

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹SUPREME COURT OF ILLINOIS.²SUPREME COURT OF IOWA.³SUPREME COURT OF MICHIGAN.⁴COURT OF CHANCERY OF NEW JERSEY.⁵SUPREME COURT OF RHODE ISLAND.⁶

ACCORD AND SATISFACTION

Must be Executed.—A defence of accord and satisfaction is not supported by proof of a tender of satisfaction without proof that the tender has been accepted or received: *Pettis v. Ray*, 12 R. I.

A., the payee of certain mortgage notes made by B., sues B. for the amount due. B. alleges in defence an agreement with A. by which B. was to find a purchaser for the mortgaged realty, who was to pay the arrears of interest, refund certain expenses, and execute new notes to A., whereupon A. was to accept the purchaser as his debtor and discharge B. B. avers that he found such a purchaser but that A. refused to consummate the agreement. A. sold the realty at auction under the mortgage power, bought it in, and brought the suit in question to recover a balance still due on the notes; *Held*, that the defence was bad as an accord and satisfaction because it only showed a readiness on the part of B. to join with A. in executing the accord, but showed no satisfaction nor execution of the accord: *Held, further*, that the alleged agreement was bad as an equitable defence, being an attempt in violation of the Statute of Frauds to substitute a new oral contract for the contract evidenced by the auctioneer's memorandum of sale: *Id.*

ATTORNEY. See *Execution*.

BANKRUPTCY.

Chattel Mortgage—Failure to Record—Rights of Assignee—Conveyance of Wife's Property—Exchange of Values.—A chattel mortgage which although not filed in the proper place is good against the mortgagor cannot be avoided by his assignee in bankruptcy: *Stewart v. Platt*, S. C. U. S., Oct. Term 1879.

The assignee cannot avoid a conveyance by the bankrupt and his wife to a creditor of property which had been previously given by the bankrupt to his wife at a time when his right to do so could not be disputed: *Id.*

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² From Hon. N. L. Freeman, Reporter; to appear in 90 Ills. Reports.

³ From J. S. Runnells, Esq., Reporter; to appear in 51 Iowa Reports.

⁴ From H. A. Chaney, Esq., Reporter; to appear in 39 Mich. Reports.

⁵ From Hon. John H. Stewart, Reporter; to appear in 32 N. J. Eq. Reports.

⁶ From Arnold Green, Esq., Reporter; to appear in 12 R. I. Reports.

Nor can he avoid a conveyance of property by the bankrupt to a creditor in consideration of the surrender by the creditor of a lien of equal value upon other property of the bankrupt: *Id.*

BILLS AND NOTES. See *Conflict of Laws*.

Time in Day for Presentment.—Except where the paper is due from a bank, the proper hours for presenting a note or bill for payment range through the whole day down to bed-time in the evening: *Skelton v. Dustin*, 92 Ill.

Negotiability—Place of Payment.—A provision in a note that it is negotiable and payable at a certain place designated has no effect upon the negotiability of the note, and does not restrain or limit its negotiability elsewhere: *Schoharie County Nat. Bank v. Bevard et al.*, 51 Iowa.

CONFLICT OF LAWS.

Days of Grace.—The law of the place of payment must govern as to whether days of grace are allowed on commercial paper: *Skelton v. Dustin*, 92 Ill.

Foreign Law—To be Proved not Inferred—Disabilities from making Contract.—An Indiana woman cannot, by pleading disqualification to contract, evade payment of notes given by her for goods purchased in Michigan, without showing that the laws of Indiana do so disqualify her. If the notes are authorized by Michigan laws it cannot be presumed that they are void, nor is it conceded that if made in Michigan they would not be governed by the statutes of the state: *Wheeler v. Constantine*, 39 Mich.

CONTRACT. See *Warranty*.

Entire Contract payable in Instalments—Failure of Contractor to complete—Completion by Surety.—A contract for an extensive public work provided that the commissioners might retain fifteen per cent. of the contract price and forfeit it if the contractor failed to finish the work. On his failure to do so, without the fault of the commissioners; *Held*,

1. That the entirety of such contract was not affected by the fact that payment for the work done was to be made in instalments.

2. That it was not inequitable to enforce such forfeiture.

3. That the subsequent completion of the work by the contractor's sureties to protect themselves from loss through his dereliction, was not a fulfillment of his obligation so as to save the forfeiture.

4. That the commissioners, at the contractor's request, applied a part of such fifteen per cent. to pay debts due from him to material-men and laborers on the work, gave his assignee, under an assignment for the benefit of creditors, no claim to the balance of the fifteen per cent.

5. That even if the commissioners exceeded their powers in advancing money to the contractor before the work therefor had been actually done, that would not prevent their repaying such advances to themselves by retaining in their hands money due to him, under his express agreement: *Grassman v. Bonn*, 32 N. J. Eq.

CORPORATION.

Decree against Corporation not Evidence against Stockholder.—A decree against a corporation finding its liability and the amount of its

indebtedness, is not admissible in evidence against a stockholder of such corporation who was no party to the decree, either actually or constructively: *Chesnut v. Pennell*, 92 Ill.

Powers of.—A corporation organized for the manufacture and sale of musical instruments was held to have authority to purchase of an agent a note which he had acquired by the sale of an article manufactured by the corporation: *Western Cottage Organ Co. v. Reddish*, 51 Iowa.

Insolvent—Receiver—Adjustment of Debts by.—In adjusting the priorities of several encumbrances on lands of an insolvent corporation in the hands of a receiver of this court, *Held*:

1. That the banks which had loaned money to such corporation on notes endorsed by its directors, were entitled to be subrogated to the rights of such directors, under a mortgage given to them by the corporation to indemnify them for such indorsements.

2. That the receiver had power to adjust by agreement the rights of claimants under the Mechanics' Lien Law, although no steps beyond filing their claims had been taken.

3. That where such claims have passed into judgment with the receiver's knowledge, they should be regarded as established.

4. That where a lien claim was filed after the beginning of the insolvency proceedings in this court, it is not necessary to pursue such claim to judgment unless so required by the court or receiver: *Demott v. Stockton Paper Ware Manufacturing Co.*, 32 N. J. Eq.

DAMAGES. See *Warranty*.

Measure of.—If services are rendered under a special contract, and the compensation therein provided has been received, the party performing the services cannot recover anything further, no matter what such services were worth: *Bradbury v. Helms*, 92 Ill.

DEED

Reformation for Mistake.—To reform a deed on the ground of mistake, it must be shown conclusively that such mistake was mutual. Where the bill does not allege, nor the accompanying affidavits state, that the mistake was mutual, and the answer denies it, the deed cannot be rectified: *Ramsey v. Smith*, 32 N. J. Eq.

DIVORCE. See *Evidence*; *Infant*.

Alimony—Practice.—A denial of a marriage *de jure*, because complainant had another husband living when she married defendant, accompanied with an admission of a marriage *de facto*, presents a proper case for allowing alimony *pendente lite*. But such alimony was refused where the defendant swore, and his oath was not overcome, that he left complainant with her consent and at her request, and he otherwise met the allegations of the bill with his answer and affidavits: *Cray v. Cray*, 32 N. J. Eq.

EQUITY. See *Evidence*; *Trust*.

Practice—Crossbill.—A foreclosure bill on a first mortgage prayed a decree for deficiency against the owner of the premises, who had assumed its payment, and, also, the payment of a second mortgage thereon. *Held*, that the holder of the second mortgage, who was a party, could

not, by filing a crossbill against the owner, obtain a decree for deficiency on his own mortgage: *Sebring v. Conkling*, 32 N. J. Eq.

ERRORS AND APPEALS.

Amendment—Appeal in Name of Firm—Act of Congress.—Under Sect. 1005 Rev. Stat., the court will allow an appeal taken in the name of a firm to be amended if the names of the individual partners can be ascertained from the record: *Moore v. Simonds*, S. C. U. S., Oct. Term 1879.

Sureties on Appeal Bond—Effect of Further Appeal to Higher Court—Liability for Costs—Omission to issue Execution against Principal.—Sureties on a bond given upon an appeal from a District to a Circuit Court are not discharged by the fact that an appeal is taken from the Circuit to the Supreme Court and a new bond taken therein: *Babbitt v. Shields*, S. C. U. S., Oct. Term 1879.

Such sureties are not liable for the costs of the appeal to the Supreme Court: *Id.*

It is not necessary in order to charge the sureties on an appeal bond that an execution upon the judgment in the appellate court should be issued against the principal: *Id.*

EVIDENCE.

Oral Contemporaneous Agreement to vary Writing.—An oral agreement, made at the time of the execution of a promissory note, that the same might be paid by a transfer of a certain patent right for the state of Iowa, cannot be pleaded to vary the terms of the note: *Bristow v. Catlett*, 92 Ill.

In Divorce.—The evidence of a husband in a divorce suit is not competent to prove his wife's adultery, nor to prove her handwriting on an intercepted letter to her alleged paramour; nor are statements of such paramour, made in defendant's absence, competent: *Doughty v. Doughty*, 32 N. J. Eq.

Inspection of Document in hands of Adverse Party.—The respondent to a bill in equity asked the court to appoint some disinterested person, and to put into his custody a paper held by the complainant, purporting to be a receipt, with permission to the respondent to inspect, test, and photograph the paper in the absence of the complainant. The affidavit supporting this request stated that it was essential to the respondent's defence for him to inspect and test the paper apart from the complainant or any one representing him. The respondent's answer to the bill of complaint simply denied having given the receipt. *Held*: that the request must be refused: *Ely v. Mowry*, 12 R. I.

EXECUTION

Attachment of Funds in Court—Assignment of Claim to Attorney.—By a decree of the Court of Chancery, Carrie E. Black recovered \$1000 against her husband, Clayton Black. Her solicitor claimed the promissory note for \$1000, on which the decree was based, by assignment from her, for professional services, and also claimed the decree by another assignment. By an attachment levied on "cash in hands of Clayton Black," one of her creditors also claimed the money on the same decree. *Held*:

1. That money due on a decree of this court, is not the subject of attachment.

2. That the levy was not effectual.

3. That the solicitor's claim could not be passed upon without notice to his client and proof by him to sustain his claim: *Black v. Black*, 32 N. J. Eq.

FORMER RECOVERY.

Continuing Injury.—A recovery of damages for the deterioration in value of the plaintiff's premises by the erection and maintenance of gas works in the vicinity, polluting the water of the plaintiff, is a bar to any further prosecution for the same cause, and it is error to refuse proof of such former recovery in a second action for the continuance of the injury: *Decatur Gas Light Co. v. Howell*, 92 Ill.

FRAUDS, STATUTE OF.

Verbal Contract relating to Lands.—A verbal executory agreement to deed land is void under the Statute of Frauds, and a promise made in consideration of it is void for want of consideration: *Liddle v. Needham*, 39 Mich.

L. and N. agreed verbally that if N. would deed land to L.'s son, L. would give him his note for a certain sum. N. deeded the land but L. refused to pay. *Held*, that N. could not recover from him, as a verbal land contract is void and furnishes no consideration for a promise, and if any undertaking to pay for the land was implied, the grantee was liable upon it: *Id.*

Promise to pay Debt of another—Substituted Liability.—A verbal promise to pay for material furnished to another person on a contract made with him and not with the promisor, cannot be enforced so long as the original contract remains uncanceled: *Baker v. Ingersoll* 39 Mich.

HUSBAND AND WIFE. See *Conflict of Laws; Evidence; Infant*.

Marriage per verba de futuro—Cohabitation as Evidence—Ante-Nuptial Contract.—Betrothal followed by copulation does not make the common-law marriage, "*per verba de futuro cum copula*," when the parties looked forward to a formal ceremony and did not agree to become husband and wife without it: *Peck v. Peck*, 12 R. I.

Cohabitation following a marriage promise is *prima facie* evidence, but not conclusive, of consent between the parties to become husband and wife *de presenti*: *Id.*

Query, whether there being no prohibitory language in the statute, a so-called common law marriage is valid in Rhode Island.

By an ante-nuptial agreement, each of the parties released all claim arising from the marriage to the property of the other. The intended husband had considerable personalty, but little realty; the intended wife had little personalty, but expected to inherit some realty. *Held*: that as the marriage would give to the wife no interest in the husband's personalty of which he could not deprive her, and might give to him a curtesy in her realty, the agreement was not without consideration nor was it grossly inequitable: *Peck v. Peck*, 12 R. I.

INFANT.

Custody of when Parents Divorced—In case of a separation between husband and wife, the court, in awarding the custody of an infant child to its father or its mother, will consult the welfare of the child rather than the rights of either parent: *McKim v. McKim*, 12 R. I.

Hence, when it appeared that the character and circumstances of either parent would secure the child's education and the satisfaction of its physical wants, but the child was a delicate female infant of four years: *Held*, That the child should, for the time being at least, be placed in the custody of its mother: *Id.*

INJUNCTION. See *Street*.

Against Excavations on Party's own Land.—A court of equity will not enjoin a land-owner from making excavations on his land, when no serious injury to the adjoining realty is imminent, and when there is nothing peculiar in the situation and circumstances of such realty: *McMaugh v. Burke*, 12 R. I.

INSURANCE.

Forfeiture for Additional Insurance—Waiver.—Where a policy contained a clause of forfeiture for additional insurance, evidence that such insurance was obtained because the insured understood that the original policy was invalid, was held irrelevant in an action on the policy. Breach of a contract is not excused by good faith: *Pennsylvania Fire Ins. Co. v. Kittle*, 39 Mich.

Forfeiture of a policy for additional insurance is waived, where the adjusting agent, with knowledge of such insurance, puts the insured to the expense of making up proofs of loss and requires him from time to time to correct them, without giving him to understand that the company will rely upon the forfeiture: *Id.*

When an insurance policy requires that in making proof of loss the written portion of any policy for additional insurance shall be set forth, the court cannot presume that the statement actually made does not substantially comply with the requirement, if the later policy is not in proof: *Id.*

JUDICIAL SALE.

Setting aside for Inadequacy of Price coupled with Mistake.—A public sale was set aside, where, owing to a misunderstanding between the counsel of a mortgagor and the counsel of a bidder who would have offered \$1800 therefor, lands worth \$2500, were sold for about \$1400: *Banta v. Brown*, 32 N. J. Eq.

JURY. See *Statute*.

LIMITATIONS, STATUTE OF.

Fraudulent Concealment.—The "fraudulent concealment" which will take a claim out of the Statute of Limitations must be that of the person sought to be charged and not that of his clerk without the employer's fault: *Stevenson v. Robinson*, 39 Mich.

Commencement of the Running.—A. purchased certain realty of B., guardian of C.; B. conveyed without following the statutory require-

ments of the state, and C. subsequently brought ejectment against the grantees of A.; whereupon A., who had given warranty deeds, sued B. to recover the purchase-money paid to him. B. pleaded the Statute of Limitations. *Held*, that the deed given by B., as guardian was a nullity, and that A. had a valid claim upon B. for the return of the purchase-money immediately upon its payment. *Held, further*, that the Statute of Limitations began to run against A.'s claim at and from the time of such payment: *Furlong v. Stone*, 12 R. I.

MANDAMUS.

Judicial Discretion—Motion for offset of Judgment.—Mandamus does not lie to review the discretion of a circuit judge in refusing a motion to allow one judgment to be set off against another: *People ex rel. Wells v. Circuit Judge*, 39 Mich.

MARRIAGE. See *Husband and Wife*.

MORTGAGE. See *Trover; Vendor and Purchaser*.

Of Chattels—Recording—Place of Residence of Firm.—Under a law requiring chattel mortgages to be filed in the town where the mortgagor resides; a chattel mortgage made by a firm, must be filed in the towns where the individual partners reside. It is not sufficient to file such mortgage in the town where the business of the firm is carried on: *Stewart v. Platt* S. C. U. S., Oct. Term 1879.

MUNICIPAL BONDS.

Lis pendens—Bona fide Purchaser not affected by.—A *bona fide* purchaser of coupon bonds before maturity is not affected with constructive notice of a suit respecting such bonds, to which he is not a party: *County of Cass v. Gillet*, S. C. U. S., Oct. Term 1879.

MUNICIPAL CORPORATIONS.

Subscription to Railroad—Manual Subscription unnecessary.—Where a county is authorized to subscribe to the stock of a railroad, and pay for it in bonds, an actual manual subscription on the company's books is not necessary. It is sufficient if an agreement to subscribe is made with a duly authorized committee of the railroad and bonds issued therefor: *County of Cass v. Gillet*, S. C. U. S., Oct. Term 1879.

Railroad in Streets.—It is well settled in Illinois, that a city may authorize the laying of railroad tracks in its streets, and where a city, under a resolution adopted, conveys a street absolutely to a railroad company, the resolution and deed will give the company the right to construct, maintain and operate its tracks upon the street, even if invalid to pass the entire dominion in the street, and when such right is exercised, the city cannot resume the grant to the exclusion of the company: *City of Quincy v. C. B. & Q. Railroad Co.*, 92 Ills.

NEGLIGENCE. See *Trust*.

When for the Jury to determine.—When a plaintiff sues for injuries caused by the negligence of another, and his own case shows contributory negligence, he may be nonsuited, otherwise his case should be submitted to a jury: *Cassidy v. Angell*, 12 R. I.

A. was found fatally injured in an excavation in a highway. All that

was known of the matter was that he had been seen walking along the highway in his usual manner. A.'s administrator sued the town, alleging that the negligence of its authorities resulted in A.'s death. *Held*, that the case should be submitted to a jury, and that the jury should consider A.'s habits as to temperance and caution, and his acquaintance with the locality, in deciding whether he had exercised reasonable care: *Id.*

Liability for injury by a Stray Horse.—A.'s horse escaped from an enclosure where it was rightfully kept by A. and strayed on to a highway where it injured B. In action by B. against A. to recover damages for injury received. *Held*: that B.'s cause of action rested upon negligence on the part of A. *Held, further*, that if the horse escaped without negligence on the part of A., and if A. exercised due diligence in pursuing and recapturing it, B. could not recover: *Fallon v. O'Brien*, 12 R. I.

PARTNERSHIP. See *Mortgage*.

Suit by Surviving Partners in their own Names.—Surviving partners can recover in their own names for goods belonging to the firm but sold by them, without joining the representatives of the deceased partner, or obtaining an assignment or organizing a new firm: *Bassett v. Miller*, 39 Mich.

The entire legal estate in the assets of a firm vests in the surviving partners: *Id.*

RECEIVER. See *Corporation*.

REPLEVIN. See *Trover*.

RIPARIAN OWNER.

Plat of Land below High-water mark—Estoppel.—A riparian owner platted his land into streets, lots, and a square, and made on the plat a declaration, sealed and acknowledged, that the square, streets and gangways were equally appurtenant to each of the lots, and that the grantees of the lots were equally entitled to use and occupy the square, streets, and gangways. When platted one of the streets was below high-water mark. It was subsequently filled out and made, and afterwards closed by B., who had purchased all the lots adjoining this street. A., owning by purchase other lots on the plat, filed a bill in equity against B. to compel him to reopen the street. B. objected to the bill: 1. That the platted lay-out of the street being over tide-water was invalid. 2. That owning all the adjoining lots he was entitled to close the street. *Held*, that neither of these defences could avail: *Providence Steam-Engine Co. v. Providence and Stonington Steamship Co.*, 12 R. I.

Held, further, that B., holding under conveyances made with reference to the plat, was estopped from denying the validity of the lay out: *Id.*

Held, further, that the street being appurtenant to the lots of the complainant, as well as to those of the respondent, and leading to tide-water, the respondent could not deny the complainant's interest in the street: *Id.*

SALE. See *Warranty*.

SET-OFF. See *Mandamus*.

STATUTE.

Repeal by implication—Construction.—A general statute or ordinance without negative words, will not repeal the particular provisions of a former statute or ordinance, unless the two are clearly inconsistent: *City of Providence v. Union Railroad Co.*, 12 R. I.

Six ordinances of the city of Providence allowed six horse railway companies to use the streets of the city, two of the ordinances requiring payments therefor from two of the companies. The six companies afterwards consolidated. Three ordinances allowed three steam railroad companies to use the streets of the city, one of the ordinances requiring payments therefor from one of the companies. Subsequently the ordinances of the city were revised, and in the revision the chapter on railroads contained general rules and regulations, continued the permission to use the streets, and prescribed certain conditions, mostly taken from the original ordinances, but said nothing about any payments. The revising ordinance contained a list of ordinances repealed, among which those requiring payments were not placed. *Held*: that the special ordinances requiring payments were not repealed by the revising ordinance: *Id.*

The charter of a horse railroad company subjected the construction and use of its track to the "assent of the city council, upon such terms and conditions * * * as said city council may impose." *Held*: that this provision was sufficient authority for the imposition by the city of a money payment for the use of the streets: *Id.*

Construction—Meaning of "liable."—Where a statute provides that, "all persons qualified to vote, &c., shall be liable to serve as jurors, etc.," the word "liable" is tantamount to "qualified," and the section defines the qualification of jurors, as well as the liability to serve: *State v. Davis*, 12 R. I.

Objections to the qualifications of a grand juror may be taken by a plea in abatement of the indictment: *Id.*

SPECIFIC PERFORMANCE. See *Vendor and Purchaser*.

STREET.

Obstruction of—Injunction.—Injunction lies at the suit of a private person to restrain such an appropriation of the site of a street by another person, as leaves no mode of access to complainant's premises, and otherwise prejudices them: *Pratt v. Lewis*, 39 Mich.

A street that has been established and recognised for more than ten years cannot be shifted unless according to charter and statutory conditions: *Id.*

SUBROGATION. See *Vendor and Purchaser*.

TENANT IN COMMON. See *Trover*.

TROVER.

Trover by Tenant in Common or Mortgagee.—A tenant in common of chattels can bring trover against a co-tenant who has refused, on demand, to admit him to his rights and has distinctly claimed sole ownership: *Grove v. Wise*, 39 Mich.

A mortgagee can bring trover for the conversion of chattels to the possession of which he is entitled under his mortgage: *Id.*

For value of Replevied Property.—Trover lies at the suit of defendants in replevin for the value of property not found on execution issued in their favor for its return. The remedy on the bond is not exclusive.—*Smith v. Demarrais*, 39 Mich.

TRUST AND TRUSTEE.

Equity—Setting aside Gift to Person in Fiduciary Relation.—One asking relief in equity on the ground of fraud must affirmatively prove the fraud alleged: *Earle v. Chace*, 12 R. I.

The rule which forbids the transfer of property to a donee who holds a fiduciary relation with the donor is relaxed where the relation is not strictly fiduciary: *Id.*

Hence, where a step-mother conveyed certain realty to her step-sons, it not appearing that they managed her property or that she relied on their advice in business matters; *Held*, that the utmost burden on the donees was to show that the donor when she conveyed the estate understood her act: *Id.*

Query, whether, if she attacked the validity of the conveyance, the burden was not upon her to show affirmatively that she misunderstood the nature of her act when she conveyed: *Id.*

A gift from a wife to a husband will not be set aside except on proof that it was unfairly obtained, and the burden of proof lies on the party attacking the gift, and no more severe rule can be applied in the case of a gift from a step-mother to her step-children: *Id.*

Liability of Trustee for loss of Trust Property.—A testator directed his executors within two years after his death to invest the sum of \$5000 "in such stocks or other productive property as they may deem advisable, in their names as executors," for the benefit of his grandson, the trust fund to be paid over to the grandson when twenty-five years of age. The executors, within the time limited, opened an account in their books in which they charged themselves as trustees, and credited the grandson with \$5000. They invested this sum in three United States 7-30 coupon bonds, and two coupon bonds of the State of Rhode Island. These bonds they put into an envelope, labelled "Investment of five thousand dollars for" the grandson, with the date of purchase, put this envelope into a tin box, and put the tin box into the vault of a bank in Providence. *Held*: that by these acts of the executors the trust for the grandson was properly and legally constituted: *Carpenter v. Carpenter*, 12 R. I.

The bank vault was robbed and the bonds lost. Subsequently the executors, by giving indemnity, obtained through an agent, whom they had a reason to believe honest, the issue of new United States bonds in place of those stolen. The agent appropriated the bonds, and but a portion of their value could be recovered. *Held*: that the executors or trustees were not liable for the loss caused, either by the robbery of the vault or by the theft of the agent: *Id.*

In managing trust property, a trustee must use as much care as prudent men ordinary adopt in their own business—more cannot be required of him: *Id.*

UNITED STATES COURTS.

Certificate of division of Opinion—Contradiction of by the Record.—A circuit and a district judge certified that they disagreed as to the correctness of an instruction to the jury upon a trial of a cause. The record showed an opinion of the district judge maintaining its correctness. *Held*, that as the law provides that in such cases the judgment shall be entered in accordance with the opinion of the presiding judge, the circuit judge must also have been of opinion that the instruction was right, otherwise a new trial would have been granted, and as it thus appeared that both judges agreed, the Supreme Court would not consider the question even, though the disagreement was certified in form: *Colorado Cent. Railroad v. White, Adm'r*, S. C. U. S., October Term, 1879.

VENDOR AND PURCHASER.

Specific Performance.—Specific performance of a land contract cannot be enforced by the seller unless he puts or offers to put the purchaser in possession: *McHugh v. Wells*, 39 Mich.

Mortgage—Subrogation—Rescission of Contract.—Where a mortgage debt forms a part of the consideration of the purchase, although the purchaser has not entered into any contract or agreement by deed or other writing to pay it, the grantor becomes as between the parties the surety of the grantee, and if he pay the mortgage debt he has the right to be subrogated to all the rights of the mortgagee: *Wood v. Smith et al.*, 51 Iowa.

The fact that the parties agreed to rescind the contract of purchase, which agreement was never carried out, but was repudiated by the purchaser, would not affect the right of the grantor to be reimbursed for the amount he has paid in discharge of the mortgage debt: *Id.*

The grantee having conveyed the land to a third party, who has assumed to discharge the mortgage, such third party is bound to reimburse the former owner for the amount he may have paid upon the mortgage: *Id.*

WARRANTY.

Damages—Action for Breach.—Where machinery is purchased with a warranty that it is in perfect order, and the vendee receives it and puts it in operation with full knowledge that it is defective, he is not entitled to recover damages for the breach of the warranty: *Nye v. Iowa City Alcohol Works*, 51 Iowa.

The measure of damages for the breach of such a contract of warranty would be the difference between the value of the use of the machinery as it would have been if it had been as represented, and the value of its use as it really was: *Id.*

WITNESS.

Party—Transactions with Deceased Persons.—In an action by the wife upon a promissory note, whose execution to her, as payee, was procured by the husband, since deceased, the testimony of the defendant as to what occurred between him and the deceased at the time the note was executed is incompetent: *Willcox v. Jackson*, 51 Iowa