RECENT CASES.

ACCORD AND SATISFACTION—WHAT CONSTITUTES.—HARBY V. HEUES, 90 N. Y. SUPP. 461.—*Held*, that the acceptance by the creditor of a check from the debtor, written as "in full payment," with immediate notice to the debtor that action would be brought for the balance claimed, is not an accord and satisfaction.

The general rule is that there can be no accord and satisfaction of a debt by a simple payment of a smaller sum than the amount actually due or owing, unless there be a release under seal, *Cumper v. Wane*, 1 Strange 426; or a new consideration. *U. S. v. Bostwick*, 94 U. S. 53. The rule and reason are purely technical, and there is constant effort to escape from its absurdity and injustice. *Harper v. Graham*, 20 Ohio 105; *Brooks v. White*, 2 Met. 285; and it does not hold in Pennsylvania; *Milliken v. Brown*, 1 Rawle 391. A receipt "in full satisfaction and discharge" is not conclusive evidence of accord and satisfaction, *McCullen v. Hood*, 14 N. C. 219; unless the debt be unliquidated and the amount uncertain, *Baird v. United States*, 96 U. S. 430; and payment was in fact made and accepted in satisfaction. *Fitch v. Sutton*, 5 East 230. If there be a controversy between the parties as to the amount due, and the debtor tender the amount which he claims to be due, but upon condition that it shall be accepted in discharge, and it be accepted, then there is accord and satisfaction by conclusion of law, on the principle that one accepting a conditional tender assents to the condition. *Preston v. Grant*, 34 Vt. 201; *Bull v. Bull*, 43 Conn. 455; *Reed v. Boardman*, 20 Pick. 441.

CARRIERS OF PASSENGERS—SEAWORTHINESS OF VESSEL—LIABILITY FOR INJURIES.—THE OREGON, 133 FED. 609.—*Held*, that there is no implied warranty, on the part of a carrier of passengers by sea, of the seaworthiness of the vessel. Ross, J., *dissenting*.

Carriers of passengers by sea are held to the same high degree of care as those who carry by land. *Hall v. Steamboat Co.*, 13 Conn. 319; *Shear. & Red., Neg.*, 495. A carrier by land need not furnish a "roadworthy" vehicle. *Stokes v. Ry. Co.*, 2 Fost. & F. 691; *Meier v. R. Co.*, 64 Pa. St. 225. Nor need the carrier by sea furnish a seaworthy ship. *Carroll v. R. Co.*, 58 N.Y. 126; *Whart., Neg.*, Sec. 638. But an accident through a defect is *prima facie* evidence of negligence. *Dawson v. R. Co.*, 5 Law Times, N. S., 682. U. S. statutes make certain requirements of the owners of passenger vessels. 10 *Stat. at L.* 61; 16 *Stat. at L.* 440. But these do not abrogate the common law rules as to liability. *Caldwell v. Steamboat Co.*, 47 N. Y. 282.

CONSTITUTIONAL LAW—INSURANCE CORPORATIONS—REVOCATION OF AUTHORITY.—PREWITT V. SECURITY M. L. INS. CO., 83 S. W. 611; 84 S. W. 527 (KY.).—Where a state statute provides that if any foreign insurance company, without consent of the other party to a suit brought by or against it in any state court, shall remove the suit to the federal court, the insurance commissioner

shall forthwith revoke its authority to do business in the state, *held*, that such statute is not in conflict with the U. S. Constitution, it being a reasonable regulation for the protection of the citizens of the state. Burnam, C. J., and Barker, J., *dissenting*.

A state can exclude a foreign corporation entirely from its limits. *Bank of Augusta v. Earle*, 13 Pet. 519. *A fortiori*, it would seem that such absolute power would necessarily include the power to impose any conditions as terms of entrance, no matter how absurd, or oppressive. But such terms, conditions, or restrictions, must not be repugnant to the Constitution or the laws of the United States, *Runyan v. Costar*, 14 Pet. 122; *Del. R.R. Tax Case*, 18 Wall. 206; *Cable v. Ins. Co.* 191 U. S. 288; and a state statute imposing on a foreign corporation, as a condition on which it may do business within the state, that it file an agreement not to remove suits from state courts to courts of the United States, as well as such agreement, is void. *Nute v. Ins. Co.*, 6 Gray 174; *So. Pac. Co. v. Denton*, 146 U. S. 202; *Tex. Land Co. v. Worsham*, 76 Tex. 556. Such right of removal may of course be waived, but it may not be bartered away in advance. But when once within a state, the foreign corporation is there on sufferance only; hence, though the statute forbidding removal of causes, and a like agreement in advance, may be void, if the corporation will not abide by them, the state may recall its license and expel the corporation; and its reason for so doing will not be inquired into. *Beale, For. Corp.*, § 122; *Doyle v. Ins. Co.*, 94 U. S. 535; *Cable v. Ins. Co., supra.*

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—ORIGINAL PACKAGE.—COOK V. MARSHALL COUNTY, 25 SUP. CT. 233.—*Held*, that cigarettes shipped in small packages, ten in a package, although shipped separately and not confined in any large receptacle, are not to be considered as in the original package so as to be exempt from a state tax. Fuller, C. J., Brewer, and Peckham, JJ., *dissenting*.

Up to the decision of *Austin v. Tennessee*, 79 U. S. 343, it was supposed that any package in which an article was shipped into a state was the original package. *Brown v. Maryland*, 12 Wheat. 419. In *Leisy v. Hardin*, 135 U. S. 100, kegs and cases of beer were original packages, and likewise ten pound packages of oleomargarine in *Schollenberger v. Pennsylvania*, 171 U. S. 1. In *Austin v. Tennessee, supra*, however, the test was held to be the *bona fide* intention of the shipper, as to whether the packages were gotten up merely for the purpose of evading the law. They are original packages only when they are such as are ordinarily used for the purpose of shipping that article. In that case, as in the present one, there was a strong dissenting opinion based on the ground that the original packages are what the shipper makes them for his own purposes even though they may be different from those in ordinary use. It is conceived that under the present decision the law must change with the change in the ordinary method of transportation.

CONTRACTS—EXECUTORY—REFUSAL TO PERFORM.—SWIGER V. HAYMAN, 48 S. E. 839 (W. VA.).—*Held*, that a mere declaration, by one of the parties to an executory contract, of an intention not to perform, which is retracted before any declaration has been made or act done by the other party in respect to such renunciation, does not constitute a breach of the contract.

Words or conduct relied on as a breach of the contract by anticipation must amount to a total refusal to perform, acted upon and adopted by the

other party. *Kadish v. Young*, 108 Ill. 170; *Johnston v. Milling*, 16 Q. B D. 460. The act must be of such a nature as necessarily to prevent the other party from performing, on his part, according to the terms of the agreement. *Dubois v. Canal Co.*, 4 Wend. 284. But a refusal to make a certain payment under a contract because of a dispute as to whether it is due will not authorize the other party to rescind. *Winchester v. Newton*, 2 Allen 492. The refusal to perform must be acted upon promptly or within a reasonable time. *Holbrook v. Burt*, 22 Pick. 546; *Kingsley v. Wallis*, 14 Me. 57. When one party gives notice of intention to abandon the contract the other party may bring an action before the day set for the completion of the contract arrives. *Follansbee v. Adams*, 86 Ill. 13.

CONTRACTS—FRAUDULENT BREACH—EXEMPLARY DAMAGES.—WILBORN V. DIXON, 49 S. E. 232 (S. C.).—*Held*, that where land is conveyed to secure a debt, with an agreement for reconveyance, and on payment the grantor fraudulently refuses to reconvey, he may be made to respond in exemplary as well as compensatory damages. Woods, J., *dissenting*.

There seems to be no authority in support of this case. Exemplary damages may be allowed for a breach of a promise to marry if defendant has been guilty of fraud, deceit, or evil motive, *Jacoby v. Stark*, 205 Ill. 34; also in an action on bond of plaintiff in garnishment, where it appears that the process of garnishment was vexatious, *Hays v. Anderson*, 57 Ala. 374. In no other cases are such damages recoverable for mere breach of contract, *Houston & T. C. Ry. Co. v. Shirley*, 54 Tex. 125; not even if it be a refusal to pay money due and a conversion thereof with intent to oppress, *Lexington Ry, Co. v. Fair*, 25 Ky. L. R. 2243; nor where the motive for the breach is fraudulent, *Sutherland Dam.*, (2nd ed.), Sec. 99; it would greatly increase the intricacy and uncertainty of such actions. *Houston & T. C. Ry. Co. v. Shirley, supra.* In case of breach through negligence or fraud, no more can be recovered as damages than will fully indemify the plaintiff for losses. *Ryder v. Thayer*, 3 La. Ann. 149.

CORPORATION—COMPENSATION OF PRESIDENT—IMPLIED CONTRACT.—LOWE V. RING, 101 N. W, 698. (WIS.).—*Held*, that the president of a corporation cannot sue on an implied contract to enforce a claim for services rendered as such officer and with the expectation of pay, where he is a stockholder or director.

It has been held that the president of a corporation may recover compensation for services rendered with expectation of pay, although there is no express contract to that effect. *Rosborough v. Shasta R. C. Co.*, 22 Cal. 557; that he may recover what his services are reasonably worth, *Nat. Loan Co. v. Rockland Co.*. 94 Fed. 335, and that nothwithstanding the fact that he is a stockholder or director. *Stacy v. Cherokee M. & M. Works*, 49 S. E. 223. On the other hand, and, it seems, by the weight of authority, in the absence of an express contract, or an express provision for compensation in the charter, statute, or by-laws, the services are presumed to have been rendered gratuitously. *Barril v. Col. Insul. & Water Proof Co.*, 50 Hun 257; and the president cannot recover on an implied contract when the services rendered were in performance of his official duties. *Beach, Priv. Corp.*, Sec. 208. The rule is analogous to that governing trustees generally, who, formerly at common law, were not entitled to compensation except as there

was warrant therefor in the contract or statute under which they acted. *Ellis v. Ward*, 137 Ill. 509. But the tendency now is to give trustees or other fiduciaries a reasonable compensation for services, without an express contract. *Bispham, Equity, Sec. 144.*

CRIMINAL LAW—CONCURRENT JURISDICTION—FRAUDULENT ASSUMPTION OF JURISDICTION.—HARGIS ET AL. V. PARKER, JUDGE, ET. AL., 85 S. W. 704 (KY.).—A mortal wound was inflicted on decedent in one country and he died in another. This, under a state statute, gave the courts of either county jurisdiction to prosecute the offence. The persons accused of the crime fraudulently instigated the commencement of criminal proceedings against themselves in the former county. A magistrate of that county issued a warrant for their arrest, and bound them over to the circuit court of that county. These steps were taken with a view not to have a trial there, and to prevent a trial elsewhere. *Held*, that the circuit court of the county in which decedent died, on subsequently indicting such persons for the offence, had exclusive jurisdiction thereof, the proceedings before the magistrate in the county in which the mortal wound was inflicted being a nullity.

The rule that, in cases of concurrent jurisdiction, the court that first gets control of the subject matter will continue to exercise exclusive jurisdiction until judgment, is applicable to criminal cases. *United States v. Wells*, Fed. Cas. No. 16, 665. The court first obtaining jurisdiction will retain it, to the exclusion of the other court or county. *Ex parte Baldwin*, 69 Iowa 502; *State v. Williford*, 91 N. C. 529; *State v. Pauley*, 12 Wis. 537. But fraud vitiates every proceeding, where proof of fraud is admissible. *Greene v. Greene*, 2 Gray 361. Judgment, procured through fraud, in a civil action, can always be set aside. *Ocean Ins. Co. v. Fields*, 2 Story 59; *Freeman, Judgments*, Sec. 489—491; *Edson v. Edson*, 108 Mass. 590.

CRIMINAL LAW—SUCCESSIVE OFFENSES—DOUBLE PUNISHMENT.—PEOPLE V. COLEMAN, 79 PAC. 283 (CAL.).—*Held*, that an increase in the penalty on subsequent convictions of the same person for crime does not subject the accused to double jeopardy for his first offense.

The danger that prejudice of the jury may make such statutes a means of double punishment is illustrated by the remark of the court, *arguendo*, in *Comm. v. Hughes*, 133 Mass. 496, that the fact of prior convictions was "evidence" to be considered by the jury as bearing on the question whether the accused was guilty of the subsequent offense charged. So where the prior conviction is faultily alleged in the indictment, evidence to support such faulty allegation is not merely irrelevant to the other issues, but positively harmful as tending to prejudice the jury against the defendant. *Rand v. Comm.*, 9 Gratt. 738. Yet the courts agree that where a statute fixes an increased punishment for successive offenses, the prior convictions must be alleged in the indictment, and it is not necessary that such allegations and the proof thereof be kept from the jury till the accused has been found guilty of the later offense. *Maguire v. Md.*, 47 Md. 485.

DAMAGES—MEASURE—TROVER.—MELOON V. READ, 59 ATL. 946 (N. H.).—*Held*, that in trover the measure of damages is, in general, the value of the goods at the time of conversion.

In an action for non-delivery of goods in pursuance of a contract of sale the vendee may be allowed, as damages, the highest value up to the time of

trial. *Kent v. Ginter*, 23 Ind. 1; *West v. Pritchard*, 19 Conn. 212. In stock transactions many states allow, as damages, the highest market value between the time of the injury and the trial. *Loeb v. Flash*, 65 Ala. 526; *Ellis v. Wire*, 33 Ind. 127. In some states the highest value between the date of the injury and the date of the bringing of the action is allowed. *Cannon v. Folsom*, 2 Ia. 101. If there is undue delay in bringing the action the value at the time of injury is the measure of damages. *Chadwick v. Butler*, 28 Mich. 349; *Heilbrover v. Douglass*, 45 Tex. 402. Many states follow the New York rule which fixes as the proper measure of damages, the highest market value from the time of conversion up to a reasonable time to replace such stock. *Baker v. Drake*, 53 N. Y. 211; overruling *Markham v. Jaudon*, 41 N. Y. 235; *Wright v. Bank of the Metropolis*, 110 N. Y. 237.

EVIDENCE—STATEMENTS TO ATTORNEY—PRIVILEGE.—KAUFMAN V. ROSENSHINE ET AL., 90 N. Y. SUPP. 205.—*Held*, that the testimony of an attorney as to communications made to him by his client is not admissible, whether they relate to a suit pending, or to any other matter requiring the professional assistance of the attorney or counsel. Van Brunt, J., *dissenting*.

This privilege is irrespective of litigation begun or contemplated. *Greenough v. Gaskell.*, 1 Myl. & K. 98; *Foster v. Hall*, 12 Pick. 89. Where no legal problem has been expressly brought forward by the client, his communications concerning the mere drafting of deeds and other instruments do not come within the privilege. *Hotton v. Robinson*, 14 Pick 416; *De Walf v. Strader*, 26 Ill. 225. The legal adviser must be admitted to practice. *Barnes v. Harris*, 7 Cush. 576; *Schubkagel v. Dierstein*, 131 Pa. 46. But the rule applies to attorney's clerks and other agents in his service. *Laudsberger v. Gorham*, 5 Cal. 450; *Sibley v. Waffle*, 16 N. Y. 180. The client's *bona fide* belief that his adviser is an admitted attorney entitles him to the privilege. *Howes v. State*, 88 Ala. 38; *People v. Barker*, 60 Mich. 277. It is immaterial whether services are gratuitous or not. *Andrews v. Simms*, 33 Ark. 771; *Davis v. Morgan*, 19 Mont. 141. A legal adviser may give evidence of a fact which is patent to his senses, but not the subject of a voluntary communication. *Coveney v. Tannahill*, 1 Hill 33; *Brown v. Foster*, 1 H. & N. 736. *Contra*, *Robson v. Kemp*, 5 Esp. 52. The moment confidence ceases, privilege ceases. *Parkhurst v. Lawter*, 2 Swanst. 194; *Hager v. Shindler*, 29 Cal. 47. Confidence is not presumed from mere relation of attorney and client. *People v. Atkinson*, 40 Cal. 284. Representative of deceased may waive the privilege in the interest of the estate. *Layman's Will*, 40 Minn. 372; *Brooks v. Holden*, 175 Mass. 137. *Contra*, *Westover v. Ins. Co.*, 9 N. Y. 56.

EVIDENCE—TELEGRAMS.—CGBB V. GLENN BOOM & LUMBER CO., 49 S. E. 1005 (W. VA.).—*Held*, that a telegram as received can be admitted only as secondary evidence where the telegraph company is the agent of the sender.

If the telegraph company is the agent of the sender, the message delivered is primary evidence as against the sender. *Morgan v. People*, 59 Ill. 58; *Trevor v. Woods*, 36 N. Y. 307. But if the receiver is the employer, the original message given by the sender to the operator must be produced. *Durkee v. R. R.*, 29 Vt. 127. In an action for failure to deliver with diligence the delivered message is the original. *Conyers v. P. T. C. Co.*, 92 Ga. 619; *West. Union Tel. Co. v. Fatman*, 73 Ala. 285. In an action for failure to transmit message the dispatch handed to the operator is the original. *West. Union*

Tel. Co. v. Hopkins, 49 Ind. 223. To prove a hiring by telegraph the dispatch received is the original. *Wilson v. R. Co.*, 31 Minn. 481; *Williams v. Brickell*, 37 Miss. 682. The rule that a letter following a previous one calling for a reply should sufficiently authenticate itself by its contents does not hold in regard to telegrams. *Howley v. Whipple*, 48 N. H. 487.

FORGERY—WHAT CONSTITUTES.—PEOPLE V. ABEEL, 91 N. Y. SUPP. 699.—*Held*, that a false letter of introduction is not a forgery at common law where it could not be considered as a means by which another could be defrauded or by which a pecuniary liability could be created.

A writing which affects no legal rights cannot be the subject of forgery. *Waterman v. People*, 67 Ill. 91. The general rule both at common law and under statute is that an instrument to be the subject of forgery must be such that if it were genuine it would have some apparent legal efficacy. *Abbott v. Rose*, 62 Me. 194; *Dixon v. State*, 81 Ala. 61. It must be valid for the purpose for which it purports to have been designed, *Anderson v. State*, 20 Tex. App. 595; and legally capable of affecting a fraud. *Terry v. Comm.*, 87 Va. 672. In *State v. Ames*, 2 Greenl. 365 and *Comm. v. Coe*, 115 Mass. 481, it is held that a letter of recommendation or testimonial of good character is subject to forgery. *Contra*, *Waterman v. People*, *supra*.

INSURANCE—CONSTRUCTION OF POLICY—TECHNICAL WORDS.—PETERSON V. MODERN BROTHERHOOD OF AMERICA, 101 N. W. 289 (IOWA.).—*Held*, that an insurance certificate entitling the insured to a certain benefit in case of the breaking of a leg, and defining such breaking as "the breaking of the shaft of the thigh bone between the hip and knee joints, or the breaking of the shafts of both bones between the knee and ankle joints" does not cover what is known as a "Pott's fracture," which is defined as the breaking of one bone between the knee and ankle joints, and the dislocation of the other or, as technically defined, the breaking of the fibula one and one-half to two inches above the joint and of the malleolus process. Weaver and Bishop, JJ., *dissenting*.

The general rule in constructing insurance contracts is that words are to be taken in that sense to which the apparent object and intention of the parties limit them. *Robertson v. French*, 4 East 135; *Ripley v. Ætna F. Ins. Co.*, 30 N. Y. 136; *Yeaton v. Fry*, 5 Cranch 335. When a stipulation or exception in a policy is capable of two meanings, the one most favorable to the insured is to be adopted. *May, Insurance*, § 172; *Western Ins. Co. v. Cropper*, 32 Pa. 351; *Phœnix Ins. Co. v. Slaughter*, 12 Wall. 404. Words are further to be construed, not in a technical, but in a general, usual way. *May, Insurance*, § 175; *Fire Ass'n. v. Transp. Co.*, 66 Md. 339; *Universal F. Ins. Co. v. Block*, 109 Pa. 535.

INSURANCE—SEVERABLE POLICY.—DONLEY V. GLENS FALLS INS. CO., 91 N. Y. SUPP. 302.—*Held*, that breach of warranty as to title of land on which the insured building is located does not avoid the policy as to personalty situated in the building. McLennan, P. J., and Storer, J., *dissenting*.

The general rule as to insurance of building and contents is that such policy is not severable, and that forfeiture of the insurance as to the building will forfeit it also as to the contents. *Assur. Co. v. Stoddard*, 88 Ala. 606; *Bank v. Ins. Co.*, 57 Conn. 335; *Havens v. Ins. Co.*, 111 Ind. 90. In New York, however, the later cases have fully established the rule in the principal case. *Sunderlin v. Ins. Co.*, 18 Hun 522; *Woodward v. Ins. Co.*, 32 Hun

365. The New York rule is followed in some other states. *Koontz v. Ins. Co.*, 42 Mo. 126; *Ins. Co. v. Shreck*, 27 Neb. 527. There is a conflict as to what contracts are severable. Early cases, and the N. Y. cases allow severability where the policy is on separate and distinct classes of property, each of which is separately valued, although the premium is paid in gross. Later cases do not seem to follow that rule, but regard the policy as severable where the property is so situated that the risk on each item is separate and distinct, that on one item not affecting the risk on the others. *Phenix Ins. Co. v. Pickel*, 119 Ind. 155; *Loomis v. Ins. Co.*, 77 Wis. 87.

MASTER AND SERVANT—VICE PRINCIPAL.—VOGEL V. AMERICAN BRIDGE CO., 73 N. E. 1 (N. Y.).—*Held*, that where a master put a supposedly competent foreman in charge, with a sufficient supply of strong ropes for the work, and a workman was injured by the breaking of an old rope which the foreman had ordered him to use over his own protest that it was not sufficently strong, the master was not liable. Cullen C. J., Bartlett and Vann, JJ., *dissenting*.

As to who is vice principal, there are two tests: the superior officer test which prevails in Ohio and most of the states west thereof, and the non-assignable duty test which is more prevalent in the east. *Huffcutt, Agency*, 338 to 314, and cases there cited. Yet the law as to the dividing line between fellow servant and vice principal is by no means clear, as is shown by the number of decisions on this point made by divided courts. *N. P. Ry. Co. v. Peterson*, 162 U. S. 346; *Murray v. S. C. Ry. Co.*, 1 McMull. 385. Especially is this true in N. Y. *Perry v. Rogers*, 157 N. Y. 251; *Malone v. Hathaway*, 64 N. Y. 5. As a general rule, those doing the work of a servant are fellow servants, whatever their grade of service; and a servant, of whatever rank, charged with the performance of the master's duty toward his servants, is, as to the discharge of that duty, a vice principal. *Jacques v. Great Falls Mfg. Co.*, 66 N.H. 482; *Moynihan v. Hills Co.*, 146 Mass. 586. As to the rule in the Federal Courts, see 14 *Yale Law Journal* 343.

NEGLIGENCE—ICE ON SIDEWALK—LIABILITY OF LANDLORD.—CITY OF NEW CASTLE V. KURTZ, 59 ATL. 989 (PA.).—*Held*, that owners of property in the possession of a tenant with properly constructed pavements in good repair, are not liable for an injury caused by a sudden accumulation of ice thereon. Metrezat and Potter, JJ., *dissenting*.

The landlord's liabilities in respect of possession are, in general, suspended as soon as the tenant takes possession, *Cheetham v. Hampson*, 4 T. R. 318; *Mayor v. Corlies*, 2 Sandf. 301; unless he has undertaken to keep the premises in repair and the injury is occasioned by his neglect so to do. *Leslie v. Pounds*, 4 Taunt. 649. Where premises are leased with a nuisance existing on them at the time, the landlord is liable. *Irvine v. Wood*, 51 N. Y. 224; *House v. Metcalf*, 27 Conn. 631. But the landlord is not liable for a new nuisance created by the tenant during his term, *Fish v. Dodge*, 4 Denio 311; *Rich v. Basterfield*, 4 C. B. 805; but if the landlord renews the lease, knowing of the existence of the nuisance, he becomes liable. *People v. Townsend*, 3 Hill 479; *Vedder v. Vedder*, 1 Denio 257.

PUBLIC OFFICERS—QUORUM OF A BOARD—NOTICE TO ABSENT MEMBER.—AKLEY V. PERRIN, 79 PAC. 192 (IDAHO.).—*Held*, that a meeting of a board of public officers can be lawfully held by a majority of the board without giving

notice to a member who is at the time of calling and holding the meeting beyond the borders of the state. Stockslager, C. J., *dissenting*.

The decision in the present case is based on a chain of inferences and analogies drawn from a state statute. The general rule is to the contrary. Although an authority given to several for public purposes may be executed by a majority of their number, *Cooley v. O'Connor*, 12 Wall. 391; yet the action of a majority cannot be upheld when the minority took no part in the transaction, was ignorant of what was done, and gave no implied consent to the action of the others. *Schenck v. Peay*, Woolw. (U. S.) 175. All must be present to hear and consult, though a majority may decide. *People v. Coghill*, 47 Cal. 361. But if all have due notice of the time and place of meeting, it is no objection to the validity of the action taken that not all the members attend if there is a quorum. *Wilson v. Watersville School Dist.*, 46 Conn. 400; *Gildersleeve v. Board of Education*, 17 Abb. Pr. (N. Y.) 201.

RAILROADS—FIRES—NEGLIGENCE.—NORFOLK & W. R. Co. v. FRITTS, 49 S. E. 971 (VA.).—*Held*, that where it is shown that a fire was set by a locomotive, the railroad company is presumptively guilty of negligence.

Escape of fire from a locomotive raises the presumption of negligence against the company. *R. R. Co., v. Quaintance*, 58 Ill. 389; *Tanner v. N. Y. R. Co.*, 108 N. Y. 623. *Contra, Gandy v. R. R. Co.*, 30 Ia. 420; *R. R. Co. v. Paramore*, 31 Ind. 143. To rebut this presumption it is necessary to show that the locomotive was provided with the best and most approved appliances which were properly and carefully managed. *R. R. Co. v. Funk*, 85 Ill. 460; *Missouri Pac. R. Co. v. Texas R. Co.*, 41 Fed. 917. The railway company is called upon to use only "reasonable care, skill and diligence." *Burroughs v. Housatonic R. Co.*, 15 Conn. 124; *Eddy v. Lafayette*, 49 Fed. 807. Failure to employ the best appliances in known use is want of ordinary care and prudence. *R R. Co. v. Peninsular Land Co.*, 27 Fla. 1; *Smith v. Old Colony R. Co.*, 10 R. I. 22. Frequent setting out of fires raises presumption of negligence. *R. R. v. Kincaid*, 29 Kan. 654. The highest and clearest evidence is not required to rebut the presumption of negligence raised by escape of fire. *Spaulding v. R. R. Co.*, 30 Wis. 110.

REAL PROPERTY—RAILROAD RIGHT OF WAY—ADVERSE POSSESSION.—NORTHERN PACIFIC R. Co. v. ELY, 25 SUP. CT. 302.—*Held*, that a private person cannot obtain title to a railroad right of way by adverse possession. Harlan, J., *dissenting*.

This decision follows the case of *North. Pac. R. Co. v. Townsend*, 190 U. S. 267, and must now be considered as the federal rule. A similar rule was laid down in *South. Pac. R. Co. v. Hyatt*, 132 Cal. 240, and *Collett v. Board of Comm'rs.*, 119 Ind. 27. With these two exceptions, however, it is practically universally held, both in this country and in England, that title may be acquired by adverse possession to railroad property devoted to public use. *Ill. Cent. R. Co. v. Wakefield*, 173 Ill. 564; *Mathews v. Lake Shore R. Co.*, 110 Mich. 170; *Babbett v. Southeastern R. Co.*, L. R. 9 Q. B. 424. The objection to this rule has been stated to be that corporations cannot alien property devoted to public use. But, since adverse possession gives title to land without a presumption of a grant, power to alien would seem not to be essential. *Pittsburg, etc., R. Co. v. Stickley*, 155 Ind. 312.

REMOVAL OF CAUSES—EMINENT DOMAIN.—MADISONVILLE TRACTION CO. v. ST. BERNARD MINING CO., 25 SUP. CT. 251.—*Held*, that an eminent domain proceeding under a state statute, to be begun in a state court, is a suit of which the Federal circuit court has original jurisdiction, where the requisite diversity of citizenship exists, and is therefore removable to that court, when begun in a state court. Fuller, C. J., Brewer, Peckham, and Holmes, JJ., *dissenting*.

Foster, 2 *Fed. Prac.*, 810, states the rule that the initial proceeding in eminent domain for appraisement by commissioners is administrative in its nature, and therefore not removable; but where an appeal has been taken to a court it becomes a suit, removable as such. *Boom Co. v. Paterson*, 98 U. S. 406; *U. P. R. Co. v. Myers*, 115 U. S. 19. A petition to railroad commissioners for consent to proceed to comdemn land is not a suit and is not removable. *N. Y., etc., R. Co. v. Cockcroft*, 46 Fed. 881. But where the proceeding was originally instituted in a court and conducted as a suit, the federal courts have held it removable. *Postal Tel. Co. v. Ry. Co.*, 88 Fed. 803; *Sugar Creek. Co. v. McRell*, 75 Fed. 34. *Mandamus* proceedings are not removable, except as they are merely ancillary. *Rosenbaum v. Baner*, 120 U. S. 450. *State of Ind. v. R. Co.*, 85 Fed. 1; see *contra*, *People v. R. Co.*, 42 Fed. 638. *Habeas corpus* suits are not removable, as not involving a money value. *Kurtz v. Moffit*, 115 U. S. 458. But *quo warranto* is removable. *Ames v. Kansas*, 111 U. S. 449.

TRIAL—INSTRUCTIONS TO JURY—PRESUMPTIONS.—JOHNSON v. STATE, 83 S. E. 651 (ARK.).—*Held*, that where the instructions are not set out in the bill of exceptions, it being only stated that no objection was made to them, the court on appeal will presume that they were correct.

Instructions are presumed to have been correctly given to the jury by the trial court on all questions arising in the case, if the record does not affirmatively show them to have been erroneous. *Linton v. Allen*, 154 Mass. 432: *Vasburgh v. Teator*, 32 N. Y. 561. And if the record contains no instructions, it will be presumed that instructions were given, covering every branch of the case. *Richardson v. Eureka*, 96 Cal. 443. When court's instructions relate to a matter not pleaded, and to which there is no evidence, it will be presumed that the jury made no findings on this point, and that the instructions were therefore without prejudice. *Eckelmid v. Talbot*, 80 Iowa 571. The entire charge is presumed correct when not excepted to in the trial court. *Khrow v. Brock*, 144 Mass. 516; *Kennedy v. Anderson*, 98 Ind. 151. The court will not presume that a palpably erroneous instruction appearing on the record was a mere mistake of the clerk who made the transcript. *Stott v. Smith*, 70 Ind. 298. If an instruction is capable of two interpretations and no objection is made to it in the trial court, it will be presumed to have been based upon the theory which would make it correct. *Siebert v. Leonard*, 21 Minn. 442; *Erd v. St. Paul*, 22 Minn. 443. The bill of exceptions should show all the instructions on a given subject when a part is alleged to be incorrect. *Oregon R. etc., v Galliher*, 2 Wash. Ter. 70.

TRIAL—RECEPTION OF VERDICT.—MORRIS v. HASBURGER, 91 N. Y. SUPP. 409.—*Held*, that a judgment entered on a verdict received by the clerk, even under the direction of the court, without objection of the parties being interposed to such reception of the verdict, is void. Van Brunt, P. J., *dissenting*.

The reception of the verdict is the function of the judge who presided at the trial of the cause, and this function may not be delegated, even to the clerk of the court. *Willet v. Porter*, 42 Ind. 250; *Wright v. Boon*, 2 Greene 458; *Hiller v. English*, 4 Strob. 486. The consent of the parties concerned cannot authorize or legalize a change in the modes of proceeding, which the law has prescribed for the government and direction of its legal tribunals. *Balto., etc., R. R. Co. v. Polly*, 14 Gratt. 447; *Britton v. Fox*, 39 Ind. 369. Some few courts have declared that the proceedings appertaining to the reception of the verdict are mere matters of practice, and are for the courts to regulate in the exercise of a reasonable discretion. But this is only in civil causes. *Sowelle v. Craig*, 9 Ala. 534; *Wright v. Hemphill*, 81 N. C. 33; *Willoughby v. Threadgill*, 72 N. C. 438.