedent in deciding reformation cases.[50] Although mutuality is important in the rescission cases, the mistake concept itself and thus "mutuality" is unnecessary in reformation theory:

> It is very commonly stated by courts in cases where no fraud is involved that, to justify reformation, the mistake must be mutual. This must always be true in the sense that the instrument does not conform to the actual agreement, and that the parties are ignorant of the discrepancy. But the use of the term "mutuality" in reformation cases has been the cause of much of the confusion of these cases with those where cancellation is sought.[51]

For these same reasons Professor Malone argued thirty-six years ago that the courts could more clearly analyze reformation problems if they discarded the "mistake" or cause-act analysis altogether.[52] If that is done, what should be the elements required for a prima facie case for reformation of a written instrument? The petitioner should have to prove (1) that a complete agreement exists between the parties, and (2) that the written instrument varies materially from the complete agreement. Professor McClintock makes this clear in his treatise:

> It is a presupposition to the granting of the relief that there was a valid agreement made between the parties which the instrument they executed failed to express correctly. Neither party was misled by any mistake or fraud into agreeing to something which he otherwise would not have agreed to; the contract as reformed will give to each just what it was intended he should receive.[53]

The trouble with the cause-act analysis is that it may lead the court away from the central issues. The suggested analysis would put the court's focus where it belongs: on the proof of the complete agreement.

---

48. General Refractories Co. v. Howard, 328 Mo. 1139, 1143, 44 S.W.2d 65, 66 (1931).

49. *See* Net Realty & Inv. Co. v. Dubinsky, 94 S.W.2d 1108 (St. L. Mo. App. 1936).

50. *See also* the confusing statement in Saline County v. Thorp, 337 Mo. 1140, 1144, 88 S.W.2d 183, 185 (1935). The court said that reformation and ordinarily rescission are only granted where there is a mutual mistake. But the court went on to say that an exception is made when one party acted fraudulently so that the parties "never actually agreed to the same proposition." Although rescission has been allowed in this situation, reformation ordinarily is not. Missouri courts have never allowed reformation in such a case. *See* pt. II, § B (1) of this Comment.

51. McCLINTOCK, § 96.

52. Malone, *supra* note 28.

53. McCLINTOCK, § 95, at 256. *See also* Covington, *supra* note 28, at 549.

2. Proof of the Complete Agreement

The heart of the petitioner's case in a reformation suit is the establishment of the complete agreement; it is, more often than not, the point at which an unsuccessful petitioner fails. The dilemma of the trier-of-fact is candidly set forth in a recent decision of the St. Louis Court of Appeals:

> If the testimony of plaintiff and her witness . . . is to be believed, the proof of plaintiff's right to reformation is clear . . . . On the other hand, if the testimony of [defendant] and his witnesses is true, the judgment should go against plaintiff . . . . Therefore, the disposition of the case is largely dependent upon a question of credibility of the witnesses.[54]

In very many cases the problem of proof is made even more difficult because considerable time has elapsed since the instrument was executed. Witnesses to the transaction are unavailable or, at best, their memories are badly faded.

a. Admissible Evidence

The initial question is: What is the effect of the parol evidence rule? That rule normally operates to exclude evidence of oral negotiations prior to or contemporaneous with any written agreement which is contradictory to the written agreement.[55] It should be self-evident that parol evidence must be admitted in suits for reformation. Historically, the remedy of reformation arose primarily because the parol evidence rule precluded the common-law courts from looking beyond the written instrument.[56] So, reformation suits are *by definition* exceptions to the parol evidence rule. If the parol evidence rule was a bar, this rule designed as a protection against fraud would aid the very fraud it was intended to prevent.[57] Even in the earliest reformation cases the Missouri courts have recognized this principle.[58]

The next question is: What type of parol evidence will the courts admit to establish the complete agreement? There would appear to be no limits in Missouri except the facts of the case and the petitioner's ingenuity. Quite naturally, Missouri courts admit evidence of the written instrument in its entirety.[59] In addition, evidence of the subject matter of the agreement, the usages of the business, the relationship of the parties, the motives of the parties in making the complete agreement, and the circumstances surrounding the execution of the written instrument is admissible.[60] Also

54. Sparks v. Sparks, 388 S.W.2d 508, 516 (St. L. Mo. App. 1965).
55. 32A C.J.S. *Evidence* § 851 (1964).
56. *See* pt. I, § A of this Comment.
57. 45 AM. JUR. *Reformation of Instruments* § 113 (1943).
58. *See* Employers' Indem. Corp. v. Garrett, 327 Mo. 874, 884, 38 S.W.2d 1049, 1053-54 (1931).
59. In Leitensdorfer v. Delphy, 15 Mo. 160, 166, 55 Am. Dec. 137, 139 (1851), the court found no necessity for going outside of the written instrument to ascertain the complete agreement.
60. *See* St. Louis 221 Club v. Melbourne Hotel Corp., 227 S.W.2d 764, 768 (St. L. Mo. App. 1950); Chandler v. Hale, 219 Mo. App. 133, 152, 268 S.W. 691, 698 (K.C. Ct. App. 1925).

very important in many cases is the conduct of the parties subsequent to the execution of the instrument. In *Maze v. Boehm*[61] plaintiff sued to quiet title to certain real estate. The defendant counterclaimed for reformation of deeds in his chain of title and in plaintiff's chain of title. To establish the complete agreement (that defendant's predecessors in title should receive the real estate in question), the defendant offered evidence of his possession of the land and the possession by those preceding him in his chain of title. The Supreme Court of Missouri held that this evidence was admissible to show "the good faith of defendants and their intention in the transaction which was the origin of their claim."[62]

On the other hand the party against whom reformation is sought may introduce these same types of evidence to show that the written instrument does not vary from the complete agreement. In *Nelson v. Grice*[63] the defendants used evidence of the surrounding circumstances to defend against reformation. The plaintiff Nelson sought reformation of a lease. The defendant lessors introduced evidence to show that Mackey, the lessee preceding Nelson, was told by them to get plaintiff's attorney to prepare a lease "just like the one" Mackey had. The court looked at Mackey's lease for evidence of the complete agreement and denied reformation.

b. The Weight of Evidence Required

Certainly, the party seeking reformation bears the burden of establishing the complete agreement.[64] However, the question is: what is the standard of proof he must satisfy? A brief reading of the Missouri decisions leaves no doubt that reformation can be granted when the evidence of the complete agreement is conflicting. In fact, this is almost always the situation in the litigated cases. But, since the evidence is being admitted contrary to the mandate of the parol evidence rule, and in some cases seemingly contrary to the Statute of Frauds,[65] it is only natural that courts require more than a mere preponderance of the evidence. Missouri courts have used a variety of phrases to describe the weight of evidence required; in fact, the words seem to change from one opinion to the next:

> The establishment of such [complete] agreement has in some cases required proof that is clear, cogent, and convincing; other cases required that the proof need not be beyond a reasonable doubt; while others required proof such as to leave no reasonable doubt . . . .[66]

---

61. 281 Mo. 507, 220 S.W. 952 (1920).
62. *Id.* at 513, 220 S.W. at 954.
63. 411 S.W.2d 117 (Mo. 1967).
64. Meredith v. Holmes, 105 Mo. App. 343, 352, 80 S.W. 61, 63 (St. L. Ct. App. 1904):
> Correlated to this [parol evidence] rule is the rule in equity suits to correct a written contract, on the ground of mistake, that casts upon the party asserting the mistake the burden of overthrowing . . . the prima facie presumption that the contract exhibits the ultimate agreement of the parties . . . .

65. *See* pt. V, § A of this Comment.
66. Lehr, *supra* note 38, at 98. The latest pronouncement by the Supreme Court of Missouri is that petitioner must show an agreement "by clear, cogent,

Regardless of what descriptive words are proper to describe the weight of evidence required in Missouri, the trial judge is the trier of fact, and the difference in wording is not likely to have much influence on him. The petitioner must simply persuade him that the complete agreement did indeed vary from the written instrument. The Missouri Supreme Court early stated the truth of the matter:

> Although it is said, that the evidence required to prove a mistake when it is denied must be as satisfactory as if the mistake were admitted, yet this and similar remarks of judges, however distinguished, form no rule of the law to direct courts in dispensing justice. When the mind of a judge is entirely convinced upon any disputed question, whether of fact or law, he is bound to act upon the conviction.[67]

3. The Mistake of Law Problem

The courts in this country broadly state that equity will not reform a written instrument when the variance arose from a mistake of law.[68] Such a situation would arise, for example, if Jones agreed to convey to Smith only a life estate in Blackacre, but because of Jones' erroneous assumption as to the words used in the deed, he actually conveyed a fee simple interest in Blackacre. Although the courts state the above proposition as a general rule, they rarely, if ever, have relied upon it to deny relief to a petitioner such as Jones:

> In suits for reformation, the attitude of the courts toward a mistake of law is very similar to that adopted by them where the suit is for cancellation, that is, they are very apt to state the rule to be that there can be no reformation for such a mistake but to find that the particular case comes within an exception to the rule so that the relief is granted.[69]

The most recent pronouncement on this proposition by the Missouri Supreme Court was in *State ex rel. State Highway Commission v. Schwabe.*[70] That case arose out of proceedings to condemn certain land of the defendants. The defendants counterclaimed for reformation of a deed by which they had previously conveyed land to the Missouri State Highway Commission. In the counterclaim they alleged that the parties' complete agreement provided that the defendants would retain a right of access to the highway and that the deed failed to do so. The state did not dispute the proposition that the deed varied materially from the complete agreement, but rather urged that equity would not reform the deed because the choice of words ineffective to reserve a right of access was a non-

---

convincing evidence, beyond a preponderance of the evidence and so as to leave no room for reasonable doubt . . . ." American Family Mut. Ins. Co. v. Bach, 471 S.W.2d 474, 477 (Mo. 1971).

67. Leitensdorfer v. Delphy, 15 Mo. 160, 167, 55 Am. Dec. 137, 140-41 (1851).

68. Hunt v. Rousmaniere's Adm'r, 26 U.S. (1 Pet.) 1, 15 (1828). *See also* 76 C.J.S. *Reformation of Instruments* § 27 (1952).

69. McCLINTOCK, § 97, at 262.

70. 335 S.W.2d 15 (Mo. 1960).

reformable mistake of law. The supreme court held that on the facts presented it would grant reformation of a mistake of law. It relied on the *Corrigan v. Tiernay*[71] exception to the general rule: "[E]quity will grant its relief . . . although the failure may have resulted from a mistake as to the *legal meaning* and operation *of the terms* or language *employed* in the writing."[72]

In reviewing the Missouri decisions, the *Corrigan* court found a further exception to the "rule" that equity will not reform a mistake of law: when the mistake of law is mixed with a mistake of fact.[73] This exception can, of course, be very broad depending on how the courts determine whether a mistake is purely a mistake of law.[74]

While the decision in *Schwabe* was based on one of the exceptions found in *Corrigan,* it is significant to note that the *Schwabe* court indicated in dictum that it disapproved the main proposition:

> The best-considered modern cases recognize that the main object of equitable jurisdiction should be to effectuate the intention of the parties to the instrument, and that any mistake made by them which would defeat such intention should be corrected in equity, irrespective of the question whether the mistake is one of law or of fact.[75]

In his treatise Professor McClintock states that there is only one instance when a mistake of law cannot be reformed: when the parties agreed on the particular instrument, though their selection of it was induced by a mistake as to the legal operation of the instrument.[76] In support of this assertion, McClintock cites the famous case of *Hunt v. Rousmaniere's Administrators.*[77] Hunt wanted security for a loan he made to Rousmaniere. The latter was prepared to give him any type of security; but, on the advice of his attorney, Hunt asked for a power of attorney authorizing sale of a ship owned by the debtor. Hunt died without exercising the power. The first time this case appeared before the Supreme Court (on a demurrer to the bill),[78] the Court held that the power of attorney expired at Hunt's death. The plaintiffs then brought an action to

---

71. 100 Mo. 276, 13 S.W. 401 (1890).

72. State *ex rel.* State Highway Comm'n v. Schwabe, 335 S.W.2d 15, 20 (Mo. 1960), *citing* Corrigan v. Tiernay, 100 Mo. 276, 280, 13 S.W. 401, 402 (1890) (emphasis added). This is a well-recognized exception to the mistake of law doctrine. *See* Annot., 135 A.L.R. 1452 (1941).

73. Corrigan v. Tiernay, 100 Mo. 276, 280, 13 S.W. 401, (1890). Note also that there is another exception which applies when an applicant for insurance correctly states his interest in the property and asks for insurance thereon, and the agent of the insurer agrees to comply with his request and to decide on the form of the policy, but by mistake of law adopts a form which does not cover such an interest. Erickson Refrigerated Transp., Inc. v. Canal Ins. Co., 474 S.W.2d 337, 340 (Spr. Mo. App. 1971).

74. *See* discussion in 2 F. COOPER, STATE ADMINISTRATIVE LAW 665-67 (1965).

75. State *ex rel.* State Highway Comm'n v. Schwabe, 335 S.W.2d 15, 21 (Mo. 1960). *See also* McIntyre v. Casey, 182 S.W. 966 (Mo. 1916).

76. MCCLINTOCK, § 97, at 262.

77. 26 U.S. (1 Pet.) 1 (1828).

78. 21 U.S. (8 Wheat.) 174 (1823).

reform the power of attorney so that it could become effective as a chattel mortgage, alleging in effect that there was a complete agreement to provide security. Reformation was denied at trial and the Supreme Court affirmed. Although the Court made sweeping statements that equity would not reform a mistake of law, the precise holding of the case is that there was no complete agreement to provide security, *i.e.*, that the complete agreement called only for Rousmaniere to execute a power of attorney.[79] Thus, Professor McClintock might have been more accurate if he had said that when parties have agreed on a particular instrument it will probably be impossible for a chancellor to find a complete agreement to serve as the basis for the reformation of the instrument even though their selection of it was induced by a mistake as to its legal effect.[80] The *Hunt* result can thereby be explained without resort to the mistake of law doctrine.

There is no sound policy supporting the proposition that courts should not grant reformation where the variance arose because of a mistake of law. As stated earlier, the cause of the variance of the written instrument from the complete agreement is not important. Once the complete agreement is established, the object of the court should be to effectuate the intention of the parties, and this object should be carried out unless there is some overriding policy consideration not present in this situation. As indicated in *Schwabe,* the Missouri Supreme Court has seen the merit in this argument and may well remove the vestiges of this rule in a future decision. In any case, the rule has little application since the courts have developed so many exceptions to the general rule. In Missouri there is apparently no decision denying reformation on the ground that equity would not reform a mistake of law.

B. *Possible Exceptions When the Written Agreement Does Not Vary from the Complete Agreement*

The normal requirements for a prima facie case for reformation of a written instrument are two: first, that a complete agreement exists between the parties, and second, that the written instrument varies materially from the complete agreement. But there are other instances where reformation should be available even though the written agreement does not vary from the complete agreement. Some are discussed herein.

---

79. The language of the Court so indicated:

> [I]f he [Rousmaniere] had totally refused to execute the agreement, and the plaintiff had filed his bill, praying that defendant might be compelled to execute a mortgage instead of an irrevocable power of attorney, could that court have granted the relief specifically asked for? We think not . . . [Equity] has no power to make agreements for parties, and then compel them to execute the same.

Hunt v. Rousmaniere's Adm'r, 26 U.S. (1 Pet.) 1, 14 (1828).

80. In one situation American courts will give a written instrument the legal effect of another type of document. If, for example, *A* conveyed Blackacre to *B* by warranty deed but there was an oral agreement that the property would be held as security for *A's* debt to *B,* some courts would allow *A* to prove the oral mortgage in spite of the Statute of Frauds. Scott, *Conveyances Upon Trusts Not Properly Declared,* 37 HARV. L. REV. 653, 662 (1924). The deed absolute would be declared a mortgage and given the effect thereof. O'Neill v. Capelle, 62 Mo. 202 (1876).

1. Fraud in the Inducement

Suppose Smith induces Jones to buy his late model automobile by representing that it has been driven only 10,000 miles when in fact it has been driven 110,000 miles. Jones purchases the automobile for $3,000, but its market value is much lower—say $2,500—because it has been driven so many miles. Can Jones get the sale contract reformed so that he will only have to pay $2,500 (the actual market value) *in toto?*

The general rule is, of course, that Jones cannot get reformation, for the written instrument does not vary from the complete agreement; the parties agreed on $3,000. However, the New York Court of Appeals strayed from this principle in *Brandwein v. Provident Mutual Life Insurance Co.*[81] In that case the plaintiff alleged that defendant had entered into an agent's agreement with the plaintiff; that the plaintiff had originally refused to enter into the agreement because as it was written commissions would not be vested in plaintiff if the agreement was terminated; and that defendant's officer had induced plaintiff to sign the agreement by representing that a vesting provision would be recorded in the official records of the defendant corporation. The plaintiff prayed for reformation of the written instrument to include the "side agreement" (the vesting provision). The supreme court dismissed the complaint, and the appellate division of the supreme court affirmed. But the court of appeals reversed, holding that plaintiff stated a cause of action for reformation. If the standard analysis is applied, this decision is incorrect. Since the side agreement was merely an inducement to the making of the contract, that side agreement did not become a part of the complete agreement. Thus, the written instrument did not vary from the complete agreement.[82]

The question posed here is whether an exception should be made for cases of fraud in the inducement: Should reformation be available notwithstanding the fact that the normal requirements are not met? The policy has always been that it is not the function of equity to punish a defendant by forcing a bargain on him which he never made. On the other hand, Professor Malone has asked: "Is there any reason that a defendant should not be forced to fulfill the terms of a fraudulent representation made by him even though it did not reach the dignity of being a part of the agreement itself?"[83] Certainly, Brandwein—as well as Jones, our hypothetical car buyer—should have had some remedy. But reformation may not have been his only remedy even though, as the majority opinion noted, the oral side agreement was unenforceable because of the Statute of Frauds.[84] At least one commentator has argued that the *Brandwein* court could have reached the same result via another theory.[85] He believed that

81. 3 N.Y.2d 491, 146 N.E.2d 693, 168 N.Y.S.2d 964 (1957).

82. The term "complete agreement" may be a bit confusing here; in this case it is the agent's agreement. This does not include the side agreement or vesting provision which was not intended to be part of the agent's agreement but was used to induce plaintiff to enter into the agent's agreement.

83. Malone, *The Reformation of Writings for Mutual Mistake of Fact,* 24 GEO. L.J. 613, 614 n.1 (1936).

84. Brandwein v. Provident Mut. Life Ins. Co., 3 N.Y.2d 491, 495-96, 146 N.E.2d 693, 695, 168 N.Y.S.2d 964, 967 (1957).

85. Note, 44 CORNELL L.Q. 124 (1958).

the court should have disregarded the plaintiff's prayer for reformation and read the complaint as a tort action for fraud or deceit; then the application of New York's "loss of bargain" rule of damages would have placed the plaintiff in the same position as if reformation had been granted.[86] Similarly, in the hypothetical, Jones could bring an action for rescission and a tort action for fraud. If the "loss of bargain" rule of damages is the measure of recovery, success in the two actions amounts to specific enforcement against Smith of his fraudulent representation regarding the mileage.

In summary, when the writing expresses the complete agreement correctly but one party's assent was obtained by fraud, that party's remedy is rescission not reformation.

> [I]f his assent was induced by an antecedent unilateral mistake, he may perhaps get rescission and restitution, but he is not entitled to reformation.
>
> In cases of this kind, the court often says as a reason for denying reformation that this mistake was not "mutual." The true reason back of this, however, is that the plaintiff is trying to enforce a contract that the defendant never agreed to.[87]

It is possible to reach a just result via rescission and fraud actions provided that the jurisdiction follows the "loss of bargain" rule of damages. Since Missouri is such a jurisdiction,[88] there is no need to make an exception in Missouri from the standard requirements for reformation.[89]

2. Hardship

Suppose our friend Jones—who has a habit of making bad deals—is a contractor, and he agrees to supply and install all the sewer pipe needed in Smith's new subdivision. Both parties think that nine-inch pipe will be adequate, and the contract price is set with that in mind. However, it turns out that twelve-inch pipe is required. Supplying the twelve-inch pipe causes contractor Jones to suffer financially, but he supplies the pipe because he has labor contracts to fulfill and he doesn't want to lose his other contracts with Smith. Can Jones get reformation of the contract to provide for a greater price? Of course, under the normal requirements he cannot make

---

86. *Id.* at 131.

87. 3 A. CORBIN, CONTRACTS § 614 (1960).

88. *See* Miller v. Wilson, 381 S.W.2d 31, 38 (St. L. Mo. App. 1964), and cases cited therein.

89. *Brandwein* appears to be the only case of fraud in the inducement where reformation has been held an appropriate remedy although Professor McClintock cites Hugo v. Erickson, 110 Neb. 602, 194 N.W. 723 (1923), as such a case. MCCLINTOCK, § 100 n.68. The defendant, Erickson, represented that all of a lot was included in the sale, but the deed conveyed only part of the lot. The court granted reformation so that the deed would convey all of the lot. McClintock says there was no complete agreement to sell the lot and that reformation was granted to compel the defendant to make good his representations. However, under the modern objective theory of contracts, there was a complete agreement. The court appeared to recognize this. If so, *Hugo* is no more than a standard reformation case. It is this writer's opinion that none of the cases cited by McClintock stand for the proposition that reformation may be granted where there was fraud in the inducement. *See* MCCLINTOCK, § 100.

out a case because the written instrument does not differ from the complete agreement. The normal rule is that hardship is not grounds for reformation: "[W]here parties to an agreement are ignorant of facts which, if known, would have caused a different contract, the remedy is rescission and not reformation."[90]

However, the United States Court of Claims granted reformation in a case factually similar to the hypothetical. In *National Presto Industries, Inc. v. United States*,[91] the parties contracted for the production of 105-mm shells at a fixed price. Both parties thought that certain lathes or plunge grinders would not be necessary in the production process; but, as it turned out, they were necessary in order to produce shells of the required quality. Plaintiff produced the shells and later instituted an action for reformation to raise the contract price. The Court of Claims allowed reformation so that the contract would provide that the parties would split the cost of the extra work and equipment. Even though the evidence was contradictory, the court held that the defendant did not agree to be responsible for the omission of the lathes and also that the contract did not expressly put the risk on the plaintiff. The court found that defendant would have paid at least part of the cost of the lathes if they had been thought necessary and that defendant had benefited from the extra work:

> For such a case it is equitable to reform the contract so that each side bears a share of the unexpected costs . . . . Reformation, as the child of equity, can mold its relief to attain any fair result within the broadest perimeter of the charter the parties have established for themselves.[92]

No other jurisdiction has ever followed the lead of the Court of Claims, which admittedly changed the reformation ground rules in this case as it has in other government contract cases.[93]

In two recent cases the Supreme Court of Missouri has denied reformation sought basically on the ground of hardship. *Croy v. Zalma Reorganized School District R-V*[94] involved a contract for the sale of land. Both parties entered into the contract without knowing whether a certain building was on the land to be conveyed. The building was not on the land, so plaintiff-buyer sued for reformation of the deed to include in the description the land on which the building actually sat. The court denied reformation, holding that plaintiff had gambled that the building was on the land he purchased and that he did not state a cause of action because the written instrument did not differ from the complete agreement. In *German Evangelical St. Marcus Congregation v. Archambault*,[95] plaintiff owned land which was dedicated and used for cemetery purposes. Defendants were

---

90. Harley v. Magnolia Petroleum Co., 378 Ill. 19, 27, 37 N.E.2d 760, 764 (1941). *See* Annot., 137 A.L.R. 908 (1942).
91. 167 Ct. Cl. 749, 338 F.2d 99 (1964), *cert. denied*, 380 U.S. 962 (1965).
92. *Id.* at 769, 338 F.2d at 112.
93. *See also* Note, *Equitable Adjustment of Government Contracts*, 42 N.Y.U.L. REV. 302 (1967).
94. 434 S.W.2d 517 (Mo. 1968).
95. 383 S.W.2d 704 (Mo. 1964).

burial lot owners. Plaintiff sought a decree authorizing abandonment, removal of remains and sale of the property; but it had obligated itself under perpetual care contracts to maintain 2,290 grave sites, more than ten per cent of the total in the cemetery. The court said: "[T]he mere fact that an obligation has become burdensome affords no basis for relief [reformation of the contracts]."[96]

Thus, Missouri follows the almost universal rule that hardship or unfairness is not a ground for reformation of a written instrument. Of course, rescission is available on those grounds;[97] but rescission is not possible when the contract has already been performed, as in *National Presto* and our hypothetical. Therefore, the question remains whether hardship in such cases should be grounds for reformation in spite of the fact that the written instrument does not vary materially from the complete agreement. The problem is that the court would have no basis for rewriting the written instrument. On what basis would the court determine the terms of the new contract the petitioner would have it write for the parties? Can the court write a new contract acceptable to both parties? The logical response is that the courts should not try. In those cases where the rescission remedy is not adequate, the parties must simply live with their agreement. As so many courts have said: "The court cannot supply an agreement that was never made."[98]

One question remains: What bearing, if any, does hardship have on a reformation case if it is not a basis for relief per se? This writer suggests that hardship has a very definite bearing on reformation cases because it is a factor which cuts toward finding a complete agreement which varies from the written instrument. If the bargain as written is very harsh on the petitioner, his case will probably be more credible. Since proving the complete agreement is the most difficult part of petitioner's case, hardship will be very important to a petitioner even though not sufficient for relief per se. Although it is difficult to get actual data to support this thesis,[99] it is borne out in the language of the St. Louis Court of Appeals in *Sparks v. Sparks*.[100] Several written instruments were involved in that case, all of which were part of a financial agreement between the parties which included the sale of a business from plaintiff to defendant. Plaintiff alleged that defendant fraudulently changed the term for payment from ten years to twenty-five years when he drew up the instruments and also that he fraudulently prepared the main instrument so that it purported to be a testamentary disposition of plaintiff's interest in the $45,000 deed of trust, so that payments on the principal would be extinguished when plaintiff died. The plaintiff, a seventy-four-year-old widow, also alleged certain other irregularities and sued to reform the main financial agreement, the deed

96. *Id.* at 713.
97. Sims v. Sims, 101 Mo. App. 407, 74 S.W. 449 (St. L. Ct. App. 1903). *But see* Chelrob, Inc. v. Barret, 293 N.Y. 442, 57 N.E. 825 (1944), where the court in effect reformed a contract on the ground of hardship because the parent corporation was benefiting from a low price at the expense of its subsidiary.
98. *E.g.*, Tesson v. Atlantic Mut. Ins. Co., 40 Mo. 33, 36, 93 Am. Dec. 293, 295 (1867).
99. Hardship may often be an *unarticulated* factor in the court's decision.
100. 388 S.W.2d 508 (St. L. Mo. App. 1965).

of trust, a promissory note and a chattel mortgage. Relief was granted. The court found that the complete agreement existed as plaintiff alleged and went on to say:

> We might add that said finding seems amply supported by other considerations not the least of which was the *unconscionable bargain* which defendant, who we find stood in a confidential relationship with plaintiff, will have made unless the contract as written is not [sic] reformed.[101]

Although the wording might have been better,[102] the point is clear that the hardship on the plaintiff was taken to support plaintiff's proof of the complete agreement.

It is surprising that the Court of Claims did not take this approach in *National Presto* since there was indeed a great hardship on the plaintiff. Rescission, the normal remedy, was unavailable because the contract had already been performed. Thus, an unfavorable decree in the reformation suit would have been very hard on the plaintiff. But the court refused to find a complete agreement even though the evidence was at least mildly in favor of such a finding.[103] Surely, if the trier-of-fact had found a complete agreement, the court would have affirmed. However, without such a finding, the court was forced to take a more radical course.[104]

3. The *Cy Pres* Doctrine

A third exception to the rule that reformation may not be granted when the written instrument does not vary from the complete agreement is based on the *cy pres* doctrine. In several types of cases courts, by approximating[105] the intention of the testator or grantor who made the instrument, may utilize this doctrine to salvage a written instrument which would otherwise fail. First, where property is given in trust for a particular charitable purpose and it is impossible or impracticable to carry out that purpose, a court may direct the application of the funds to some charitable purpose falling within the general intention of the testator.[106] Clearly, this is judicial reformation. The major limitation is that the court must find that the testator had a general charitable intent.[107] The test is not clear-cut,

---

101. *Id.* at 516 (emphasis added).

102. From the context it is clear that the court did not mean to add the word "not" at the end of the sentence. Also, the court might have chosen a better word than "unconscionable." It was used by the court to indicate simply that the bargain as written was very harsh on the petitioner.

103. 167 Ct. Cl. 749, 750, 338 F.2d 99, 101 n.1 (1964).

104. Note, however, that the final result was more favorable to the government. If the court had found a complete agreement that the government was to bear the cost of the lathes, the government would have paid all of the extra cost. As the court actually reformed the contract, the government paid only half.

105. "The phrase [*cy pres*] is in the Anglo-French and is equivalent to the modern French *si pres*, meaning so near or as near. The intention of the testator is carried out as nearly as may be." A. SCOTT, TRUSTS § 399, at 3084 (3d ed. 1967).

106. A leading case is Thatcher v. City of St. Louis, 335 Mo. 1130, 76 S.W.2d 677 (1934). *See generally* A. SCOTT, *supra* note 105, §§ 395-401.

107. *See* Ramsey v. City of Brookfield, 361 Mo. 857, 237 S.W.2d 143 (1951); A. SCOTT, *supra* note 105, § 399.

but in general the court will exercise its *cy pres* powers if there is some indication that the testator intended that the property should be applied for charitable purposes even if the particular purpose should fail.[108] The *cy pres* doctrine is, strictly speaking, applicable only to dispositions for charitable purposes. However, even with respect to private trusts the court may to a limited extent permit a modification of the trust in order to prevent its failure. The court may permit or direct a deviation from the terms of the trust if owing to circumstances not known to the settlor and not anticipated by him compliance with the terms would defeat or substantially impair the accomplishment of the purposes of the trust.[109]

Secondly, when a limitation otherwise void under the rule against perpetuities can be reformed to come within the rule while still conforming as nearly as possible to the intention of the grantor, settlor or testator, some courts will so reform it, some pursuant to statute, some without statutory authority.[110] Whatever the Missouri courts' common law powers, they now have statutory *cy pres* power to reform and salvage that part of the limitation which violates the rule against perpetuities.[111]

---

108. Ramsey v. City of Brookfield, 361 Mo. 857, 862, 237 S.W.2d 143, 145-46 (1951).

109. *See, e.g.*, St. Louis Union Trust Co. v. Ghio, 240 Mo. App. 1033, 222 S.W.2d 556 (St. L. Ct. App. 1949). *See* A. SCOTT, *supra* note 105, § 167.

110. *See generally* L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1256 (Supp. 1972); Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1 (1963).

Before the common law Rule Against Perpetuities was developed, the English courts established a rule that a limitation to the children of an unborn life tenant was not effective. Haddon's Case, *cited in* Perrot's Case, 72 Eng. Rep. 634, 637 (K.B. 1594); Whitby v. Mitchell, 44 Ch. Div. 85 (1890); *In re* Nash, [1910] 1 Ch. 1. In applying this rule the English courts followed a *cy pres* doctrine under which they reformed dispositions which violated the rule so as to carry them out as far as permitted by law, usually by changing the interest of the unborn life tenant into an estate tail. Humberston v. Humberston, 24 Eng. Rep. 412 (Ch. 1716). The English courts did not follow such a *cy pres* doctrine in applying the modern Rule Against Perpetuities. The American courts have tended to reject altogether the rule in Whitby v. Mitchel, *supra*, and to follow the English precedents in refusing to reform *cy pres* limitations which violate the modern Rule Against Perpetuities. The application of *cy pres* in the perpetuities field in this country is new. Nine jurisdictions have statutes authorizing it; at least four states have applied it without statutory authority. *See* L. SIMES & A. SMITH, *supra*.

111. § 442.555, RSMo 1969 provides (in part):

> 2. When any limitation or provision violates the rule against perpetuities or a rule or policy corrollary thereto and reformation would more closely approximate the primary purpose or scheme of the grantor, settlor or testator than total invalidity of the limitation or provision, upon the timely filing of a petition in a court of competent jurisdiction, by any party in interest, all parties in interest having been served by process, the limitation or provisions shall be reformed, if possible, to the extent necessary to avoid violation of the rule or policy and, as so reformed, shall be valid and effective. When such a petition is filed in a probate court the matter shall be transferred to the circuit court.

It has never been decided whether Missouri courts have the power to reform limitations to which this statute does not apply. Whether or not the statute is applicable to a given case will depend on several factors, including the statute's effective date. *See* Eckhardt, *Perpetuities Reform by Legislation*, 31 Mo. L. REV. 56 (1966).

III. Instruments and Defects Which May Be Reformed

A. *Types of Instruments*

1. General

By the very nature of the remedy, there must be a written instrument which is the object of the reformation.[112] It may be executory or executed.[113] Unlike rescission, there is no need to convince the court that the parties can be put back in the status quo as it was before the instrument became effective.[114] As illustrated in *National Presto,* this will sometimes be impossible after the agreement is executed.[115] In this sense, reformation is a broader remedy than rescission.

Petitioners have sought and successfully obtained reformation of many different types of instruments.[116] In Missouri, for example, petitioners have successfully reformed contracts,[117], deeds,[118] contracts to convey land,[119] deeds of trust,[120] leases,[121] promissory notes,[122] surety bonds,[123] chattel mortgages,[124] assignments,[125] certificates of deposit[126] and insurance policies.[127] With few exceptions the type of instrument is really not important, and the basic theory of relief will not vary. The theory of relief for reformation of a multi-million dollar contract is the same as that for reformation of a $100 promissory note.

2. The Exceptions

Although the type of instrument is generally unimportant, courts of the various jurisdictions have refused to grant the equitable remedy of reformation for three types of instruments for overriding policy reasons.

---

112. 76 C.J.S. *Reformation of Instruments* § 8 (1952).
113. Leitensdorfer v. Delphy, 15 Mo. 160, 167, 55 Am. Dec. 137, 140 (1851).
114. Johnson v. Crowley, 191 S.W. 690 (Mo. 1916); 12 C.J.S. *Cancellation of Instruments* § 44 (1938).
115. *See* text accompanying notes 91-93 *supra.* The plaintiff in *National Presto* sought reformation of the contract price after plaintiff had already performed its end of the bargain. At that point it would have been impossible to put the parties back in the status quo. Thus, rescission was unavailable although reformation was granted.
116. *See generally* 76 C.J.S. *Reformation of Instruments* § 13 (1952).
117. Smith v. Githens, 271 S.W.2d 374 (Spr. Mo. App. 1954).
118. Leitensdorfer v. Delphy, 15 Mo. 160, 55 Am. Dec. 137 (1851).
119. Henley v. Sullivant, 248 Mo. 672, 154 S.W. 706 (1913).
120. Ethridge v. Perryman, 363 S.W.2d 696 (Mo. 1963).
121. St. Louis 221 Club v. Melbourne Hotel Corp., 227 S.W.2d 764 (St. L. Mo. App. 1950).
122. Conrath v. Houchin, 226 Mo. App. 261, 34 S.W.2d 190 (K.C. Ct. App. 1930).
123. State *ex rel.* Frank v. Administrator of Frank, 51 Mo. 98 (1872).
124. David Plaut Sec. Co. v. Cooper, 258 S.W. 455 (K.C. Mo. App. 1924).
125. Net Realty & Inv. Co. v. Dubinsky, 94 S.W.2d 1108 (St. L. Mo. App. 1936).
126. Merchants & Planters Bank v. Brewer, 177 S.W.2d 540 (Spr. Mo. App. 1944).
127. Schimmel Fur Co. v. American Indem Co., 440 S.W.2d 932 (Mo. 1969). The incontestible clause has generally been held no defense to reformation. *See* Covington, *Reformation of Contracts of Personal Insurance,* 1964 Ill. L.F. 548, 567.

These rules are by no means uniform, however, and the decisions of a particular jurisdiction should be consulted for its position.

a. Sheriffs' Deeds

Some jurisdictions will not grant reformation of instruments executed under power conferred by statute, *i.e.,* sheriffs' deeds.[128] In Missouri this exception is not important today because there is a statutory method for correction of mistakes in sheriffs' deeds.[129] Missouri courts have held that the statutory method is exclusive and have denied reformation on that ground.[130] Of course, the statutory remedy will be needed only when the sheriff is no longer available to execute a new deed.

b. Wills

Nearly all courts hold that wills may not be reformed;[131] only Tennessee clearly holds to the contrary.[132] Missouri is, therefore, a member of the majority.[133] One Missouri decision went so far as to hold that certain *deeds* could not be reformed because it was held that they were "to be regarded as part of and read into the will."[134]

There are strong policy considerations behind the decisions to make wills inviolate. Two commentators made this judgment:

> The right to devise property did not exist at common law prior to the Statute [of Wills]. Hence the reformation of a will would constitute the passage of title by way of devise in a manner contrary to the terms of the Statute. Furthermore, it is probably believed by the courts that a reformation of such a proceeding would open the door to countless ill-founded claims and doubtless to fraud.[135]

---

128. Ware v. Johnson, 55 Mo. 500 (1874), *aff'd,* 66 Mo. 662 (1877). *See generally* 76 C.J.S. *Reformation of Instruments* § 13 (1952).

129. § 513.335, RSMo 1969 provides:

> When any officer shall die, be removed from office or disqualified, or shall remove from this state, after the sale of any property and before executing a conveyance therefor, as required by law, or *after executing a defective conveyance therefor,* the purchaser, his grantee, or any one claiming by, through or under the purchaser, may petition the court out of which the execution issued, stating the facts, verified by affidavit, and if said petitioner satisfy the court that the purchase money has been paid, the court shall order the sheriff then in office to execute, acknowledge and deliver a deed to the purchaser, or if he be dead, to his heirs, and if the purchaser has sold the same, to his grantee, or to the party claiming by, through or under said purchaser reciting the facts; which deed shall be executed accordingly, and shall have the same effect, to all intents and purposes, as if made by the officer so deceased, removed from office, disqualified or absent from the state (emphasis added).

Mo. R. Civ. P. 76.58 is identical.

130. Hill Inv. Co. v. Peter Gerlach Co., 293 S.W. 102 (Mo. 1927); Dixon v. Hunter, 204 Mo. 382, 102 S.W. 970 (1907).

131. *See* Annot., 90 A.L.R.2d 924, 933 (1963).

132. Eatherly v. Eatherly, 41 Tenn. 461, 78 Am. Dec. 495 (1860).

133. First Nat'l Bank v. Solomon, 412 S.W.2d 458 (Mo. 1967).

134. White v. Reading, 293 Mo. 347, 363, 239 S.W. 90, 94 (1922).

135. Malone & Keesee, *The Reformation of Writings Under the Law of Mississippi,* 8 Miss. L.J. 329, 344 (1936).

Thus, the decision to refuse categorically the equitable relief of reformation is probably a sound one.

However, the courts do *construe* wills and may accomplish the same result as reformation via construction. As noted earlier,[136] the practical effect of interpretation[137] and reformation is the same. In theory, a court cannot construe unambiguous language in a will; but ambiguity can be found in the strangest places.[138] Practically, the words in the instrument impose some restraint on construction of that instrument, whereas they are in theory no restriction at all in a suit for reformation. Thus, within some indefinite bounds formed by the words used in a will, a court can "reform" a will via construction.

> [A]lthough the generally accepted view is that a will cannot be reformed, the same result is accomplished under the name of "construction", and when a court construes a will as passing title to a devisee or legatee whose name is omitted, or substitutes for misdescribed property or beneficiary not answering the description in the will, it is in effect "reforming" the will. What the courts undoubtedly mean by holding that a will cannot be reformed is that a suit for reformation (as for reformation of a contract or a deed) is not the appropriate remedy, but that the appropriate remedy is a suit for construction.[139]

c. Trustees' Deeds—Deeds of Trust After Foreclosure

Suppose that Jones purports to have purchased two improved city lots, #1 and #2, at a foreclosure sale for a bargain price. Although the parties to the deed of trust also intended and assumed that improved lots 1 and 2 were described in the deed of trust, in the sale advertisement and in the trustee's deed to Jones, unimproved lots 3 and 4 were actually described in all three instances. Jones wants to get his deed (and the deed of trust) reformed so as to invest himself with title to the more valuable lots 1 and 2. The question is whether a purchaser can get reformation, after the foreclosure sale, of an erroneous description originating in the deed of trust. If Jones is in Missouri, he cannot.[140] In *Schwickerath v. Cooksey*[141] the court held that a purchaser could not get reformation of a trustee's

---

136. *See* pt. I, § D of this Comment.

137. Strictly speaking, *construction* of a written instrument is not the same as *interpretation*. The former is a broader "remedy." *See* Herrick Motor Co. v. Fischer Oldsmobile Co., 421 S.W.2d 58, 64 n.1 (Spr. Mo. App. 1967). However, the difference is not important to this discussion. *But see* note 139 *infra*.

138. *See, e.g.*, Patch v. White, 117 U.S. 210, 215-16 (1886).

139. Annot., 90 A.L.R.2d 924, 928 (1963). *See, e.g.*, Patch v. White, 117 U.S. 210 (1886). The question at issue was construction of a will. The Court held that by "lot numbered six in square four hundred and three" the testator intended to describe lot numbered three in square four hundred and six. Corbin's analysis is that if such a mistaken description was in a contract—and the only alternative to reformation was interpretation, not construction—the appropriate remedy would be reformation because the court could not reach this result by interpretation. 3 A. CORBIN, CONTRACTS § 540, at 88 n.63 (1960).

140. On this question the discussion will be limited to the Missouri deed of trust and the decisions in this state. *See generally* Annot., 172 A.L.R. 655 (1948).

141. 53 Mo. 75 (1873), *See also* Haley v. Bagley, 37 Mo. 363 (1866).

deed (or the deed of trust) in order to invest himself with title to the land. Relief was denied even though the written instruments clearly varied from the complete agreements (1) to mortgage the land and (2) to sell the land.[142] The policy behind this rule seems reasonable. Although purchaser Jones intended to buy lots 1 and 2, lots 3 and 4 were advertised as the real estate which was to be sold at the foreclosure sale. So, the courts are justifiably concerned that the erroneous advertisement may have chilled the bidding at the sale.[143] That unimproved lots 3 and 4 were advertised (and described in the deed of trust) as the lots for sale may have been the reason that Jones "purchased" the improved lots at a bargain price.

Although it is not possible for the purchaser at a foreclosure sale to reform his deed, he can possibly have the deed of trust reformed and then try to purchase the land at a second foreclosure sale. The recent case of *Ethridge v. Perryman*,[144] with facts similar to the hypothetical, sets forth the proper procedure. The mortgagee, who had purchased at the foreclosure sale, alleged that he and the mortgagor had intended that lots 1, 2 and 3 be described and included in the deed of trust and that the scrivener had mistakenly described only lot 3. After determining that there was a complete agreement as alleged,[145] the Missouri Supreme Court held that only the deed of trust could be reformed and ordered another foreclosure and sale by the proper description.[146] This procedure protects the interests of the original debtor-mortgagor as well as a mortgagee who was not the purchaser at the original foreclosure sale. It eliminates the possibility of a low sale price stemming from the erroneous description in the deed of trust and sale advertisement.

B. *Defects Correctable*

The range of defects which may be corrected is broad. In general, the variance of the written instrument from the complete agreement must be material.[147] The court may strike subject matter not embraced in the complete agreement, supply omitted provisions,[148] insert words which more clearly express the complete agreement, and, in theory at least, give the written instrument the effect of a totally different type of written instrument.[149] In short, when a proper case is made out, the court may do

---

142. *Accord,* Colin v. Moldenhauer, 338 Mo. 827, 92 S.W.2d 601 (1936).

143. *Cf.* Schwickerath v. Cooksey, 53 Mo. 75, 80 (1873).

144. 363 S.W.2d 696 (Mo. 1963).

145. *Id.* at 699.

146. "[E]quity has jurisdiction on a proper showing made to correct the description in the original mortgage and to order another foreclosure and sale by the proper description . . . ." *Id.* at 703. For other jurisdictions which take this approach, see Annot., 172 A.L.R. 655, 670 (1948).

147. 76 C.J.S. *Reformation of Instruments* § 25, at 351 (1952).

148. Two qualifications must be made. First, the power to supply omitted provisions does not give the court power to supply a term to the "complete agreement" which is essential to a valid contract. *See* text accompanying note 8 *supra*. Second, some states hold that the Statute of Frauds is a bar to the *addition* of land omitted from a deed. *See* pt. V, § A of this Comment.

149. *But see* text accompanying notes 76-79 *supra*.

anything which is linguistically and legally necessary to make the written instrument truly reflect the complete agreement.

IV. Parties to the Action

A. *Persons Subject to the Remedy*

1. In General

The original parties to a written instrument are normally subject to an action for reformation.[150] Moreover, reformation may be granted against many third parties claiming through the original parties.[151] The Missouri Supreme Court stated these principles in *Sicher v. Rambousek* when it said that equity

> will exercise this power not only as between the original parties, but as to those claiming under them in privity, such as personal representatives, heirs, assigns, grantees, judgment creditors, or purchasers with notice of the facts.[152]

2. Intervening Bona Fide Purchaser or Encumbrancer; Holder in Due Course

One party against whom Anglo-American courts generally will not grant reformation is the bona fide purchaser. When a bona fide purchaser intervenes without notice of the variance in the original instrument and purchases for value, he is protected by the courts.[153] This doctrine is no different from the protection which a bona fide purchaser is generally afforded in our legal system, and the policy considerations are the same here as in the other situations. The bona fide purchaser is seen as standing upon a higher equity than the person seeking reformation. The Missouri Supreme Court followed this doctrine in denying relief in *American Bank v. Bray*.[154] A grantee from a bona fide purchaser should be protected by the intervention of the bona fide purchaser and not be subject to reformation even though the grantee had notice. A recent Minnesota decision supports this position,[155] but the question has never been decided in Missouri.

The same policy considerations have prompted the Missouri courts, as well as those in other jurisdictions, to deny relief against lienholders or other encumbrancers who obtained such interest without notice of the

---

150. *But see* pt. III, § B (2) of this Comment. The grantor of a voluntary conveyance is an exception to this rule in some situations.

151. *See* 45 Am. Jur. *Reformation of Instruments* § 66 (1943).

152. 193 Mo. 113, 129, 91 S.W. 68, 72 (1906). The court repeated this statement in a more recent case, Walters v. Tucker, 308 S.W.2d 673, 675 (Mo. 1957).

153. *See* Annots., 79 A.L.R.2d 1180 (1961), 44 A.L.R. 78 (1926). The English rule is the same. Keeton, *Rectification of Instruments for Mistake in England*, 14 N.Y.U.L. Rev. 319 (1937). What constitutes notice in Missouri and other states is, of course, relevant to whether the party against whom reformation is sought is a bona fide purchaser. *See, e.g.*, Sicher v. Rambousek, 193 Mo. 113, 129, 91 S.W. 68, 72 (1906).

154. 321 Mo. 576, 11 S.W.2d 1016 (1928).

155. Aldrich v. Wilson, 265 Minn. 150, 159, 120 N.W.2d 849, 855 (1963).

variance in the written instrument.[156] In *Cass County v. Oldham*,[157] Oldham executed a mortgage to the plaintiff, but the description in the written instrument was incomplete. Oldham then executed a deed of trust on the same property to Freese, who had no actual notice of the first mortgage. Freese later purchased the tract at the foreclosure sale pursuant to his deed of trust. Plaintiff then sued for reformation of the mortgage which Oldham had executed to it. The Missouri Supreme Court denied relief, holding that the record of the mortgage was not constructive notice to Freese because of the incomplete description; and since there was no evidence of actual notice, "Freese was not only a purchaser without notice, but he was also an incumbrancer for value."[158] Thus, plaintiff could not get reformation against Freese.

The rights of a holder in due course of a negotiable instrument may also be superior to those of a party seeking reformation. To the extent that one is a holder in due course as defined in the Missouri statutes,[159] he takes the instrument free from "all defenses of any party to the instrument with whom the holder has not dealt except . . . (c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms . . . ."[160] The draftsmen of the Uniform Commercial Code indicate in the comments that the test for failure to obtain knowledge is "excusable negligence."[161] Thus, unless the misrepresentation meets this test, the holder in due course should take free of the defense of reformation.[162]

The above doctrines present very big obstacles to the party seeking reformation of the written instrument. First of all, that party may not discover the variance in the written instrument until after the other party has transferred or conveyed his interest in the instrument for value to a third party who has no notice of the variance. Second, there is a danger that the other party could transfer or convey his interest after the variance is discovered but before the petitioner can get the instrument reformed. Thus, when a negotiable instrument is involved, the petitioner may want to seek a temporary restraining order to keep the other party from transferring the instrument to a holder in due course who could successfully

---

156. In most states, the judgment creditor is not so protected. *See* pt. IV, § A (3) of this Comment.

157. 75 Mo. 50 (1881).

158. *Id.* at 52.

159. *See* § 400.3-302, RSMo 1969 (UNIFORM COMMERCIAL CODE § 3-302). Even a payee may be a holder in due course in certain circumstances. § 400.3-302 (2), *supra. See generally* Comment, *The Concept of Holder in Due Course in Article III of the Uniform Commercial Code*, 68 COLUM. L. REV. 1573 (1968).

160. § 400.3-305 (2) (c), RSMo 1969 (UNIFORM COMMERCIAL CODE § 3-305 (2) (c)).

161. UNIFORM COMMERCIAL CODE § 3-305, Comment 7 (1962 version). This comment and the test outlined therein was adopted in Burchett v. Allied Concord Financial Corp., 74 N.M. 575, 396 P.2d 186 (1964), which is a rescission case.

162. Although there is little authority, several courts have held that a holder in due course takes free of an equity of rescission when the party seeking rescission cannot meet the "excusable negligence" test. Waterbury Savings Bank v. Jaroszewski, 4 Conn. Cir. 620, 238 A.2d 446 (1967); Burchett v. Allied Concord Financial Corp., 74 N.M. 575, 396 P.2d 186 (1964).

defend against an action for reformation. If granted, the temporary restraining order would protect the petitioner from running up against the holder-in-due-course defense. For further protection the petitioner could ask the court to take possession of the instrument.

When the instrument is a contract to convey land, a deed or a deed of trust, *lis pendens* filing will protect the petitioner from third party defenses. The filing is constructive notice to all potential purchasers.[163] In Missouri *lis pendens* notice must be filed if a civil action involving land is equitable in whole or in part;[164] therefore, the petitioner in a reformation action must file.

3. Judgment Creditors

Missouri follows the general rule[165] that an instrument may be reformed against judgment creditors.[166] However, in some states the liens of judgment creditors stand upon the same footing as the liens of bona fide emcumbrancers of the property or as the rights of bona fide purchasers.[167] This is the law of Mississippi, for example.[168] Commentators have criticized the Mississippi view:

> On principle, a judgment creditor accedes only to the legal interest of the debtor, whatever that interest might be. Hence he is not a bona fide purchaser who takes by reason of an independent equity. In this respect there should be no serious obstacle to relief either against a judgment creditor or a purchaser at an execution sale . . . . In the case of *Nugent v. Priebatsch* it was held that the Recording Act [Miss. Code 1880, section 1212] was conclusive against the right to reformation where the interest of a judgment creditor had intervened . . . . The conclusion reached in this case appears highly debatable both from the standpoint of legal accuracy and policy. Although all interests subject to record are void as against creditors and subsequent purchasers unless recorded, nevertheless it is universally admitted that interests in land arising solely by implication of law and hence impossible of record do not come within the purview of recording acts. Nor was this denied in the *Priebatsch case.* The necessary implication, rather, was that an equity of reformation could not be deemed an unrecordable interest.[169]

B. *Persons Entitled to Relief*

1. In General

Again, the general rule is that either party to a written instrument is entitled to reformation as well as those who claim through them.[170] This is the rule in Missouri, and the language in *Sicher v. Rambousek*

---

163. § 527.260, RSMo 1969.
164. *Id.*
165. *See generally* Annot., 44 A.L.R. 78, 103 (1926).
166. Young v. Coleman, 43 Mo. 179 (1869), *aff'd sub nom.* Young v. Cason, 48 Mo. 259 (1871).
167. Annot., 44 A.L.R. 78, 107 (1926).
168. Nugent v. Priebatsch, 61 Miss. 402 (1883).
169. Malone & Keesee, *supra* note 135, at 339.
170. 45 AM. JUR. *Reformation of Instruments* § 63 (1943).

quoted earlier[171] is again appropriate. The Kansas City Court of Appeals has also upheld the right of a third party entitled to maintain an action at law on a contract between other parties to sue for reformation of that contract. In *Binswanger v. Employers' Liability Assurance Corp.*,[172] the plaintiff was injured on the grounds of a funeral home because of the latter's negligence. The funeral home had a contract of liability insurance with defendant expressly providing that an injured party could sue defendant on the contract. Plaintiff was held entitled to sue for reformation since she was entitled to sue on the contract itself.[173]

2. The Donee in a Gratuitous Conveyance

The rule is usually stated that an instrument representing a gratuitous conveyance cannot be reformed, but exceptions nearly engulf the rule.[174] The most important exception allows the donor reformation against the donee. Some jurisdictions, including Missouri, extend this right to the donor's heirs or successors.[175] Another possible exception would allow one donee reformation against another donee.[176] Several commentators have noted that the courts will struggle very hard to find consideration in such a case so that reformation may be allowed.[177] Therefore, about all that remains of the "rule" is that a donee in a gratuitous conveyance cannot obtain reformation against the donor.[178] This would seemingly be explained by the discretionary nature of the remedy,[179] the argument being that a court should not, as a matter of policy, reform a purely gratuitous conveyance against the will of the donor. In *Mudd v. Dillon*[180] the Missouri Supreme Court denied reformation of a description in a gratuitous conveyance when the petitioner-donee sought relief against his donor.

There is a split of authority as to whether a donee may obtain relief against the donor's heirs. Although the weight of authority says he cannot,[181] one can construct a persuasive argument that he should be able to do so. Since the donor died thinking that his intent was successfully effectuated by the written instrument, and since more likely than not

171. 193 Mo. 113, 129, 91 S.W. 68, 72 (1906). *See* note 152 and accompanying text *supra*.

172. 224 Mo. App. 1025, 28 S.W.2d 448 (K.C. Ct. App. 1930).

173. *See* Annot., 112 A.L.R. 909 (1938). The right of the present claimant of title to correct an error in description as against the original or intermediate grantor is treated in Annot., 89 A.L.R. 1444 (1934).

174. 76 C.J.S. *Reformation of Instruments* § 10 (1952). Although the term "voluntary" (conveyance) is very often employed by the courts and commentators, "gratuitous" is a more acurate adjective, and it shall be used herein.

175. Phillips v. Cope, 111 S.W.2d 81 (1937) (grantor's heir obtained reformation of a deed of gift); 76 C.J.S. *Reformation of Instruments* § 10, at 334 (1952).

176. Reinberg v. Heiby, 404 Ill. 247, 88 N.E.2d 848 (1949).

177. Hermann, *Reformation and Rescission*, 1960 ILL. L.F. 1, 20-22; Malone & Keesee, *supra* note 135, at 340-41.

178. MCCLINTOCK, § 101, at 271.

179. *See* pt. I, § B(1) of this Comment. Of course, in most cases the donor will willingly correct the "mistake."

180. 166 Mo. 110, 65 S.W. 973 (1901).

181. 45 AM. JUR. *Reformation of Instruments* § 30 (1943).

he would have voluntarily corrected the variance in the written instrument if he had known about it, the heirs should not benefit from the variance.[182] Apparently, there has been no decision on this question in Missouri.[183]

Although Missouri and other courts will not grant relief to a donee against his donor, the petitioner can always get around that rule if he can persuade the court that there was some consideration involved. The equitable requirement is not difficult to meet: "[I]t is not required that there be a valuable consideration sufficient to support a contract at law before a court of equity will reform an instrument; it is enough if there is a good or equitable consideration. . . ."[184] The petitioner may show equitable consideration via some relationship of love and affection. In *Partridge v. Partridge*[185] the children and heirs at law of James M. Partridge sued his widow and her children by a former marriage for partition of certain real estate. The widow claimed under a deed of gift to her from James which he gave her for her support. She alleged that the deed varied materially from the complete agreement and counterclaimed for reformation. The court held that there was meritorious consideration as between the grantor (James) and the grantee (his widow) and granted reformation. An older case in accord is *Hutsel v. Crewse*,[186] in which a parent-child relationship was held sufficient. The donee may also get around this rule if he has relied detrimentally on the conveyance so that promissory estoppel may substitute for consideration.[187] As previously noted, the courts seem to struggle very hard to find consideration when a donee sues another donee for reformation.

V. DEFENSES

In prior discussion several defenses have been raised which may be available to the party against whom reformation is sought. He may argue that the mistake was of law, not fact, and that equity will not reform a mistake of law.[188] He may have a good defense if the written instrument is a type which the court will not reform: a sheriff's deed, a will, or a deed of trust after foreclosure.[189] He will have a good defense if he is a bona fide purchaser from the original grantor, an intervening encumbrancer, a holder in due course[190] or a donor in a voluntary conveyance.[191] And in some states he will prevail if he is an intervening judgment creditor.[192] At this point four other possible defenses will be considered in detail.

---

182. This argument is persuasively put in McLane, *Equity—May Voluntary Grantees Obtain Reformation of a Deed over the Opposition of the Grantor's Heirs?*, 25 GA. B.J. 445, 446 (1963).

183. The Missouri Supreme Court avoided the question in Partridge v. Partridge, 220 Mo. 321, 119 S.W. 415 (1909), holding that there was meritorious consideration and that the deed could be reformed.

184. MCCLINTOCK, § 101, at 272.

185. 220 Mo. 321, 119 S.W. 415 (1909).

186. 138 Mo. 1, 39 S.W. 449 (1897).

187. MCCLINTOCK, § 101, at 273.

188. *See* pt. II, § A (3) of this Comment.

189. *See* pt. III, § A (2) of this Comment.

190. *See* pt. IV § A (1) of this Comment.

191. *See* pt. IV, § B (2) of this Comment.

192. *See* pt. IV, § A (2) of this Comment.

A. *Statute of Frauds*

Suppose Smith conveys Blackacre to Jones. The only written instrument is the deed, which varies from the complete agreement in that it describes only half of Blackacre. Smith refuses to execute a new deed, so Jones institutes an action for reformation. Is the Statute of Frauds a defense to reformation?

It is helpful to review the development of the English law on this issue.[193] At least for a time in England, rectification[194] was available only where the instrument sought to be rectified was preceded by an enforceable contract.[195] Thus, where the agreement was one which had to be evidenced by a writing under the Statute of Frauds, it was held that a plaintiff could not use parol evidence to show that an executory written agreement was not the complete agreement.[196] However, in 1924 this position was reversed:

> It was further suggested that the present action involved an attempt to enforce a parol contract inconsistently with the principle of the Statute of Frauds. It is, however, well settled by a series of familiar authorities that the Statute of Frauds is not allowed by any court administering the doctrines of equity to become an instrument for enabling sharp practice to be committed . . . . The statute, in fact, only provides that no agreement not in writing and not duly signed shall be sued on; but when the written instrument is rectified there is a writing which satisfies the Statute, the jurisdiction of the Court to rectify being outside the prohibition of the statute.[197]

The majority American view is the same. When a particular formality is required to make the agreement binding, reformation cannot be granted to supply the needed formality;[198] but if the instrument has been executed in the proper form, reformation can be granted to correct any variance from the complete agreement.[199] That is, a court will *reform* a term which is required by the Statute to be in writing, but it will not *supply* the term if omitted altogether.

The *Restatement of Contracts* espouses the rather odd view that reformation of a contract required by the Statute of Frauds to be in writing should be permitted only when there has been part performance or when the contract has been executed.[200] Professor McClintock criticized this rule:

---

193. The author relied heavily on Keeton, *supra* note 153, for this background information.

194. *Rectification* is the English version of reformation. *See* pt. I, § A of this Comment.

195. Keeton, *supra* note 153, at 321.

196. Woollam v. Hearn, 32 Eng. Rep. 86 (Ch. 1802).

197. United States v. Motor Trucks, Ltd., [1924] A.C. 196, 200-01 (P.C.).

198. This first statement is a corollary of the rule that the court cannot supply a term to the "complete" agreement which is essential to a valid contract. *See* text accompanying note 1 *supra*. *See* Devlen v. Wilkinson, 473 S.W.2d 357, 361-62 (Mo. 1971).

199. McCLINTOCK, § 103.

200. RESTATEMENT OF CONTRACTS § 509 (2) (1932).

> The comment gives no reason for the limitation of the remedy, which is against the clear weight of American authority, and it is not obvious why the law should not extend the protection of this remedy to the expectation interest under a purely executory agreement . . . .[201]

Massachusetts and South Carolina take an even more radical position. They refuse to reform deeds where the effect would be to convey more land than was included or described in the deed.[202] Their contention is that allowing reformation would be tantamount to giving legal effect to terms in parol which the statute required to be in writing. Under this view hypothetical Mr. Jones would fail in his effort to reform his deed from Smith even though the parties did indeed intend to convey all of Blackacre, not just that portion of it which was described in the deed. Even Massachusetts and South Carolina courts would, however, allow reformation if the court could find a sufficient change in position or other acts which would take the case out from under the Statute of Frauds.[203] Of course, rescission may be an alternative.[204]

The Missouri courts seem to follow the majority view in applying the Missouri statutes of fraud[205] although there is very little authority. *Strothcamp v. Sandy Ford Ranch, Inc.*[206] is apparently the only reported

---

201. McCLINTOCK, § 103.

202. Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418 (1869); Westbrook v. Harbeson, 2 S.C.Eq. 112 (1827).

> [W]e are satisfied that, upon principle, the conveyance of land cannot be decreed in equity by reason merely of an oral agreement therefor, against a party denying the alleged agreement and relying upon the statute of frauds . . . . This rule applies as well to the enforcement of such agreement by way of rectifying a deed, as to a direct suit for its specific performance. We are satisfied also that this is the rule to be derived from a great preponderance of the authorities [citing, *inter alia,* Woollam v. Hearn, 32 Eng. Rep. 86 (Ch. 1802); *See* text accompanying note 196 *supra*].

Glass v. Hulbert, *supra* at 43, 3 Am. Rep. at 434.

203. *See, e.g.,* Potter v. Jacobs, 111 Mass. 32 (1872).

204. Glass v. Hulbert, 102 Mass. 24, 34-35, 3 Am. Rep. 418, 426-27 (1869).

205. § 432.010, RSMo 1969, applies to contracts:

> *No action shall be brought* . . . upon any contract made for the sale of lands, tenements, hereditaments, or an interest in or concerning them, or any lease thereof, for a longer time than one year, or upon any agreement that is not to be performed within one year from the making thereof, unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized . . . (emphasis added).

§ 432.050, RSMo 1969, applies to conveyances:

> All leases, estates, interests of freehold or term of years, or any uncertain interest of, in, to or out of any messuages, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force.

206. 440 S.W.2d 193 (St. L. Mo. App. 1969).

case in which the Statute of Frauds has been raised as a defense to reformation. The parties had agreed upon a warranty deed by which the defendant was to convey land to the plaintiff. However, the defendant fraudulently inserted a restrictive clause after the deed was executed. The St. Louis Court of Appeals granted reformation:

> Defendant cites no authority for the proposition that reformation must be preceded by an *enforceable* contract. To say that this is a prerequisite to reformation would ignore the maxim that the statute of frauds is designed to prevent fraud and may not be used by a defendant as a shelter to avoid the penalty of his own fraud.[207]

Arguably, this language restricts the applicability of *Strothcamp* to cases involving fraud by the party against whom reformation is sought. However, there is no reason to suspect that the rule would differ in cases where there was no fraud. The rule in Missouri is probably that, when the instrument has been executed in the proper form, reformation can be granted to correct any variance from the complete agreement. This is in line with the majority American and English view, which is the most equitable and best-reasoned approach. Moreover, the reasoning of the leading English case is applicable to the Missouri statute which applies to contracts:[208]

> The Statute, in fact, only provides that an agreement not in writing and not duly signed shall not be sued on; but when the written instrument is rectified there is a writing which satisfies the Statute, the jurisdiction of the court to rectify being outside the prohibition of the Statute.[209]

B. *Petitioner's Negligence as a Bar*

1. The General Rule

Whether petitioner's negligence is a bar to an action for reformation is a troublesome question. The answer varies with each jurisdiction, factual situation and trial judge. Most jurisdictions recite that the petitioner's negligence may be a valid defense,[210] but it is not clear how many actually apply the rule to deny relief.[211] The Illinois courts require the negligence to amount to a "violation of a positive legal duty"[212] while others require some other degree of negligence, *e.g.*, "gross," "culpable" or "inexcusable."[213]

---

207. *Id.* at 197.

208. § 432.010, RSMo 1969, quoted note 205 *supra.*

209. United States v. Motor Trucks, Ltd., [1924] A.C. 196, 201 (P.C.). This language is not applicable to § 432.050, RSMo 1969, quoted note 205 *supra,* which applies to conveyances.

210. 45 AM. JUR. *Reformation of Instruments* § 78 (1943); *see* Annot., 81 A.L.R.2d 7 (1962).

211. Some courts have held that negligence is not a bar in any case. *See* authorities cited note 236 *infra.*

212. Pearce v. Osterman, 343 Ill. 175, 175 N.E. 416 (1931); Hermann, *Reformation and Rescission,* 1960 ILL. L.F. 1, 42.

213. Scoville v. Hampton, 217 Ore. 256, 259, 335 P.2d 399, 401, *rev'd,* 340 P.2d 952 (1959) ("gross"); *but see* Kontz v. B.P. John Furniture Corp., 167 Ore. 187,

In early cases the Missouri Supreme Court espoused the view that negligence might bar an action for reformation.[214] But more than ordinary negligence is required. The descriptive term which has apparently been settled on is "inexcusable negligence."[215] However, no Missouri court has ever denied reformation explicitly on the grounds that petitioner was inexcusably negligent although several cases are constantly cited as so holding.[216] The most that can be said is that petitioner's negligence is used as a "make weight" argument if the court decided to deny reformation on some other ground.[217]

Nonetheless, some annotators have said that Missouri courts have denied reformation on the ground that the petitioner was negligent.[218] Indeed, in several cases reformation of *insurance contracts* has been denied to a petitioner who failed to read the contract and object to the variance within a reasonable time after he received the contract.[219] However, the real basis for these decisions was that the policy or certificate as written was itself the complete agreement of the parties and, therefore, there was no variance. *Evers v. Brotherhood of Railroad Trainmen*[220] is a representative case. Plaintiff, the assignee of the insured, alleged that defendant's agent had represented to the insured that the certificate of insurance would provide benefits for "every kind" of total and permanent disability. But the certificate, by reference to the brotherhood's constitution, limited the

---

206, 115 P.2d 319, 327 (1941) (dictum that negligence is never a bar in Oregon); Taylor v. Burns, 250 Ala. 218, 221, 34 So. 2d 5, 8 (1948) ("culpable"); *In re* Miller's Estate, 226 S.W. 302, 304 (St. L. Mo. App. 1920) ("inexcusable"). *See generally* Annot., 81 A.L.R.2d 7, 19-23 (1962).

214. The statement most often quoted in later Missouri decisions was made by the Missouri Supreme Court as *obiter dictum* in Miller v. St. Louis & K.C. Ry., 162 Mo. 424, 441, 63 S.W. 85, 89 (1901): "The party who seeks the equitable relief [of reformation] must show that he was without negligence in the matter. Equity does not interfere to relieve men of the consequences of their own carelessness."

215. *In re* Miller's Estate, 226 S.W. 302, 304 (St. L. Mo. App. 1920).

216. These cases merely state and do not hold that negligence is a bar: Austin v. Brooklyn Cooperage Co., 285 S.W. 1015 (Spr. Mo. App. 1926); *In re* Miller's Estate, 226 S.W. 302 (St. L. Mo. App. 1920); Spelman v. Delano, 187 Mo. App. 119, 172 S.W. 1163 (K.C. Ct. App. 1915); Young v. Marion Sims College of Medicine, 91 Mo. App. 214 (St. L. Ct. App. 1901). These cases are often cited and are illustrative. *Austin* is a rescission case and therefore not valid precedent. *See* pt. I, § C of this Comment. In *Spelman* the court stated that petitioner's negligence would have barred reformation, but reformation was not prayed for. Spelman v. Delano, *supra* at 121, 172 S.W. at 1163. In *Young* the court stated at one point that there was not sufficient evidence of the complete agreement. Young v. Marion Sims College of Medicine, *supra* at 219. Reformation was denied on other grounds in *In re* Miller's Estate, *supra* at 304.

217. Commentators in other states have also noticed this tendency to rely on petitioner's negligence only to "make weight." *See* Malone & Keesee, *The Reformation of Writings Under the Law of Mississippi*, 8 Miss. L.J. 329, 345-46 (1936).

218. See Annots., 32 A.L.R.3d 661, 721 (1970), 81 A.L.R.2d 7, 85 (1962).

219. The cases relied on by the annotators include: Evers v. Brotherhood of R.R. Trainmen, 172 S.W.2d 899 (K.C. Mo. App. 1943); Steward v. Mutual Life Ins. Co., 127 S.W.2d 22 (K.C. Mo. App. 1939); Peterson v. Commonwealth Cas. Co., 212 Mo. App. 434, 249 S.W. 148 (Spr. Ct. App. 1923); McHoney v. German Ins. Co., 52 Mo. App. 94 (St. L. Ct. App. 1892).

220. 172 S.W.2d 899 (K.C. Mo. App. 1943).

types of disability for which the insured could receive benefits. The insured was given a certificate and a copy of the constitution. He examined the certificate when delivered but he made no complaint until five years later, after he had been disabled in a manner which did not give him the right to benefits under the certificate (and constitution) as written. Suit was instituted to reform the certificate so that it would correctly express the alleged complete agreement. The court in effect assumed the above allegations were true but denied reformation saying that plaintiff's claim was barred by the insured's delay in objecting to the "variance" in the certificate.

What the *Evers* court probably meant to say was that the application and negotiations amounted to an offer to the defendant and that the certificate which varied from the offer was a counter-offer which the insured accepted by his silence and failure to object within a reasonable time after receipt. The court relied heavily on *American Insurance Co. v. Neiberger*,[221] which held as follows:

> When the application does not attempt to set forth all the provisions which the policy to be issued must contain, and the agent, with or without authority, represents that the policy will contain certain stipulations, which are not unlawful, then the policy must contain them, or the insured will not be bound to accept it. But in such case it will be the duty of the insured when he receives the policy promptly to examine the same, and if it does not contain the stipulations agreed upon, to at once notify the company of such fact, and of his refusal to accept said policy . . . . After such delay, he will be deemed to have *accepted* the policy as issued.[222]

The wisdom of the *Neiberger* rule is not at issue here. However, it does help explain *Evers* and cases like it. If the *Neiberger* rule is applied, the written policy is itself the complete agreement between the parties since the policy itself was a counteroffer which the insured accepted by his silence. Thus, the reason that reformation is not available is that the written instrument does not vary from the complete agreement.[223]

Supporting this analysis is the fact that when the courts can find a complete agreement underlying the insurance policy which varies therefrom they will reform the policy. In *Peterson v. Commonwealth Casualty Co.*,[224] the court found a complete agreement had been made before the application was sent to the insurer and that the written policy varied materially from it. Reformation was allowed. Unfortunately, the court stated that reformation would have been denied had the delay been greater than the five days between petitioner's receipt of the policy and his objection to it. However, this statement is clearly dictum and does not hold up under scrutiny. Although the *Neiberger* rule is the basis for

221. 74 Mo. 167 (1881).
222. *Id.* at 173 (emphasis added).
223. A recent case properly applies the *Neiberger* rule without speaking of "negligence." *See* Galemore v. Haley, 471 S.W.2d 518, 525 (Spr. Mo. App. 1971).
224. 212 Mo. App. 434, 249 S.W. 148 (Spr. Ct. App. 1923).

cases relied on by the court, it does not apply because a complete agreement was made before the application was sent to the insurer. It applies only when the application is an offer and the varying policy is therefore a counteroffer. The statute of limitations or laches may be a defense,[225] but any delay less than that required for those defenses should not bar reformation.

Thus, arguably, these cases provide questionable support for the annotators' proposition that negligence was the ground upon which the courts denied relief. All of the cases relied upon by the annotators involve *insurance* contracts, where the *Neiberger* rule comes into play.[226] Moreover, in none of these insurance cases is the analysis normally applied to the negligence defense relied on by the courts.[227] The courts apply *Neiberger,* but disconcertingly speak of "negligence" and "laches"[228] as defenses to reformation while they are really applying a contracts principle. The confusion arises from the fact that the *Neiberger* rule does involve unreasonable delay, *i.e.,* negligent delay. Only when the application is a mere offer does the failure to object to the varying policy within a reasonable time operate as acceptance of the policy (counteroffer). In that case the written instrument is the complete agreement, and the petitioner cannot make out a prima facie case for reformation.

2. Limitations on the Rule

Perhaps one reason that petitioner's negligence has never been applied to bar relief in Missouri is that the courts have placed three major limitations on the doctrine. First, negligence is not a defense when the party against whom reformation is sought has not been harmed by the petitioner's negligence.[229] Second, negligence has been held not to be a defense when both parties were equally at fault.[230] Finally, in a recent case the St. Louis Court of Appeals said emphatically that petitioner's negligence should not bar reformation when the party against whom relief is sought fraudulently introduced the variance into the written instrument:

---

225. *See* pt. V, § C of this Comment.

226. Cases cited note 219 *supra.*

227. *See* pt. V, § B (2) of this Comment.

228. This is not a true case of laches. Rather, laches would be a defense if the petitioner delayed too long *after* discovering the variance. *See* pt. V, § C (2) of this Comment. The delay important in these insurance cases is *before* the variance is discovered.

229. *See* New York Life Ins. Co. v. Gilbert, 215 Mo. App. 201, 256 S.W. 148 (K.C. Ct. App. 1923). The petitioner-insurance company sought reformation of a policy issued to defendant. The court allowed reformation, holding that negligence was not a defense:

> There was no injury caused the insured by the mistake made in the case at bar. No rights of a third party have intervened nor have defendants acted to their injury upon the assumption that the amount indorsed on the policy was the true amount of paid-up insurance. *Id.* at 212-13, 256 S.W. at 152.

This limitation is applied in many jurisdictions. *See* Annot., 81 A.L.R.2d 7, 18 (1962).

230. McVey v. Phillips, 259 S.W. 1065 (Mo. 1924); Conrath v. Houchin, 226 Mo. App. 261, 34 S.W.2d 190 (K.C. Ct. App. 1930). Many jurisdictions apply this limitation. Annot., 81 A.L.R.2d 7, 20 (1962).

> We have been cited to no case where such negligence [petitioner's failure to read the instrument] has defeated reformation for fraud or misplaced confidence, as in the case at bar. In our opinion, it should not be applied in such cases . . . .
>
> It would be a monstrous perversion of justice to deny plaintiff the right of reformation upon the ground that she was negligent in not reading the entire contract and in failing to read the note and mortgage before signing the contract, under the facts and circumstances shown. Defendant . . . by his attempt to take advantage of plaintiff's failure to discover the fraud does not assume a position that commends him to a court of equity. It is inconsistent and inequitable for defendants to rely upon plaintiff's negligence in failing to discover the fraud under the facts in this case.[231]

The inexcusably negligent petitioner may thus have three arguments at his disposal to get him around the general rule. It is submitted that these limitations make the doctrine virtually meaningless. In order for the negligent petitioner to fall outside of the limitations protecting him, he must have been inexcusably negligent with harm resulting to the party against whom reformation is sought, and the latter must not have acted fraudulently nor have been equally negligent. This situation will rarely, if ever, arise.

Thus, the negligence doctrine appears to have little utility.[232] Indeed, if a situation was ever presented in which a court would desire to refuse reformation because of petitioner's extraordinarily bad conduct, the court could simply deny relief because of petitioner's unclean hands.[233] The specific negligence defense with all its intricacies would not be needed. As a result, the court would be freed from confusing and time-consuming argument and counter-argument on the negligence defense and its limitations so that it could concentrate more fully on the determinative issues in the lawsuit.

Many authorities have argued that negligence should not bar the equitable relief of reformation in any case.[234] The *Restatement of Contracts* adopted this view,[235] and several states have adopted the Restatement view.[236] Hopefully, the Missouri courts will recognize the merit of this position in future decisions.

---

231. Sparks v. Sparks, 388 S.W.2d 508, 517 (St. L. Mo. App. 1965). For a statement of the facts, *see* text accompanying notes 100-01 *supra*. This limitation is also widely accepted. Annot., 81 A.L.R.2d 7, 102 (1962); McCLINTOCK, § 98, at 265 n.41.

As the quoted language indicates, this limitation seems to be a special application of the equitable "clean hands" doctrine. *See* McCLINTOCK, § 26, for a discussion of this doctrine.

232. However, when the party against whom reformation is sought is a holder in due course, negligence is very important under the Missouri statutes (and the Uniform Commercial Code). *See* text accompanying notes 159-162 *supra*.

233. *See* McCLINTOCK, § 26, for a discussion of the "clean hands" doctrine.

234. McCLINTOCK, § 98, at 267.

235. RESTATEMENT OF CONTRACTS § 508 (1932).

236. *E.g.*, Bankers Fire Ins. Co. v. Henderson, 196 Va. 195, 209, 83 S.E.2d 424, 432 (1954). *See generally* Annot., 81 A.L.R.2d 7, 17 (1962).

C. *Passage of Time as a Bar*

1. Statutes of Limitation

In this section the discussion will focus exclusively on Missouri law. Readers in other states may refer to two annotations as starting points in determining the applicable statute in their state[237] and when it starts to run.[238]

The Missouri statutes of limitation apply to equitable actions as well as those at law.[239] The first inquiries are what statute applies and when does it begin to run. The controlling statute varies according to the type of case. It has been said[240] that the statute generally applicable to suits for reformation is section 516.110, RSMo 1969, which provides for a ten year limitation in "[a]ctions for relief, not herein otherwise provided for." This ten-year limitation has been applied several times to bar relief.[241]

Whether the statute has tolled the right to relief often depends on when the statute starts to run. In cases where there has been no fraud, the Missouri courts have held that the statute runs from "the date the right accrued,"[242] *i.e.,* from the date the instrument was *executed.* In cases of fraud, other statutes discussed below govern the applicable time period and the time when it begins to run.

At least one statute of limitations precludes the operation of section 516.110. In suits to reform deeds in order to recover the possession of land, section 516.010 has been held to govern.[243] The courts have also stated that the statute does not begin to run until the petitioner is ousted from possession on the basis of the variance in the deed as written.[244] However, in *Michel v. Tinsley*[245] the Missouri Supreme Court indicated that the statute would start to run if the party in possession *knew* of the mistake even though his possession was unchallenged.[246] So, the attorney for the

---

237. Annot., 36 A.L.R.2d 687 (1954).

238. Annot., 106 A.L.R. 1338 (1937). Warning: This annotation is incomplete and thus defective in its analysis of Missouri law; *see* text accompanying notes 250-51 *infra.*

239. Ludwig v. Scott, 65 S.W.2d 1034 (Mo. 1933).

240. Kithcart v. Metropolitan Life Ins. Co., 150 F.2d 997 (8th Cir. 1945). This case partially summarizes the Missouri decisions.

241. Stark v. Zehnder, 204 Mo. 442, 102 S.W. 992 (1907); Hoester v. Sammelmann, 101 Mo. 619, 14 S.W. 728 (1890).

242. Stark v. Zehnder, 204 Mo. 442, 451-52, 102 S.W. 992, 994-95 (1907).

243. Cooper v. Deal, 114 Mo. 527, 22 S.W. 31 (1893); State *ex rel.* Missouri State Highway Comm'n v. Fitton, 180 S.W.2d 245 (Spr. Mo. App. 1944). § 516.010, RSMo 1969, provides:

> No action for the recovery of any lands, tenements or hereditaments, or for the recovery of the possession thereof, shall be commenced, had or maintained by any person, whether citizen, denizen, alien, resident or nonresident of this state, unless it appear that the plaintiff, his ancestor, predecessor, grantor or other person under whom he claims was seized or possessed of the permises in question within ten years before the commencement of such action.

244. Cooper v. Deal, 114 Mo. 527, 534, 22 S.W. 31, 36 (1893); State *ex rel.* Missouri State Highway Comm'n v. Fitton, 180 S.W.2d 245, 248 (Spr. Mo. App. 1944).

245. 65 Mo. 442 (1879).

246. *Id.* at 449.

party in possession would be wise to advise his client to have the deed reformed immediately.

When there is some fraud in the transaction, two other statutes come into play. First, when the party against whom reformation is sought has been guilty of "continuing fraud" to keep petitioner from discovering the variance, section 516.280 delays the running of the statute until the fraud ceases.[247] In *Citizens Bank v. Frazier*[248] this statute was applied to extend the normal ten-year limitation. Reformation was allowed even though the instrument had been executed considerably more than ten years before. Second, if the party against whom reformation is sought was fraudulent in introducing the variance into the written instrument, section 516.120 may preclude the operation of 516.110.[249] Section 516.120 applies generally when relief is sought on the ground of fraud.[250] The aggrieved party has ten years within which to discover the fraud. Upon discovery, he has five years to bring suit. So, this statute might extend the limitation to fifteen years. Certainly, a petitioner should make the argument that this statute applies if his action would be barred under the general ten-year limitation.

These statutes, especially the general ten-year limitation, can be very dangerous. Often the variance in the written instrument is not discovered until long after the instrument was executed; and under the ten-year statute at least, the statute starts to run at execution. However, the statutes of limitation have not been relied on very often. In some cases where the applicable statute would clearly have barred the action, the court does not discuss the issue, perhaps because the party against whom reformation is sought failed to plead the statute as a defense.[251] Some attorneys may have relied on an annotator's statement that in Missouri the statute does not begin to run until the mistake is discovered.[252] This is correct, perhaps, when section 516.010 is the applicable statute,[253] but certainly not when section 516.110 is controlling. In making this sweeping statement of Missouri law, the annotator relied on cases controlled by 516.010,

---

247. § 516.280, RSMo 1969, provides:
If any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented.

248. 352 Mo. 367, 177 S.W.2d 477 (1944). Section 516.110, RSMo 1969, was the applicable statute.

249. Stark v. Zehnder, 204 Mo. 442, 453, 102 S.W. 992, 995 (1907).

250. Section 516.120, RSMo 1969, provides for a five-year limitation for:
(5) An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud.

251. *E.g.*, Berry v. Continental Life Ins. Co., 224 Mo. App. 1207, 33 S.W.2d 1016 (St. L. Ct. App. 1931). The instrument was executed 20 years before the action was brought; and the variance was discovered by the petitioner five years before. There was no evidence of fraud. Section 516.110 clearly tolled the right to reformation after ten years, but it was not raised as a defense.

252. *See* Annot., 106 A.L.R. 1338, 1339 (1937).

253. *See* text accompanying notes 242-44 *supra*.

without mentioning the other Missouri statutes and the decisions based on them.

2. Laches

Where the petitioner has unreasonably delayed the assertion of his right to reformation until either the party against whom relief is sought has acted in reliance or the circumstances have changed so as to result in prejudice to the latter because of the delay, equity will hold the petitioner to be guilty of laches and will deny relief to him.[254] Some authorities state that the delay alone is enough[255] but the better view would appear to be that the passage of time must be accompanied by some prejudice to the defendant.[256] Missouri adheres to the latter view. In *Berry v. Continental Life Insurance Co.*,[257] plaintiff sued on the insurance contract. Defendant counterclaimed for reformation to change the cash value of the policy at the end of twenty years to the figure allegedly agreed upon. Plaintiff asserted laches as a defense since the error was discovered five years before the suit was brought. The court held that laches on these facts was not a bar:

> In the instant case, defendant's delay in no way injured plaintiff. Plaintiff was entitled to receive what he applied for and paid for, and defendant by its silence in no way acted to plaintiff's detriment.[258]

The general rule is that laches will not be imputed until the mistake is discovered,[259] but some courts have held to the contrary.[260] There is no suggestion in the Missouri decisions that the law in this state varies from the sound majority rule.

If the party against whom reformation is sought was fraudulent, the court is not likely to allow his defense of laches. Defendants had acted fraudulently in the peculiar case of *Lauffer v. Smith*.[261] The defense of laches was denied even though the defendants had made valuable improvements on the land.

These restrictions on the defense of laches prevent its application in most cases. However, in *Davidson v. Mayhew*[262] the Supreme Court of Missouri relied heavily on laches as a basis for denying reformation. The plaintiffs discovered the alleged variance in the 1866 deed in 1880; but they did not bring suit to reform the deed until 1899. Defendants had been prejudiced by the delay since they had been forced to defend several

---

254. McCLINTOCK, § 28 (*a*).
255. W. WALSH, EQUITY § 102 (1930). *See* Note, *Passage of Time as Laches*, 61 W. VA. L. REV. 126 (1959).
256. *See* Wallace v. Fiske, 80 F.2d 897, 912 (8th Cir. 1935).
257. 224 Mo. App. 1207, 33 S.W.2d 1016 (St. L. Ct. App. 1931).
258. *Id.* at 1213, 33 S.W.2d at 1019. *Accord*, Sicher v. Rambousek, 193 Mo. 113, 129, 91 S.W. 68, 72 (1906).
259. McCLINTOCK, § 105, at 281.
260. *E.g.*, Brooks v. Northwestern Mut. Life Ins. Co., 193 Ga. 522, 18 S.E.2d 860 (1942).
261. 337 Mo. 22, 85 S.W.2d 94 (1935).
262. 169 Mo. 258, 68 S.W. 1031 (1902).

suits involving the same deed because of the alleged variance. However, the court was not content to rely on laches alone to deny relief. It stated strongly that the decision could have rested on the ground that the alleged complete agreement was not satisfactorily proven.[263]

VI. Conclusion

Traditionally, the courts have said that the ground for the equitable relief of reformation is that the parties had come to an understanding but in reducing it to writing, through mutual mistake or mistake and fraud, some provision was omitted or mistakenly inserted. This seems simple enough, but in practice this analysis has proven misleading and inadequate. In theory, the courts should require only that the party seeking reformation show that *there was a complete agreement between the parties and that the written instrument varies materially from it.* This simple analysis is not only adequate, but it also clearly underscores the ultimate factual issue in any reformation action: the establishment of the complete agreement.

Of course, there may be other obstacles which the successful litigant must overcome. Equity courts categorically refuse to reform certain types of instruments, notably wills. Furthermore, the party against whom reformation is sought may stand upon some equity higher than that of the party seeking the reformation, as in the case of a bona fide purchaser, encumbrancer or holder in due course. The party seeking reformation may be the donee in a voluntary conveyance, in which case he will face special obstacles. The statutes of limitation or petitioner's laches may also be a bar. The former is often a problem since the variance which was introduced into the written instrument is often not discovered until a considerable time after the instrument is executed. Finally, petitioner's negligence may be bothersome. It is often used as a "make-weight" argument by the courts in supporting decisions denying reformation; but, standing alone, it has never been relied upon by a Missouri court to deny relief. This defense is of questionable value in theory and in practice and should be repudiated by the courts.

All things considered, the courts have shrouded this remedy with so many complexities that it has lost its basic simplicity. It is hoped that this article will contribute to a return to the basic concept underlying the remedy: that when two parties have reached an agreement and the written instrument varies from it, the instrument should be reformed absent a special equity favoring an intervening innocent party.

William H. Thomas, Jr.

263. *Id.* at 267, 68 S.W. at 1034. The statute of limitations was not discussed. Apparently, it was assumed that the statute governing actions to recover land (now § 516.010, RSMo 1969) was applicable. The ten-year limit would not have started to run until 1895, when plaintiffs acquired whatever rights they had to possession of the disputed tract. (Plaintiffs claimed as remaindermen, and the life tenant died in 1895.)