

TROVER, for fifteen tons of hay. The plaintiff's title was a mortgage from one Gray to secure a note for \$400. The plaintiff testified that the mortgage was given to secure a note for \$400, which was given as security for the plaintiff's signing two other notes for Gray, neither of which had been paid by the plaintiff when the mortgage was given.

The defendant, a subsequent purchaser of the hay from Gray, claimed that the plaintiff's mortgage was invalid because it was in fact given to secure a liability and not a debt, and no liability was mentioned in the condition of the mortgage or the certificate of the oath. At the time of the purchase and removal by the defendant, the hay was in Gray's barn. There was evidence tending to show that the defendant knew of the existence of the mortgage when he bought the hay of Gray. The court refused the defendant's motion for a nonsuit, and the defendant excepted. Verdict for the plaintiff.

*Twitchell & Evans and Benton & Hutchins*, for the defendant.

*Fletcher and Drew*, for the plaintiff.

FOSTER, J. There is no suggestion of fraud or want of consideration between the parties to the mortgage; and the defendant rests his case upon the ground of a defect in the mortgage arising solely from a want of strict compliance with the terms of the statute (Gen. St., c. 123, s. 9) concerning the affidavit. The law must be considered as settled in this state, that a mortgage of personal chattels, without the affidavit required by law, is valid against a subsequent purchaser with notice that the mortgage was made in good faith and for a full consideration. *Patten v. Moore*, 32 N. H. 382, 384; *Gooding v. Riley*, 50 N. H. 400, 404; *Sanborn v. Robinson*, 54 N. H. 239; *Clark v. Tarbell*, 57 N. H. 328.

*Judgment on the verdict.*

CLARK, J., did not sit.

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HOBART v. JORDAN.

In a suit at law brought against a purchaser of land for a part of the price, if he has materially changed the condition of the land by cutting and removing timber, and cannot, by a reconveyance, restore the vendor to his former position, it is no defence that there was a mutual mistake as to the boundaries, and the vendor has received a part of the price greater than the value of the timber cut by the purchaser, and refused to accept a reconveyance of the land tendered him by the purchaser. The defendant's remedy, if he has any, is in equity.

ASSUMPSIT, on a note given for part of the price of wild land conveyed by the plaintiff to the defendant. Plea, the general issue. The deed described the land as Lots 1 and 2 in the 12th Range in Columbia; and the price was \$1100. One ground of defence was, that the defendant, not knowing where the boundaries of the land were, was induced to buy it by the plaintiff's fraudulently representing the south line to be further south than it was, and the defendant had rescinded the contract and tendered the plaintiff a deed of the land. The jury found there was no fraud. There was evidence on which the jury might have found that, at the time of the conveyance, neither party knew where the south line was, and that both believed it to be further south than it was. Soon after the defendant bought the land, he cut and removed from it and sold a considerable amount of timber. The defendant testified that the plaintiff received in part payment for the land the proceeds of the timber, the same being more than the timber was worth before it was cut; and that afterwards, when the defendant ascertained that the south line was further north than he had supposed, the plaintiff refused to accept a deed of the land tendered him by the defendant. The defendant excepted to the refusal of the court to instruct the jury that he had a right to rescind the purchase on the ground of mistake, if there was a mutual mistake, as to the south line, and if the defendant was induced by that mistake, to make the purchase. The question whether there was a partial failure of the consideration was not raised. Verdict for the plaintiff: motion of the defendant for a new trial.

*Ray, Drew & Jordan*, for the defendant. A contract may be rescinded by either party on the ground of mutual mistake as well as on the ground of fraud: and the defendant may be relieved at law as well as in equity. *Fogg v. Sawyer*, 9 N. H. 365; *Ketchum v. Catlin*, 21 Vt. 191; *Mowatt v. Wright*, 1 Wend. 362; *Wheadon v. Olds*, 20 Wend. 174; *Flight v. Booth*, 1 Bing. N. C. 370; *Cox v. Prentice*, 3 M. & S. 344; 2 Kent Com. 491; *Wood v. Scarth*, 1 F. & F. 293; *Luce v. Izod*, 25 L. J. Exch. 307; *Kelly v. Salari*, 9 M. & W. 54.

*Shurtleff and Ladd & Fletcher*, for the plaintiff.

STANLEY, J. If the defendant has a remedy, it is in equity. *Noble v. Googins*, 99 Mass. 231; *Spurr v. Benedict*, 99 Mass. 463; *Wells v. Day*, 124 Mass. 38; *Grymes v. Sanders*, 93 U. S. 55. The timber was removed from a portion of the land, and the proceeds were paid to the plaintiff. He cannot, therefore, be exactly and wholly restored to his former position: and if the contract of purchase can be rescinded by restoring part of the property and paying for the rest, it must be done upon such an adjustment of the equities as cannot be made in this suit. *Scott v. Littledale*, 8 E. & B. 815.

*Judgment on the verdict.*

DOE, C. J., did not sit.