RECENT CASES.

ACCIDENT INSURANCE—INTENTIONAL HOMICIDE—ACCIDENT.—FURBUSH v. CASUALTY CO., 91 N. W. 135 (MICH.).—There was evidence tending to show that insured was intentionally killed by another. *Held,* that an intentional homicide is an accident within the meaning of an accident policy.

Accident policies are of recent origin and the question is a modern one. Such authorities as can be found give "accident" its popular meaning, *i. e.,* disasters not brought about through the intention or design of the assured. See *Ripley v. Ins. Co. (Mich.),* 2 Big. Rep. 738; *Richards v. Ins. Co.,* 89 Cal. 170, and *Robinson v. Association,* 68 Fed. 825.

ATTORNEYS—DISBARMENT—DECEIT—PREVIOUS CONVICTION.—IN RE WEED, 68 PAC. 1115 (MONT.).—*Held,* that an attorney should be disbarred without previous prosecution for a criminal act outside of his official capacity.

The courts may disbar without previous conviction where the acts charged against an attorney were not done in an official capacity as well as where they were. *People v. Appleton,* 105 Ill. 474; *Perry v. State,* 3 Greene (Iowa) 550. *Contra, State v. Capman,* 1 Ohio 430; *Ex parte Steinman and Hensel,* 95 Pa. St. 220. Against the objection that at least an attempt should be made at criminal prosecution before disbarment, see *Delano's Case,* 58 N. H. 5, and *Ex parte Walls,* 64 Ind. 461.

CARRIERS—INJURY TO PASSENGER—POSTAL CLERK—NEGLIGENCE OF ANOTHER CORPORATION.—STODDARD v. NEW YORK, N. H. &. H. R. R. Co., 63 N. E. 927 (MASS.).—A railway company's mail car in which was plaintiff, a postal clerk, being sidetracked at a terminal, was run into by the car of another company. *Held,* in an action for injuries, one corporation is not liable for for the negligence of the servants of another.

Liability can extend only to limit of control. *Robinson v. Cone,* 22 Vt. 213; *R. R. Co. v. Burke,* 28 Amer. Dec. 488. Use of tracks by another road is no exception, in that lessee is agent of lessor. *Driscoll v. R. R. Co.,* 32 Atl. 354. In this case, agreement for common use does not mean joint liability. 9 *Amer. Dig.,* Sec. 1264c.

CARRIERS—INJURIES TO PASSENGERS—MEASURE OF DUTY—CHARGE TO JURY.—MERRILL v. METROPOLITAN ST. RY. Co., 77 N. Y. SUPP. 122 (1902).—Plaintiff, a passenger on defendant's car, was injured by another passenger's being thrown against her by a jolt of the car rounding a curve. *Held,* a charge that it was the duty of defendant's servants "to conduct themselves with reasonable care under all the circumstances, with a view of protecting their passengers," was correct. O'Brien and Hatch, JJ., *dissenting.*

Courts have generally held that the duty of carriers of passengers is to use in all cases "the utmost care and diligence of very cautious persons." *Maverick v. Eighth Ave. R. R. Co.,* 36 N. Y. 378; *Indianapolis & St. L. R. Co. v. Horst,* 93 U. S. 291. But *contra, Stierle v. Railway Co.,* 156 N. Y. 70 (1898). The strict rule is not universally applicable; and the better principle

is said to be, that "in every case the degree of care to be exercised is dependent upon the circumstances." Followed in *Keegan v. Railroad Co.*, 54 N. Y. Supp. 391 (1898); *Zimmer v. Railroad Co.*, 55 N. Y. Supp. 308 (1898), and in the present case. But this principle seems to have been accepted in no other State. Its soundness is questioned in 3 *Thomp., Neg.*, Secs. 2748, 3481 (ed. 1902).

CARRIERS—INJURY TO PASSENGER ON FREIGHT TRAIN—LIABILITY.—CRUM v. KANSAS, FT. S. & M. RY. CO., 68 S. W. 88 (Mo.).—Plaintiff was injured by sudden stop of freight train on which he was a passenger. *Held*, that he was entitled to look for only such security as that mode of conveyance is reasonably expected to afford; otherwise the liability of the railroad company is the same as though he was a passenger on a passenger train.

This decision is generally upheld. *Crine v. East Tenn. V. & G. Ry. Co.*, 84 Ga. 651; *Fitchburg R. Co. v. Nichols*, 85 Fed. 945; *Ill. Cent. R. Co. v. Axley*, 47 Ill. App. 307. But in *R. Co. v. Horst*, 93 U. S. 291, the U. S. Supreme Court held that as to passengers on freight trains "the highest degree of carefulness and diligence is expressly exacted."

CONTRACTS—PREVENTION OF PERFORMANCE BY THIRD PERSON—DAMAGES—PROFITS.—PENDER LUMBER CO. v. WILMINGTON IRON WORKS, 41 S. E. 797 (N. C.).—Plaintiff was prevented from performing a contract by failure of a third person to repair plaintiff's machinery according to contract. *Held*, in an action for damages consisting of the loss of profits, that an estimate of cost of production of certain articles was properly admitted in evidence. Furches, C. J., *dissenting*.

Damages for the loss of profits is an extraordinary special damage. If the data of estimating the profits be so definite and certain that they can be ascertained by reasonable calculation, they can be recovered. *Jones v. Call*, 96 N. C. 337; *Williams v. Barton*, 13 La. 404. But the party at fault must have had notice either of the nature of the contract itself, or explanation that such damages would ensue from the non-performance. Moreover, the plaintiff must not remain inactive but should make reasonable exertions to reduce his losses and diminish responsibility of the party in default. *Railroad Co. v. Ragsdale*, 46 Miss. 458.

CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—AUTOMOBILES.—THIES v. THOMAS, 77 N. Y. SUPP. 276.—A boy of six, while playing between blocks, was run over by an automobile and killed. In an action by administrator, *held*, that the burden of proof, to show absence of contributory negligence, was on plaintiff.

Where the burden of proof lies, to establish contributory negligence, is a much disputed question. This ruling, though following the later New York decisions, *Whalen v. Citizens' Gas Co.*, 151 N. Y. 70, is not followed uniformly in the earlier New York cases. *Jackson v. Hudson R. R. Co.*, 22 N. Y. 65; *Lorickio v. Brooklyn Heights R. Co.*, 60 N. Y. Supp. 247. The opposite rule is followed in the Federal Courts, *Chicago G. W. Ry. Co. v. Price*, 97 Fed. R. 423; in England, *Beach, Cont. Neg.*, Sec. 156; and in the majority of the States. *Allen v. Township of Warwick*, 9 Pa. Sup. Ct. 507; *Pullman Palace Car Co. v. Adams*, 24 So. 912 (Ala.); *Gulf C. and S. F. Ry. Co. v. Shieder*, 30 S. W. 902 (Tex.). This last case reviews the whole course of decisions

on this subject, in an exhaustive opinion. For the Massachusetts rule see *Warren v. Fitchburg R. R. Co.*, 8 Allen 227.

CORPORATIONS—CONTRACT—CONSIDERATION—EQUITABLE RELIEF.—KENDALL V. KLAPPERTHAL CO. ET AL., 52 ATL. 92 (PA.).—Two corporations were created, owned and managed in the interest of a third corporation. Certain directors of the parent company indorsed notes of one of the others and having paid them, were reimbursed from funds of the original company. *Held*, that their relation was a sufficient consideration to warrant this.

There can be no doubt that directors of a corporation can reimburse themselves for loss from indorsement of its paper; 1 *Moraw., Priv. Corp.*, Sec. 526; 3 *Thompson, Corp.*, Sec. 4069; but an extension of the dictum to accord with the above facts seems contrary to the rule that, unless expressly authorized by charter, one corporation cannot lend its credit to another. *Smith v. Alabama L. Ins. Co.*, 4 Ala. 558. So it was ultra vires for a railroad corporation to guarantee the dividends of an elevator company. 30 *Am. and Eng. R. R. Cas.* 522. The decision in the case in hand rests solely on the basis that, if necessary, courts of equity will look behind the artificial personality to the individuals who compose it. *Rice's Appeal*, 79 Pa. 168; *Gas Co. v. West*, 50 Iowa 16.

DEFECTIVE SIDEWALK—WHAT CONSTITUTES.—BIEBER V. ST. PAUL, 91 N. W. 20 (MINN.).—Plaintiff was injured by slipping on a hexagonal cement block depressed on one edge an inch and a quarter below the level of the sidewalk. *Held*, that this defect was such as to render the city liable for damages. Lewis, J., *dissenting*.

The extent of use of the street is made the test of liability, but the courts generally hold that slight defects will not render the municipality liable. In *Beltz v. Yonkers*, 148 N. Y. 67, for a similar, but more pronounced defect there was no liability. See also *Jackson v. Lansing* (Mich.), 80 N. W. 8; *Morgan v. Lewiston*, 91 Me. 566; *Morris v. Philadelphia*, 45 Atl. 1068 (Pa.), and 24 *Am. and Eng. Enc. Law* 90.

EVIDENCE—DECLARATIONS—PEDIGREE.—WASHINGTON V. THE BANK FOR SAVINGS IN CITY OF NEW YORK, 63 N. E. 831 (N. Y.).—Testimony as to declarations of deceased to the effect that *she had never had any children* was introduced for the purpose of showing that accounts with defendant bank "in trust for son John" and "in trust for son Thomas" were in reality for the benefit of the deceased herself. The testimony was *held* competent as a matter of pedigree.

From the time of *The Bukley Peerage Case*, 4 Camp. 401 (decided in 1811), on, this exception to the rule against the admission of hearsay evidence has been repeatedly recognized both here and in England. *Stein v. Bowman*, 13 Pet. 209; *Eisenlord v. Clum*, 126 N. Y. 552; *Dawson v. Myall*, 45 Minn. 408. While, undoubtedly, the principle involved in declarations as to the existence, or non-existence, of children is the same, nevertheless authorities in support of the latter statement are so rare as to make this decision worthy of notice. See *Butrick v. Tilden*, 155 Mass. 461.

FOREIGN CORPORATIONS—WHAT CONSTITUTE—REMOVAL OF CAUSES.—CALVERT V. SOUTHERN RY. CO., 41 S. E. 963 (S. C.).—The South Carolina statute fixes conditions under which foreign corporations may become domestic. The

Southern Ry. Co., a Virginia corporation, having complied with these provisions, was sued by a citizen of South Carolina in the courts of that state. *Held*, that the railway company was not a citizen of South Carolina, and was therefore entitled to a removal of the cause to the federal court. Gary, A. J., Pope, J., and Townsend, Circuit Judge, *dissenting*.

The weight of authority would seem to be with the dissenting opinion. In a Kentucky case it is stated that a foreign corporation does not become a corporation of that State by being licensed to do business in a State, but is suable as a non-resident; yet if a corporation is created by the adoption of a foreign corporation, its status is the same as if it had been originally incorporated by the State adopting it. *Uphoff v. Chicago R. Co.*, 5 Fed. 545. Alabama, Georgia, Pennsylvania, Virginia and West Virginia courts have upheld this view. *Contra, Markwood v. Southern Ry. Co.*, 65 Fed. 817. The two cases on which the opinion of the court is chiefly based are not wholly parallel to the case in hand. In one the plaintiff was herself a citizen of the State of the defendant's original incorporation. *R. R. Co. v. James*, 161 U. S. 545, 40 L. Ed. 802. In the other the plaintiff, as an Indiana corporation, sued a Kentucky corporation, although itself domesticated in Kentucky. *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552.

INJUNCTION—PUBLICATION OF LIBEL.—MARLIN FIREARMS CO., v. SHIELDS, 64 N. E. 163 (N. Y.).—Defendant published "fake" letters falsely attacking the quality of articles manufactured by plaintiff. Plaintiff brought bill in equity to enjoin further publication, alleging that he had no adequate remedy at law and that it was impossible to ascertain or prove special damages. *Held*, that publication could not be enjoined.

For a discussion of the principles involved, see XI *Yale Law Journal* 372, where the opinion of the Appellate Division, now reversed, was commented upon and adversely criticised.

INSURANCE—ADDITIONAL INSURANCE—ESTOPPEL.—RAUCH v. MICHIGAN MILLERS' INS. CO., 91 N. W. 160 (MICH.).—Where a policy holder took out additional insurance contrary to the terms of the policy, but notified the company which did not reply, *held*, that the company is estopped from claiming that the policy is avoided. Prant, J., *dissenting*.

No recovery can be had where additional insurance is taken out contrary to the terms of the policy. *Continental Ins. Co. v. Hullman*, 92 Ill. 145; *Ill. Mutual Fire Ins. Co. v. Fix*, 53 Ill. 151; *Germania Ins. Co. v. Klewer*, 129 Ill. 600. But the principle that the silence of the company indicates that it is willing to continue the policy, is well established in *Phoenix Ins. Co. v. Johnson*, 42 Ill. 66; *Ill. Fire Ins. Co. v. Stanton*, 57 Ill. 354; *Williamsburg City Ins. Co. v. Cary*, 83 Ill. 453.

JURISDICTION—STATE BOUNDARIES—ADJACENT WATERS.—LENNAN v. HAMBURG-AMERICAN S. S. CO., 77 N. Y. SUPP. 60.—*Held*, the New Jersey courts have jurisdiction of an offense committed on the seas within three miles of the New Jersey shore.

By the law of nations, every nation has exclusive jurisdiction to the distance of a marine league over the waters adjacent to its shores. *Church v. Hubbart*, 2 Cranch 234; *The Brig Ann*, 1 Gallis. 62. And over all bays wholly within the territory of the country which do not exceed two marine

leagues at the mouth. *Com. v. Gaines*, 2 Va. Cas. 172; *Direct U. S. Cable Co. v. Anglo-American Tel. Co.*, 2 App. Cas. 394. But the border States of the Union have their boundary lines co-existent with the national boundaries; and hence the State courts have the same exclusive jurisdiction over adjacent waters as over other parts of their territory, except in so far as jurisdiction has been expressly granted to the general government. *People v. Tyler*, 7 Mich. 161; *U. S. v. Bevans*, 3 Wheat. 336; *Com. v. Manchester*, 152 Mass. 230.

NEGLIGENCE—CONTRIBUTORY—CYCLIST RIDING IN A RACE—QUESTION FOR THE JURY.—BENEDICT V. UNION AGRIC. SOCIETY, 52 ATL. 110 (VT.).—In an advertised bicycle race for which prizes were offered and entrance fees charged, a racer lowered his head over his handle-bars so that he failed to see and avoid a sulky, driven on the track preparatory to the succeeding race. *Held*, that contributory negligence on rider's part was a question for the jury.

This appears to be an attempt to establish contributory negligence on a new state of facts which modern bicycle racing has made possible. As two inferences could be drawn from the facts, it was for the jury to decide as to plaintiff's conduct. *Hathaway v. East Tennessee, etc., R. Co.*, 29 Fed. 489; *Hart v. Hudson River Bridge Co.*, 80 N. Y. 622. As a matter of law he was not negligent. Had he been riding on the highway as he did in the race, the rule in *Butterfield v. Forrester*, 11 East 60, would have applied, but "he conformed to the rules laid down and followed by others in a similar line of business and, as a matter of law, that was all he could be asked to do.

PRIVATE NUISANCE—POWDER MAGAZINE—PROXIMITY TO DWELLINGS—EXPLOSION.—REILLY V. ERIE R. R. CO., 76 N. Y. SUPP. 620.—The plaintiff and her dwelling were seriously injured by the explosion of a large quantity of dynamite, stored in the powder magazine of the defendant, situated less than 100 feet from her own, and several other dwellings. On appeal, *held*, that the jury were justified in finding that the keeping of such a quantity of explosive, in such a locality, was a nuisance, irrespective of negligence.

This decision, making the character of the storage of explosives as a nuisance, depend upon locality and surrounding circumstances, and not upon negligence, follows the great weight of authority. *Heeg v. Licht*, 80 N. Y. 579; *McAndrews v. Collerd*, 42 N. J. L. 189. Some decisions go even farther, holding the keeping of gunpowder a nuisance *per se*. *Laflin Rand Powder Co. v. Tierney*, 23 N. E. 389. The dissenting opinion in the present case held that liability must depend on negligence in locating and storing the powder, and thus construed *Heeg v. Licht*, cited above. This is not the usual interpretation of that case, see *Cooley on Torts*, 723. The other cases cited in support of this novel view may be distinguished as referring to various kinds of business which only become nuisances through the negligent manner in which they are carried on. *Bohan v. Gaslight Co.*, 122 N. Y. 18; *Losee v. Buchanan*, 51 N. Y. 476.

SERVANTS—INJURIES—EMPLOYER'S LIABILITY—MAINTENANCE OF A SAFE WORKING PLACE.—MCLAINE V. HEAD & DOWST CO., 52 ATL. 545 (N. H.).—A servant, at work at the bottom of a deep trench into which earth was being dumped from time to time, was injured through the neglect of a foreman to give warning of the approach of one load. *Held*, that the employer, having provided a competent servant to give this warning, was not liable for the injury. Remick, J., *dissenting*.

It is a duty of the master to maintain the working place of the servant in a reasonably safe condition. *Nall, Adm'x, v. Louisville & Nashville R. R. Co.*, 129 Ind. 260. In England, it is established that the master fully discharges this duty by appointing competent servants to act for him. *Waller, Adm'x, v. The South Eastern Ry. Co.*, 2 H. L. C. 102; although some inclination to restrict this doctrine is apparent. *Smith, Master and Servant*, p. 257; *Stat. 43 and 44 Vic.*, c. 42. In this country, the English rule has been adopted by several States. 54 L. R. A. 120, note "f." But the Circuit Court of Appeals holds that this duty is non-delegable, so as to exempt the master from liability. *Louisville & Nashville R. R. Co. v. Ward*, 61 Fed. 927. And many of the State courts have decided similarly. *Louisville E. & St. L. C. R. Co. v. Hanning*, 131 Ind. 528; *Anderson v. Michigan Cent. R. R. Co.*, 107 Mich. 591; and have therein the strong support of text writers. *Wharton, Neg.*, Secs. 211, 212, 232; *J. F. Dillon, Employer's Liability*, 24 Am. Law Rev. 175. It would seem a nearer approach to justice to hold that the implication in the contract of service is one requiring the employer to exercise reasonable care to secure to the servant a safe working place, even when acting through an agent, rather than one compelling the servant to assume the liability for the neglect of that agent. *Hough v. Railway Co.*, 100 U. S. 213.

SERVANT—INJURIES—EMPLOYER'S LIABILITY—"SUPERIOR SERVANT" RULE.—KNUTTER V. NEW YORK & N. J. TEL. CO., 52 ATL. 565 (N. J.).—A general district superintendent, with power to hire and discharge, negligently caused injury to a workman under his authority. *Held*, that the superintendent and workman were fellow-servants, and hence the employer was not liable for the injury.

In holding that mere superiority of rank of one servant over another is not sufficient to destroy the relation of co-service, so as to make the master liable for injury done by the former to the latter, the Court follows the preponderance of decision; *Wilson v. Merry*, 1 H. L. Sc. App. 326; *Central R. Co. v. Keegan*, 160 U. S. 349; *Moody v. Hamilton Mfg. Co.*, 159 Mass. 70, and of text-book authority; *Shearm. & Red., Neg.*, Sec. 100; 3 *Wood, Railway Law*, Sec. 388; although a few States maintain the opposite. *Cleveland, Col. & Cin. R. Co. v. Keary*, 3 O. St. 201; and the denial that the power to hire and discharge is the criterion for determining whether the liability rests on the master or not is also well supported; *Alaska Mining Co. v. Whelan*, 168 U. S. 86; *Pierce, Rec'r v. Oliver*, 18 Md. 87; although this is the accepted doctrine in one State, *Missouri Pac. R. Co. v. Williams*, 75 Tex. 4, and is upheld by commentators, *Shearm. & Red., Neg.*, Sec. 103; *Wood, Master and Servant*, Sec. 448. But there is strong authority to support the view that one having general charge of a separate department, with power to hire and discharge, as in the case in question, is not a fellow servant; *Northern Pac. R. Co. v. Peterson*, 162 U. S. 346; *Lanning v. R. R. Co.*, 49 N. Y. 521; *Wood, Master and Servant*, Sec. 446; *Redfield, Railways*, pp. 528, 529 and note; despite a not very widespread recognition of it, and its absolute denial by one court. *Albro v. Agawan Canal Co.*, 6 Cush. (Mass.) 75.

TAXATION—ATTEMPT TO ESCAPE.—BROWN ET AL. V. NEWELL ET AL., 41 S. E. 835 (S. C.).—A. released a prior note and mortgage to B. and then executed a subsequent note and mortgage to C., which was assigned to B.

and bore date of the first mortgage, such date being nearly a year previous to execution. The condition of the second mortgage was the satisfaction of record of the first. Fraud was not alleged in the complaint. Neither was the defrauded party (the State) before the court. *Held*, that the defandant did not intend thereby to evade taxation, and that said mortgage and note constituted a valid contract which could be enforced by a court of equity. McIver, C. J., *dissenting*.

Disclosure of fraud against the government is generally fatal to the case. If the illegality is not alleged, but is first disclosed by evidence, the court itself will pursue the inquiry. *Parken v. Whitby*, T. & R. 366. But there is some discrepancy of opinion in respect to the certainty with which the illegality must be established. *Johnson v. Shrewsbury Ry.*, 3 De G. M. & G. 914, held the illegality must be simply shown by convincing evidence. Lord Hatherley stated, in *Auben v. Holt*, 2 K. & J. 66, that it is not within the discretion of the court to refuse specific performance because an agreement savors of illegality. The latter opinion has the weight of authority. Can the defendant, being in *pari delicto*, avail himself of the equitable doctrine that no court will lend aid in enforcing an agreement entered into in violation of law? If executed, a court of equity will not grant aid. *Solinger v. Earle*, 82 N. Y. 393; *York v. Merritt*, 77 N. C. 213. If executory, it cannot be enforced by any kind of action brought directly upon it. The defense of illegality is allowed from motives of public policy rather than in regard to interests of the objecting party. See decision by Lord Mansfield in *Holman v. Johnson*, 1 Cowp. 341.

TAXATION—STATUTORY EXEMPTIONS—LAND OWNED BY CITY.—CITY OF CINCINNATI v. LEWIS, AUDITOR, 63 N. E. 588 (OHIO).—The city of Cincinnati owned land which was rented to a private person and by him used for farming purposes. *Held*, that the land was subject to taxation.

It is a general rule that land owned by a municipality and not used in the actual exercise of its municipal functions is subject to taxation. *Town of West Hartford v. The Board of Water Commissioners*, 44 Conn. 360. It is not exempt, though leased and the rent applied to a public purpose. *City of Louisville v. Commonwealth*, 1 Duvall 296 (Ky.).

TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—MENTAL ANGUISH.—SPARKMAN V. WESTERN UNION TEL. CO., 41 S. E. 881 (N. C.).—Plaintiff received a message that his brother had died and telegraphed back, "Shall we look for him or what are you going to do?" The company failed to deliver the dispatch. *Held*, that the plaintiff could not recover damages for mental suffering. Douglas, J., *dissenting*.

This case illustrates the limitations placed upon the "mental anguish" doctrine by those courts which recognize it. A company will not be held liable where there is nothing in the language of the message to indicate that mental anguish would naturally result. *Shear. & Red., Neg.*, Sec. 756. Nor is there liability for failure to deliver message intended to relieve mental anxiety already existent in sender's mind. *Rowell v. Tel. Co.*, 75 Tex. 26. But the weight of authority is against recovery for mental anguish alone under any circumstances. *Francis v. W. U. Tel. Co.*, 58 Minn. 252; *Morton*

v. W. U. Tel. Co., 53 O. St. 431. Indiana and Virginia have recently taken this majority view. *W. U. Tel. Co. v. Ferguson*, 157 Ind. 64; *Connelly v. W. U. Tel. Co.*, 40 S. E. 618.

JOINT TORT FEASORS—RELEASE OF ONE RELEASES ALL.—ABB V. NORTHERN PAC. RY. CO., 68 PAC. 954 (WASH.).—Injuries were occasioned by the joint carelessness of the Grant Street Electric Co. and defendant. Plaintiff upon consideration of partial satisfaction released the street electric company from all damages, but expressly reserved the right to hold the defendant. *Held*, an absolute release of the one released the other also.

The weight of authority supports the doctrine that when the full amount of damages is ascertainable by direct positive proof, an absolute release of one, on consideration of partial satisfaction, is not a bar. *Cooley on Torts*, 139; *Ellis v. Essan*, 6 N. W. 518 (Wis.); *Sloan v. Herrick*, 49 Vt. 327. There are conflicting decisions where the damages rest mainly upon the opinion of a jury. The present case is supported by *Ellis v. Bitzer*, 2 Ohio 89; *Gunther v. Lee*, 45 Md. 60. A contrary view, however, is taken in *Matthew v. Chicopee Mfg. Co.*, 3 Robt. (N. Y.) 713. An agreement to discontinue a suit against one, in the absence of full satisfaction, was held to operate as a bar to further action in *Mitchell v. Allen*, 25 Hun 543, and *Ayer v. Ashmead*, 31 Conn. 447; but it was not so held in *Lovejoy v. Murray*, 3 Wall. (U. S.) 1, and *Chamberlin v. Murphy*, 41 Vt. 110. A distinction was made between a technical release, and one merely by implication, in *Bloss v. Plymale*, 3 W. Va. 393, where a receipt in full given to one tort-feasor did not release the others.

WILLS—PROBATE—TESTAMENTARY CAPACITY—EXPERT WITNESSES—INSTRUCTIONS.—IN RE BLAKE'S ESTATE, 68 PAC. 827 (CAL.).—The lower court had instructed the jury that the opinions of experts, although competent as evidence, were frequently unsatisfactory and unreliable, and that such opinions were not entitled to as much weight as facts. *Held*, that the instruction was erroneous as matter of law.

By the principle that the credibility of witnesses is exclusively within the province of the jury, the court must not disparage expert testimony. *Louisville, etc., R. Co. v. Whitehead*, 71 Miss. 451; *White v. Fox*, 1 Bibb (Ky.) 371. But the court may instruct that expert evidence of opinion should be received with caution. *Rogers' Expert Test.* 451; *Maye v. Herndon*, 30 Miss. 118; *Grigsby v. Waterworks Co.*, 40 Cal. 396. And the instruction of the lower court seems to have gone no further than the cautionary instruction in *Benedict v. Flanigan*, 18 S. C. 506: "All testimony founded upon opinion merely is weak and uncertain and should in every case be weighed with great caution."