matter which is known as express matter," the court says it is not there averred nor shown by the testimony that any railroad in the United States has ever held itself out as a common carrier of express companies, *i. e.*, a common carrier of common carriers. Much stress is laid on the inconveniences that would follow, were the railroad companies obliged to furnish express facilities to all applying for them, its interference with passenger business, etc., and the conclusion is reached, that "The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security."

Failing to find any evidence of a usage to that effect, in the absence of any statute, the court declares that it is not the duty of railroad companies to furnish express facilities to all alike who demand them; and as no duty was imposed by contract upon the defendants to furnish the complainants with such, the court declines making a judicial regulation of their business.

The opinion is of value because of the decision reached, rather than for the discussion of the subject, which has been more elaborately treated in many other cases, a collection of which will be found in a note to *Southern Ex. Co.* v. *Nashville Ry. Co.*, 20 Am. L. Reg. 602.

The practical solution of the problem is not free from difficulty. The growing feeling against monopolies of every sort, will no doubt lead to attempts on the part of the various state legislatures to impose on the railway companies, the duty which it has just been decided is not theirs by the common law, and the complicated provisions, inseparable from such legislation, will no doubt give rise to many constitutional questions, akin to those we may expect from the Railroad Commission Acts.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF UNITED STATES.[1]

SUPREME COURT OF GEORGIA.[2]

SUPREME COURT OF INDIANA.[3]

SUPREME COURT OF ILLINOIS.[4]

COURT OF ERRORS AND APPEALS OF MARYLAND.[5]

AGENT. See *Bank.*

Authority to Warrant—Presumption.—An agent, upon whom general authority to sell, is conferred, will be presumed to have authority to warrant, unless the contrary appears: *Talmage* v. *Bierhouse*, 103 Ind.

[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term, 1885. The cases will probably appear in 116 U. S. Rep.

[2] From J. H. Lumpkin, Esq., Reporter; to appear in 73 or 74 Ga. Rep.

[3] From John W. Kern, Esq., Reporter; to appear in 103 Ind. Rep.

[4] From Hon. N. L. Freeman, Reporter; to appear in 114 Ill. Rep.

[5] From J. Shaaf Stockett, Esq., Reporter; to appear in 64 Md. Rep.

It will be presumed, in the absence of a showing to the contrary, that a warranty is not an unusual incident to a sale by an agent for a dealer in a commodity, where the thing sold is not present and subject to the inspection of the purchaser: *Id.*

Though the authority of the agent be restricted by instructions from his principal, the latter will be bound by a warranty attending a sale by the agent, unless the purchaser knew of such restriction: *Id.*

ATTACHMENT. See *Bank.*

BANK.

Garnishment—Checks drawn before Service—Lien to secure Endorsements—Fraud—Conflict of Laws.—Where a depositor in a bank, before the service of process upon the bank as garnishee at the suit of a creditor of the deposit or, drew acheck in favor of another, which was forwarded to the bank, and was by it paid in due course of business after the service of the writ, and charged to the account of the depositor, it was *held*, that the bank, as garnishee, was entitled to credit for the amount of the check so paid: *Bank of America* v. *Indiana Banking Co.*, 114 Ill.

But if a bank pays checks drawn on it after it is served with garnishee process, it cannot be allowed credit therefor as against the rights of creditors of the depositor, entitled to share in the funds garnished: *Id.*

Where a depositor indorsed a promissory note of a third person, made payable to his order, and discounted the same in a bank where he had funds to his credit, it was *held*, that a payment of the amount due on such note by the indorser, to the bank, out of his funds on deposit, after the service of garnishee process upon the bank at the suit of a creditor of such indorser, could not be allowed the bank as a set-off, the indorser's liability to the bank being that only of a surety, and contingent: *Id.*

If a depositor draws a check upon his banker, who has funds to an amount equal or greater, it operates to transfer the sum named in the check to the payee, who may sue for and recover the same in his own name: *Id.*

The fact that a check is drawn by a depositor of funds in a bank, in favor of the cashier of such bank, just previous to the service upon the bank, by garnishee process, is not of itself evidence of fraud or want of good faith. It is as lawful for an attachment debtor to draw his check in favor of the garnishee, as in favor of any one else, if done in good faith before the service of process, and the garnishee will be entitled to credit for the amount named in the check, in the absence of evidence impeaching the transaction for fraud: *Id.*

A check drawn by a depositor in the state of Indiana, on his banker, payable in this state, will be construed by the laws of this state, and operate to transfer the sum named therein in accordance with the laws of this state, notwithstanding a different rule obtains in the other state: *Id.*

Authority of Cashier—Note—Evidence—Notice.—In a suit against a firm of private bankers, upon a note given by their clerk and cashier for money borrowed by him in the firm name and appropriated to his own use, in which the cashier's authority to give the note is put in issue, evidence of the custom of bankers at the place in which the defendants'

bank was located, to borrow money on time, is proper, as tending to show that the borrowing of money was within the scope of the ordinary and customary business of the defendants: *Crain* v. *First Nat. Bank of Jacksonville,* 114 Ill.

In the same suit it was *held,* a paper, directed to another and distant bank, giving the signatures of persons authorized to sign for the defendants, one of which was in the handwriting of the cashier and another that of one of the defendants, was proper evidence as an admission of the defendant signing the same, of the cashier's authority to bind the defendants by the execution of a note in their firm name. And the fact that the payee of the note did not act on the faith of such paper, though detracting from its weight, did not render it irrelevant and improper: *Id.*

The giving as collateral security, by a cashier of a private bank, notes of other persons, of over $5000, of his bank, to secure a note of that amount given by him in the name of his principals, with authority, on maturity of the latter notes, to sell the collaterals at public or private sale, with or without notice, and apply the proceeds to the payment of the note given, is not of such a nature as to afford notice to the party making the loan and taking the notes, of the cashier's want of authority to execute the note for the bank, or of fraud in giving it: *Id.*

General or Special Deposit of Money—Insolvency—Trust Funds.—Upon a special deposit of money, a bank is merely a bailee, and is bound according to the terms of the deposit; but on a general deposit the money becomes the property of the bank, and the depositor's claim on the bank is merely for a like amount: *McLain* v. *Wallace,* 103 Ind.

Upon the insolvency of a bank, its general depositors must be paid *pro rata: Id.*

The addition of the word "clerk" to the name of a general depositor does not make the deposit a special one, nor does it change the liability of the bank: *Id.*

The rule that a trustee may follow trust property as long as it can be traced, has no application in an action to recover money on general deposit in a bank: *Id.*

Contract of Cashier—Misappropriation of Funds—Notice.—A contract between the cashier of a bank and defendant, whereby defendant was to buy railroad stock for such cashier, was to give his note to the bank for it, and deposit the stock as collateral security for the payment of the same, and the cashier was to advance the money of the bank, to pay for the stock, was contrary to the rules of the bank, it amounted to a misappropriation of the bank's funds, for which both the cashier and defendant are liable: *Savannah Bank and Trust Co.* v. *Hartridge,* 73 or 74 Ga.

The knowledge of the cashier in such a transaction, was not the knowledge of the bank, and it was not bound thereby: *Id.*

Contract by President.—The president of a bank cannot make a valid contract between it and a third party, acting in the capacity of agent for such third party as well as for the bank: *English* v. *Bank of Georgia,* 73 or 74 Ga.

Where Coker, who was president of a bank, and English agreed with the bank, in writing, to become guarantors for the safe return of certain jewelry to the bank, by Sharpe, and by such return of the jewelry such

agreement became abrogated, it was not subsequently revived as against English, by a note of English to Coker, authorizing him to make any arrangement with Sharpe, for Coker and English, by which Sharpe might take the goods, which Coker might see proper to make, and an arrangement by which Sharpe was allowed by Coker to take the goods, giving a receipt to Coker and English therefor, and Coker bound himself verbally to the bank, to be jointly responsible with English for their safe return: *Id.*

Bills and Notes.

Forbearance to Sue—Estoppel—Extension.—Where the holder of a promissory note gratuitously permits it to run more than a year after maturity, and then, upon the payment of a part of it by the maker, the holder, at the request of the maker, and without losing any right or changing his situation, agrees to wait until the latter can collect money with which to discharge the balance, such maker is not estopped to set up a defence then existing, or which might thereafter arise, of which neither such maker nor the holder, had notice at the time of such agreement: *Henry* v. *Gilliland*, 103 Ind.

To defeat the right to a clear defence to a note, not payable in bank, in the hands of an assignee, on the ground of a subsequent contract to pay in consideration of an extension of time, the plaintiff must show a contract of extension for a definite time, upon a valid consideration. Performance of his part is not sufficient to bind the maker: *Id.*

Common Carrier.

Negligence.—Contract Limiting Liability—Fixing of Value.—A common carrier, may by contract, limit his liability as an insurer, but he can not thus relieve himself from the consequences of his own negligence or fraud: *Rosenfield* v. *Peoria, etc., Ry. Co.*, 103 Ind.

In order that a common carrier may, by fixing the value of goods received for transportation, limit his liability, he must show that the shipper had knowledge of such fixing of value and for a sufficient consideration consented thereto, or that his statements and conduct justified the carrier in so fixing the value: *Id.*

Contracts limiting the amount of recovery will be construed most strictly against the carrier. The burden is upon the carrier to show any claimed limitation upon its common-law liability: *Id.*

Conflict of Laws. See *Bank.*

Constitutional Law. See *Telegraph.*

Regulation of Commerce.—Occupation Tax on Sale of Products of another State.—An act of a state legislature imposing a tax or duty on persons who, not having their principal place of business within the state, engage in the business of selling or of soliciting the sale of certain described liquors to be shipped into the state, is unconstitutional, as discriminating to the disadvantage of the products of other states, and in effect, a regulation of inter-state commerce: *Walling* v. *State of Michigan*, S. C. U. S., Oct. Term 1885.

Contempt.

Service of an Order to Show Cause upon an Attorney of Record.—A New York corporation doing business in California, was required by the

law of that state to designate a person upon whom process may be served. A suitwas commenced against the corporation, which duly appeared by its attorneys. An order was issued against it to show cause why it should not be punished for contempt in disobeying an *ex parte* restraining order issued immediately upon the bringing of the suit. The designated agent of the company purposely kept himself out of the way of the officer to avoid service of this order; and an order was entered that service be made upon "the attorneys of record herein of said defendant." *Held*, that such service was valid: *Eureka Lake Company* v. *Yuba County*, S. C. U. S., Oct. Term 1885.

CONTRACT.

Construction—Right of Buyer to pass upon Quality—Evidence.—A contract for the sawing, and delivery to the purchaser, of lumber, providing that he should measure the same when delivered, and that he should measure and pay for only such as was absolutely clear, and suitable for a certain purpose, while it gives the buyer the right to measure the lumber and pass upon its quality, does not make him the sole judge, and his decision beyond review. In such case, he is bound to receive and measure such of the lumber as complies with the contract, although in his judgment it is not of the proper quality: *Mulliner* v. *Bronson*, 114 Ill.

In a suit upon a contract for the sawing and delivery of lumber to the defendant at his yard in a city, containing a clause that defendant should measure the same after its delivery, and take only such as was absolutely clear and would work into tobacco boxes, there is no error in admitting the testimony of witnesses who saw the lumber after it was sawed, in the timber, and when it was being shipped, to show its quality when delivered. If injured while being shipped, such fact might be shown: *Id.*

CORPORATION.

Necessity of Acceptance of Charter within State creating it.—The mere granting of a charter, it not appearing upon the face of the incorporating act or otherwise, that the named corporators had applied for it, does not create a corporate body—there must be at least an acceptance of the grant by a majority of the corporators before its corporate life and existence can begin: *Smith* v. *Silver Valley Min. Co.*, 64 Md.

Where there is nothing in the charter which dispenses with the necessity of its acceptance, and of organization under it, by the corporators, and nothing which authorizes them, even if the grant of such authority would in any case be valid, to do those acts in another state, the charter will be held invalid in the absence of proof of acceptance: *Id.*

A charter can be accepted and the corporation organized only within the limits of the state creating it: and this rule should be applied and enforced, when a proper case for its application arises, in the tribunals of the state in which the unauthorized acts were done or the suit was instituted, as well as by the courts of the incorporating state: *Id.*

Conflict of Laws—Jurisdiction of Courts as to Controversies relating to Management.—The courts of Maryland will not interfere in controversies relating only to the internal management of the affairs of a foreign corporation. Such controversies must be settled by the courts of the state creating the corporation: *North State Copper and Gold Min. Co.* v. *Field*, 64 Md.

Where the act of a foreign corporation affects one solely in his capacity as a member of the corporation, such act may be said to relate to the management of the internal affairs of the corporation; but it is otherwise where it affects his individual rights only: *Id.*

Two Corporations using same Name—Injunction.—A bill by a domestic corporation incorporated by the name of "Drummond Tobacco Company," to enjoin the incorporation of another company in the same city by the name of "Drummond-Randle Tobacco Company," to engage in the same business, will not be sustained unless it is shown, by such a preponderance of evidence as to satisfy the mind of the chancellor, that the incorporation of the second company under the name proposed will injure the former company in its business: *Drummond Tobacco Co.* v. *Randle*, 114 Ill.

So the use of any particular name by a corporation will not be enjoined unless it is made to appear, from the evidence and by all the circumstances, the proposed use of the name will likely result in injury to the complainant: *Id.*

DAMAGES. See *United States Courts.*

EQUITY. See *Specific Performance.*

EVIDENCE.

Expert—Hypothetical Case.—Where a hypothetical case, covering the leading facts testified to, and practically admitted, is stated to a witness shown to be an expert, his opinion, based on such hypothetical case, is proper evidence: *Lotz* v. *Scott*, 123 Ind.

EXECUTOR AND ADMINISTRATOR.

Bequest for Life—Waste by Executor during Life-estate—Remedy for Remainderman.—Where money is bequeathed to one for life, with remainder to another, and the executor, or administrator with the will annexed, has wasted or converted it to his own use, the remainderman cannot sue the bond of such executor or administrator, during the lifetime of the tenant for life: *State* v. *Brown*, 64 Md.

The remedy for the remainderman in such case, is to apply to the Orphans' Court to order the executor to bring the money into court to be safely invested, so that the tenant for life may receive the interest during his life, and at his death the principal may be paid over to the remainderman: *Id.*

Upon the neglect or refusal of the executor to comply with such order the court will revoke his letters, and appoint an administrator *de bonis non*, with the will annexed, and direct him to bring suit on the testamentary bond of the recusant executor. Or the remainderman may proceed against such executor in a court of equity, and compel him to bring the money into court for investment: *Id.*

Right of one Executor to Maintain Bill against the Other.—An executor or administrator cannot file a bill in equity against his co-executor or co-administrator, in order to compel the latter to account for and pay over to him certain claims alleged to be due from the defendant as debtor to the estate of the deceased: *Whiting* v. *Whiting*, 64 Md.

FRAUD. See *Bank.*

FRAUDS, STATUTE OF.

Lease.—Consideration.—Where, as part of the consideration of the sale and transfer of a lease, for ten years, of real estate, the assignee agreed "to assume the covenants, and pay the rent agreed in said lease," such contract is not a promise to answer for the default of another, within the Statute of Frauds, but is an independent undertaking, founded upon a new and valuable consideration, for the benefit of a third person, and is valid: *Wolke* v. *Fleming*, 103 Ind.

INJUNCTION. See *Corporation.*

INSURANCE.

Assignment of Policy to Insurer as Collateral—Duty to pay Premiums —Failure to give customary notice—Unreasonable Delay of Insured.—It would be the duty of one insured to keep alive his policy, assigned as collateral security to the insuring company, by the payment of premiums, just as much as if it had been so assigned to any third person: *Grant* v. *Alabama Gold Life Ins. Co.*, 73 or 74 Ga.

While the custom and usage in dealings between one insured and the insuring company, such as in regard to personal notice to the insured by the agent of the company at Savannah of the time when premiums became due, become so much a part of the contract of insurance as to require the company to keep it up, or to give notice before substituting another mode, yet the insured must act with reasonable diligence, and six months' delay to pay a premium for want of notice appears so unreasonable as to show a purpose to abandon the policy and let it lapse: *Id.*

LEGACY.

Failure to put Property in Inventory—Rights of Legatee.—In an action of ejectment by legatees to recover leasehold property specifically bequeathed to them, it is not necessary to prove, in addition to the probate of the will, and the grant of letters testamentary, and the assent of the executor to the legacy, that the property was included in the inventory returned by the executor, and was distributed to the legatees by the order of the Orphans' Court: *Matthews* v. *Turner*, 64 Md.

The entire personal estate ought to be returned in the inventory to the Orphans' Court. But the title of a legatee to property specifically bequeathed, does not depend upon the inventory returned by the executor, nor does it necessarily depend upon the orders of the Orphans' Court: *Id.*

LIBEL.

False Statement in Affidavit for want of Arrest.—An action for libel cannot be sustained for false charges of a crime, in an affidavit for a warrant taken before a duly authorized and lawfully commissioned magistrate, having jurisdiction of the offence for which the warrant issues: *Francis* v. *Wood*, 73 or 74 Ga.

The only exception made is where an affidavit is sworn recklessly and maliciously before a court, that has no jurisdiction in the matter, and no power to entertain the proceedings: *Id.*

The libeller may be punished and the abuse repressed by a prosecution for perjury, the result of which is to make the libeller infamous if he is convicted: *Id.*

Master and Servant.

Injury to Servant—Co-employees—Foreman.—Where a master delegates duties which the law imposes upon him to an agent, the latter, whatever his rank, in performing such duties acts as the master, and for an injury to an employee caused by the negligence of such agent, the master is liable: *Capper* v. *Louisville, &c., Ry. Co.*, 103 Ind.

A foreman, or other like agent, except where the master's duties are delegated to him, is a fellow servant with those under his immediate supervision, and for his negligence the master is not liable to a servant engaged in the same general service: *Id.*

One engaged in the work of constructing and repairing tunnels upon the line of a railroad, who is injured by being carried from one point to another upon the line of the road, is a fellow servant with the engineer and other persons in charge of the train: *Id.*

Mines and Mining.

Following Veins outside of the lines of the Surface Location—Definition of "Vein, Lodge or Ledge."—The act of congress (Rev. Stat. § 2322) gives to the owner of a mineral vein or lode, not only all that is covered by the surface lines of his established claim, as those lines are extended vertically, but it gives him the right to possess and enjoy that lode or vein by following it when it passes outside of these vertial lines laterally: *Iron Silver Mining Co.* v. *Cheesman*, S. C. U. S., Oct. Term 1885.

The acts of congress use the words vein, lode or ledge, as embracing a more or less continuous body of mineral, lying within a well-defined boundary of other rock, in the mass within which it is found, or it may be said to be a body of mineral, or a mineral body of rock within defined boundaries in this general mass: *Id.*

A vein is by no means always a straight line, or of uniform dip or thickness, or richness of mineral matter, throughout its course. The cleft or fissure in which a vein is found may be narrowed or widened in its course, and even closed for a few feet and then found further on, and the mineral deposit may be diminished or totally suspended for a short distance, but if found again in the same course with the same mineral within that distance, its identity may be presumed: *Id.*

Municipal Corporation.

Nuisance—System of Drainage—Liability therefor.—Though the city, by its charter, has the right to establish a system of grading and drainage, such grading and drainage must be done so that the same will not prove a nuisance to the citizens, impairing the health of families, etc., thereby rendering enjoyment of their property impossible; otherwise the city will be liable for damages: *Smith* v. *City of Atlanta*, 73 or 73 Ga.

The sewer in question, though dug in 1870, was and is under the control of the city; if it be a nuisance, the city has not abated it, no one else could, and not having abated it the city may be said to have maintained

it and kept it up, and it is thereby a continuing nuisance, for the maintenance of which the city is liable: *Id.*

Governmental Duties—Principal and Agent—Respondeat Superior.—Where the duties delegated to officers elected by public corporations, are political or governmental, the relation of principal and agent does not exist, and the maxim of *respondeat superior* does not govern: *Summers* v. *Board*, 103 Ind.

Counties are instrumentalities of government, and are not liable for injuries caused by the negligence of the commissioners in the selection of an unskilful or incompetent physician for the care of the poor: *Id.*

Nuisance—"Coasting" on a Street—Passing of Ordinance—Liability of Municipality.—By sect. 40, of the act of 1878, chap. 484, amending the charter of the city of Cumberland, it is provided that the city council "may pass ordinances to remove all nuisances and obstructions from the streets, lanes and alleys within the limits of the city;" and "for the preservation of peace and good order, securing persons and property from violence, danger or destruction." The city council, by ordinance, sect. 5, chap. 13, of the city code, prohibited, under the penalty of a fine, "any sport, play or exercise that might produce bodily injury, or endanger property on any street, square or alley within the city limits." In an action against the mayor and city council of Cumberland, to recover for injuries to the plaintiff, caused by his being knocked down, while crossing one of the streets of the city, by a sled on which a number of boys were coasting on the snow, it was *held*, 1st. That the defendant was under an obligation to exercise for the public good the powers conferred on it by its charter to prevent nuisances and to protect persons and property; and that this duty was not discharged by merely passing ordinances; a vigorous effort must be made to enforce them. 2d. That the defendant was bound to prevent the nuisance if it could do so by ordinary and reasonable care and diligence; but if it did use this degree of care and diligence, it discharged its duty, and was relieved from responsibility; and a vigorous effort to enforce its ordinance on the subject would fulfil its duty in this respect. 3d. That the question whether such effort was made was one to be determined by the jury: *Taylor* v. *Mayor, &c., of Cumberland*, 64 Md.

Negligence—Sidewalks—Notice.—It is the duty of a city to keep its streets and sidewalks in a reasonable safe condition, so that they may be passed over in safety both by day and by night, and for neglect in this particular the city would be liable: *Bellamy* v. *City of Atlanta*, 73 or 74 Ga.

If the defect causing an injury has existed for some time the city is chargeable with notice of it. If the city could have ascertained the defect its failure to do so is negligence, and its liability the same as if it had notice, and a charge that the defect must be open and notorious, etc., is error: *Id.*

NEGLIGENCE. See *Common Carrier; Master and Servant; Municipal Corporation; Railroad.*

Excavation causing Pitfall upon Adjoining Lot—Parent and Child—Contributory Negligence.—One who makes an excavation upon his lot in

such a manner as to cause a pitfall upon an adjoining lot is liable, in the absence of contributory negligence, to one who resides upon the latter, for the death of his child caused by falling into such pit: *Mayhew* v. *Burns*, 103 Ind.

Where one is suing for the death of his child alleged to have been caused by the negligence of another, evidence that the plaintiff is poor, and not able to employ any one other than his housekeeper to take care of his children, is not admissible upon the question of contributory negligence: *Id.*

Where one knows of danger which threatens injury to himself or those to whom he is bound to afford protection, and he can by reasonable exertion avert it, his negligent failure to do so will prevent a recovery: *Id.*

NUISANCE. See *Municipal Corporation.*

PARTNERSHIP. See *Receiver.*

Injunction—Receiver—Equity Practice.—Upon an application for a receiver of a partnership the court does not determine the questions arising between the partners; the only question for consideration being, whether, upon the facts disclosed, there is an apparent necessity for either an injunction, or a receiver, to protect the assets of the partnership until the rights of the partners can be definitely determined upon full hearing of the case: *Heflebower* v. *Buck*, 64 Md.

The question of the propriety of granting an injunction or of appointing a receiver, is not to be determined upon the allegations of the bill alone, but the averments of the answer are also to be considered: *Id.*

The interest of the defendants, as well as that of the complainant, must be considered in an application of this kind; and where it is manifest that to grant the injunction and appoint a receiver as prayed, at that stage of the settlement of the affairs of the partnership then nearly at the close, would be attended with no substantial good to any of the parties concerned, but would likely be attended with unnecessary trouble, perplexity and expense, if not with even more serious mischief to the real interests involved, the application will be denied: *Id.*

In such a case there must be some clear breach of duty, or conduct amounting to fraud, or the facts must be such as to show a real danger to the partnership assets thus confided to the administration of the settling partner, by reason of insolvency or otherwise: *Id.*

PRACTICE.

Trial by the Court without a Jury—Effect of a Stipulation as to what was Proven.—Under the stipulation in writing of the parties a case was tried by a circuit court without a jury. The court entered a judgment finding certain facts, and, as a conclusion of law, the issues joined for defendant. On the same day a stipulation was filed, signed by the attorneys for the parties, by which it was agreed that on the trial certain facts were "proved." *Held*, That the stipulation did not contain any agreement as to the existence of any facts, but merely a statement as to what the proof showed on the trial; and therefore as to any facts stated in the stipulation to have been shown by proof at the trial, if they were not contained in the special findings, the only conclusion could be that the court did not find them to be facts; and that the case must be adjudicated on the special findings alone: *Tyre & Spring Works Co.* v. *Spaulding*, S. C. U. S., Oct. Term 1885.

RAILROAD. See *Common Carrier.*

Negligence—Sparks from Locomotive—Evidence—An action was brought against a railroad company to recover damages resulting from a fire alleged to have been occasioned by the engines and locomotives of the defendant being negligently run and controlled on the line of its road. The plaintiff offered only indirect proof that the fire was caused by the engine of the defendant. The defendant then offered to prove that among the farmers in that region it was a custom or usage to set fire to the leaves and underbrush at that season, so as to improve the pasturage; and that annually, during many years before the defendant's road was built, such fires had been started in that valley and the adjacent mountains. *Held*, That the evidence was inadmissible: *Green Ridge Co.* v. *Brinkman*, 64 Md.

Where a railroad company is sued for damages resulting from a fire communicated by the defendant's engine, proof that the fire so originated creates the presumption of negligence, and the *onus probandi* is on the defendant to show the contrary: *Id.*

The fact that the engine habitually scattered sparks to such an extent as to endanger combustible material along the line of the road, is one from which the jury may find negligence on the part of the defendant: *Id.*

RECEIVER. See *Partnership.*

Partnership—Distribution of Assets—Recovery of Judgment—Lien.—The recovery of a judgment against partners after the appointment of a receiver to take charge of the firm assets for the benefit of the firm creditors generally, creates no lien against any property or funds of the firm in the hands of the receiver. Such property or funds cannot be levied on by an execution, or reached by garnishment, for the reason of its being in the custody of the law: *Jackson* v. *Lahee*, 114 Ill.

A receiver was appointed on bill filed by one partner against the other for the settlement and adjustment of the partnership accounts and the payment of creditors of the firm, which was insolvent, and the court had ordered notice to be given to all creditors to come in and prove their debts before the master. It was *held*, that one of the creditors, by the recovery of a judgment against the firm during the pendency of said bill, and the filing of a creditor's bill on the same day that notice to creditors was ordered, did not acquire any lien upon the assets in the hands of the receiver, or right to be preferred over other creditors—and this more especially when such creditor proved his claim before the master, and shared in the distribution of the funds in his hands: *Id.*

SPECIFIC PERFORMANCE.

How far affected by Stipulation for Penalty.—The mere fact that a contract stipulates for the payment of liquidated damages in case of failure to perform, does not prevent a court of equity from decreeing a specific performance: *Lyman* v. *Gedney*, 114 Ill.

It is only where the contract stipulates for one of two things in the alternative—the performance of certain acts, or the payment of a certain amount of money in lieu thereof—that equity will not decree a specific performance of the first alternative: *Id.*

SURETY.

Right to require Indemnity or further Security from Principal—Right to Account.—A surety of a trustee cannot maintain a bill in equity to require his principal to give other and additional securities upon his bond given to secure the *cestuis que trust*, or counter security, and on his failure to give such security have him removed: *Ridgeway* v. *Potter*, 114 Ill.

The contract created by law between a principal and surety is, that the former shall refund to the latter whatever the surety has to pay for him. The principal is under no legal duty to a surety to keep his co-sureties in equal solvency as they were when they first became such, or to keep any co-sureties to share in the liability: *Id.*

Courts of equity, in relief of sureties under apprehension of loss or injury, have gone to the extent to allow the surety, after the debt has become due, to file a bill to compel the principal to discharge the debt for which the surety is responsible; and it has been said that a surety, when the debt has become due, may come into equity and compel the creditor to sue for and collect the debt from the principal: *Id.*

On bill by a surety on the bond of a trustee, against the trustee, to compel him to render to the court a report of his acts, including his receipts and disbursements, or his debits and credits, where the *cestuis que trust* are not made parties, there is no error in the court refusing to pass upon the report and state the account, as such a statement of the account would not conclude them; *Id.*

TAX AND TAXATION.

Goods for Export—When Power to Tax same Ceases.—Goods intended for export from the state of their production to a foreign country or to another state do not cease to be part of the general mass of the property in the state of production, subject, as such, to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation, or have been started upon such transportation in a continuous route or journey; the carrying of them to the depot where the journey is to commence is no part of that journey: *Coe* v. *Errol*, S. C. U. S., Oct. Term 1885.

Property in Transit.—Where property is collected from one or more points, by any means of transportation, and is awaiting the necessary preparation and facilities for further transportation, it will be deemed to be in transit while so detained, and not liable to taxation: *Board, &c.*, v. *Standard Oil Co.*, 103 Ind.

But where property is collected, even though it may be at the point of final shipment, to await indefinitely the owner's pleasure or the rise of markets, or to undergo a partial process of manufacture, or from any other cause having no relation to the preparation for or facilities or exigencies of transportation, it will be held to have acquired a *situs*, making it subject to taxation: *Id.*

TELEGRAPH.

Failing to transmit Message to Point without the State—Statutory Penalty—Constitutional Law—Delay in transmitting Messages—Evidence—Burden of Proof.—Prescribing a penalty against telegraph companies for failing to transmit a message, is valid and constitutional,

whether the message is to a point within or without the limits of this state: *Western U. Tel. Co.* v. *Ferris*, 103 Ind.

Where the sender of the message proves that there was an unreasonable delay, the burden of explaining the delay is upon the company: *Id.*

A delay of several hours in transmitting a message that only requires from five to fifteen minutes for its transmission, shows a want of diligence: *Id.*

Where the business of an office is such that one operator cannot receive messages with reasonable promptness, it is the duty of the company to supply the required assistance: *Id.*

TORT. See *United States Courts.*

TRUSTEE. See *Surety.*

Payment to—Acceptance of Credit on his Individual Account.—Where a trustee holds a note belonging to the trust estate, and receives in payment thereof, wholly or partially, a credit allowed to himself on his own individual indebtedness, the payment is not, in behalf of the maker of the note, a good payment to the trust estate; although the trustee is solvent at the time of such payment: *Maynard* v. *Cleveland*, 73 or 74 Ga.

UNITED STATES COURTS.

Jurisdiction—Tort—Measure of Damages—Judicial Discretion.—In an action of trespass for seizing and taking personal property, *colore officii*, with circumstances of aggravation and averment of special damage, brought in Circuit Court United States, under act 3d March 1875, it is error for the court to dismiss the suit on the ground that it did not, "really and substantially," involve a dispute or controversy properly within its jurisdiction, where the conclusion reached is founded on an opinion deduced from the declaration filed that the damage complained of did not exceed the sum of $500 and that, if the jury should render a verdict for that amount, the court would set it aside as excessive: *Berry* v. *Edmunds*, S. C. U. S., Oct. Term 1885.

The action being for tort and no precise rule of law fixing the recoverable damages, it was the peculiar function of the jury to determine the amount by their verdict; and in so doing they might have properly inflicted punitive damages upon the defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff; such a verdict should not be set aside "unless the court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence or prejudice, or have totally mistaken the rules by which the damages are to be regulated: *Id.*

Where it does not appear *as matter of law* from the nature of the case, as stated in the pleadings, that there could not *legally* be a judgment recovered for the amount necessary to give jurisdiction, the court, in order to dismiss the suit for want of jurisdiction, must find, as a matter of fact, *upon evidence legally sufficient*, "that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case:" *Id.*

The discretion given by sect. 5, act March 3d 1875, is judicial, proceeding upon ascertained facts according to rules of law, and subject to review for apparent errors: *Id.*