RECENT CASES.

ACTION FOR POSSESSION OF LAND—ADVERSE POSSESSION—TAKING SUCCESSIVE POSSESSION.—JENNINGS v. WHITE, 51 S. E. 799 (N. C.).—*Held*, that where the deed to one claiming title to land by adverse possession did not cover the land, the possession thereof by his grantor could not be tacked on his possession for the purpose of showing a continuous adverse possession for the statutory period.

Adverse possession must be continuous and when one seeks to unite to his possession the possession of prior occupants the several titles must be connected by purchase or descent. Without some privity between the successive occupants, the several possessions cannot be tacked together so as to make continuity of possession. *Smith v. Reich*, 87 Hun. (N. Y.) 287. Different entries, at different times, by different persons, between whom no privity exists, are but a succession of trespasses. *Rose v. Goodwin*, 88 Ala. 390. Privity must be shown to have existed between them. *Wheeler v. Moody*, 9 Tex., 372. And deed must be shown to tack possession of successive tenants. *Johnson v. Nash*, 15 Tex. 419. Each succeeding occupant must show title under his predecessor and his possession must be referable to the original entry. *Witt v. St. Paul & Northern Ry. Co.*, 38 Minn. 122; but evidence of omission by mistake in drafting deed embracing land in question is admissible to characterize the possession of grantor and grantee. *Smith v. Chapin*, 31 Conn. 530.

BOYCOTT—INJUNCTION—ACTUAL INJURY.—VAN ILER PLAAT v. UNDERTAKERS' AND LIVERYMEN'S ASSOCIATION OF PASSAIC, 62 ATL. (N. J.) 453.—Plaintiff claimed to be an educated embalmer and undertaker and that for two months he had been ready and willing to engage in business in Paterson, N. J. He also alleges that defendant association and its members have been and are preventing him by boycotting him and refusing to admit him to membership and also refusing to hire to him hacks or hearses or to sell him coffins or supplies. It is admitted that he neither has nor owns appliances of any kind and that, at no time, has he had any corpse to care for; also that the association has adopted a constitution and by-laws and attempted to enforce them against him and that this amounts to criminal conspiracy. Plaintiff asks for an injunction and other relief.

Held, that as plaintiff had no business or establishment, even if the alleged attempt to boycott has been made or threatened, plaintiff has suffered no damage, nor, from evidence set forth, is he likely to. It was not proven that there was any attempt to enforce the clause against him and though there were an attempt, even if it were unlawful, the action of the court would not be incited unless the personal or property rights of plaintiff were affected.

CHARITABLE TRUSTS—CY PRES DOCTRINE.—MACKENZIE v. TRUSTEES OF PRESBYTERY OF JERSEY CITY, 61 ATL., (N. J.) 1027.—A trust for public worship and instruction of indefinite number of persons according to the Presby-

terian faith, *held* to be a good charitable trust and enforceable either exactly, or under the doctrine of *Cy Pres*.

A trust for a public charitable purpose will be sustained and enforced, although there may be such indefiniteness in the declaration and description as would render void an express private trust. *Pomeroy Equity Jurisprudence*, (6th ed.) p. 585. In case of uncertainty, beneficiaries can always be identified by extrinsic evidence. *Hinckley v. Thacher*, 139 Mass. 477. A gift to "missionary, educational and benevolent enterprises" may be held valid as a charitable use. *Thomson v. Norris*, 20 N. J. Eq. 5; but not a devise to be applied solely to "benevolent" purposes, such not being considered charity. *Chamberlain v. Stearns*, 111 Mass. 267. The *Cy Pres* doctrine has been the subject of much discussion and criticism in this country, and in some states it has been altogether repudiated. *White v. Fisk*, 21 Conn. 31. But the tendency of modern decisions is to follow this doctrine as restricted in *Jackson v. Phillips*, 14 Allen 539. By the above decision New Jersey formally adopts the doctrine of *Cy Pres*, which had never been approved before in that state. *Bispham's Equity*, sec. 130.

CHARITABLE TRUSTS—UNCERTAINTY.—HEGEMAN V. ROOME, 62 ATL. REP. 392 (N. J.).—*Held*, that a bequest to a trustee for the purpose of making such distribution among religious, benevolent and charitable objects as he may select is void, as vague and indefinite.

Charitable trusts are in their very conception uncertain. *Pomeroy's Eq. Jur.* (6th ed.) sec. 987; *Coggshell v. Pelton*, 7 Johns Ch. 292; *Saltonstall v. Sanders*, 11 Allen 446; *Jackson v. Phillips*, 14 Allen 539. The decisions are in utter conflict in limiting this uncertainty to reasonable bounds. Compare *Vesey v. Tamson*, 1 S. & S. 69; and *Dolan v. Dolan*, L. R. 5 Eq. 60; *Treats App.*, 30 Conn. 113. In England if the trustee may at his discretion apply the property to a charity or not the gift will fail. *Morice v. Bishop of Durham*, 9 Ves. 404. The purpose must be sufficiently definite to allow the court to exercise control over the trustee. *Nash v. Morly*, 5 Beav. 177. Thus if the purposes are discretionary or alternative the trust is void. *Williams v. Kershaw*, 5 Cl. & F. 111; *Vesey v. Tamson*, *supra*. These principles are universally recognized where charitable trusts are supported in this country. *Rabeh v. Emerson*, 105 Mass. 431. But many courts require greater certainty than is required in England. *White v. Ristel*, 22 Conn. 31. In New York the doctrine has no place and funds dedicated to charitable purposes are administered through corporate agencies sanctioned by legislative authority. *Bascom v. Albertson*, 34 N. Y. 603; *Burrill v. Boardman*, 43 N. Y., 254.

CONTRACTS—RESTRAINT OF TRADE—VALIDITY.—MERRIMAN V. COVER AND OTHERS, 51 S. E. 817 (VA.).—*Held*, that restraint is reasonable when it is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the public.

At one time it was considered that the whole of the United States or an entire state was an extent of space too extensive to be reasonable. *More v. Bonnet*, 40 Cal. 251. *Nobles v. Bates*, 7 Cow. 307 (N. Y.). This doctrine has been overruled by modern authorities, which lay more stress on the particular circumstances of each case. *Diamond Match Co. v. Roeber*, 35 Hun. (N. Y.) 421; *Beal v. Chase*, 31 Mich. 490. So it was held to restrict the marble business within a county was not unreasonable. *Cobbs v. Niblo*, 6 Ill. App.

60; while in *Herreshoff v. Bontineau*, 17 R. I. 3, it was held that the state was too extensive for the restraint of a teacher of French; so in *Bingham v. Maigne*, 52 N. Y. Sup. 90, the territory of New York city and 250 miles outside was too extensive a restriction on the manufacture of printers' rollers and composition; also where no limit of space is designated the contract is void. *Curtis v. Gokey*, 5 Hun. 355; *Bishop v. Palmer*, 146 Mass. 469; *Gamewell Fire Alarm Tel. Co. v. Crane*, 160 Mass. 50. In regard to contracts of restraint unlimited as to time, it is said that this restraint, if unnecessary, will invalidate contract. *Carrl v. Snyder*, (N. J. Eq.) 26 Atl. 977; *Swanson v. Kirby*, 98 Ga. 586. So a contract that a physician shall not "at any time thereafter" engage in practice in a certain city is void, as otherwise he might not practice after death of the other party. *Mandeville v. Harmon*, 42 N. J. Eq. 185. The general rule to-day is that a contract in restraint of trade, to be supported, must be restricted as to territory, and the court be able to see that considering the nature of the business in connection with the territorial limits assigned, the limits designated are not unreasonable in extent. *Schwahn v. Holmes*, 49 Cal. 665; *Ellis v. Jones*, 56 Ga. 504; *Empson v. Bissinger*, (Com. Pl.) 9 Wkly Law Bul. 86 (Ohio); *Daly v. Smith*, 38 N. Y. Sup. Ct. 158.

CORPORATION BOND ISSUE—RESTRAINT OF STOCK SUBSCRIPTION.—WALL V. UTAH COPPER CO., 62 ATL. (N. J. EQ.) 533.—Defendant company wishing to develop its property, resorted to an issue of bonds secured by mortgage, each bond "to be convertible at the option of the holder at any time within five (5) years from the date thereof, into fifty (50) shares of the value of ten (10) dollars each of the stock of the company." The bonds were $1000 each and the stock was worth about $23 a share actual market value. The company is a prosperous, growing concern. Complainant is a stockholder and seeks to restrain the issue of the bonds on the ground that the proposed action will deprive him of a clear and indisputable right which he has by law to participate in any issue of *new* stock to an extent measured by the comparative amount of his present holdings of stock and upon the same terms that other parties shall participate therein. Injunction granted.

CORPORATIONS—RIGHTS OF PERSONS ENTITLED TO INCOME FROM SHARES—STOCK DIVIDENDS.—IN RE STEVENS, 95 N. Y. SUPP. 1084.—*Held*, that a stock dividend declared on shares out of "surplus and undivided profits" belonged to the life tenants and not to the remainderman and was properly credited to "income."

This case follows the rule laid down in the leading case of *McSouth v. Hunt*, 154 N. Y. 179, and is well supported. *Smith's Estate*, 140 Pa. St. 344; *Hite's Devisees v. Hite's Ex'r.* 93 Ky. 257; The reason for the rule being that such a dividend is only a form adopted by a corporation of distributing to its shareholders its profits and accretion instead of a money payment. 2 *Thompson, Corporations*, Sec. 2192. But the contrary is held in England and by high authority in this country, such dividend being considered as forming part of the *corpus*. *Minot v. Paine*, 99 Mass. 101, *Gibbons v. Mahon*, 136 U. S. 549. The theory of these decisions is that a stock dividend is "merely a change in the form of ownership of corporate capital and to give the new share certificates to the life tenant would seem to rob the remainderman." 2 *Thompson, Corporations*, Sec. 2192. The

cases are in direct conflict and irreconcilable. The rule as approved in the present case is equitable and just while the latter doctrine seems to be founded upon considerations of mere convenience. *Pritchett v. Nashville Trust Co.*, 96 Tenn. 472.

CRIMINAL LAW—EVIDENCE—INSANITY—OPINIONS OF NON-EXPERTS.—BOYD V. STATE, 88 S. W. 974 (ARK.).—*Held*, that in a prosecution for murder, witnesses who have detailed the acts of defendant may properly state whether they considered him insane or not.

The question of the admissibility of such evidence has been much debated in this country. *Wigmore on Evidence*, Sec. 1993. It has been held in some states that such evidence by a non-expert is inadmissible even though based on his own knowledge of facts. *Com. v. Wilson*, 1 Gray 337; *Real v. People*, 42 N. Y. 270; *O'Brien v. People*, 48 Barb. 275. Other states have decided that the opinion of a witness, not an expert, is competent upon the question of the prisoner's sanity when such opinion is formed on facts within personal knowledge of the witness. *Genty v. State*, N. J. L. 482; *Chaice v. State*, 31 Ga. 424; *Jamison v. People*, 145 Ill. 357. The rule generally accepted by the weight of authority to-day is that a witness, who has had an opportunity of observing defendant may be asked, after stating facts within such observation whether from defendant's general appearance and conversation he was at the time of sound mind. *Wilkinson v. Pearson*, 23 Pa. St. 147; *Grant v. Thompson*, 4 Conn. 403; *Harrison v. Rowsan*, 3 Wash. C. C. 580; *Chaice v. State*, *supra*. But a non-expert witness will not be permitted to give mere opinions, disconnected from the facts on which such opinions are based. *Farrel v. Brenan*, 32 Mo. 328; *Eckert v. Flawry*, 43 Pa. St. 46. The tendency in some states is to confine such non-experts to a mere statement of facts. *Real v. People*, 42 N. Y, 270; *Gewike v. State*, 13 Tex. 568; *Caleb v. State*, 39 Miss. 722. Neither experts nor non-experts can be examined on conclusions of law. *State v. Klinger*, 46 Mo. 224.

EVIDENCE—EXPERT TESTIMONY—HYPOTHETICAL QUESTIONS.—HUMBER V. VILLAGE OF ITHACA, 105 N. W. 9 (MICH.).—*Held*, that a question to a physician, as to certain results being caused by an injury, which permitted him to use knowledge of the injured person's condition not embodied in the question, is unobjectionable if his conclusion is based upon conditions discovered by him and previously fully detailed to the jury.

When the testimony of an expert is based upon personal observation there are three rules applied in different courts. Hypothetical questions are in most courts held to be unnecessary. *State v. Foote*, 58 S. C. 218; *People v. Young*, 151 N. Y. 219; *Van Deusen v. Newcomer*, 40 Mich. 119. Some of these courts hold, however, that all the facts from which the conclusion is drawn must first be put in evidence as was done in this case. *Van Deusen v. Newcomer*, *supra*; *Louisville Etc. R. R. Co. v. Falvey*, 104 Ind. 419. And in rare cases the courts have required an advance hypothetical question. *Hitchcock v. Burgess*, 38 Mich. 507. The fallacy in the second class of cases is well illustrated in *Van Deusen v. Newcomer*, *supra.*, where the reason given for the rule is the alleged impossibility of testing such an opinion by calling other experts. There can be no such practical difficulty since all the facts upon which the opinion is based may be brought out in cross-examination. *Fuller v. The Mayor*, 92 Mich. 201.

EVIDENCE—NON-EXPERT WITNESSES—INSANITY.—BETTS v. STATE, 89 S.W. 413 (Tex.).—*Held*, that it was error to permit non-experts to give their opinions that the defendant was sane, without first testifying as to the defendant's conduct and the observations from which the non-experts derived their conclusions.

This seems to be a much mooted question and to be decided differently in the several states. Some hold that if a change has taken place in the defendant's conduct a witness, not an expert, could be permitted to testify as to the defendant's insanity provided he had noticed the change of conduct. *State v. Winter*, 72 Iowa 627. It is proper to permit non-expert witnesses to give their opinion of the defendant's insanity, though they may not give any particular circumstances in support of their views. *Cotrell v. Commonwealth*, 17 S. W. 149. The reason for this is that a witness who has had actual acquaintance with and knowledge of a person ought to know whether or not that person was insane. But *Collee v. State*, 75 Ind. 511; *State v. Erb*, 74 Mo. 199; *Parsons v. State*, 87 Ala. 577, suostantially hold that non-experts may give their opinions of the defendant's insanity but that they must first state to the jury upon what facts these opinions are based. The reason for this is that the jury should know the facts in order to ascertain what weight they shall give to the testimony of the witness. This seems to be the prevailing and better rule.

EVIDENCE—UNCORROBORATED CONFESSION.—BLACKER v. STATE, 105 N. W. 302 (NEB.).—*Held*, that one cannot be convicted of a felony upon his own unsupported extrajudicial confession.

Whether the uncorroborated confession of an accused in a criminal cases is alone sufficient for a conviction is a question "which," says *Wigmore on Evidence*, Vol. III, Sec. 2070, "for more than an hundred years has been left culpably unsettled in English law." In 1784 there was a ruling that such a confession sufficed. *R. v. Wheeling*, 1 Leach C. L. 24; but this was not final authority; it remains, however, in the English and Irish courts except in cases of homicide. So in 1887 it was held *R. v. Sullivan*, (Ire.) 16 Cox. C. 347, that an uncorroborated confession was sufficient to sustain a conviction for larceny. Since then the United States courts have been at liberty to adopt whatever rule they saw fit. *People v. Elliott*, 90 Cal. 586; *Cunningham v. Com.*, 72 Ky. 141, held that a confession of a defendant, unless made in open court, would not warrant a conviction unless accompanied by other proof that a crime had been committed. The reason why caution is necessary in these cases is that the defendant may have admitted things as true, such as in case of forgery, writing another's name to a note, when he really intended by such a confession to imply that the act was done rightfully. See also *State v. Knowles*, 48 Iowa 598, for the same proposition. But to the contrary *State. v. Cowan*, 29 N. C. 239; *Stephen v. State*, 11 Ga. 225, held that any person accused of an offense might be convicted upon his own voluntary confession although it was totally uncorroborated by any other proof. The best rule, and the one supported by the weight of authority in this country, is that there should be corroborating evidence. *Greenleaf on Evidence*, Sec. 217, says "it best accords with the humanity of the criminal code."

HIGHWAY AGENT—LIABILITY OF TOWN FOR NEGLIGENCE.—WHEELER v. TOWN OF GILSUM, 62 ATL. 597 (N. H.).—A highway under control of defendant town was overflowed, so as to prevent travel thereon, by reason of

an ice jam on an adjoining river. Defendant's highway agent went out upon the river and attempted to break up the jam with dynamite. He did this so carelessly that the ice bore down upon plaintiff's mill, which was down the river a short distance, and completely demolished it. The dynamiting could have been done in such a manner that the ice would have passed off easily. The highway agent and other proper officers knew of the danger in time to prevent the occurrence but took no steps to do so. Plaintiff claims damages for the loss of his mill. *Held*, that no duty rested upon the town to act for the protection of the plaintiff and its failure merely to take action is not actionable negligence.

INFAMOUS CRIME—DEFINITION.—GARITEE V. BOND, 62 ATL. (MD.). 631.—Appellant was named as executor of a will and on application to the Orphan's Court of Baltimore for letters testamentary, the appellee, claiming to be the adopted son of the testatrix, filed a petition asking that letters be refused, because appellant had been convicted of and imprisoned for an infamous crime and had been disbarred as an attorney by the Supreme Bench of Baltimore City for improper conduct involving moral turpitude. Appellant admitted that he had been indicted and convicted of violation of an act of Congress (U. S. Comp. St. 1901, p. 3231), which provided "that no attorney should take . . more than $10 for preparing, etc., . . any pension claim." It is claimed by appellant that this is not an infamous offense and that nothing alleged would justify the court in refusing to grant him letters prayed for.

Held, that the decision as to the infamy of the offense depended, not on the punishment prescribed, but in the character of the offense itself and that the statutory offense of which appellant was convicted did not involve the requisite degree of moral turpitude to make the transgression an infamous crime at common law. Appellant's contention was sustained (The opinion cites a number of cases as to whether the *character* or *punishment* of a crime is the criterion as to its infamy.)

INJUNCTIONS—INTERFERENCE WITH PATRONS—BOYCOTT.—JENSEN V. COOKS' AND WAITERS' UNION OF SEATTLE ET AL., 81 PAC. 1069 (WASH.).—*Held*, that former employees of an establishment may be restrained, by injunction, from congregating about the entrance of the place of business for the purpose of preventing, by force or pursuasion, the public from entering.

Employees who have quit their employment have no further interest in the buisness of their former employer and no lawful right to interfere with such business by attempting to induce other employees or the public from transacting business with their former employer. *Rundsen v. Benn*, 123 Fed. 636. If they enter upon the premises except for the *bona fide* purposes of trade they are trespassers. *Foster v. Retail Clerks' I. P. Ass'n.*, 39 Misc. (N. Y.) 48. But, as a general proposition, the proprietor of a store cannot restrain sympathizers from picketing the store provided they use no violence or coercion; *Union Pac. Ry. Co. v. Ruef*, 120 Fed. 102; unless their interference amounts to an unlawful conspiracy. *Gray v. Bldg. Trades Council*, 97 N. W. 663 (Minn). Nor will an injunction be granted unless it clearly appears that there is a substantial pecuniary loss for which there is no adequate remedy at law. *Atkins v. Fletcher*, 55 Atl. 1074 (N. J. Eq.). The fact that their acts are punishable under the criminal law will not, however, prevent the issuing of an injunction. *Union Pac. Ry. Co. v. Ruef, supra.*

INTOXICATING LIQUORS—CIVIL DAMAGE LAWS—CONSTRUCTION—POST-HUMOUS CHILD—RIGHT OF ACTION.—STATE EX REL. NIECE V. SALLE ET AL., 74 N. E. 1111 (IND.).—*Held*, that a statute, providing that any person sustaining any injury to his means of support in consequence of use of liquors unlawfully sold may sue the seller personally, gives to a child, born after its father's death resulting from use of intoxicating liquors unlawfully sold, the right to sue therefor.

Such right of action exists only by virtue of statute and not at common law. *Belding v. Johnson*, 11 L. R. A. 53; *Woody v. Coleman*, 44 Iowa 19. But the majority of the states have adopted statutes similar to the one under consideration. *Mead v. Stratton*, 87 N. Y. 493; *Quinlan v. Welch*, 23 N. Y. Supp. 963; *Hocket v. Smelsey*, 77 Ill. 110; *Brockway v. Patterson*, 72 Mich. 122; *Rose v. Perkins*, 9 Neb. 304; *Rafferty v. Buckingham*, 46 Iowa 195. It has been contended that such a statute does not include a post-humous child as the rights of the latter do not accrue until birth. *Allier v. St. Luke's Hospital*, 184 Ill. 359; *Walker v. Railway Co.*, 26; N. Amer. Law Rev. 50. These cases, however, have to do with the personal rights of a child and must be distinguished from the civil or property rights, which exist from the time of the child's conception. 1 *Bl. Comm.* 130. The right to support from a parent is such a right as was decided in *Quinlan v. Welch, supra.; The George and Richard*, L. R. 3 Adm. and Ecc. 466.

NAVIGABLE WATERS—TITLE TO BED OF STREAM.—KINKEAD V. TINGEON, 104 N. W. 1061 (NEB.).—*Held*, that the title to the bed of a navigable river is in the state, and the rights of a riparian proprietor on such streams are bounded by the banks of the river.

At common law, the title to the bed of a river in which the tide ebbs and flows was in the Crown, but above the flow of the tide, belonged to the riparian proprietors. Current law in England follows this ancient rule. *Hudson v. Ashby*, (1896) 2 Ch. 1. All of the American courts recognize the state ownership of the beds of tidal streams but, in regard to rivers where the tide does not flow but which are navigable in fact, there is a direct conflict. In some jurisdictions riparian proprietors own to the *filum aquae*. *McCartney et al. v. C. & E. R. R. Co.*, 112 Ill. 635; *Cobb v. Davenport*, 32 N. J. L. 379, while in the following states ownership extends only to water line. *Gilchrist's Appeal*, 109 Pa. 604; *Cooley v. Golden*, 117 Mo. 43, but may be to low water mark. *Palmer v. Williams*, 122 Pa. 191. A distinction is made in some courts between public and navigable streams. *Steamboat Magnolia v. Marshall*, 39 Miss. 109–135. The Federal courts have refused to decide this question, leaving the state to determine as between itself and riparian proprietors. *Packer v. Bird*, 137 U. S. 661.

NEGLIGENCE—PROXIMATE CAUSE.—COLLINS V. W. JERSEY EXPRESS CO., 6 ATL. 675 (N. J.).—A servant of defendant while driving a wagon struck the hind wheel of a wagon standing alongside the curb, forcing the wagon against the horse attached to it. The horse took fright and ran away and after running along the same street for some distance turned up another street where plaintiff was standing near a pile of loose boards and he, to avoid being hit by the runaway, jumped aside and broke his leg over the board pile. Plaintiff sued for damages and was non-suited. *Held*, hat the case should be restored and intimated that plaintiff had a good case

PRINCIPAL AND AGENT—COMPENSATION OF AGENT—COMMISSIONS.—GIBSON V. BAILEY CO., 89 S. W. 597.—*Held*, that a general agent for the sale of goods in a certain territory, who entices away from his principal orders in that territory which the principal had previously acquired, is guilty of such misconduct as to defeat his right to commissions.

General agent is one whom man puts in his place to transact all his business of a certain kind, as to sell certain kind of ware. *Walker v. Skipwith*, 1 Meigs (Tenn.) 502. An agent must not conceal facts in dealing with a principal nor act adversely to the interests of his principal. *Dennis v. McCagg*, 32 Ill. 429; *Hughes v. Washington*, 72 Ill. 84. Good faith is the vital principle of the law of agency; without it the relations of principal and agent cannot exist, and so jealously guarded is this principle that all departures from it are esteemed frauds. *Keighler v. Savage Mfg. Co.*, 12 Md. 383; *Merryman v. David*, 31 Ill. 404. For gross misconduct in the course of his agency, or intentional frauds upon his principal, he may be held to forfeit all right to compensation as respects any of the business of the principal into which such frauds or misconduct shall have entered. *Porter v. Silvers*, 35 Ind. 295; *Prescott v. White*, 18 Ill. 322. And, if he makes any profit in the course of his agency by any concealed management in selling on account of his principal, the profits will belong exclusively to the principal. *Cottom v. Holliday* 59 Ill. 176.

RAILROADS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.—ST. LOUIS I. M. & P. RY. CO. V. HITT ET AL., 88 S. W. 990 (ARK.).—*Held*, that where a brakeman standing at a crossing which was blocked by a standing frieght train, told plaintiffs, who were waiting to drive over the crossing, that it would soon be clear, and when the train cleared the crossing the brakeman was standing nearby and in a position where he could see the tracks better than plaintiffs could, the latter could take into consideration the fact that the brakeman was in a favorable position to see any danger and would doubtless give them warning thereof. Battle and Riddicks, JJ., *dissenting*.

Weight of authority holds that it is the duty of a traveller approaching a railroad crossing to make vigilant use of eyes and ears for the approach of a train before proceeding over. *Davis v. Ry.*, 47 N. Y. 400; *Ry. v. Righter* 42 N. J. L. 180; *Ry. v. Masely*, 57 Fed. Rep. 921; *Wilds v. Ry.*, 29 N. Y. 315; *Ry. v. Beal*, 73 Pa. St. 507. Exercise of some care is not sufficient. *Ry. v. Burke*, 57 N. Y. St. Rep. 7. This rule does not require plaintiff, if in a team, to get out and go on the track for a better view. *Davis v. Ry., supra.* One cannot depend upon another's senses to give warning of danger. *Wiwirowski v. Ry.*, 124 N. Y. 420. Fact that a flagman at a railroad crossing signals a person to cross does not relieve such person from duty of looking and listening for train. *Ry. v. Gustavson*, 21 Col. 393; *Cadwallader v. Ry.*, 128 Ind. 518; *Renner v. Ry.*, 46 Fed. 344. Although plaintiff has right to assume that defendant will do his duty in giving signals, yet he cannot rely on that assumption and thus relieve himself from exercising proper care. *Shaw v. Jewett*, 86 N. Y. 616: *Ry. v. Righter, supra; Ry. v. Masely, supra.*

SALES—RESCISSION BY BUYER—WAIVER OF RIGHT TO RESCIND.—WARD V. MARVIN, 62 ATL. 46 (VT.).—*Held*, that where the buyer of a horse, after dis-

eovering fraud of the seller, and after being assured by the seller that, if the horse was not as represented, he would make it right, continues to use the horse as his own, he thereby waived his right to rescind the contract.

A purchaser, upon discovery of a fraud, may treat the contract as voidable and may rescind by returning the property purchased. *State v. Hendricks*, 1 Cent. Rep. (N. J.) 451. But the right to rescind must be exercised within a reasonable time after the fraud is discovered or the time when it should have been discovered. *Young v. Arntze*, 86 Ala. 116. The continuing dealing with the property purchased in reference to the fraudulent transaction as if the contract were subsisting and binding is evidence of a waiver of the fraud and the election to treat the contract as valid and still subsisting; *Oakey v. Cook*, 41 N. J. Eq. 350; unless what is done is merely for the purpose of saving the plaintiff from further loss, without any purpose to give up whatever right he may have either at law or in equity to rescind. *Montgomery v. Pickering*, 166 Mass. 227. And even one whose tender of chattels for the purpose of rescinding is refused, and who takes it back and uses it as his own, thereby waives the benefit of his tender, and his remedy is an action at law for damages. *McCulloch v. Scott*, 52 Ky. 172.

TELEGRAPHS—MESSAGES—DELAY.—HAMRICK V. WESTERN UNION TELEGRAPH Co., 52 S. E. 232 (N. C.).—*Held*, that where delivery of a message informing plaintiff of the serious illness of his wife was delayed for a period of 28 hours, and plaintiff was informed of such delay before he started to his wife's bedside, it was no defense that, in view of the fact that his wife ultimately recovered, he was not damaged, but was in fact relieved of 28 hours anxiety on account of the delay.

This decision is in accord with previous decisions in same state. *Thompson v. W. U. Tel. Co.*, 107 N. C. 449. And also in harmony with the decisions of a few other states. *W. U. Tel. Co. v. Cunningham*, 99 Ala. 314; *Chapman v. W. U. Tel. Co.*, 90 Ky. 265. But beyond all doubt the above decisions are contrary to the weight of authority which holds that damages cannot be recovered from a telegraph company for mental suffering resulting from simple negligence in the prompt delivery of a message announcing the dangerous illness of a relation, as such damages are too uncertain and speculative. *Chase v. Telegraph Co.*, 44 Fed. 554 The law of the state to which the message is sent will govern whether a recovery shall be had or not. *Gray v. Telegraph Co.*, 91 Am. St. Rep. 706. These case must be distinguished from those in which an actual loss is suffered. *Bodkin v. Telegraph Co.*, 31 Fed. 134.

TORT—DAMAGES—SPECIFIC PROOF.—ERIE R. R. Co., 62 ATL., 482 (N. J.).—Plaintiff in a tort action in basing his claim for damages testifies that he took in $1,000 to $1,100 per annum gross. He produced no books nor any evidence as to the expenses of his business or of the proportion of the expenses to the gross income. The court left it to the jury to award damages based on the plaintiff's statement. *Held*, that there being no proof of loss of profits in the business of the plaintiff which the jury could, under the evidence, arrive at with reasonable certainly, it was error for the trial judge to submit the question of the class of damages to the jury, and he should have charged as requested by defendant. Fort, J., citing *East Jersey Water Co. v. Bigelow* 60 N. J. L. 201.

TRUSTS—CONSTRUCTIVE TRUSTS.—HEDDLESTON E, AL. v. STONER ET AL. 105 N. W. 56 (IOWA).—*Held*, that the breach of an express trust to hold title for another is not fraud on which equity will declare a constructive trust.

A trust results from the acts and not from the agreements of the parties and no trust results merely from breach of a parole contract. *Perry on Trusts*, § 134; *2 Story Eq. Juris.* § 1201 a. If one agrees to purchase land and give another an interest in it and he purchases and pays his own money and takes title in his own name, no trust results. *Williard v. Williard*, 56 Pa. St. 119; *Duffy v Masterson*, 44 N. Y. 557; *Hunt v. Friedman*, 63 Cal. 510. But if the promise which induced the agreement was fraudulently made the breach of such a promise becomes a fraud from which a trust will arise. *Perry on Trusts* §§ 134, 171. A trust created by such fraud need not be in writing. *Statute of Frauds*, § 8. There are some cases which hold that mere breach of contract is sufficient fraud to raise a trust in favor of the party defrauded. *Chastain v. Smith*, 30 Ga. 96; *Ousan v. Cown.* 22 Wis. 329. But the weight of authority is to the contrary, and in harmony with the decision rendered in the present case. *Loomis v. Loomis*, 60 Barb. 22; *Andrew v. Andrew*, 114 Iowa 524.

UNFAIR COMPETITION—RIGHT TO PROTECTION IN EQUITY.—SIEGERT V. GANDOLFI, 139 FED. 917. A manufacturer of "Augostura Bitters" which, in its advertisements, is said to contain no harmful or intoxicating ingredients, when in fact such bitters are composed of more than forty per cent alcohol, *held*, guilty of fraudulent misrepresentation and not entitled to aid of court of equity against alleged unfair competition.

Equity as a rule will not tolerate any imitation of another's trade mark or trade name whereby the public is liable to be deceived. Relief has been afforded when use was made of "Canadian Rye Whiskey" for "Canadian Club Whiskey," *Hiram Walker & Sons v. Nikolas*, 79 Fed. 955; "Six Big Tailors" for "Six Little Tailors," *Mossler v. Jacobs*, 66 Ill. App. 571; "Holsteter" "Hostetter," *Hostetter v. Vowinkle*, 1 Dill 329; "Saphia" for "Sapolio," *Enoch Morgan's Sons v. Schwachofer*, 55 How. Prac. 37. No injunction however against "Baco-Curo" for "No-to-Bac," *Sterling Co. v. Eureka Co.*, 70 Fed. 704. Arbitrary numbers and letters may be used as trademark, but not "I. X. L." *Lichtenstein v. Mellis*, 34 Am. Rep. 592. (Ore). In no case, however, will trademark be protected if owner has knowingly misrepresented the article to the public: *Medicine Co. v. Wood*, 108 U. S. 218; nor will there be any relief where medicine was advertised as "Syrup of Figs" but its principal ingredient was senna; *California Fig Syrup Co. v. Putnam*, 66 Fed. 750; nor where whiskey was guaranteed to be "pure and unadulterated" but contained 35 per cent of other blends. *Kraus v. Jos. R. Peebles Sons Co.*, 58 Fed. 585. Similarly a court will not interfere between manufacturers of quack medicines; *Heath v. Wright*, 3 Wall. 141; nor when word "Habana" is placed on cigar label, when cigars in fact were merely Havana filler. *Solis Cigar Co. v. Pozo*, 25 Am. St. 279 (Colo.). But misrepresentation must always be more than trivial inaccuracies or "trade talk," *Clark Thread Co. v. Armitage*, 67 Fed. 896.

WITNESSES—CREDIBILITY—RAPE—EVIDENCE.—STATE V. SIMPSON, 62 ATL., (VT.) 14.—*Held*, in a prosecution for rape on a female under the age of consent, defendant was not entitled to prove, to affect her credibility as a witness, previous unchastity with other men.

Proof of reputation for unchastity is usually held incompetent in order to impeach credibility. *People v. Mills*, 94 Mich. 630; *Com. v. Churchill*, 52 Mass. 538. Although opposite doctrine is upheld in a few states. *Wright v. Kansas City*, 187 Mo. 678; *Weathers v. Barksdale*, 30 Ga. 888. So also as to general moral character of witness. *Taylor v. Taylor's Estate* (Mich.) 10. N. W. 832; *McKelvey Evidence* p. 160; *contra, Helm v. Com.* (Ky.) 81 S. W. 270. In a case of rape when lack of consent is material, proof of general reputation of complainant for unchastity and former improper acts with defendant is always allowed as tending to show acquiescence. *Com. v. Kendall*, 113 Mass. 210. But as to whether specific acts of incontinence with other men can be proved the courts are in conflict. *Com. v. Harris*, 131 Mass. 336; *State v. Foshner*, 43 N. H. 89; *contra, State v. Reed*, 39 Vt, 417; *Brennan v. People*, 7 Hun. (N. Y.) 171.