RECENT CASES

ATTORNEY AND CLIENT—COMPENSATION OF ATTORNEY—PROTECTION AGAINST COLLUSIVE SETTLEMENT.—BURKHART v. SCOTT, 72 S. E., 784 (W. VA.).—*Held,* that an attorney who has brought a suit, pursuant to an agreement that he is to have a certain *per centum* of the judgment that shall be recovered, as his fee for services, has an inchoate right in the chose in action, and may avoid a collusive settlement, made between the defendant and his client, for the purpose of defeating his fee.

An attorney who brings an action under a contract for a contingent fee, and by which his client agrees not to compromise, cannot question a *bona fide* settlement before judgment. *DeGraffenreid v. St. Louis S. W. R. Co.,* 66 Ark., 260. An agreement not to compromise is violative of public policy. *Ellwood v. Wilson,* 21 Ia., 523. An attorney has no lien for services before judgment or decree. *Jones on Liens,* §193; *Jackson v. Stearns,* 48 Ore., 24; *Hutchinson v. Pettes,* 18 Vt., 614; *Voight Brewery Co. v. Donovan,* 103 Mich., 190. Though the case of *Johnson v. McCurry,* 102 Ga., 471, holds to the contrary. Yet it has been the practice at common law for the courts to intervene to protect attorneys against settlements made by their clients to deprive them of their costs or fees. *Potter v. Ajax Min. Co.,* 19 Utah, 421. If, therefore, a suit is settled collusively, and with an intent to defeat the attorney's claim, the court will set aside, or refuse to enforce, the settlement. *Young v. Dearborn,* 27 N. H., 324; *Fischer-Hansen v. Brooklyn Heights R. Co.,* 71 N. Y. Supp., 513; *Jones on Liens,* §203.

CHARITIES—ADMINISTRATION—TORTS OF.—KELLOGG v. CHURCH CHARITY FOUNDATION OF LONG ISLAND, 96 N. E., 406 (N. Y.).—*Held,* that a charitable corporation cannot escape liability for a tort against a stranger, because it holds its property in trust to be applied for purposes of charity.

The weight of authority favors the doctrine that charitable corporations are not liable for the torts of their agents. *Benton v. Hospital,* 140 Mass., 13; *Hearns v. Waterbury Hospital,* 66 Conn., 98. Though such exemption from liability is limited to the cases of those who are beneficiaries under the trust fund, and does not extend to strangers. *Bruce v. Central M. E. Church,* 147 Mich., 230; *Mulchey v. Methodist Society,* 125 Mass., 487. Yet it extends to cases where the beneficiary pays a pecuniary consideration. *Abston v. Waldon Acad.,* 118 Tenn., 24. In most states the ground for this non-liability is that to pay damages for such torts would be a diversion of the funds from the trust purposes. *Williamson v. Industrial School,* 95 Ky., 251. This rule would apply equally as well to strangers, and for this reason in *Powers v. Mass. Hospital,* 109 Fed., 294, the exemption was made to rest upon an implied agreement arising from acceptance by the patient. In *Fordyce v. Women's Association,* 79 Ark., 532, a recovery was denied, even to a stranger, on the ground that property of a charity cannot be sold under execution issued on a judgment. And

yet in *Glavin v. R. I. Hospital,* 12 R. I., 411, the charity was held liable on the ground of public policy, even though the plaintiff was a beneficiary of the trust fund.

CRIMINAL LAW—EVIDENCE—WITNESS WITHOUT JURISDICTION.—STATE v. CONKLIN, 133 N. W., 119 (IA.).—*Held,* that where a witness who had testified at a previous trial was beyond the jurisdiction, and his testimony had not been taken down in short hand, it was permissible for one who heard to give the substance thereof against the accused. Weaver and Evans, J. J., *dissenting.*

That the witness is not a resident of the state, or is absent therefrom at the time of the trial has been held sufficient ground for the admission of his testimony as taken at the preliminary examination. *Perry v. State,* 87 Ala., 30; *Cowell v. State,* 16 Texas App., 58. Some courts refuse to recognize this as a sufficient reason. *Finn v. Com.,* 5 Rand (Va.), 701, unless his absence was procured by the opposite party. *State v. Houser,* 26 Mo., 431. Yet even when the only means of proving such testimony is by the oral testimony of those who heard it at the examination, and they are able to repeat it in substance, such a method, according to the majority opinion, is permissible. *State v. Harmon,* 70 Kan., 476; *Baker v. Sands,* 140 S. W. (Texas), 520. But in *United States v. Wood,* Fed. Cas. No. 16, 756, it was held that the witness must repeat the testimony of even a deceased witness exactly as it was given, and not merely in substance. And in *Wade v. State,* 7 Baxt. (Tenn.), 80, the witness was required to repeat it in such detail as the Court should demand.

EVIDENCE—DOCUMENTARY—TIME BOOKS.—BOCKELCAMP V. LACKAWANNA & W. V. R. CO., 81 ATL., 93 (PA.).—*Held,* a time book, not a book of original entries, of an employer is inadmissible to show the hours that an employee worked on a particular day where the book was made from time slips which were not produced, and where the witnesses who made the entries were not produced.

The established rule is that a book which is not a book of original entries is not admissible. *Rumsey v. Tel. Co.,* 49 N. J. L., 322; *Woolsey v. Boher,* 41 Minn., 235; *Bently v. Ward,* 116 Mass., 333; *Way v. Cross,* 95 Ia., 258. While a book of original entries fair and regular on its face will, provided it is properly authenticated, generally be admissible in evidence. *Folsom v. Grant,* 136 Mass., 493; *Anchor Milling Co. v. Walsh,* 108 Mo., 277; *Lunsford v. Butler,* 102 Ala., 403. Whether a book is one of original entries is something difficult to decide; the fact, however, that temporary memoranda were originally made, and the entries then made from them in the books, does not make them inadmissible; they are still books of original entries. *Faxon v. Hollis,* 13 Mass., 427; *McGoldrick v. Teaphagen,* 88 N. Y., 334; *Hall v. Glidden,* 39 Me., 445. For their admission in evidence proper authentification by the party making the entries is essential; or in case of his death or other disability, by proof of his handwriting. *Miller v. Shay,* 145 Mass., 162; *Stroud v. Tilton,* 4 App. Dec. (N. Y.), 324. It must be shown that the entries were made in the regular

course of business. *In re Fulton,* 178 Pa. St., 78; *Baldridge v. Penland,* 68 Tex., 441. Also the entries must have been made contemporaneously with the transactions recorded. *Wells v. Hobson,* 91 Mo. App., 379. There is no fixed rule as to what is "contemporaneous;" entries may be transcribed within a reasonable time. *Redlick v. Banerle,* 98 Ill., 134. Where these entries have been transcribed by one clerk from temporary memoranda made by another, some courts hold that, if the original observer cannot testify the book will be excluded. *Kent v. Garvin,* 1 Gray (Mass.), 148. Others will admit this evidence upon proof that the original observer is unavailable. *Am. Surety Co. v. Panly,* 38 W. S. App., 254. A copy of the original book will not ordinarily be received in evidence. *Skipworth v. Deyell,* 83 Hun. (N. Y.), 307; *Peck v. Parchen,* 52 Ia., 46.

EVIDENCE—PHOTOGRAPHS—ADMISSIBILITY—CITY OF LOUISVILLE v. ARROWSMITH, 140 S. W., 1022, (KY.).—*Held,* that in an action against a city for injury to a traveler caused by a defect in a street, photographs taken some time after the accident were admissible in evidence to show the condition of the street where witness other than the photographer testified that they accurately described the condition of the street, and there was no contention that the condition of the street had changed since the accident.

As a general rule, photographs are competent as evidence when their correctness has been shown. *First National Bank v. Wisdom's Ex'rs.,* 111 Ky., 135; *Alberti v. R. R. Co.,* 118 N. Y., 77; *Cooper v. Ry. Co.,* 54 Minn., 379. They are admissible to show identity. *United States v. A Lot of Jewelry,* 59 Fed., 684. Or to show the condition of a person. *Cooper v. Ry. C.,* 54 Minn., 379; *Ry. Co. v. Allen,* 36 Neb., 361. Or to show the condition of premises. *Dyson v. R. R. Co.,* 57 Conn., 9; *German School v. Dubuque,* 64 Ia., 736. But they must be authenticated extrinsically. *Cunningham v. R. R. Co.,* 72 Conn., 244; *Leidlin v. Meyer,* 95 Mich., 586; *Beardslee v. Columbia Township,* 188 Pa. St., 496. This need not, however, be done by the photographer himself, but may be done by any eye-witness. *Mow v. People,* 31 Colo., 351; *Hall v. Ins. Co.,* 76 Minn., 401. They are not, however, admissible if they are unnecessary. *Cirello v. Express Co.,* 88 N. Y. Supp., 932; *Selleck v. Janesville,* 104 Wis., 570. Nor if they are not practicaly instructive. *Harris v. Quincy,* 171 Mass., 472; *State v. Miller,* 43 Ore., 325. Photographic copies of an instrument are not admissible when the original can be readily exhibited to the jury, except to identify a writing, or to detect a forgery. *Baxter v. Ry. Co.,* 104 Wis., 307. Where the photograph is offered to show distances, relative sizes, or the location of objects, its accuracy must be very convincingly proved. *Cunningham v. R. R. Co.,* 72 Conn., 244. X-Ray photographs are admissible when shown to have been properly taken. *De Forge v. R. R. Co.,* 178 Mass., 59; *Geneva v. Burnett,* 65 Neb., 464.

FRAUDS, STATUTE OF—SALE OF STANDING TIMBER—"CONTRACT FOR THE SALE OF REAL ESTATE."—ADAMS V. HUGHES, 140 S. W., 1163 (TEX.)—*Held,* that a contract of sale of timber allowing the purchaser fifteen years to

remove it is a "contract for the sale of real estate" within the statute of frauds, and must be in writing.

While there is probably no conflict on this point in the case of such a contract as that in the leading case, there is a sharp conflict as to the applicability of the statute of frauds to such contracts, when they are to be performed immediately. Many cases hold that any contract for the sale of standing timber is within the statute of frauds. *Cool v. Peters, Etc., Co.,* 87 Ind., 531; *Green v. Armstrong,* 1 Denio, 550; *McGregor v. Brown,* 10 N. Y., 114; *Lillie v. Dunbar,* 62 Wis., 198; *Garner v. Mahoney,* 115 Ia., 356; *Harrell v. Miller,* 35 Miss., 700; *Slocum v. Seymour,* 36 N. J. Law, 138. On the other hand, many cases hold that where the contract contemplates the immediate separation of the trees from the land, it is not within the statute. *In re Benjamin,* 140 Fed., 320; *Leonard v. Medford,* 85 Md., 666; *Banton v. Sherry,* 77 Me., 48; *Byasee v. Reese,* 4 Met., (Ky.), 372; *Clafin v. Carpenter,* 4 Metc., 580; *Robbins v. Farwell,* 193 Pa. St., 37. And this appears to be the English rule, *Marshall v. Green,* 1 C. P. Div., 35. In *Wilson v. Fuller,* 58 Minn., 149, it is held that though such a contract may have been originally within the statute, the cutting of the trees takes it out of the statute. In *Killmore v. Howlett,* 48 N. Y., 569, a distinction is drawn between a contract for the sale of standing timber, and a contract whereby the owner was to cut the trees and deliver them as cord-wood; and the latter is held to be a contract for work and labor and for the sale of chattels.

INSURANCE—EMPLOYER'S ACCIDENT INSURANCE—PERSONS ENTITLED TO SUE.—CLARK V. BONSAL & *Co.,* 72 S. W., 954 (N. C.).—*Held,* that unless an employer's accident insurance policy expressly provides that it is for the benefit of injured employes, and that amounts recovered should be paid to them, an injured employe may not, in the first instance, sue on the policy.

The injured employe is no party to the contract, nor has he any rights, legal or equitable, growing out of it. *Finley v. U. S. Casualty Co.,* 113 Tenn., 592; *Frye v. Bath Gas & Electric Co.,* 97 Me., 241. If the policy amounts to a contract of indemnity, an action cannot be maintained against the insurance company, on the theory that the amount is not due until the insured has paid the loss. *Allen v. Aetna Life Ins. Co.,* 76 C. C. A., 265; *Connelly v. Bolster,* 187 Mass., 266. Though such an action was allowed in *Sanders v. Frankfort Ins. Co.,* 72 N. H., 485. Where the policy insures directly against liability, some courts hold the view that the insurer is liable to garnishment. *Hoven v. Employer's Liability Co.,* 93 Wis., 201; *Fritchie v. Miller's Extract Co.,* 197 Pa., 401. That the insurance money due under a policy against liability to third persons does not constitute a trust fund for the benefit of the person whose injury caused the liability was expressly decided in *Bain v. Atkins,* 181 Mass., 240. By statute in New York State, contracts making the insurer directly liable to the injured employe, are expressly authorized. St. 1892, C. 690, §55.

INSURANCE—INSURABLE INTEREST—ASSIGNMENT OF POLICY INTEREST.—JOHNSON V. MUT. BEN. LIFE INS. Co., 72 S. E., 847 (N. C.).—*Held,* that an

assignment of a policy of life insurance, payable to insured, on which premiums have been paid, made to secure a loan in good faith, and not as a cover for a wagering transaction, or a mere speculation, to a person who has no insurable interest in the life of the insured, is valid.

The right to assign a policy as collateral security for a loan or debt due from the insured seems to be unquestioned. *Jones v. N. Y. Life Ins. Co.*, 15 Utah, 522; *Page v. Burnstine*, 102 U. S., 664; *Coleman v. Anderson*, 98 Texas, 570. In this last case the policy forbade such an assignment. There are numerous cases holding that, even where the assignment is absolute, no interest in the assignee is necessary to support its validity if the policy has been taken out by one having such interest. *Mutual Life Ins. Co. v. Allen*, 138 Mass., 24; *Steinback v. Diepenbrock*, 158 N. Y., 24; *Mutual Life Ins. Co. v. Armstrong*, 117 U. S., 591; (this last case overruling the famous case of *Warnock v. Davis*, 104 U. S., 775). Some states regard it as assignable like any other chose in action if not made to cover a speculative risk. *Chamberlain v. Butler*, 61 Neb., 730; *Bowen v. Nat. Life Ins. Co.*, 63 Conn., 460. In other states, on the contrary, the assignment is held invalid on the ground of public policy. *Keystone Mut. Ben. Ass. v. Norris*, 115 Pa., 446; and being absolutely void, there can be no recovery thereon. *Franklin Life Ins. Co. v. Hazzard*, 41 Ind., 116; *Missouri Valley Life Ins. Co. v. Sturges*, 18 Kan., 93.

MASTER AND SERVANT—INJURY TO SERVANT—VICE-PRINCIPAL.—REID v. NORTHWESTERN FUEL CO., 133 N. W., 161 (MINN.).—*Held*, that the order of a foreman to an experienced servant under his control to perform an act, which is merely a detail of the servant's employment, and not known to the foreman to be attended with hidden danger, is, though coupled with an assurance of safety, the direction of a superior servant, and not that of a vice-principal.

The rule that an employe can not recover from his employer for injuries resulting from the negligence of a fellow-servant, as laid down in the leading case of *Farwell v. B. & W. Ry. Co.*, 4 Metc. (Mass.), 49, has been the subject of severe criticism, *Ziegler v. Danbury R. Co.*, 52 Conn., 543; *Peck on Mass. Act*, 14 YALE LAW JOURNAL, 18; *Pollock on Torts*, 85. But it is still the law where not changed by statute. *Barry v. McGhee*, 100 Ga., 759; *Rosemand v. Southern Ry.*, 66 S. C., 91; *Hough v. Railway Co.*, 100 U. S., 213. See also *Mondou v. N. Y., N. H. & H. R. Co.*, 82 Conn., 373, reversed by decision of the United States Supreme Court, Jan. 15, 1912, affirming the constitutionality of the *Railroad Employers' Liability Act*, Pt. 1 of 35 U. S. Statutes at Large, 65, which abolished the fellow-servant rule in the case of interstate railroads. The theory that a superior servant is an exception to the rule may be considered as generally rejected. *What Cheer Coal Co. v. Johnson*, 56 Fed., 810; *Lundberg v. Shevlin-Carpenter Co.*, 68 Minn., 135; *N. E. R. Co. v. Conroy*, 175 U. S., 323. *Contra, Chicago & A. R. Co. v. May*, 108 Ill., 288; *Ill. Cent. R. Co. v. Spence*, 93 Tenn., 173. The vice-principal exception has more support. *Lund v. Hersey Lumber Co.*, 41 Fed., 202; *Wilson v. Willimantic Linen Co.*, 50 Conn., 433; *Tierney v. Minneapolis & R. Co.*, 33 Minn., 311. But

it has also been criticised, and has been rejected in at least one state. *Northern Pac. R. Co. v. Peterson,* 51 Fed., 182; *Holden v. Fitchburg R. Co.,* 129 Mass., 268. An employer has often been held liable for the negligence of a foreman. *Leiter v. Kinnare,* 68 Ill. App., 558; *Kelley v. Stewart,* 93 Mo. App., 47; *Allison v. Railroad,* 129 N. C., 336. But it would seem that the weight of authority is with the principal case in holding that a foreman is a fellow-servant only. *Reno, Employers' Liability Acts,* Sec. 52, 53; *Pistorres v. Am. Can Co.,* 119 Fed., 496; *Southern Ind. Ry. Co. v. Martin,* 160 Ind., 280; *Moore v. McNeill,* 54 N. Y. Supp., 956. So even the express direction of the foreman will not give a right of action, unless such direction was authorized by the master. *White v. Eidlitz,* 46 N. Y. Supp., 184; *Watts v. Hart,* 7 Wash., 178.

NEGLIGENCE—LIABILITY OF MANUFACTURER—IMMINENTLY DANGEROUS MACHINE.—OLDS MOTOR WORKS V. SHAFFER, 140 S. W., 1047 (KY.).—*Held,* that an automobile is such an imminently dangerous machine as to entitle persons, other than the owner, to recover damages from the maker for injuries occasioned by its defective construction.

One who sells and delivers to another an article intrinsically dangerous to human life or health, without notice to the purchaser of the danger, is responsible to any person who is, without fault on his part, injured thereby. *Thomas v. Winchester,* 6 N. Y., 397; *Waiser v. Holzman,* 33 Wash., 87. And the maker of such an article owes a duty to the public to exercise great care that it be not unnecessarily dangerous. *Standard Oil Co. v. Murray,* 119 Fed., 572; *Devlin v. Smith,* 89 N. Y., 470. Nor does this duty depend on privity of contract. *Thomas v. Winchester, supra; Weiser v. Holzman, supra.* But if the manufacturer has used proper care, no liability attaches to him. *Favo v. Remington Arms Co.,* 73 N. Y. Supp., 788. On the other hand, where the article is dangerous through a defect, the person supplying it is not liable to one with whom he has no contractual relation, unless it is also imminently dangerous in kind. *Loop v. Litchfield,* 42 N. Y., 351; *McCaffrey v. Mossberg, Etc., Co.,* 23 R. I., 381; *Goodlander Co. v. Standard Oil Co.,* 63 Fed., 400. And the weight of authority seems to be that an automobile is not an imminently dangerous machine. *Hartley v. Miller,* 165 Mich., 115; *Jones v. Hoge,* 47 Wash., 663; *McIntyre v. Orner,* 166 Ind., 57; *Steffen v. McNaughton,* 142 Wis., 49. But *Ingraham v. Stockamore,* 118 N. Y. Supp., 399, holds the contrary.

PAYMENT—RECOVERY—MISTAKE OF LAW.—LEACH V. COWAN, 140 S. W., 1070, (TENN.).—*Held,* that a payment of money under a mistake of law may be recovered, where it would be unconscionable for the party who obtains the advantage in such transaction to retain it; but though there was a clear mistake of law, yet if the party benefited may retain the advantage in good conscience, neither a court of law nor of equity will give relief.

The rule in most jurisdictions seems to be that a voluntary payment under a mistake or ignorance of the law, but with full knowledge of all the facts, or means of such knowledge, and not induced by fraud or

improper conduct of the payee, can not be recovered. *Elliott v. Swartwout,* 35 U. S., 137; *Elston v. Chicago,* 40 Ill., 514; *Supervisors v. Briggs,* 2 Denio, 26. The same rule holds in the English courts. *Bilbie v. Lumley,* 2 East., 469; *Brisbane v. Dacres,* 5 Taunt., 143. But in some states it is held that the payment can be recovered in a suit in equity, if the payee can not in good conscience retain the money. *Northrop v. Graves,* 19 Conn., 548; *Culbreath v. Culbreath,* 7 Ga., 64; *Lynn v. Mason,* 102 Ky., 594; *Coudert v. Coudert,* 43 N. J. Eq., 407. Except in these jurisdictions, however, the rule applies even where the payment was made under a statute later held unconstitutional or invalid. *Benson v. Monroe,* 61 Mass., 125; *Mayor v. Lefferman,* 4 Gill., 425. But it does not apply to a payment made by a public agent. *Battle Creek v. Barnes,* 143 Mich., 400; *County v. Greer,* 179 Pa. St., 639. Nor to a payment made to an officer of the court. *Gillig v. Grant,* 49 N. Y. Supp., 78. Nor is a payment obtained by oppression, extortion, or undue advantage within the rule. *Haviland v. Willets,* 141 N. Y., 35. This is true though these elements are not sufficient in themselves to justify the interposition of equity. *Jordan v. Stevens,* 51 Me., 78.

RELEASE—PERSONAL INJURY CLAIMS—CONSTRUCTION.—SCHWEIKERT V. JOHN R. DAVIS LUMBER CO., 133 N. W., 136 (WIS.).—*Held,* that while contracts of settlement for trifling amounts, made with employes with unseemly haste, and when they are unable to intelligently comprehend what they are doing, are disfavored, settlements fairly made and untainted by fraud are to be encouraged.

The weight of authority supports the rule of the principal case that a release procured without fraud, deception, or artifice, if the releasor is in full possession of all his faculties, is valid and binding. *Am. Quarries Co. v. Lay,* 37 Ind. App., 386; *Spitze v. B. & O. Ry. Co.,* 75 Md., 162; *Homuth v. Street Ry. Co.,* 129 Mo., 629. But there must be a full understanding on the part of the releasor of his legal rights as well as good faith on the part of the wrongdoer. *Railway Co. v. Goodholm,* 61 Kan., 758; *Railroad Co. v. Chiles,* 86 Miss., 361; *Strode v. St. Louis Transit Co.,* 197 Mo., 616. And where there is no reality of assent, because of the condition of the releasor, it is generally not binding. *Rockwell v. Capital Traction Co.,* 25 App., D. C., 98; *Chicago Union Traction Co. v. Ludlow,* 108 Ill. App., 357; *M. K. & T. Ry. Co. v. Brantley,* 26 Tex. Civ. App., 311. *Contra, Cooney v. Lincoln,* 21 R. I., 246. The consideration may be nominal, but gross inadequacy is evidence of fraud. *Featherstone v. Bettejewski,* 75 Ill. App., 591; *Lease v. Penn. Co.,* 10 Ind. App., 47; *Dorsett v Manufacturing Co.,* 131 N. C., 254. But *Barker v. Northern Pac. Ry. Co.,* 65 Fed., 460, holds an improvident settlement valid where the releasor was still sensitive of her injuries, though her mental faculties were not impaired. And reasonable care may be expected of the releasor in ascertaining the effect of the release. *Vickers v. Chicago, B. & Q. Ry. Co.,* 71 Fed,. 139; *Jossey v. Georgia Southern Ry. Co.,* 109 Ga., 439; *Williams v. Wilson,* 40 N. Y. Supp., 1132. *Contra, Eagle Packet Co. v. Defries,* 94 Ill., 598. And, as courts are disposed to favor releases, ignorance of the extent of the injury generally does not invalidate. *Chicago & N. W. Ry.*

Co. v. Wilcox, 116 Fed., 913; *Seeley v. Citizens Traction Co.,* 179 Pa. St., 334; *Kowalke v. Milwaukee Co.,* 103 Wis., 472. *Contra, Great Northern Ry. Co. v. Fowler,* 136 Fed., 118; *McCarthy v. H. & T. C. Ry. Co.,* 21 Tex. Civ. App., 568. A promise of employment, though indefinite, is generally sufficient consideration. *Hobbs v. Electric Light Co.,* 75 Mich., 550; *Quebe v. G. C. & S. F. Ry. Co.,* 98 Tex., 6; *Rhoades v. Ry. Co.,* 49 W. Va., 494. *Contra, G. C. & S F. Ry. Co. v. Winton,* 7 Tex. Civ. App., 57. And since a written release is presumed to be valid, a mere preponderance of evidence of fraud is not sufficient to set it aside. *Davis v. Weatherly,* 119 Ill., App., 238; *McCall v. Bushnell,* 41 Minn., 37; *McFarland v. Mo. Pac. Ry. Co.,* 125 Mo., 253; *Bouten v. Railroad,* 128 N. C., 337.

TELEGRAPHS—DELAY—PERSONS ENTITLED TO DAMAGES.—MAXVILLE V. WESTERN UNION TELEGRAPH CO., 140 S. W., 464, (TEX.).—Plaintiff arranged with a hospital and with her mother for the shipment of her husband's body, in the event of his death, to a certain place, and a telegram sent by the hospital to the plaintiff's mother, announcing the husband's death, and fixing the place of burial, unless otherwise notified, was delayed; but it did not appear that the telegraph company knew of the plaintiff's relationship with the deceased, or that the addressee was plaintiff's agent to receive the telegram, or of anything connecting it with the beneficiary. *Held,* that damages for mental suffering to plaintiff from its delay could not have been in contemplation of the parties to the contract, and plaintiff could not recover.

In several states, in actions for non-delivery, or delay in delivering a telegram, damages for mental suffering without other injury are recoverable. *Tel. Co. v. Van Cleave,* 107 Ky., 513; *Tel. Co. v. Adair,* 115 Ala., 441; *Cowan v. Tel. Co.,* 122 Ia., 379; *Green v. Tel. Co.,* 136 N. C., 489. But this doctrine has sometimes been limited to cases where the addressee was sent for to be present in case of sickness or death or burial. *Tel. Co. v. McCaul,* 115 Tenn., 99; *Tel. Co. v. Westmoreland,* 151 Ala., 319. And even in such cases, there must be a close relationship between the addressee and the person concerning whom the message was sent. *Tel. Co. v. Ayres,* 131 Ala., 391; *Lee v. Tel. Co.,* 130 Ky., 202. And the defendant must have notice that its negligence would probably cause mental suffering. *Tel. Co. v. Raines,* 78 Ark., 545; *Tel. Co. v. Brown,* 71 Tex., 723. But the fact that the message relates to sickness or death is itself sufficient notice that mental suffering will result from failure to deliver it. *Lyles v. Tel. Co.,* 77 S. C., 174; *Foreman v. Tel. Co.,* 141 Ia., 32. And the notice does not necessarily have to show that the plaintiff was the particular person who would suffer, if the message was for his benefit. *Landie v. Tel. Co.,* 124 N. C., 528. But it has been held, on the other hand, that the defendant must have notice of the plaintiff's connection with, or interest in, the message. *Tel. Co. v. Gotcher,* 93 Tex., 114; *Tel. Co. v. Potts,* 120 Tenn., 37; *Tel. Co. v. Northcutt,* 158 Ala., 539. It is not, however, necessary that the plaintiff should be either the sender or the sendee of the message. *Landie v. Tel. Co.,* 124 N. C., 528; *Tel. Co. v. Cooper,* 71 Tex., 507.

TRADE-MARKS AND TRADE-NAMES—INFRINGEMENT—DECEPTION IN USE AS A BARRIER TO RELIEF.—LEACH V. SCARFF, 188 FED., 447 (ILL.).—*Held,*

that where the manufacturer of a medicine misrepresents himself as a physician and deceives the public as to the ingredients of his product by the use of a fanciful name registered as a trade-name, a court of equity will not enjoin an infringement of his patent right.

The general American rule as laid down by numerous state courts and sustained by the Supreme Court of the United States is, that if a person wishes to have his trade-mark property protected by a court of equity, and it appears that the trade-mark for which he seeks protection is itself a misrepresentation and has acquired a value with the public by fraud, all relief will be denied. *Worden & Co. v. California Fig Syrup Co.*, 187 U. S., 516; *Manhattan Medicine Co. v. Wood*, 108 U. S., 218; *Uri v. Hirsch*, 123 Fed., 568. A material false representation in a trade-mark or trade-name will prevent equity relief though the defendant's act be without justification. *New York & New Jersey Lubricant Co. v. Young*, 77 N. J. Eq., 321. He who seeks the aid of equity must come with clean hands is an old doctrine that still prevails. *Newbro v. Undeland*, 69 Neb., 821. The rule is not limited to representations made by the trade-mark itself, but covers whatever is calculated to deceive the public if used in such connection that it is essential to the success of the trade-mark. *Daderrian v. Yacubian*, 98 Fed. Rep., 872. This rule is of universal application. *New York & New Jersey Lubricant Co. v. Young*, 77 N. J. Eq., 321. As is also the rule that a medicine label falsely representing the manufacturer to be a physician will not be protected by injunction. *Leucke v. Dietz*, 121 Wis., 102.