RECENT CASES

APPEAL—DIVISION OF JUDGES—AFFIRMANCE.—CLARK V. WABASH RY. CO., 109 N. W. 309 (IOWA).—*Held,* that on appeal, if the State Supreme Court is equally divided, the ruling of the lower court is affirmed by operation of law.

The judgment will be affirmed or exceptions over-ruled when the Appellate Court is divided in opinion, *Etting v. United States Bank,* 24 U. S. 59; *Clark v. Kean,* 1 Del. Ch. 144; otherwise the majority opinion rules, *Beaulieu v. Furst,* 2 La. Ann. 46; and it matters not if such is reached by different reasoning. *Oakley v. Aspinwall,* 8 N. Y. Sup. 1. It follows that when the Court of Appeals is equally divided in opinion as to part of the decree appealed from, it must be affirmed as to so much; and if they concur or a majority of them concur, that there is eror in the residue, so much of it must be reversed. *Commonwealth v. Beaumarchais,* 3 Call. 122 (Va.). But in the National Supreme Court, if on a constitutional question, a majority is required to pronounce a judgment, *Briscoe v. Commonwealth Bank,* 33 U. S. 118; as to jurisdiction, if equal division, the jurisdiction is sustained and the case is decided on its merits. *State v. Hays,* 30 W. Va. 107; *contra,* if in U. S. Supreme Court, *Coleman v. Hudson River Bridge Co., Fed. Cas.,* No. 2983. When one judge is disqualified or cannot sit in a cause, and the other two are divided, the decision below is affirmed, *Tex. & P. Ry. Co. v. Gentrey,* 13 U. S. App. 531; *contra,* no judgment can be rendered, *Bowman v. Flower,* 5 Mart. (La.) 407. But when such opinion is divided and judgment affirmed, the court are not obliged by statutes to file their opinions as in other cases, *Fraser v. Whilley,* 2 Fla. 116; nor does it settle the law, *Bridge v. Johnson,* 5 Wend. (N. Y.) 342, *Durrett v. Rucker,* 36 Ga. 272; and a bill in equity will be dismissed, *Waddle v. U. S. Bank,* 2 Ohio 336.

CONTRACTS—ABANDONMENT—PART PERFORMANCE.—CLEVELAND, C. C. & ST. L. RY. CO. V. SCOTT, 79 NORTHEASTERN, 226 (IND.).—*Held,* that a recovery may be had for a part performance of an entire contract, though there be no cause or excuse for its abandonment, if the part performed is beneficial to the defendant.

If the servant, without legal excuse, abandon the employment before full performance of an entire contract, he cannot recover anything for his services upon the contract, *Start v. Parker,* 2 Pick. 267; for under an entire contract, full performance is a condition precedent to the right of recovery thereon, *Miller v. Goddard,* 34 Me. 104; neither can he recover on an implied contract, *Laurence v. Miller,* 86 N. Y. 131; because the special contract governs the rights of the parties in respect to what has been done under it and excludes any implied contract, *Hansell v. Erickson,* 28 Ill. 257. The same applies to the contractor in the same circumstances. *Olmstead v. Beale,* 19 Pick. 528; *Peterson v. Maher,* 46 Minn. 468; *Diefenback v. Stark,* 56 Wis. 462. Although the rule very generally prevails that one guilty of a wilful breach of an entire or special, but not general contract, is without remedy for the recovery for a part performance, yet it is not universal. The

pioneer case, *Britton v. Turner,* 6 N. H. 481, allowed a recovery upon a *quantum meruit* to the extent of benefits received, but that recovery, if any, was based at the contract price with deduction for what it would cost to procure a completion and of any damages sustained by reason of the breach and this case has since been followed by a very few states, *Pixler v. Nichols,* 8 Iowa 106; *Wheatly v. Miscal,* 5 Ind. 142; *Duncan v. Baker,* 21 Kan. 107. Those cases rested on two reasons: First, that a plaintiff should be allowed to recover, notwithstanding a wilful breach, for the reason that when he was sued by the defendant, the defendant might not be able to recover more than nominal damages, and in such a case, to refuse the plaintiff a right of action, would be to give substantial damages to the defendant. Second, that the understanding of the community, in such a case, is that a laborer shall receive compensation for the services actually rendered by him, but this understanding rests not on the contract itself but only upon the obligation imposed by law. *Parcell v. McCumber,* 11 Neb. 209; *Chambler v. Baker,* 95 N. C. 98; *Carroll v. Welch,* 26 Tex. 147.

CONTRACTS—MASTER AND SERVANT—WRONGFUL DISCHARGE—DANIEL V. MANHATTAN LIFE INS. CO., 102 N. Y. SUPP. 27. A contract of employment stipulated that either party might terminate it by a notice of thirty days. Thereafter, the contract was extended for a year from a specified date. Similar renewals were subsequently made, the last renewal extending the contract for a year after a specified date. *Held,* that the master was liable for discharging the employee before the expiration of the year. Jenks, J., *dissenting.*

A new contract may abrogate an earlier one, either expressly or by implication. *Evans v. Jacobitz,* 67 Kan. 249; *Sutton v. Griebel,* 118 Ia. 78. To effect discharge by implication, however, the new contract must be clearly inconsistent with the earlier contract. *Drown v. Forrest,* 63 Vt. 557; *Pease v. McQuillin,* 180 Mass. 135. If the later contract covers the same subject and has the same scope, but is wholly or partially inconsistent therewith, it abrogates the earlier contract in *toto. Tuggles v. Callison,* 143 Mo. 527; *Spreckel v. Bander,* 30 Or. 577. But if the subject-matter is only in part the same, the latter contract supersedes and abrogates, only in so far as it is inconsistent with the earlier one. *Alferitz v. Ingalls,* 83 Fed. 964; *Bray v. Loomer,* 61 Conn. 456. A modification which merely extends the time for performance, leaves the remaining provisions in full force. *Underwood v. Wolf,* 131 Ill. 425. The minority opinion in this case is supported in *Blondel v. Le Vesconte,* 41 Minn. 35, holding that after a contract of service for no definite period had been partly performed, a subsequent written agreement fixing a definite term, embodies the terms of the prior contract.

CORPORATIONS—TRANSFER OF ASSETS—VALIDITY AS TO CREDITORS.—WARD V. CITY TRUST CO. OF NEW YORK, 102 N. Y. SUPP. 50. A trust company loaned money to the owners of the capital stock of a corporation, taking their note therefor, with the stock as security. Thereafter, the control of the corporation affairs was given to one of the stockholders who, in the name of the corporation, as president and general manager, indorsed a draft drawn to the order of the corporation, to the trust company who accepted this as payment of the loan and surrendered the note and stock. *Held,* that the title of the trust company to the draft could not be attacked on the ground that the payment thereof rendered the corporation insolvent, where the company

had no information, leading it to believe that the corporation was thereby made insolvent. Scott and McLaughlin, J.J., *dissenting.*

The assets of a corporation are a trust fund for the payment of its debts upon which the creditors have an equitable lien both as against stockholders and all transferees, except those purchasing in good faith for value. *Brum v. Ins. Co.,* 16 Fed. 143; *San Francisco R. R. Co. v. Bee,* 48 Cal. 398. This doctrine obtains whether a corporation is solvent or insolvent. *Union Nat. Bank v. Douglas,* 1 McCrary 86. In England, the so-called "trust fund" doctrine is not applied in respect to business corporations. *In re Wincham Shipbuilding Co.,* 9 Ch. Div. 322. But a person who pays value for negotiable paper is to be regarded as rightful holder unless he has been guilty of actual bad faith and he is not bound to make inquiries as to defects in the title thereof. *Johnson v. Way,* 27 Ohio St. 374; *Spooner v. Holmes,* 102 Mass. 503. There are minority *dicta,* however, supporting the dissenting opinion here, which hold that a corporation note, given for an individual obligation is not given in the regular course of business, but presumptively is *ultra vires* and therefore, one who takes such paper with knowledge that it is not given for a corporate purpose, can have no claim to the protection accorded a *bona fide* holder. *McLellan v. Detroit File Works,* 56 Mich. 579; *West St. Louis Savings Bank v. Shawnee County Bank,* 95 U. S. 557.

CRIMINAL LAW—FORMER JEOPARDY.—STEINKUHLER V. STATE, 109 N. W. 395 (NEB.).—*Held,* that to constitute a former jeopardy, it must appear that the defendant was put upon trial before a court having competent jurisdiction upon an indictment or an information sufficient in form and substance to sustain a conviction, and that the jury was impaneled and sworn, and thus charged with his deliverance. This privilege, derived from legal guaranty, was common law, 4 *Bl. Comm.,* 335; and when declared in the American Bill of Rights, it was held that it applied only to the Federal Courts, *United State v. Gilbert, Fed. Cas.,* No. 15204, *Cold v. Eves,* 12 Conn. 243; but the constitutions of the several states have the same provision, *Bishop Crim. Law,* Vol. I, 650. It applies to felonies and misdemeanors, but not to actions *qui tam;* nor to civil or tort actions; nor to any action which does not make the defendant liable to be restrained from his personal liberty, *Brink v. State,* 18 Tex. App. 344; *State v. Spear,* 6 Md. 644. It may be waived by the defendant, *State v. Gurney,* 37 Maine 156. In its application, the interpretation has occasionally been, "That no man shall be tried twice for the same offence," *People v. Goodwin,* 18 Johns. 187; but "how can it mean that when there is a plain difference between a verdict given and the jeopardy of a verdict? Hazard, peril, danger, jeopardy of a verdict cannot mean a verdict given." *Commonwealth v. Cook,* 6 S. & R. 577; *Bishop Crim. Law,* Vol. I, 661; *Cobin v. The State,* 16 Ala. 781. Thus it follows that former jeopardy attaches as soon as a person has once been put upon his trial before a court of competent jurisdiction, upon an indictment or information, which is sufficient to sustain a conviction and the jury has been charged with his deliverance, and if, afterwards, for any reason, the jury are discharged unnecessarily and without his consent, he is entitled to his discharge and cannot be tried again, *Wright v. State,* 5 Ind. 290; *State v. Wallers,* 16 La. Ann. 400; *Price v. State,* 19 Ohio 423. But there can be no former jeopardy when the acquittal was obtained by fraud, *State v. Brown,* 16 Conn. 54; nor if indictment or information is defective, no matter how far trial has proceeded, *Maxwell Crim. Procedure,* 566; *Commonwealth v. Peters,* 12 Met. 387; nor

if one juror escape, *State v. Hall,* 4 Halst. 256; likewise if juryman was incompetent or not sufficiently sworn, or if the case was tried by a less than legal jury, *Brown v. The State,* 5 Eng. 607; nor if jury are discharged upon failure to agree, but *contra* if the discharge before disagreement is without defendant's consent, *United States v. Perez,* 9 Wheat. 579; nor proceedings before a grand jury, *State v. Whipple,* 57 Vt. 637; nor increased penalties for subsequent offences, *Kelley v. People,* 115 Ill. 583; nor a plea of guilty extorted by duress and judgment entered upon it, *Sanders v. State,* 4 *Crim. Law Mag.* 359; nor pendency of other indictments for the same charge, *Bailey v. State,* 11 Tex. App. 140.

DIVORCE—ACTION—STATE COURT—JURISDICTION—DOMICILE.—STATE EX REL ALDRACH V. MORSE, 87 PAC. 705 (UTAH.)—*Held,* that where a husband and wife were married and resided in Utah, where the husband abandoned the wife, the matrimonial domicile was in that state, which was all that was essential to confer jurisdiction to decree a divorce, though the husband could not be personally served there.

This case is interesting as following the much discussed case of *Haddock v. Haddock,* 201 U. S. 562. The domicile of the husband for all practical purposes is the domicile of the wife. *Greene v. Greene,* 28 Mass. 410. But for the purpose of bringing a suit, when the husband's conduct is cause for the same, she may acquire a domicile distinct from his. *Ditson v. Ditson,* 4 R. I. 87. The desertion of the husband for a time sufficient to give the wife a cause for divorce, entitles her to sue in the former domicile of the husband. *Shaw v. Shaw,* 98 Mass. 158. So where the actual residence of the wife is in one state, but her domicile in another, an act of the husband, cause for divorce, will make the former her domicile, *Bowman v. Bowman,* 24 Ill. App. 165. By acquiring a foreign residence the wife does not lose the right to sue in the state of the husband's domicile, *Sewall v. Sewall,* 122 Mass. 156. There may be a separate domicile when the husband and wife are living apart under judicial separation, or when the husband has been guilty of misconduct. *Hunt v. Hunt,* 72 N. Y. 217; which overcomes the presumption that the domicile of the husband is that of the wife, *Harteau v. Harteau,* 14 Pick. 181; and the wife may maintain a suit in the state where they were last domiciled, *Burtis v. Burtis,* 161 Mass. 508.

EMBEZZLEMENT—INDICTMENT—CHARACTER IN WHICH PROPERTY WAS RECEIVED—ALLEGATION—SUFFICIENCY.—STORMS V. STATE, 98 S. W. 678 (ARK.).—*Held,* on a trial for embezzlement, evidence of similar transactions by accused, before and after transaction relied on, is admissible on the question of his intent.

In a prosecution of a clerk, in a Circuit Court for converting to his own use solicitor's fees in certain cases, proof of other acts of embezzlement of similar character is admissible to show guilty knowledge. *Stanley v. State,* 88 Ala. 154. In a prosecution for embezzlement previous acts of embezzlement similar to the one charged may be shown as evidence of guilty knowledge. *Same v. Neyce,* 88 Cal. 393. On a trial for embezzlement testimony as to transactions in the year following, and similar in character to those charged, are competent evidence to show guilty knowledge on the part of the defendant. *People v. DeGraff,* 6 N. Y. 412.

EVIDENCE—OPINIONS OF NON-EXPERTS.—DAVIS V. SHORT LINE RY. CO., 88 PAC. 2 (UTAH).—*Held,* that a man's wife, who had lived with him for many years, and was in attendance on him during his illness, and was in a

condition to inform herself of his general physical condition as it was before and after he was injured, may testify to his good or poor health, and as to his suffering pains or being free from them.

A non-expert witness may give an opinion as to the general health and physical condition of another, if the facts upon which the opinion is based, are within his knowledge, and have been first stated. *Louisville, N. A. & C. v. Holsapple,* 38 N. E. 137; *Turnpike Co. v. Andrews,* 102 Ind. 138. A mother of the injured party, with whom she has been living, may testify from her observations as to what the physical condition of the party injured was, before the accident. *Sherman v. Village of Oneota,* 21 N. Y. Supp. 137. A wife may testify as to the appearance of her husband's injuries. *James v. Ford,* 9 N. Y. Supp. 504. Testimony by non-experts of the plaintiff's condition before and after the accident is admissible, such testimony being within the range of common observation; and the fact that expert witnesses have given contrary evidence is no ground for excluding it. *Winter v. Central Ia. Ry. Co.,* 45 N. W. 737.

EVIDENCE—PAROL EVIDENCE—COURT RECORDS.—WARBURTON V. GOWRE, 79 N. E. 270 (MASS.).—*Held,* the court record of a trial, though meager, must be taken as true, and can neither be enlarged nor diminished by parol evidence.

Parol evidence is inadmissible to vary the terms of a written instrument. 1 *Greenleaf Ev.,* Section 275. Judicial proceedings must be proved from record of court. *Lyon v. Bolling,* 14 Ala. 753. Except facts connected with the trial, which were not proper to be incorporated in the record and not inconsistent with it, may, when relevant, be proved by parol evidence. *Tobey v. Esterely Machine Co.,* 44 Am. St. Rep. 554 (N. D.). The oral testimony of a magistrate is not admissible to contradict his own record of the proceedings before him, *Henshaw v. Sanil,* 114 Mass. 74. Nor can parol evidence be given to vary decree of divorce, *Wilson v. Wilson,* 45 Cal. 399. The record of proceedings in bankruptcy, however, is only *prima facie* evidence of the facts stated in it and may be varied by parol testimony. *Tehley v. Ban,* 16 Pa. 196. A conclusive judgment in one state offered in evidence in another cannot be varied by parol testimony, *Barkman v. Hopkins,* 11 Ark. 157.

EVIDENCE—PRESUMPTIONS—COMMON LAW.—ELLINGTON V. HARRIS, 56 S. E. 134 (GA.).—*Held,* there being no evidence as to what was the law of South Carolina, the presumption is that the common law there prevailed.

The views upon this proposition are by no means uniform. In some states it is held that in the absence of proof, it will be presumed that the laws of another state are the same as the laws of the forum. *Osborn v. Blackburn,* 78 Wis. 209. Others hold that the law of another state will be presumed to be the same as the common law of the state of the forum. *Tilexan v. Wilson,* 43 Me. 186. Again, in the absence of evidence, some courts maintain that no presumption arises that the statute law of the forum is the same as the law of another state. *Dickey v. Bank,* 89 Md. 280. But where the law of two states has been the same, the repeal of the law in the state of the forum will not raise a presumption of its repeal in the other. *Ex parte Lafonta,* 2 Rob. 495 (La.). A court cannot presume that laws as to the distribution of intestate property in one state are the same as in another. *Leach v. Pillsbury,* 15 N. H. 137. No presumption will be made as to the law of a foreign state which would work a forfeiture. *Way v. Tele-*

graph Co., 83 Ala. 542. The general rule, then, seems to be that when the courts of a state shall know as a fact, the law of a particular state, such law must be proved as a fact, and the court will not take judicial notice of it, but in the absence of proof, will presume it to be the same as the law of the forum. *R. R. v. Weaver*, 35 Kan. 412.

INJUNCTION—BOYCOTTING.—ALFRED W. BOOTH & BRO. v. BURGESS, ET AL., 65 ATL., 226 (N. J.).—*Held*, that the manufacturer was entitled to an injunction restraining the officers of the union from directing or inducing by threats, etc., the employees of the boss carpenters to strike.

Prior to the decision of *Leathen v. Quinn*, 15 Q. B. 476, decided in 1901 the doctrine laid down in the leading English case of *Allen v. Flood*, 1 A. C. 1894, was followed both in the United States and England, viz., that it was not illegal for one person or combination to persuade a party not to enter into a contract with another, if his ability or capacity was not impugned. *Mogul Steamship Co. v. McGregor*, L. R. 15 Q. B. D. 476; *Boyson v. Thorn*, 98 Cal. 578; *Ashley v. Dixon*, 48 N. Y. 430. But a conspiracy to injure a person in his profession by false statements, as to his character followed by damages is actionable. *Wilder v. McKee*, 111 Penn. St. 335. It seems to be an undisputed rule in most jurisdictions that workmen have the right to organize themselves in associations for the purpose of having their demands granted and to strike or quit work in a body upon the refusal of the employer to accede to their demands. *Arthur v. Oakes*, 11 C. C. A. 209. But to allow a business to be subjected to the control of an organization, that orders away its employees and frightens away others that it may seek to employ, is a condition utterly at war with every principal of justice. *State v. Charles T. Stewart, et al.*, 59 Vt. 273. It seems preposterous to deny an individual the right to carry on a legitimate business, as he sees fit, and the law should afford ample protection against powerful combinations using coercion and intimidating his customers. *Oxley Stave Co. v. Hopkins, et al.*, 83 Fed. 912. The procurement of workmen to quit work, who are employed upon satisfactory terms, unless the employer accedes to the demands of persons who he is under no obligation to, is illegal and constitutes a malicious and unlawful interference in the business of the employer, which is not only actionable, but a misdemeanor at common law. *Old Dominion Steamship Co. v. McKenna*, 30 Fed. 48.

INSURANCE—ORAL APPLICATION—WAIVER.—GLENS FALLS INS. CO. v. MICHAEL, 79 N. E. 905 (IND.).—*Held*, that where a standard fire policy was issued on an oral application, without any representations on the part of the assured as to the extent of his title, insurer thereby waived a clause providing for forfeiture, in case assured's interest was other than unconditional and sole ownership in fee.

A covenant in a fire policy, that the application "contains a just, full and true exposition of all the facts in regard to the condition and value of the property," is waived by an insurer who issues it solely upon a bare request. *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136; *Bahringer v. Empire Mut. Life Ins. Co.*, 2 T. and C. (N. Y.) 610. This is upon the ground that an applicant has a right to suppose that the insurer will make proper inquiries, and that, if he does not, he waives information in regard to them. *Short v. Home Ins. Co.*, 90 N. Y. 16. But a clause in a fire insurance policy avoiding the policy if the premises are vacant for a specified period, is not waived by reason of knowledge on the part of the insurer that they are

vacant at the time the policy issued. *Queen Ins. Co. of America v. Chadwick,* 13 Tex. Civ. App. 318; *Conn. Fire Ins. Co. v. Tilley,* 88 Va. 1024. There are many *dicta* contrary to the case in point, upon the ground that where there is no written application and no terms have been agreed upon by parol, except the amount, the insured must be charged with knowledge that the policy he receives, contains the contract binding upon him. *Waller v. Northern Assur. Co.,* 10 Fed. 232; *Brown v. Commercial Fire Ins. Co.,* 86 Ala. 189; *Wierengo v. Amer. Fire Ins. Co.,* 98 Mich. 621.

LANDLORD AND TENANT—ACTION BY LANDLORD TO RECOVER POSSESSION—DEFENSES.—WALLACE V. OCEAN GROVE CAMP MEETING ASS'N OF METHODIST EPISCOPAL CHURCH, 148 FED. 672 (N. J.).—*Held,* a tenant, who repudiates that relation and claims title adversely to the landlord, cannot defend against an action by the landlord to recover possession on the ground of the insufficiency of the notice to terminate the lease.

Where the relation of landlord and tenant is disclaimed by the tenant, or the tenant repudiates the title of his landlord, neither a demand of possession or notice to quit is necesary to enable the landlord to maintain an action for possession of premises. *Carger v. Fee,* 40 Ind. 572; 39 N. E. 93. A landlord is not bound to give his tenant notice to quit, if the tenant has taken possession under an adverse title. *Williams v. Hensley,* 1 A. K. Marshall 181. The notice to quit to which a tenant at sufferance is entitled cannot be claimed by one who has asserted any title that directly or impliedly negatives the right to put an end to his interest. *Kunzie v. Wixom,* 39 Mich. 384. In ejectment the defense of adverse possession is inconsistent with a tenancy, and exempts plaintiff from the necessity of proving a notice to quit. *Wolf v. Holton,* 92 Mich. 136; 52 N. W. 459. A tenant at will cannot defend an action of ejectment by the landlord on the ground that he had no notice to quit, where the answer expressly denies plaintiff's title, and sets up ownership in defendant. *McCarthy v. Brown,* 113 Cal. 15.

LANDLORD AND TENANT—DEFECT IN PREMISES—INJURIES TO OCCUPANTS.—HATCH ET AL. V. MCCLOUD RIVER LUMBER CO., 88 PAC. 355.—*Held,* occupants of premises under a lease assumed the risk of injury from a wire extending from an electric light pole without the premises to an anchor about two feet within the premises which was so located at the time of the lease and was known to them.

Where the occupants of a tenement house are permitted, without objection, to use the yard, and there is no restriction in the lease against such use, an easement is thereby created in favor of the tenant, and the landlord is liable for injuries resulting from his failure to make the yard safe. *Canavan v. Stayvesant,* 27 N. Y. Sup. 413. A nuisance being allowed to remain in the same position a sufficient length of time without any endeavor on the part of the defendant by the exercise of reasonable care and diligence, to ascertain its dangerous position; and having let the premises with a nuisance, existing thereupon he is, under the circumstance, liable for injuries sustained by the tenant, *Altern v. Steel,* 115 N. Y. 203. In an action for personal injuries, it appears that in the yard of a tenement house in which apartments were rented from defendant to plaintiff's father, a large flat stone stood almost perpendicularly against the fence, and had so stood for several months, and at the time the apartments were let; that while the plaintiff's child was playing around the stone, it fell and injured her, it was held that the defendants were

liable, though they had no actual knowledge of the existence of the stone, or its dangerous nature. *Schmidt v. Cook et al.*, 33 N. Y. Sup. 624.

MASTER AND SERVANT—DEFECTIVE CAR—DUTY OF INSPECTION.—SHANKWEILER V. BALTIMORE & O. R. R. Co., 148 FEDERAL REPORTER 195. A railroad company is not chargeable with negligence which will render it liable for an injury to an employee caused by the breaking of a defective brake-rod, where the defect was latent and in a place where it was not discoverable by such an inspection as is customarily made by well-regulated and prudently conducted railroads, which inspection was made and was the only kind which was practicable, or which could be made without seriously interfering with the operation of trains.

It is the duty of defendant railroad company, receiving a freight car from another company, to inspect it, and to see that it is reasonably fit for service; and, in the event that a freight car is received with a brake-beam in such a defective condition that defendant's brakeman, whose duty it is to couple the foreign car with those of defendant, and is injured in his attempt to make such coupling, and the brakeman has no knowledge of the condition of the brake-beam, and its condition cannot be readily seen, defendant is liable for such injury. *Missouri Pacific Railway Company v. Barber*, 44 Kan. 612, 24 Pac. 969.

MASTER AND SERVANT—INJURY TO SERVANT—VICE PRINCIPAL—TIVNAN V. KEAHON, 101 N. Y. SUPP. 1076. Houghton and Scott, J.J., *dissenting*.

Held:—One through whom the proprietor of a livery stable conducted it, and who is the manager and superintendent thereof, and employs help, is the vice-principal of the master, for whose negligence in failing to instruct a common laborer how to start an engine, great danger being attendant thereon unless it was started properly, the master is liable.

A foreman in a mine, whose duty it was to direct ten or twelve men what work to do, and take care of mine, but who is subject to the orders of the pit boss and the superintendent, is the fellow servant and not vice-principal of a laborer under his control, who is injured while assisting the foreman in the execution of his work. *What Cheer Coal Co. v. Johnson*, 56 Fed. 810; *Railroad Co. v. Baugh*, 13 Sup. Ct. 914. A section boss having charge of keeping track in order, who hired and discharged his men, but who was subject to the orders and directions of a track master, to whom it was his duty to report needed repairs, and to receive from him the necessary tools and materials, was a fellow servant of a section hand injured from the defective condition of a hand car, the defects in which were known to such section boss, and were suffered to exist through his negligence. *Barringer v. Delaware & H. Canal Co.*, 19 Hun. 216. In an action to recover for injuries sustained while unloading dirt under a foreman who was in charge of the men, that he was not a vice-principal, but fellow servant, although he had power to discharge for cause. *Schroeder v. Flint and P. M. R. Co.*, 103 Mich. 213; 61 N. W. 663.

NEGLIGENCE—DANGEROUS PREMISES—CARE REQUIRED.—GILFALLAN V. GERMAN HOSPITAL & DISPENSARY IN THE CITY OF NEW YORK, 100 N. Y. SUPP. 601. The intestate, employed as plumber by the defendant, attempted to leave the defendant's premises by means of a ladder and wall, although the premises were provided with a safe entrance and exit. After climbing to the top of the wall and as he stepped out on what he supposed to be the roof of an ash-lift, he fell into a well sustaining fatal injuries. *Held*, that as

the intestate had never been authorized to use this means of exit from the hospital grounds, the defendant owed him no duty to keep the same safe for that purpose. Hooker, J., *dissenting.*

The basis of liability in negligence cases is the violation of some legal duty to exercise care. *Cusick v. Adams,* 115 N. Y. 55. Such duty must be owed to the plaintiff or the action will not lie. *Nickerson v. Bridgeport H. Co.,* 46 Conn. 24; *Marvin Safe Co. v. Ward,* 46 N. J. L. 19. The general rule is that a landowner is under no obligation to render his premises safe for any purpose for which he cannot reasonably anticipate that they will be used. *Armstrong v. Medbury,* 67 Mich. 250. A mere license given by the owners to enter and use the premises, which the licensee has full opportunity of inspecting and which contain no concealed cause of mischief, throws no obligation upon the owner to guard the licensee against danger. *Sullway v. Waters,* 14 Ir. C. L. 460. If plaintiff is a licensee and falls into a hole, which is not concealed except by the darkness of night, the owner of the premises is not liable for injuries sustained thereby. *Reardon v. Thompson,* 149 Mass. 267.

NEGLIGENCE—EVIDENCE TO ESTABLISH.—LEONARD V. MIAMI MIN. CO., 148 FED. REP. 827.—*Held,* that an inference of negligence cannot be based on a presumption nor on speculation and conjecture.

General rule is that negligence cannot be presumed without any evidence, *Lyndsay v. Conn. & P. R. R. Co.,* 27 Vt. 643; *Daniel v. Directors, etc., Met. R. Co.,* L. R. (5 H. L.) 45. And as law does not impute it, it lies on party alleging it to prove it, *Doyle v. Boston & A. R. R. Co.,* 145 Mass. 386; *O'Connor v. Mo. Pac. R. R. Co.,* 94 Mo. 150. Mere fact of an accident's happening does not amount to evidence sufficient to base an inference of negligence on, *Welfare v. London & B. R. Co.,* L. R. (4 Q. B.) 698. To the general rule as just stated there are two well recognized exceptions, the first being: when relation of carrier and passenger exists and injury occurs during actual transportation, *Curtis v. Rochester, etc., R. Co.,* 18 N. Y. 534. But besides these two elements the plaintiff must show that the accident was caused by some defect in road or some part of the apparatus employed in operating it, *Wall v. Livezay,* 6 Col. 465; *Christie v. Griggs,* 2 Campbell's Rep. 79. The second exception being: when an injury arises from some condition or event which is in its very nature so obviously destructive of safety of person or property as to admit of no other inference save negligence on part of person in control of such agency, such acts come within the principle of *res ipsa loquitur, Kearney v. London & B. R. Co.,* L. R. (6 Q. B.) 761; *Mullen v. St. John,* 57 N. Y. 567.

PATENTS—INFRINGEMENT—EQUIVALENTS.—UNIVERSAL BRUSH CO. V. SONN, ET AL., 146 FED. 517 (N. Y.).—*Held,* that the substantial equivalent of a patented device or means which performs the same function does not avoid an infringement because it may perform an additional function.

The courts and text writers are very reluctant about defining the term invention, lest it should breed injustice. However, it must be new, useful and comply with all legal formalities. *Cooley on Torts,* second edition, page 414. Novelty is presumed on the grant of a patent, and the patent is *prima facie* evidence thereof. *Waterbury Brass Co. v. N. Y., etc., Brass Co.,* 3 Fish. Pat. Cas. 43; *Huber v. Nelson Mfg. Co.,* 30 Fed. 830. Whether a device is new, however, depends upon whether it is the same kind as another or whether it acts in the same way and produces the same result in substance.

Howe Mach. Co. v. Nail Needle Co., 134 U. S. 388; *Day v. Fair Haven Ry. Co.*, 132 U. S. 98. To be raised to the dignity of an invention, the improvement must be one which would not ordinarily occur to an expert mechanic. *Mast, Foos & Co. v. Stove Mfg. Co.*, 177 U. S. 493; *Potts v. Creager*, 155 U. S. 597. So also the aggregation or combination of old elements, which perform no new function and accomplishes no new results, does not involve a patentable novelty. *Mosler Safe Co. v. Mosler*, 127 U. S. 364; *Peters v. Hanson*, 129 U. S. 541. Yet if such a new combination of known elements produces a new and beneficial result, it is evidence of invention but not conclusive. *Loom Co. v. Higgins*, 105 U. S. 580. Moreover, the use of an old thing for a new purpose does not constitute an invention unless it produces a new and useful result. *Grant v. Walter*, 148 U. S. 547; *Knapp v. Morss*, 150 V. S. 221. Nor is a device any less an equivalent of another because it may perform an additional function, *O'Leary v. Utica & M. V. Ry. Co.*, 144 Fed. 399; *Wheeler v. Climper, Mower, etc., Co.*, Fed. Cas. No. 17,493. One of the best tests of invention, also, is whether it brings to actual commercial success what prior inventors had partly accomplished. *Consolidated Valve Co. v. Crosby Valve Co.*, 113 U. S. 157; *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 686. And although prior unsuccessful experiments involved the same idea or principle as a subsequent patent, the latter will not be invalidated. *Whitelys v. Swayne*, 7 Wall. 685; *Am. Bell Telep. Co. v. People Tel. Co.*, 25 Fed. 725.

SLANDER—EVIDENCE—UNDERSTANDING OF WORDS SPOKEN.—PROCTER V. POINTER, 56 S. E. 111 (GA.).—*Held*, that in cases of slander, an exception is sometimes made to the general rule that witnesses must state facts, and not their inferences from them and as the slander and damage consist in the apprehension of the hearers, they are allowed to give their understanding of the words spoken.

The general rule is that witnesses may state their understanding of slanderous words proved to have been spoken. *Tottlebein v. Blankenship*, 88 Ill. App. 47; *Freeman v. Sanderson*, 123 Ind. 264. But a contrary view has occasionally been taken. *Snell v. Snow*, 54 Mass. 278; *Wright v. Paige*, 36 Barb. (N. Y.) 438. So where a slander was made by insinuations and gestures, it was competent for hearers to state what they understood by them. *Leonard v. Allen*, 65 Mass. 241. Custom may give to words an uncommon meaning and a witness may be allowed to give his understanding of them. *Newbold v. Bradstreet*, 57 Md. 38. But where words are unambiguous and expressed in ordinary language, a witness will not be allowed to testify as to his understanding. *Jarnigan v. Fleming*, 43 Miss. 710. Hence, the converse also is true, that evidence as to understanding of witness will only be admitted where the words are ambiguous and susceptible of different meanings. *Shaw v. Shaw*, 49 N. H. 533.

STATE REGULATION—POLICE POWER—CITY ORDINANCE—CITY OF SELMA V. TILL, 42 So. 405 (ALA.).—*Held*, that a city ordinance, making it an offense for one to peddle without having secured a license was not repugnant to the Interstate Law nor any other feature of the State or Federal Constitution.

Any state has the right, by virtue of its police power, to tax or forbid any class of employment which may be prejudicial to the public good *Cooley on Const. Limitations*, sixth edition, 742; *Sayre v. Phillips*, 148 Pa. St. 482. This police power is inherent in a state without any reservation in the Constitution. *Carthage v. Frederick*, 122 N. Y. 268; *Com. v. Vrooman*,

164 Pa. St. 306. It must be distinguished from eminent domain or taxing power. *Carthage v. Rhodes,* 101 Mo. 175; *N. Y. Health Dep't. v. Trinity Church,* 145 N. Y. 32. Although police power is exercised only for the purpose of promoting the public welfare, yet the object must always be regulation and not the raising of revenue. *Walker v. Jameson,* 140 Ind. 591; *Muhlenbrinck v. Long Branch Com'rs,* 42 N. J. L. 364. Moreover, in the absence of any constitutional restriction it may be delegated to the various municipalities throughout the state. *N. Y. Fire Dep't v. Gilmour,* 149 N. Y. 453; *Com. v. Plaisted,* 148 Mass. 375. But such city ordinance must not be a regulation of interstate commerce nor discriminate between residents or products of different states. *Welton v. Mo.* 91 U. S. 275; *Robbins v. Shelby Co. Taxing Dist.* 120 U. S. 498. Hence, sellers by sample for future delivery are not regarded, in this country, as peddlers, under such a city ordinance. *Stanford v. Fisher,* 140 N. Y. 187; *Com. v. Farnum,* 114 Mass. 267. And one imposing a license on peddling of patent rights would be unconstitutional and void. *In re Sheffield,* 64 Fed. 836. So, also, such an ordinance must not deny anyone, such as a foreigner, within the jurisdiction of that state, the equal protection of its laws. *State v. Montgomery,* 94 Me. 192; *County of Santa Clara v. So. Pac. Ry. Co.,* 118 U. S. 396.

STREET RAILROADS—COLLISION WITH TEAM—EVIDENCE.—BAICKER V. PEOPLE'S ST. RY. CO. OF NANTICOKE & NEWPORT, 64 ATL., 675 PA.—A collision occurred between a street car and the plaintiff's wagon, the evidence showing that if plaintiff had continued on his course, he could have cleared the track and avoided the collision, but that having changed his mind, he attempted to back off. Both the motorman and the plaintiff acted on the belief that he would succeed. *Held,* that he could not recover for the injuries received. Mestrezat, J., *dissenting.*

Persons engaged in operating street cars are not required to use more than ordinary care to see that the track is clear to avoid collisions with vehicles. *St. Antonio St. Ry. Co. v. Mechler,* 87 Tex. 628. Where a person drives in front of an electric car and is struck by it, while attempting to get off the track, the street railway is not liable where there was no evidence that the speed was dangerous or that the gong was not sounded. *Guilloz v. Fort Wayne & B. I. Ry. Co.,* 108 Mich. 41. The dissenting opinion is in accordance with the decisions laid down in several jurisdictions. Since street railroads have no superior right of way over vehicles at public crossings, the company will be liable for negligence in its employees, in failing to have the car under control at such places. *Watson v. Minneapolis St. R. Co.,* 53 Minn. 551; *Hickman v. Union Depot R. Co.,* 47 Mo. App. 65. Although the peril may have been increased by an attempt to avoid it, the street railway is liable, if the driver was placed in peril by the negligence of the conductor and injury occurred while the teamster was exercising ordinary care. *Gibbons v. Wilkesbarre & S. St. Ry. Co.,* 155 Pa. 279.

USURY—ASSUMPTION OF USURIOUS DEBT.—STUCKEY V. MIDDLE STATES LOAN BLDG. & CONST. CO., 55 S. E. 996 (W. VA.).—*Held,* that one who purchases land which is subject to an usurious debt and assumes payment of such debt, as part of the consideration cannot be relieved from the usury.

Whether the right to take advantage of the different statutes of usury is a personal or vested one is apparently a much mooted question in the various jurisdictions of this country. Some courts give the assignee of an usurious trust obligation the same rights of defense, as that of assignor at the

time of the assignment. *Tamplin v. Wentworth*, 99 Mass. 63; *Woolfolk v. Plant*, 46 Ga. 422. These decisions are consistent with the general rule, that an assignee takes an assignment subject to all the equities of the debtor existing at the time he received notice of the assignment. *Callanan v. Edwards*, 32 N. Y. 483; *Buckner v. Smith*, 1 Wash. (Va.) 296. Courts maintaining otherwise, hold that a person assuming payment of an usurious loan does so, as part of the consideration, and that it is a personal right of the assignor, and the assignee is precluded from setting up usury as a defense. *Smith v. McMillian*, 46 W. Va. 577; *Sands v. Church*, 6 N. Y. 347. Improbably all jurisdictions, an execution creditor and a purchaser of an equity of redemption are allowed to plead usury in the inception of the contract as a defense, *Bank v. Warehouse*, 49 N. Y. 642.