

field, from which he escaped into the enclosure of one B, who took him as an estray, and caused him to be appraised under Gen. St., c. 130. A motion for a nonsuit was denied, and the defendant excepted. The defendant also contended that the tender of the horse and money must not only be made at the defendant's dwelling-house, but they must be kept by the plaintiff in readiness for the defendant at all times until the action was decided. Both parties moved for judgment.

*Aldrich & Parsons* and *Ladd*, for the plaintiff.

*Dudley, Shurtleff*, and *Ray, Drew & Jordan*, for the defendant.

CLARK, J. The referee made a general award in favor of the plaintiff; and it is to be assumed, nothing appearing to the contrary, that the referee found the facts necessary to warrant his award, the defendant's fraud in the trade, the plaintiff's right for that cause to rescind the contract, and an actual rescission by the plaintiff so far as the question is one of fact. Contracts entered into on fraudulent representations are voidable at the election of the party defrauded, and may be rescinded on discovery of the fraud if the parties can be restored to their original position. The party seeking to rescind must ordinarily restore, or offer to restore, whatever he has received under the contract; and in case of the refusal of the wrong-doer to receive it, an offer to restore, properly made, is equivalent to actual restoration. *Concord Bank v. Gregg*, 14 N. H. 331; *Sanborn v. Batchelder*, 51 N. H. 426; *Luey v. Bundy*, 9 N. H. 298, 303; *Manahan v. Noyes*, 52 N. H. 232, 237; *Moody v. Drown*, 58 N. H. 45.

In this case the plaintiff seasonably returned the money he had received from the defendant to the defendant's house, leaving it with his wife, and returned the horse to the defendant's pasture, and notified the defendant of what he had done. Having done this, he had done all that was required of him to rescind the contract; and the defendant having refused to deliver the plaintiff's horse when demanded, replevin lies for the wrongful detention. Laws of 1873, c. 21.

*Judgment for the plaintiff on the report.*

STANLEY, J., did not sit: the others concurred.

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PLAISTED *v.* HOLMES.

A question of law, once decided at the law term, is not reconsidered in the same case except on a motion for rehearing.

The title of a vendee of a chattel, in a sale void as to creditors of the vendor

for want of a change of possession, is invalid against a subsequent mortgage of the chattel by the vendor to one having no notice of the sale. A mortgagee is a creditor of the mortgagor, and to the extent of his claim a purchaser, and as such is entitled to the same protection from secret equities and trusts, of which he had no notice, as any other *bona fide* purchaser.

TROVER, for a horse, being the action reported *ante*, p. 293. The evidence there reported was again introduced at the second trial. Gray, and his mortgagee, and the attaching creditor agreed in writing that the officer who attached the horse should sell it by auction, and apply the proceeds to the payment of the mortgage debt, and the balance to the payment of the debt of the attaching creditor. In accordance with this agreement, but in his official capacity, and not as agent of the parties to the agreement, the officer sold the horse, and the defendant bought it. The proceeds being less than the mortgage debt, were paid by the officer to the mortgagee. The plaintiff contended that the defendant derived his title from the mortgagee, and had not the right of an attaching creditor to contest the plaintiff's title. The plaintiff desired to submit to the jury the question of fraud alleged by the defendant in Gray's sale to the plaintiff. The court ordered a nonsuit, and the plaintiff excepted.

*Fletcher and Twitchell*, for the plaintiff.

*Ray, Drew & Jordan and Heywood*, for the defendant.

CLARK, J. A question of law once decided at the law term is not reconsidered in the same case except on a motion for a rehearing. *Bell v. Lamprey*, 58 N. H. 124. The question upon which the plaintiff desired to take the verdict of the jury was determined adversely to the plaintiff upon a former trial (*ante*, p. 293), and the evidence being the same as at the former trial, the request was properly denied.

The plaintiff's title being invalid as to Gray's creditors was invalid against the defendant, who derived his title from an attachment and sale of the horse by a creditor of Gray. The legality of the sale was not affected by the assent of the mortgagee, nor by the fact that the property sold at a sum less than the amount due upon the mortgage. If the defendant derived his title under the mortgage, it was valid against the plaintiff. A mortgagee is a creditor of the mortgagor (2 Hilliard on Mort. 85), and, to the extent of his claim, a purchaser, and is entitled to the same protection from all secret equities and trusts, of which he had no notice, as any other *bona fide* purchaser. Jones on Mort., s. 710.

*Exceptions overruled.*

DOE, C. J., did not sit: the others concurred.