

would have been effective, cannot now be treated as having the same force it would have had had it been used, nor in the absence of the other party's fraud can it be set up as a ground of equity for defeating the judgment. 2 Sto. Eq. Jur., ss. 894, 895. The record showing no legal error, and the court having jurisdiction of the cause and the parties, the judgment and the levy following it must stand until reversed or set aside by appropriate proceedings. *Claggett v. Simes*, 31 N. H. 56; *Bruce v. Cloutman*, 45 N. H. 37.

The plaintiff is not entitled to a new trial by reason of accident, mistake, or misfortune, if the mistake or accident, against the consequences of which relief is sought, was occasioned by her own fault or negligence (*French's Petition*, 17 N. H. 472), or by the fault or negligence of her authorized attorney appearing in the case. *Handy v. Davis*, 38 N. H. 411; *Heath v. Marshall*, 46 N. H. 40. The mistake or accident relied on here, which was the plaintiff's failure to make the defence which she had to the suit, was the result of her attorney's negligence, and justice does not require a new trial. The bill in equity is dismissed.

In the second named suit, the acts of the defendants complained of as trespasses were done by them as agents of the defendant in the first suit, under and by virtue of its right of possession to the land acquired by the levy of its execution. The title and right of possession acquired by the extent were sufficient to justify the defendants' acts. *Drown v. Foss*, 39 N. H. 525; *Ladd v. Dudley*, 45 N. H. 61.

*Judgment for the defendants.*

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

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WRIGHT v. BUCK.

The plaintiff is not prevented from recovering in an action upon a promissory note which, after suit brought, she has given up to the defendant for a new note for the amount of the old one and ten dollars cash, when the defendant has failed to keep his promise to give security for the new note.

The giving of a new note for the full amount of the old one was a ratification of a change in the figures of an erroneous indorsement made by the plaintiff upon the old note, and a waiver of any objection to the note on that account.

ASSUMPSIT, upon a promissory note. After suit was brought, the defendant gave to the plaintiff a new note for the full amount

of the one sued upon, and ten dollars in money, and at the same time promised to furnish security for the new note. Upon this condition and understanding the plaintiff gave up the old note to the defendant. The defendant failing to give the security promised, the plaintiff returned the new note to him and demanded the old one, which the defendant did not return. The plaintiff retained the ten dollars. The figures of an indorsement on the old note were found to be too large, and the plaintiff altered them to their true amount. Upon the referee's report, that the plaintiff recover the amount of the old note less ten dollars, judgment was ordered, and the defendant excepted.

*E. W. Smith* (of Vermont), for the plaintiff.

*S. B. Page*, for the defendant.

ALLEN, J. The plaintiff agreed to take the second note for the first one, upon the sole condition that the second one should be secured. The condition failing, the plaintiff was at liberty to treat the second note as a nullity, or as mere security for the payment of the first note, and pursue the defendant upon that. *Jaffrey v. Cornish*, 10 N. H. 505; *Johnson v. Cleaves*, 15 N. H. 332; *Clark v. Draper*, 19 N. H. 419, 423; *Smith v. Smith*, 27 N. H. 244, 253; *Foster v. Hill*, 36 N. H. 526, 528.

The alteration of an indorsement of a payment on the note from erroneous to true figures, if material as an alteration of a written receipt for the payment of money and would have vitiated the note as evidence on which to support the action, was ratified, and any objection to it was waived by the defendant's giving a second note and ten dollars for the full amount of the first one without objection, and with a promise of security. *Humphreys v. Guillow*, 13 N. H. 385. The plaintiff could retain the ten dollars as part payment on the note, and her failure to return it with the second note did not prevent her from rescinding the contract by which the second note was received, nor from treating it as security for the original note, nor from recovering in the action upon that.

*Exceptions overruled.*

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

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LANGDON v. BUCHANAN.

As between the mortgagee of a mill and the mortgagor, or attaching creditors of the mortgagor, a machine becomes a fixture when it is annexed to the freehold, and is adapted to the purposes for which it is used. The mode of annexation is not the controlling test. Much depends on the