

being a purchaser without notice. In *Gibson v. Smith*, Barnardiston C.C. 491, the case was really one of mutual error; for the question was whether the conveyance did not convey more than was described in the written agreement.

*Carpmael v. Powis*, 10 Beavan, 36, was a suit to set aside or rectify an annuity deed granted by the plaintiff, and was therefore a case of vendor and purchaser. It was contended by the defendant that, because it was not a case of mutual mistake, the Court would not interfere. The mistake was a miscalculation by the plaintiff on information supplied by the defendant, and the defence was that the defendant would not have accepted an annuity of less amount than that in the deed. There was no suggestion of fraud. The Master of the Rolls, Lord Langdale, in his judgment, said that "a decree to rectify the annuity deed could not be made, and the only question was whether the grant of the annuity was to be declared void." He decided that there was such a mistake, that the plaintiff ought not to be held to the agreement, and that the deed must be cancelled. The case is one, therefore, of mistake on one side, and therefore not one for rectification, but cancellation.

*Murray v. Parker* (19 Beav. 305) was a case where a lease was ordered to be reformed, and there it was held by Lord Langdale that, to justify the Court in reforming an executed deed, it must appear that there has been a mistake common to both contracting parties, and that the agreement had been carried into effect by the deed in a manner contrary to the intention of both. That was not a case of settlement, but in effect of vendor and purchaser.

In his judgment in *Wright v. Goff* (22 Beav. 207), the Master of the Rolls (Romilly) says, "The Court looks with extreme jealousy upon an application to reform a deed, and the onus lies upon the plaintiff to show that the deed was executed under a mistake;" and he held that, "as the deed was executed under a mistake, not only of the person executing it, but of all the parties concerned, it must be reformed." It is true that this case was not one of vendor and purchaser, and therefore does not come within the exception from the general rule, which, according to Lord Romilly, in *Harris v. Pepperell*, exists. But the grounds of the judgment are a common mistake, and not the alteration in the position of the parties.

In *Leuty v. Hillas*, 2 De G. and J. 101, where the plaintiff and defendant had purchased separate lots of land, &c., at an auction, and a portion which the plaintiff had purchased was by mistake conveyed to the defendant, the Master of the Rolls refused relief either by rectification, rescission, or otherwise; but on appeal relief was granted to the plaintiff on the ground that, though the Court was satisfied that the defendant believed he had purchased the portion in dispute, yet he had not good reason for so believing, and that he ought to have known that it did not form part of his purchase; and he was ordered to convey it to the plaintiff. There was in that case, therefore, a mutual error.

In *Fowler v. Fowler*, 4 De G. and J. 250-265, it was held that, for the purpose of reforming an instrument, clear and unambiguous evidence must be produced, not merely showing a mistake, but showing the deed in its proposed state to be in conformity with the intention of all the parties at the very time of its execution. The latter part of this ruling is a distinct authority that in such a case as that now before the Court there can be no rectification in the manner proposed by the plaintiff, for such rectification would not make the deed in conformity with the intention of the defendant. In the *Metropolitan Counties, &c., Society v. Brown*, 26 Bevan, p. 454, one question was whether the schedule to a mortgage deed of machinery could be rectified by reason of some portion of the machinery, which the plaintiff intended to have had in the deed, having been omitted by mistake; but the Master of the Rolls (Romilly), in his judgment, says, "Then the question arises as to that part [of the machinery] which was put down between the date of the two mortgage deeds, whether this Court can reform the second by inserting the metal flooring, because, as I understand, the schedule of the second deed does not include the metal flooring. I cannot, however, alter the deed upon the valuation made when the plaintiffs took their mortgage. The parties who advanced the money no doubt intended to include in the deed everything which was included in the valuation. The metal flooring was without doubt there, but I cannot therefore include it in the deed, in the absence of proof that it was omitted by a common mistake of both parties." There is nothing to show that Mr. Brown (the defendant) made any mistake on the subject.

In that case the defendants had assigned their estate for the benefit of their creditors, and therefore it was not a case in which rescission would be asked. The case, however, is in effect one of vendor and purchaser, and yet rectification was refused.

In *Elwes v. Elwes*, 2 Gif. 545, it is said by Sir John Stuart, V.C., that the principle on which the Court reforms a settlement is to make it conform to what was the real agreement. In *Sella v. Sella*, 29 L.J., ch. 500, Vice-Chancellor Kindersley held that the Court could not correct an instrument made upon the marriage of two parties, except upon the clear mistake of both parties. He refers to Vice-Chancellor Wood's judgment in *Rooke v. Lord Kensington*, 2 Kay and J. 753-764.

In *Bentley v. Mackay*, 31 L.J., ch. 700, the Master of the Rolls, in the course of his judgment, says, "When this Court rectifies a deed under the equity of mistake, it must be a common mistake, a mistake of all the parties to the deed; you must show that all made the mistake, and then when you come to reform it that mistake must be clearly proved."

In the *Earl of Bradford v. the Earl of Romney*, 31 L.J., ch. 499, the Master of the Rolls says, "It is a rule of equity in such cases that to reform a deed it is necessary to show that the mistake was an error common to both parties to the contract." And, "Above all things, in cases of reforming a deed, it is essential that the extent of the proposed alteration should be clearly defined and ascertained by evidence contemporaneous with or anterior to the deed."

In *Mortimer v. Shortall*, 2 Dr. and War. 372, the principles upon which Courts of Equity proceed in reforming deeds and instruments are discussed, and it is laid down that in such cases the mistake must be mutual, and that a mistake on one side may be a ground for rescinding, but not for correcting, an instrument. The case was one of a lease in which more land had been demised than was intended or agreed. In a late case on this subject, *Bloomer v. Spittle*, L.R. 13 Eq. p. 431, the Master of the Rolls thought there was a common mistake. In that case the purchaser asked for rectification because of an omission from the conveyance by mistake; but, though the Judge (Romilly) was satisfied there was a common mistake, yet as a period of years had elapsed, and the defendant denied the mistake, he refused to rectify the deed against the will of the defendant, and, as he said, followed the case of *Garrard v. Frankel*, and gave the defendant the option of having the deed rectified in the manner asked by the plaintiff, otherwise the transaction to be set aside. In that case the position of the parties had not been so altered that complete relief could not be given.

*Powell v. Smith*, cited at the argument, was for specific performance, and the mistake insisted upon by the defendant was one of law, not of fact.

Accepting, however, the authority of *Harris v. Pepperell*, that, though the mistake be not common, the instrument might be set aside if the parties can be placed in their former position, yet, as already pointed out, the plaintiff has not laid that foundation for the decree. There is no finding of the jury on which I can proceed to make a decree on the supposition that the parties can be placed in their former position, and I cannot look beyond the issues. I may remark, however, that it was indisputably proved at the trial, though there was no issue to meet the fact, that the defendant had some time since sold to the lessee the fee-simple of the whole of the land included in the lease, and no doubt the purchaser had no notice of the alleged mistake. If that fact had been found by the jury, then it would have been made apparent that the parties could not be restored to their former position. If the plaintiff Rewi asks for a reference and inquiry as to the matter, I should be disposed to grant it, though it is clear to me on the evidence that no benefit would accrue to him from it.

The transaction cannot be set aside in part. If set aside, it would have to be set aside altogether. As the plaintiff Rewi states he will not ask for such inquiry, I must therefore refuse the relief to the plaintiff Rewi, and dismiss the bill, both as to himself and his co-plaintiff. As the declaration made a case of fraud, and that was not established, I must give the defendant his costs of so much of the proceedings as have been caused by that charge, and order that these costs shall be paid by Paora Torotoro and Rewi; and I also order that the plaintiff Paora Torotoro do pay the defendant his costs of the cause generally.

The question for the Court of Appeal is, Whether the decision of the learned Judge should be sustained, or varied wholly or in part.

No. 340.—Application from F SUTTON, Napier, Storekeeper, for a Certificate of Title for Portion of Omararui 3N Block.

I, FREDERICK SUTTON, of Napier, storekeeper, do declare that I am seised of an estate of freehold of fee-simple in all that piece of land situated in the Puketapu District, portion of the Omararui Block, numbered 3N, marked B, containing