RECENT CASES.

BANKRUPTCY—CONFLICT OF JURISDICTION—AMENDMENT OF 1903—CORPORATION.—SINGER V. NAT. BEDSTEAD MFG. CO., 11 AM. B. R. 276 (N. J. CH.)—*Held,* that while it is doubtful whether, according to the amendment of 1903 to the Bankruptcy Act, the appointment of a receiver of a corporation by a State court under a State insolvency law is superseded by the selection of a trustee by a Federal court in subsequent bankruptcy proceedings, the State court, by comity, would discharge its own receiver in favor of the Federal trustee without attempting a construction of the amendment.

This case presents a vexatious question of a conflict of jurisdiction between the State and Federal courts. The difficulty rises directly out of the amendment to Sec. 4b of the Bankruptcy Act, making a receivership of a corporation, because of insolvency, an act of bankruptcy. *In re Watts,* 23 Sup. Ct. 718, which is the only case yet reported touching this question, was a contempt proceeding involving an ugly clash of jurisdiction between a Circuit Court of Indiana and a Federal District Court. The question in the instant case was only alluded to in a *dictum* by Fuller, C. J., but sufficiently to show that the Supreme Court will consider State receiverships as superseded by subsequent bankruptcy proceedings in a Federal court. But the result of the decision in that case was virtually a rebuke to the Federal court for attempting to enforce this very thing. A similar warning to Federal courts to refrain from summary measures when a conflict of jurisdiction is involved in construing this amendment may be derived from the holding in *Jaquith v. Rowley,* 188 U. S. 620. As the law now stands a corporation cannot go into voluntary bankruptcy. Its only relief is to petition a State court for the appointment of a receiver in insolvency, who takes charge of the property. By the amendment of 1903, this appointment is, *ipso facto,* an act of bankruptcy, giving the trustee in bankruptcy exclusive control of the same property. Thus the very act of a State court appointing a receiver in insolvency, *proprio vigore,* terminates that receivership by throwing the whole estate into bankruptcy. As no provision existed in any previous bankruptcy act similar to this amendment, it is impossible to reason by analogy as to the rule of law to be applied. The only proper solution of the difficulty would seem to be the repeal of the bungling amendment. Until this can be done serious friction will only be prevented by comity. *Carling v. Seymour Lumber Co.,* 113 Fed. 483.

BANKRUPTCY—INVOLUNTARY PROCEEDING—JURY TRIAL—LIMITING ISSUES.—MORSS V. FRANKLIN COAL CO., 11 AM. B. R. 423.—*Held,* that upon a jury trial duly demanded by the alleged bankrupt, the issues to be determined by the jury are limited to (1) the question of insolvency, and (2) the act of bankruptcy, charged in the petition, and where the answer alleges that the

petitioners are not entitled to maintain the proceedings, not being in fact creditors, a motion to limit the issues to the first two questions, excluding from the jury the question of the right of the petitioners to maintain the suit, will be granted.

Section 19a of the Bankruptcy Act specifies the above two issues which an alleged bankrupt may require to be submitted to a jury. The gist of this case is whether, under Const. U. S., Amend. 7, a defendant has an absolute right to have submitted to a jury the question whether the petitioners are qualified to maintain the suit. It is well settled that this amendment applies only to courts of law and that there is no absolute right to a trial by jury in a court of equity. *McClave v. Gibb,* 157 N. Y. 413. As bankruptcy is essentially a division of equity, *In re Anderson,* 23 Fed. 482, it is reasonable that this rule of equity is alike applicable in bankruptcy. *In re Christenson,* 101 Fed. 243; *Simonson v. Sinshiener,* 100 Fed. 426. This reasoning is supported in *Barton v. Barbour,* 104 U. S. 106, in construing a provision in a former act very similar to the section of the present statute here involved. Act of 1867, Sec. 41; *Bill, Ass'n. v. Beckwith,* Fed. Cas. 1,406. The principal case, in holding that a demand for a trial by jury can be had in bankruptcy in only the two cases specified in the statute, seems in consonance with the few decisions that have been rendered directly on the subject, but is treated as questionable in *Brandenburg on Bankruptcy* (3d ed.), Secs. 508-511.

BANKRUPTCY—JURISDICTION—EXEMPT PROPERTY—PROSECUTION OF ACTION IN STATE COURT.—IN RE RICHARDSON, 11 AM. B. R. 379.—A creditor, holding a note against property of a bankrupt in which right of redemption has been waived, petitioned for stay of bankruptcy proceedings while he sued in a State court for a lien upon the exempt property. *Held,* that a court of bankruptcy has jurisdiction over such claims and can afford relief equivalent to that of a State court, hence the petition should be denied.

Doubt as to what the real law is on the question of jurisdiction involved in this case led the referee to announce this decision avowedly "with much difference." Since the title of the exempt property does not vest in the trustee, as does that of the unexempt property, Bankruptcy Act of 1898, Sec. 70a, it is only reasonable that claims against such property should never come within the jurisdiction of the court of bankruptcy. The decision to the contrary in the present case is sustained, to a degree, by *In re Tune,* 115 Fed. 906, and by a dictum of Shiras, J., in *In re Little,* 110 Fed. 661. But the preponderant authority is unquestionably against this holding, denying the jurisdiction of a court of bankruptcy to adjudicate claims against exemptions. *In re Bass,* Fed. Cas. 1,891; *In re Camp,* 91 Fed. 745; *Sellers v. Bell,* 94 Fed. 801; *In re Hill,* 96 Fed. 185; *In re Black,* 104 Fed. 289; *In re Swords,* 112 Fed. 661. The present decision is therefore grounded on very poor authority. See *Collier on Bankruptcy* (4th ed.), 78-81; *Bardes v. Bank,* 178 U. S. 524.

CARRIERS—ILLEGAL COMBINATIONS—UNJUST DISCRIMINATION.—KELLOGG V. SOWERBY, 87 N. Y. SUPP. 412.—Owners of elevators formed an association, which contracted with railroad companies to receive a fixed price per bushel for all grain handled at a certain point, whether by themselves or by outside companies. In pursuance of this agreement, the railroads refused to deliver grain to the plaintiff, who had not joined the association, except on the pay-

ment by the shipper of an additional charge, thus ruining plaintiff's business. *Held,* that the association and railroads were liable for damages sustained by plaintiff.

The discrimination against the plaintiff was unlawful, and as the association was a party to the illegal agreement, their liability is co-extensive with that of the railroads. It is a well established principle of law that a common carrier cannot make unjust discriminations either in granting carriage or in carrying for some at a less rate than for others. *McDuffee v. Ry. Co.,* 52 N. H. 430; *R. R. Co. v. Rinard,* 46 Ind. 293; *R. R. Co. v. Ervin,* 118 Ill. 250. But in many instances a discrimination has been sustained on the ground that it was not unreasonable. *Johnson v. R. R. Co.,* 16 Fla. 623; *R. R. Co. v. People,* 67 Ill. 11. But a railway company cannot charge one rate for delivering grain at a particular elevator in a city, and a higher rate for delivering at another elevator in the same city, and equally accessible. *Vincent v. Ry. Co.,* 49 Ill. 33. At common law a carrier is not bound to treat all with absolute equality. *Ry. Co. v. Gage,* 12 Gray 393; *Sargent v. R. R. Co.,* 115 Mass. 422; *Menacho v. Ward,* 27 Fed. 529; and it has been held that a company may discriminate in favor of persons shipping large quantities of freight. *R. R. Co. v. Forsaith,* 59 N. H. 122; *Nicholson v. Ry Co.,* 1 Nev. & Macn. 121; *contra, Scofield v. Ry. Co.,* 43 Ohio St. 571.

CONSTITUTIONAL LAW—EMINENT DOMAIN—FISHING RIGHTS.—ALBRIGHT v. PARK COMMISSION, 57 ATL. 398 (N. J.).—A statute providing that the right to take fish from inland lakes be acquired by eminent domain for public enjoyment, *held,* unconstitutional, such right not being one of use, but of mere pastime. Gummere, C. J., and Vroom, J., *dissenting.*

In this case the decision rests on the distinction between the right to acquire property for park purposes, which the State has, *Shoemaker v. U. S.,* 147 U. S. 282, for the benefit of the public at large, and the acquisition of property by the State for a limited benefit to a small number of people. It is usually considered a question for the legislature to determine whether the public benefit is sufficiently great to justify the exercise of eminent domain, *Water Co. v. Stanley,* 39 Hun. 428; *Com. v. Breed,* 4 Pick. 463; *State v. Morris Aque. Co.,* 46 N. J. L. 495, though the courts will always rectify a gross abuse of this power. *Buckingham v. Smith,* 10 Ohio 288; *Coster v. Water Co.,* 18 N. J. Eq. 64. And they will look with particular care that the use to which the property is to be put, be public, especially in the case of real property, *Heyward v. New York,* 8 Barb. 488; *Taylor v. Porter,* 4 Hill 149. Being a grant by the government, it would be repugnant to the Constitution for the State to violate a contract for other than public purposes.

CONSTITUTIONAL LAW—EXPORTS—TAXATION.—CORNELL v. COYNE, 24 SUP. CT. 383.—*Held,* that the same tax on cheese manufactured solely for exporting as is laid on other cheese, is not obnoxious to the constitutional provision forbidding a tax on exports. Fuller, C. J., and Harlan, J., *dissenting.*

In the dissenting opinion it is contended that as soon as an article is set aside for the purpose of exporting, it becomes an export within the meaning of the Constitution; that otherwise there is no way of preventing Congress from evading the Constitution by taxing exports before they are shipped.

This contention, however, is not supported by authority. The goods must be actually in process of transportation by the carrier before they become exports. *Coe v. Errol,* 116 U. S. 577; *Clarke v. Clarke,* 3 Wood. 408. In *Clark v. Monroe,* 60 Ga. 61, property was held to be exports, but there it was actually on board the carrier. The test is not whether the goods taxed are to be exported later, but whether they are taxed because they are going to be exported. *Turpin v. Burgess,* 117 U. S. 504. Goods still in the factory, though finished and ready for shipping, are a part of the general mass of taxable property and do not come under the head of exports. *Brown v. Houston,* 114 U. S. 622; *Myers v. Co. Commissioners,* 83 Md. 385; *Nelson Lumber Co. v. Loraine, 22* Fed. 54.

CONTRACTS—GOODS TO BE MANUFACTURED—SALE BY SAMPLE.—IDEAL WRENCH CO. V. GARVIN MACHINE CO., 87 N. Y. SUPP. 41.—The defendant contracted to manufacture a quantity of wrenches, equal in every respect to sample. The purchase price was paid and the goods were delivered and accepted. The wrenches proved to be defective, and were valueless for plaintiff's purposes. *Held,* that, as the contract was to manufacture and deliver and not a sale by sample, the acceptance of the goods precluded a recovery for damages sustained. Laughlin and Hatch, JJ., *dissenting.*

The decision is based upon the hypothesis that to constitute a sale by sample the goods must be *in esse* at the time of sale, a conclusion analogous to the New York doctrine relative to the statute of frauds. When the contract is to manufacture and deliver, as distinguished from a sale by sample, the court adopts the theory that an acceptance of the goods, with opportunity to examine, precludes a recovery for any defects that may exist, the docrine of *caveat emptor* governing. *Iron Co. v. Pope,* 108 N. Y. 232. In a sale by sample, however, there is a warranty surviving acceptance that the goods will substantially conform with the sample, the buyer having the privilege of rejecting them, or accepting and suing for damages. *Zabriski v. R. R. Co.,* 131 N. Y. 72; *Day v. Pool,* 52 N. Y. 416; *Leitch v. Manufacturing Co.,* 64 Minn. 434. This latter proposition, however, in *Briggs v. Hilton,* 99 N. Y. 517, was applied to an executory contract to manufacture, the court deciding that the existence of the goods was immaterial; and the recent case of *Henry v. Talcott,* 175 N. Y. 385, negatives the presumption that the goods must be *in esse* to constitute a sale by sample, holding that the question is one of fact for the jury. In elucidating their position as to the statute of frauds, the New York courts have freely acknowledged that it is continued "at the expense of sound principle," *Cooke v. Millard,* 65 N. Y. 352; and to extend the doctrine to questions outside of its original application would seem anomalous. In view of the prevalent custom of manufacturers to exhibit samples, contracting to manufacture goods in conformity thereto, and considering the underlying reason for exempting sales by samples from the doctrine of *caveat emptor,* it would appear that the application of the rule should not be made dependent upon the existence or non-existence of the subject matter at the time the agreement is made.

CORPORATIONS—FIDUCIARY RELATION OF PROMOTERS—RECOVERY OF SECRET PROFITS BY STOCKHOLDERS.—HUTCHINSON V. SIMPSON, 87 N. Y. SUPP. 369.—The promoters of a corporation to control malting establishments on which

they held options issued subscription blanks, addressed to themselves, containing representations that the capital would be used for specified purposes. A large block of stock remained after the projects enumerated in the contract were consummated, and this they secretly appropriated. *Held,* that an action could not be maintained by stockholders to compel the promoters to account to the corporation for the stock taken. Hatch and Laughlin, JJ., *dissenting.*

A promoter occupies a fiduciary relation towards the corporation and stockholders, and if he retains secret profits, he is liable to account therefor. *Dickerman v. Trust Co.,* 176 U. S. 181; *Brewster v. Hatch,* 122 N. Y. 349; *Hayward v. Leeson,* 176 Mass. 310; *Gluckstein v. Barnes* (1900) App. Cas. 310; and it is not necessary to show a fraudulent intent—it is sufficient that the profits were made secretly. *Land Co. v. Loudenslager,* 55 N. J. Eq. 78; *Nitrate Co. v. Syndicate* (1899), 2 Ch. 392. But the liability of a promoter is predicated upon a violation of the trust relation, and the decision in the principal case is based upon the assumption that the contract was a private one between the signers of the subscription blanks and the promoters, the latter not occupying a fiduciary position towards the corporation. The distinction is a doubtful one, as the acts of the promoters were impliedly ratified by the company, the promoters themselves assuming the management of the same. Where a director sells property to the corporation at an excessive valuation, the company alone can take advantage thereof, a stockholder having no remedy. *Burland v. Earle* (1902) App. Cas. 83; but when the corporation is in control of the promoters, and the officers refuse to act, a suit by the stockholders will be sustained. *Flynn v. R. R. Co.,* 158 N. Y. 493; *Hawes v. Oakland,* 104 U. S. 450. Where there was a sale to the corporation by the promoters, the sale was rescinded, but it was held that equity would not compel the promoters to account for the profits. *Erlanger v. Phosphate Co.,* 3 App. Cas. 1219; but where new equities have arisen, the remedy is not a rescission of the contract, but an action for accounting. *Yale Stove Co. v. Wilcox,* 64 Conn. 101; *In re Olympic,* 2 Ch. 153. Undoubtedly the stockholders have a remedy in the nature of an action of deceit against the promoters. *Brewster v. Hatch, supra.*

DEATH BY WRONGFUL ACT—SURVIVAL OF TORT ACTION—CONFLICT OF LAWS.—SMITH V. EMPIRE STATE-IDAHO M. & D. Co., 127 FED. 462 (C. C.).—*Held,* that an action to recover damages against a master for the death of a servant while in the course of his employment by the master's alleged negligence is a transitory action to enforce a personal liability, which may be litigated in a State other than that in which the accident occurred.

The reasoning of this case seems to illustrate the trend of the law toward recognizing the transitory nature of such actions as a matter of right rather than of mere comity. Early cases in this country held that in absence of proof as to statutes of the State where the death occurred the common law will be presumed to be there in force, and other States will not apply their own statutory remedies to cases arising outside their own borders. *C. & W. I. Ry. Co. v. Schroeder,* 18 Ill. App. 328. So no remedy lay in Maryland for such death in Pennsylvania, the remedy being local and having no force nor vigor outside the State where the statute was made. *State v. Pittsburgh & C. Ry. Co.,* 45 Md. 41. On the other hand, while the foreign

statute has no extraterritorial force, rights under it, not contrary to the policy of Pennsylvania, will, by comity, be enforced by remedies according to Pennsylvania procedure. *Knight v. W. J. Ry. Co.*, 108 Pa. St. 250. And although at common law such actions abate upon the death of the person injured, yet where the statute of the State in which the injury was inflicted gives a right of action to the personal representatives of the deceased, that right may be enforced in another State having a similar statute. *Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169; 15 N. E. 230.

EMINENT DOMAIN—PROCEEDINGS BY THE UNITED STATES—DISMISSAL—DAMAGES.—UNITED STATES V. DICKSON, 127 FED. 774 (C. C.).—*Held*, that proceedings by the United States to condemn land for a public building or other governmental purpose may be dismissed at any time before the actual acceptance of the property and payment therefor, until which time there is no "taking" of the property, and the United States is not subject to the payment of costs or damages to the landowners on such dismissal.

Such costs and damages seem to have no existence independently of statutory enactments. Thus a municipal corporation which institutes condemnation proceedings against certain land, and abandons them six months later, is not liable for damages to the rental of the land caused by such delay, in the absence of any showing that the delay was unnecessary, or that there was malice or want of probable cause. *Feiten v. City of Milwaukee*, 47 Wis. 494; 2 N. W. 1148. So where a city proceeds under an ordinance to widen a street, and thereafter takes no steps in the premises, and an abutting owner, learning of the passage of the ordinances, tears away all the front of a building in front of his lot and rebuilds such front four feet further back, he cannot recover for the expense incurred from the city. *Whyte v. City of Kansas*, 23 Mo. App. 409. And where a railroad company dismisses an appeal in condemnation proceedings against the protest of the appellee, in the absence of a special contract or positive rule of law, there can be no recovery against the railroad company for services, time, or expenses incurred in defending against such condemnation proceedings. *Bergmann v. St. P., S. & T. F. Ry. Co.*, 21 Minn. 533.

EQUITY—STREET IMPROVEMENT—SETTING ASIDE ASSESSMENT.—FARR V. CITY OF DETROIT, 99 N. W. 19 (MICH.).—A city council paved a street in accordance with a petition which did not have enough signers to give the council jurisdiction. *Held*, that a property owner on the street cannot maintain an action in equity, after the work is completed, to have his assessment set aside. Grant, J., *dissenting*.

As a general rule assessments made without all the requisites of jurisdiction can be restrained, *Zeigler v. Hopkins*, 117 U. S. 683; *Dillon's Munic. Corps*, Sec. 400, Vol. 2. But a party may so act as to be estopped to deny the authority of the city officials. *Goodwillie v. City of Manistee*, 93 Mich. 170. As to what constitutes an estoppel, in such cases, however, there is a conflict. Some decisions hold that if the property owner simply knows that the work is going on he is estopped. *People v. City of Rochester*, 21 Barb. 656; *Fitzhugh v. Bay City*, 109 Mich. 581. Others, that he is not obliged to take any action till his rights are called in question. *Mulligan v. Smith*, 59

Cal. 206; *Whitney v. Port Huron,* 88 Mich. 268. From these citations it appears that even in Michigan, where the present case was decided, the decisions are not harmonious. The rule held generally is, contrary to the decision in the present case, that mere inaction will not estop the complainant from contesting the jurisdiction of the officials. *Ogden City v. Armstrong,* 168 U. S. 224; *Canfield v. Smith,* 34 Wis. 381.

EVIDENCE—ADMISSIBILITY—DANGEROUS PREMISES.—POTTER V. CAVE, 98 N. W. 569 (IA.).—In an action for injuries sustained by falling down an unguarded stairway, plaintiff attempted to introduce evidence of previous accidents on the stairway and of warnings to the defendant that it was dangerous. *Held,* that it was properly excluded.

Following previous decisions in the same court, *Hudson v. R. R.,* 59 Ia. 581; *Croddy v. R. R.,* 91 Ia. 605. But the court has intimated its disapproval of this view. *Mathews v. Cedar Rapids,* 80 Ia. 466. The leading case in support is, *Collins v. Dorchester,* 6 Cush. 396; *Hubbard v. R. R.,* 39 Me. 508. The objection to the evidence is based on the fact that its introduction tends to divert the attention of the jury from the real question in dispute by raising a collateral issue. The better rule, however, seems to be that such evidence is admissible. The character of the place being in issue the defendant should be prepared to show its real character in the face of any proof bearing on the subject. *Columbia v. Armes,* 107 U. S. 519; *Quinlan v. Utica,* 74 N. Y. 603; *Chicago v. Powers.* 42 Ill. 169. As tending to support the principal decision, in a number of cases evidence that persons had escaped injury was excluded. *Aldrich v. Pelham,* 1 Gray 510; *Ass'n. v. Giles,* 33 N. J. L. 263. But in the latter case the court said that the matter rested in the discretion of the court; it being often better to admit such evidence. As illustrating a case where this kind of evidence was properly admitted see *Calkins v. Hartford,* 33 Conn. 57. But this latter class of evidence, viz.: that other persons escaped injury, is not so convincing as evidence that others were injured, since persons are not wont to seek such places and do not willingly fall into them. *Columbia v. Armes, supra.*

LEASE—COVENANTS AND WARRANTIES—QUIET ENJOYMENT—EMINENT DOMAIN.—PABST BREWING CO. V. THORLEY, 127 FED. 439 (C. C. A.).—Where a lessor covenanted to secure the lessee in the quiet enjoyment of the premises against acts of the lessor, his heirs, executors, administrators or assigns, "or any other persons," *held,* that the words "or any other persons," being read by the rule *ejusdem generis,* do not warrant against the exercise by the government of its power of eminent domain.

All contracts are inherently subject to the paramount power of the sovereign, and the exercise of such power is never understood to involve their violation. The power acts upon the property which is the subject of the contract, and not upon the contract itself. *Osborn v. Nicholson,* 13 Wall. 655. Eminent domain is the right of the sovereign, without the consent of the owner, when necessary, to make private property subservient to the public welfare, and hence does not involve paramount ownership in the State. *Giesy v. Cincinnati, W. & Z. R. Co.,* 4 Ohio St. 308. Even the act of a *de facto* sovereign is outside the scope of the covenant. If the sovereignty be eventu-

ally recognized as *de jure* also, the act is an act of sovereignty and lawful; otherwise it is merely tortious. *Dudley v. Folliott*, 3 T. R. 584; *Watkeys v. De Lancey*, 4 Doug. 354, 26 E. C. L. 400. A covenant for quiet enjoyment in a lease only goes to the extent of engaging that the landlord has a good title and can give a free and unencumbered lease. *Ramsay v. Wilkie*, 13 N. Y. Supp. 554. But the covenant for quiet enjoyment is broken where the land at the time of the lease was subject to a lien for street betterments, unless the lessor remove the lien. *Blackie v. Hudson*, 117 Mass. 181.

NEGLIGENCE—FREE PASS—EXEMPTION FROM LIABILITY.—NORTH. PAC. RY. CO. V. ADAMS, 24 SUP. CT. 408.—*Held*, that a railway company can exempt itself from liability for injury through negligence to one travelling on a free pass. Harlan and McKenna, JJ., *dissenting*.

The decisions on this subject are various and conflicting. In England there can be a general exemption for liability even in case of a passenger for hire. *Slims v. Great Northern R. Co.*, 14 C. B. 647; *Peek v. R. Co.*, 10 H. L. Cas. 473. In this country some cases are to the effect that the company is liable for negligence to all its passengers, free or otherwise. *Penn. R. Co. v. Butler*, 57 Pa. St. 335; *Mobile & O. R. Co.*, 41 Ala. 486. In New York there can be a limitation of liability for negligence of servants; not for party's own negligence. *Stinson v. N. Y. Central*, 32 N. Y. 333. In Illinois there is a distinction between gross and ordinary negligence. *Chicago, etc., R. Co. v. Chapman*, 133 Ill. 96. The general rule is that it is not just and reasonable on grounds of public policy that carriers should limit their liability for negligence in case of passengers for hire. *Louisville, etc., R. Co. v. Taylor*, 126 Ind. 176; *Baltimore, etc., R. Co. v. McLaughlin*, 73 Fed. 519. The leading case on this point in the Federal courts is *R. Co. v. Lockwood*, 17 Wall. 357. But as regards free passengers a limitation of liability violates no rule of public policy and is valid. *Quimby v. Boston, etc., R. Co.*, 150 Mass. 365; *Griswold v. N. Y., etc., R. Co.*, 53 Conn. 371. This rule as to free passengers formerly unsettled in the United States courts, may, by the present decision, be considered as established.

NOTES—GUARANTOR—NOTICE OF NON-PAYMENT—EFFECT OF FAILURE TO GIVE.—PFAELZER V. KAU, 69 N. E. 914 (ILL.).—*Held*, that a guarantor of a note is not entitled to notice of non-payment even though he can show that he has sustained losses which would not have occurred if notice had been given to him.

There is no unanimity among the authorities on this point, some holding that reasonable notice of non-payment should be given. *Talbot v. Gray*, 18 Pick. 534; *Gamage v. Hutchins*, 23 Me. 565; *Gibbs v. Cannon*, 9 Serg. & R. 198. The weight of authority maintains that the guarantor cannot set up want of notice as a defense. *Beebe v. Dudley*, 6 Foster 249; *Allen v. Rightmere*, 20 Johns. 365. The Illinois decisions are in conflict. In *Heaton v. Hulbert*, 3 Scam. 489, it was held that notice must be given if through the lack of it the guarantor suffers. *Voltz v. Harris*, 40 Ill. 155. The later cases seem to uphold the principal case. *Gage v. Mechanics Nat. Bank*, 79 Ill. 62; *Parkhurst v. Vail*, 73 Ill. 343; *Stowell v. Raymond*, 83 Ill. 120.

PEONAGE—CONSTITUTIONALITY OF STATUTE.—U. S. v. MCCLELLAN, 127 FED. 971 (GA.).—A conviction, in accordance with the statute against peonage, of one who holds another in involuntary servitude to work out a debt, *held,* valid.

The constitutionality of the statute is plain under Const. U. S., Amend. 13, Secs. 1 and 2, since it is merely a prohibition of involuntary servitude. Although the statute in question was enacted to prohibit peonage in New Mexico, it is proper for the law to be applied to any of the States as well. *Prigg v. Penn.,* 16 Pet. 539. In the principal case the question of the somewhat conflicting doctrines of the necessity of a strict application of the Penal Statutes, and the broad construction with which the statutes guarding the liberty of the citizen should be viewed, arises. Following the *Peonage Cases,* 123 Fed. 671, it holds that the latter doctrine demands the greater protection. On the whole, it seems rather incongruous that the question of negro slavery should still appear in the Federal courts. (See editorial comment.)

RAILROADS—CROSSING ACCIDENT—IMPUTABLE NEGLIGENCE.—DUVAL V. RAILROAD, 46 S. E. 750 (N. C.).—*Held,* that negligence of one with whom plaintiff was riding as a guest in a carriage struck by defendant's train, is not imputable to plaintiff.

In *Thorogood v. Bryan,* 8 C. B. 115, it was held that the negligence of a driver was imputable to one riding in the conveyance with him. This case was expressly overruled in *The Bernina,* 13 App. Cas. 1, in which Lord Herschell cites with approval *Little v. Hackett,* 116 U. S. 336. In *Prideaux v. City of Mineral Point,* 43 Wis. 513, the English doctrine as promulgated in *Thorogood v. Bryan, supra,* was approved and adopted. See also *Otis v. Town of Jonesville,* 47 Wis. 422; *Whittaker v. Helena,* 14 Mont. 124; *Railroad v. Talbot,* 48 Neb. 627. But by the great weight of authority in this country and in England, the doctrine set forth in the decision in the principal case is the correct one. *Railroad v. Lapsley,* 51 Fed. 174; *Little v. Hackett, supra; City of Coruna v. Ervin,* 59 Ill. App. 555; *Knapp v. Dogg,* 18 How. Prac. 165. It has been held that the rule that the driver's negligence should not be imputed to the plaintiff should apply only in cases where the plaintiff is seated away from the driver or is separated from him by an inclosure and is without opportunity to discover danger. *Robinson v. Railroad,* 66 N. Y. 11; *Brickell v. Railroad,* 120 N. Y. 290.

TELEGRAM—FAILURE TO DELIVER—DAMAGES.—WESTERN UNION TEL. CO. V. MCNAIRY, 78 S. W. 969 (TEX.).—The delivery of a telegram notifying plaintiff of her brother's death and requesting instructions was negligently delayed. *Held,* that damages for mental anguish are not recoverable, although the nature and importance of the message are apparent on its face.

This is the first break in the long line of decisions of this court, which have established the so-called "Texas Doctrine," namely, that where the importance of the message is apparent, damages for mental anguish are recoverable. *Tel. Co. v. Simpson,* 73 Tex. 422; *Tel. Co. v. Kerr,* 4 Tex. Cir. App. 280; *Tel. Co. v. Proctor,* 6 Tex. Cir. App. 300. The trend of the later decisions is to repudiate that doctrine. *Sparkman v. Tel. Co.,* 41 S. E. (N. C.) 881; XII *Yale Law Journal,* 111, in which the authorities are carefully marshalled.