

though, perhaps, where the vendee thinks he is buying what the vendor does not think he is selling, the Court may not, before conveyance, actively interfere by setting aside a void contract; yet, when there has been a conveyance, then there arises a sufficient reason for the active interference of the Court, for otherwise the vendee would be able to set up the conveyance against the vendor, which would be inequitable, and would be damaging to the vendor. I say perhaps, for there are strong authorities in favour of the active interference of the Court even before conveyance. In *Calverley v. Williams*, 1 Ves. (Jun.) 211, Lord Chancellor Thurlow refused specific performance, because neither party thought the land in dispute was to be conveyed; but, in the course of his judgment, said, "Where one thinks he is buying what the vendor does not think he is selling, it is ground to set aside the contract;" but in *Alvanley v. Kinnaird*, 2 MacN. and Gordon 1, Lord Cottenham says, "Where the vendor includes more than intended by mistake, the Court will not decree specific performance of the whole. If the vendee refuses to take a part, the Court will not interfere—it will not rescind the contract." And in *Lord St. Leonards' Vendors and Purchasers* (p. 314), he says, "If a purchaser of an estate thinks he has purchased *bond fide* a part which the vendor thinks he has not sold, that is a ground to set aside the contract, or at least not to execute it, that neither party may be damaged." But the authorities cited are all suits for specific performance of contracts, and not for rectification or setting aside contracts. And at page 215 he says, "Where there is mistake between two parties as to what was sold, the Court will not interfere in favour of either party." See also *Kerr on Fraud*, p. 362; and per Lord Justice James in *Torrance v. Bolton*, L.R., 8 Ch. Ap. 118. See also *Powell v. Smith*, L.R., 14 Eq., p. 90. However, it is not material to inquire whether the Court will set aside the contract where one party does not think he is selling what the other thinks he is buying; but there seems good ground for the active interference of the Court where, in such a case, the vendor has by mistake executed the conveyance; and *Harris v. Pepperell* is an authority that, in such a case, the Court will set aside such a conveyance if the parties can be replaced in their former position. That is a necessary condition, and was so treated in *Harris v. Pepperell*. See also *Powell v. Smith*, *supra*, p. 91. In the case now before this Court there is no finding which would enable it to make a decree on the basis of placing the parties in their former position. Indeed, the plaintiff does not ask that the deeds should be set aside; he asks that they may be rectified so as to conform to what he intended, though not in conformity with what the jury has found to be the intention of the defendant; and *Harris v. Pepperell* is cited as a case in which that was done. In my opinion the Master of the Rolls did not so decide. At any rate the decision may be supported as a decree for setting aside, but not for rectification, unless it be on the supposition that there was a common error. The case cited has been the subject of observations in several text-books of repute, and the general opinion seems to be that the case decides only that, where there is mistake on one side only, the Court will set aside the conveyance, but that it cannot be taken as an authority for the proposition that the Court will, in such a case, rectify the deed against the will of the other party; but that, if the case does so decide, it cannot be upheld. In *Kerr on Fraud and Mistake*, p. 35 he says, "In *Harris v. Pepperell*, Lord Romilly, M.R., said that the rule that the Court will not rectify an instrument on the ground of mistake except the mistake be mutual, is liable to an exception in a case between vendor and purchaser. But the distinction is not supported by the authorities, and does not seem sound. *Garrard v. Frankel*, and *Harris v. Pepperell*, were, there is no reason to doubt, correctly determined; but the principle upon which they are to be upheld is that the Court, in these cases, merely abstained from setting the agreement aside on the consent of the defendant to submit to the variation alleged by the plaintiff. In cases of rectification properly so called, the Court does not put it to the defendant to submit to the variation alleged by the plaintiff, but makes the instrument conformable to the intent of the parties without any such offer or submission." In *Dart's Vendors and Purchasers*, p. 683, he observes on this case as follows: "In a recent case where the plan on the conveyance comprised more land than the vendor intended to convey, the Court, in a suit by the vendor to rectify the deed, gave the purchaser the option of having the contract annulled, or of taking the conveyance in the form which the vendor intended; and this decision was rested on the ground that, where the parties can be placed in the same position as if no contract had been executed, the Court will interfere provided the party aggrieved comes speedily for redress; but after conveyance the parties can seldom be restored to their original position, and it would seem the sounder doctrine that, in such a case, no relief should be granted unless both parties have participated in the error. In the case just cited the purchaser appears to have been not altogether free from blame, and it cannot be regarded as an authority for the proposition that the Court will, to the prejudice of an innocent purchaser, rectify a conveyance merely on the ground of the vendor's mistake." This author therefore questions the soundness of the decision, and seems to be of opinion that, after conveyance, there can be no relief unless the error is common. See also p. 681 in note (w). In *Chute on Equity* in relation to the Common Law, at page 135, he observes of the decision in *Harris v. Pepperell* that "the Master of the Rolls decreed, in effect, that the obligation should not be interfered with by the erroneous deed, and that the indenture which stood in the way of the real agreement or obligation should be rescinded."

It hardly seems to require authority to show that the Court will not rectify an instrument so as to make it conform to the understanding and intention of one of the parties only for to do so would be to make the contract for the parties. However, as the observations in the judgment of the Master of the Rolls seem to show that he conceived that the Court would, in such a case, rectify the instrument as between vendor and purchaser, and that judgment was relied upon in the argument, I have thought it better to review some of the many authorities on the subject, with a view to show that they do not support the observations of the Master of the Rolls. And, first, it may be premised that it is not necessary here to consider those cases which have turned upon the question of evidence. Courts of Equity in England require clear and satisfactory evidence of mistake, and attach considerable weight to the evidence of the defendant denying the mistake; and many of the judgments in cases of mistake are addressed to the question of evidence of the mistake rather than to the effect of mistake. The defendant may depose that there is no mistake on his part, and yet the Court may on the whole evidence come to a different conclusion. In New Zealand the jury are the judges of the fact, and in the case now before the Court the jury find that the mistake is on the side of the plaintiff *Rewi* only. In the case of *Garrard v. Frankel*, 30 Beavan, 445, the Master of the Rolls thought that the defendant had verbally agreed for a higher rent than was by mistake named in the written agreement or the lease; and but for an inconsistency in the written agreement he would have decreed the rectification, as in case of a common mistake. But, as the draft lease contained the error, and the agreement, though in its body stating correctly the higher rent, yet incorporated the draft, and was therefore in itself inconsistent, he made the same decree as in *Harris v. Pepperell*, namely, gave an option to the defendant of having the deed set aside, or, if he retained the lease, that it should be rectified. As there was a written agreement and patent ambiguity existed, parol evidence could not be admitted on behalf of the plaintiff to explain and rectify it, and force the lease on the defendant, though such evidence was admissible to set aside the lease. The Master of the Rolls, in the judgment in that case, says, "The next question is also one of fact: it is whether the defendant knew that the reservation of £130 was a mistake. It was certainly not a mistake committed by him, and therefore it is argued that there must be an end of the case, for that, to enable the Court to rectify a mistake, the mistake must be mutual; but, though as a general rule that is correct, it does not apply to every case. The Court will interfere in cases of mistake where one party to the transaction, being at the time cognizant of the fact of the error, seeks to take advantage of it." And, after considering the evidence, he concludes that the defendant, at the time he executed the lease, was cognizant of the mistake which had been committed by the plaintiff. Moreover, he proceeded on the assumption that the parties could be placed in their former position; for, though the defendant had mortgaged the lease, the terms on which the lease was to be set aside were that the mortgage security should not be affected, and the plaintiff be entitled to repayment from the defendant. The authority of this case is questioned by Mr. Dart, and is supported by Mr. Kerr only on the ground that in effect the decree was to set aside the lease unless the defendant consented to retain it, and, if he retained it, he must retain it with rectification.

In *Sugden's Vendors and Purchasers*, p. 326, he says the Court will relieve the vendor where more has passed than was contracted for. But the present question is, whether it will relieve where more has passed than was intended by one side only. The cases he relies upon are not authorities in favour of the plaintiff in the present case. They are the three following cases: In *Clifford v. Loughton*, Tot. p. 23, more land passed than was intended, but relief was refused as against a purchaser for value without notice. It does not appear from the short note of the case whether the mistake was mutual or not. In *Tyler v. Beversham*, Finch, 86, 2 Ch., Ca. 199, land was included in general words which had not been intended to be conveyed; it was not specified in the particulars, and the mistake was admitted by the defendant. That was clearly a case of mutual mistake, and relief was granted as against the vendee but not as against the mortgagee, he