

This was a motion on behalf of one of the plaintiffs, Rewi Haokore, for a decree in a suit brought by himself and Paora Torotoro against Frederick Sutton. Mr. Travers and Mr. Izard appeared for the plaintiff Rewi, and Mr. Wilson and Mr. Crawford for the defendant. The action was commenced on the 8th August, 1874.

The declaration stated that, by Crown grant dated the 14th July, 1866, a parcel of land of 3,573 acres, known as Oamarunui, was granted to the plaintiffs in fee-simple. That in July, 1866, the plaintiffs leased a part of the said land (3,410 acres) to James Butcher Braithwaite for the term of twenty-one years, at an annual rental of £300. That on the 5th October, 1868, the plaintiffs mortgaged to the defendant the whole of the grant, to secure repayment of a loan of £500 and future advances and interest. That on the 16th March, 1869, the plaintiffs conveyed to the defendant the whole of the granted lands, in consideration of a debt of £1,200 due by plaintiffs to defendant, and of £1,300 paid to the plaintiffs by defendant. That at the time of the treaty for the mortgage it was verbally agreed that only the land leased to Braithwaite should be included in the mortgage. That the mortgage deed was prepared under the instructions of the defendant alone, and that the plaintiffs had no independent legal advice in the matter. That neither of the plaintiffs knew that the mortgage deed comprised the whole of the land in the grant. That the plaintiffs executed the mortgage deed under the mistake that only the leased land was affected thereby. That the execution of the mortgage deed was obtained fraudulently by the defendant, in that he knew that the plaintiffs did not intend to include the part of the land not leased. That the conveyance to the defendant was also prepared under the defendant's instructions, and the plaintiffs had no independent legal advice in the matter, and that neither of them knew that the conveyance comprised the whole of the land in the grant, and that they executed it believing and on the understanding that the land conveyed did not include the portion not leased. That the plaintiffs never agreed to mortgage or sell the land not leased, and that they executed the deeds under a mistake as to the land comprised therein. That the execution of the conveyance was obtained by the fraud of the defendant, in that he knew that it contained land not agreed on or intended to be conveyed. That the plaintiffs have been in continuous occupation of the land not leased, and no claim for possession was made till May, 1874, and that until that the plaintiffs were not aware that the deeds of mortgage and conveyance included the leased land.

The declaration then prays a declaration that the deeds of mortgage and conveyance are a mortgage and conveyance of only the lands leased, and that the deeds may be altered and reformed.

The defendant, by his plea, denied the allegations of mistake and fraud, and the allegations as to the manner in which the deeds were prepared and executed, and the occupation of the lands not leased. The plaintiffs replied by joining issue. Subsequently, in fact immediately before the trial, the defendant pleaded an after-plea, alleging that on the 21st January, 1874, he applied under the Land Transfer Act for a certificate of title for the unleased portion of the land conveyed to him by the plaintiffs; and that the plaintiffs, on the 10th July, 1874, entered a caveat, but allowed three months to expire without giving notice to the Registrar of having commenced proceedings to establish their title, and did not obtain an injunction; and that on the 15th December, 1874, the Registrar gave defendant a certificate of title for the land not leased, and that that certificate is in full force.

To this after-plea the plaintiffs demurred and replied. The grounds of demurrer were,—(1.) That the grant of the certificate, having been made *pendente lite*, does not affect the plaintiff. (2.) That the plea does not allege that this suit is not within the exception of section 129 of the Land Transfer Act. (3.) That the plea does not allege that the plaintiffs were not deprived of land by fraud as against the person registered as proprietor through fraud.

In the replication to the after-plea, the plaintiffs first deny the allegations in the plea, and also reply that the certificate of title was one issued on the first bringing of the land under the Act, and that at the time the plaintiffs were, and still are, in adverse possession, and are rightfully entitled. By a third replication they repeat the allegations in the declaration, and say that they were deprived of the land by fraud, and that the defendant procured himself to be registered as proprietor by fraud, knowing that he was not rightly entitled thereto. The defendant joined in demurrer, and denied the allegation in the replication to the after-plea.

Upon these pleadings issues were formed.

The jury found, in effect, that the plaintiffs had been and were in occupation of the land not leased; that the plaintiff Paora Torotoro had agreed to mortgage and also to convey the whole of the land granted, but that the plaintiff Rewi had not so agreed; that at the time of the execution of the mortgage and of the conveyance Paora Torotoro knew that the deeds affected the whole of the land, but Rewi did not; that the deeds were prepared under the instructions of the defendant alone, and the plaintiffs had no independent legal advice in the matter; that the deeds were read over, interpreted, and explained to both of the plaintiffs before execution, but the jury said that there was no evidence that they were understood by Rewi.

The jury negatived the issue of fraud—that is, that defendant knew that the plaintiffs did not intend to include the land not leased.

The jury found that the defendant's first claim for possession was made 11th December, 1873, and that Rewi did not know till that date that the deeds included the land not leased, but that the other plaintiff knew they did at the time of the execution by him.

The jury, as to the issues on the after-plea, found that the defendant did not know, at the time of making his application to bring the land under the Land Transfer Act, that he was not rightfully entitled thereto; that the plaintiffs were in adverse possession, but that they were not entitled to the land, as they had signed the deeds.

It is contended, on behalf of the plaintiff Rewi, that he is entitled to a decree for the rectification of the deeds of mortgage and conveyance by altering them so that the interest of Rewi in that portion of the land in the grant not leased to Braithwaite should not be affected thereby. No motion for a decree is made on behalf of the other plaintiff, Paora Torotoro. The jury have found that the plaintiff Rewi and the defendant did not mutually agree that the whole of the land in the grant should be included in the deeds, and that Rewi did not know that the deeds affected the whole of the land in the grant; but the jury have also found that the defendant did not know that Rewi did not intend to include the whole. The case, therefore, as to Rewi is not one of mutual mistake, for it must, I think, be assumed that the deeds are in accordance with the intention and understanding of the defendant, though not in accordance with the intention and understanding of the plaintiff Rewi.

But on behalf of Rewi it is contended that the Court may rectify the conveyance, though the mistake is not mutual, but is the mistake of the vendor only; and it was argued that the case of *Harris v. Pepperell*, L.R. 5, Eq. 1, establishes this. I am not aware of any authority other than *Harris v. Pepperell* which can be cited in support of the plaintiff's contention, and that case (*Harris v. Pepperell*), properly understood, does not, I think, decide that a rectification can be decreed where the mistake is not mutual. The decree which the Master of the Rolls declared that he was prepared to make was, that the deed should be set aside or rectified at the option of the defendant. The judgment of the Master of the Rolls, if properly reported, may, and I think must, be understood as deciding that the deed should be set aside, but that, if the defendant was willing to have the deed rectified, he would not order it to be set aside. So understood, the judgment is in accordance with the authorities. The suit was at the instance of the vendor of land against the vendee, seeking for a rectification of the deed on the ground that a portion of the land conveyed was not intended to be conveyed. The facts, as reported, would certainly lead one to the conclusion that, as a fact, the mistake was mutual, and that the defendant either knew or ought to have known that the parcel of land in question was not intended to be conveyed. Some of the observations of the Master of the Rolls would seem to show that, though the defendant gave evidence that he understood that he was to have the land in dispute, and that there was therefore no mistake on his part, there was, in the opinion of the Judge, a mutual mistake, and that the defendant and plaintiff had not agreed for the whole, but had agreed for the conveyance of that portion only which the plaintiff alleged was the subject of the agreement. However, other observations and the reasoning of the Judge seem to show that he did deal with the case as one of mistake on the part of the vendor only. If the Master of the Rolls found, as a fact, that the plaintiff justifiably thought that he was selling a portion of the land, while the defendant justifiably thought that he was buying the whole, in fact that the vendor and vendee never assented to the same thing, then it would follow that there was no contract at all; and, if there was no contract, clearly it would be no case for rectification. But, though not a case for rectification, it would be a case for the cancellation or setting aside of the conveyance, if the vendor had been guilty of no *laches*, and the position of the parties had not, with reference to the land, become so altered that they could be restored to the same position as before the conveyance. For