RECENT CASES

ADVERSE POSSESSION—EVIDENCE—COLOR OF TITLE.—LITTLE V. CRAWFORD, ET AL., 88 PAC. 974 (IDAHO).—*Held,* where C. was in possession of real estate and conveyed same by quit claim deed to L., and L. took possession thereof under claim and color of title, and held open, notorious, and adverse possession under such claim of title and made valuable improvements thereon, and paid all taxes assessed against said property for a period of more than five years, he secured title thereto by adverse title or prescription.

Color of title, in order to sustain a claim of adverse possession, may be shown by any paper which appears to have conveyed the land, and it is immaterial whether this paper actually conveys a good or bad title so long as the person claiming under it does so in good faith. *Unto v. Carpenter,* 21 Cal. 445. Where one is said to have color of title it is supposed that some act has been done which gives him title, good or bad. *St. Louis v. Gorman,* 29 Mo. 593. And where the title is colorable, and is held *bona fide* for a statutory period, it is sufficient to give the holder thereof the real title. *Abercrombie v. Baldwin,* 15 Ala. 363. Another case in the same state is directly in point and holds that color of title was sufficient to give the possessor the real title provided he received the land in good faith not knowing the title to be bad and that he resided thereon for the statutory period. *Goodson v. Brothers,* 111 Ala. 589.

ATTORNEY AND CLIENT—COMPROMISE BY ATTORNEY.—SEBREE V. SEBREE, ET AL., 99 S. W. (KY.) 282.—*Held,* an attorney has no power to compromise his client's case without her consent. An attorney cannot compromise an action on payment of his costs, without the knowledge and consent of his client, unless specially authorized so to do. *Mandeville v. Reynolds,* 5 Hun. 338. An attorney cannot negotiate away a judgment by way of compromise, without the consent of his client. *Boyle v. Beattie,* 2 Cin. R. 490. An attorney, without express authority from his client, has no power to bind the latter, by a compromise judgment in a litigated suit for less than the amount demanded. *Senn. v. Joseph,* 106 Ala. 454. An attorney at law, conducting an action of ejectment cannot, without his client's consent, fix upon a boundary by way of compromise. *Mackey v. Adain,* 99 Pa. St. 143.

BOUNDARIES—FENCES.—ACQUIESCENCE, 109 N. E. 287 (IOWA).—*Held,* that where adjoining land owners treat a division fence as a boundary between their respective farms for a period of twenty years, the fence will ordinarily be regarded as marking the true boundary line between them. Tiffany in his work on real property lays down the proposition that when a fence is recognized as a partition fence the continued existence of such a fence will be regarded as an acquiescence that the fence in question forms the boundary. *Tiffany on Real Property,* Vol. I, 584. This proposition has been supported by the cases of *Darst v. Eulow,* 116 Ill. 475; *Jones v. Smith,* 64 N. Y. 180. A Vermont case has gone farther than this in holding that the mere acquiescence in a line as a dividing line for fifteen years, although but one

of the proprietors and perhaps neither is in actual possession, is sufficient to establish that line as a true division line if known and claimed by both proprietors. *Brown v. Edson,* 23 Vt. 435. *Hubbard v. Stearns,* 86 Ill. 35, *held* that where two proprietors of adjoining lots acquiesced for twenty years in a certain fence as a boundary which was supposed by them to be the true boundary it was immaterial whether it was the true boundary or not, as by the limitation law it would be a conclusive presumption that it was the true line. To support this doctrine is a statement by Greenleaf: "So possession of land for the length of time mentioned in the statutes of limitation under a claim of absolute title, and ownership, constitutes against all persons but the sovereign, a conclusive presumption of a legal grant." *Greenleaf on Evidence,* Vol. I, Chapter IV, Section 16.

BROKERS—COMMISSIONS—SALE EFFECTED WITHOUT THEIR AID.—ETTINGHOFF ET AL. V. HOROWITZ, 100 N. Y. SUPP. 1002.—*Held,* that brokers were not entitled to a commission for procuring a customer for their principal's real estate, where he sold the premises to another before they produced their customer. Hooker, J., *dissenting.*

The above holding has followed the principle laid down in *McClure v. Paine,* 49 N. Y. 563. But in *Gaty v. Sack,* 19 Mo. 471, it was held that notice of the rescission of the broker's contract by the employer must be given before the broker performs; and where the principal made improvements on property apparently inconsistent with the continuance of the agency to sell, such acts did not constitute revocation, *Lloyd v. Mathews,* 51 N. Y. 124; also where plaintiff, a broker, sold stock for a savings bank, as directed by its president, and the president, during the agency, sold the stock, the bank was held liable, *Listare v. Best,* 11 Hun. 611. However, the greater weight of authority seems to be that a broker's agency is revocable without notice unless coupled with an interest in the subject-matter of the sale or entered into by reason of a valuable consideration. *Brown v. Pfarr,* 38 Colo. 550.

CONTRACTS—CONSTRUCTION.—GROTHE V. LANE, 110 N. W. 305 (NEB.).—*Held,* that a contract should be construed to give effect to the intention of the contracting parties, keeping in mind the situation of the parties, the property which is the subject-matter of the contract, and the use to which it is being applied.

Contracts should be so construed as to give effect to the intention of the parties, and where the intention is sufficiently apparent, effect should be given to it, even if it is not in harmony with the words used; for greater regard is to be had for a clear intent, than the words used to express the intent. *Walker v. Douglas,* 70 Ill. 445. In construing a contract, the surrounding circumstances must be taken into consideration. *Mobile, Montgomery Ry. Co. v. Jurey,* 111 U. S. 584; *Roberts v. Bonaparte,* 73 Md. 191. In the construction of a contract, the intention of the parties must govern, and to ascertain that intention regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the object they had in view *Strong v. Gregory,* 19 Ala. 146; *Montgomery v. Fireman's Ins. Co.,* 55 Ky. 427. But where the words are capable of one meaning the contracts are to be administered accordingly to the terms set forth therein. *Mudgett v. U. S.* 9 Ct. Cl. 467.

CRIMINAL LAW—REASONABLE DOUBT.—STATE V. UZZO, 65 ATL. (DEL. 775.—*Held,* that in a criminal prosecution, defendant is presumed to l

innocent until his guilt is proved to the satisfaction of the jury beyond a reasonable doubt; but such doubt must not be a mere fanciful, vague, speculative, or possible doubt, but a reasonable, substantial doubt, remaining after a careful consideration of all the evidence.

Proof of defendant's guilt must be made so as to exclude all reasonable doubt. *U. S. v. Jackson,* 29 Fed. Rep. 503; *Warlatt v. People,* 104 Ill. 364. It is impossible to define precisely what a reasonable doubt is, and the expression is so simple that it is best used alone, *State v. Reed,* 62 Me. 129; *Mickey v. Commonwealth,* 72 Ky. 593. It must however be founded on a consideration of all the circumstances and evidence and not on mere conjecture or speculation, *Kennedy v. State,* 107 Ind. 144; and must not be a mere misgiving of the imagination or misplaced sympathy, *State v. Murphy,* 6 Ala. 845; but natural and substantial, not forced or fanciful, *State v. Bodekee,* 34 Iowa 520, but such an honest uncertainty existing in the minds of a candid, impartial and diligent jury as fairly strikes the conscientious mind and clouds the judgment. *Commonwealth v. Drum,* 58 Pa. St. 9; *Polin v. State,* 16 N. W. (Neb.) 898.

DAMAGES—INADEQUACY—PERSONAL INJURIES.—RICHARDSON V. MISSOURI FIRE BRICK CO., 99 S. W. 778 (Mo.).—Where, through defendant's negligence, an eleven-year-old boy's right elbow joint was permanently injured, so that he never would be able to extend the arm to the full length nor obtain its full use, and the injury caused him pain whenever he used it in a manner requiring strength in the elbow, *held,* that the trial court did not abuse its discretion in setting aside a verdict in his favor for $500 as being grossly inadequate.

Where damages are found inadequate the verdict will be set aside, on the same principles that apply when the damages are excessive. *Hale on Damages,* 233. It has been held that in actions of tort, as a general rule, the verdict will not be set aside because the damages were too small. The court refused, in an action for the negligent construction of a building, whereby it fell and injured the plaintiff, to grant a new trial, on the ground that the jury had given merely nominal damages,—there being no reason for supposing them to have been actuated by improper motives. *Howard v. Barnard,* 11 C. B. 652. A new trial will not be granted in personal actions, founded upon tort and sounding merely in damages, on the sole ground of the smallness of the amount of the damages recovered. *Pritchard v. Hewitt,* 91 Mo. 547. But the rule is now established otherwise. Where the damages found by the jury were so small as to show that they must have omitted to take into consideration some of the elements of damage, a new trial was granted. *Phillips v. Railway Co.,* 5 Q. B. D. 78. The power of the court to award a new trial when dissatisfied with the verdict, is not open to question and whether because the verdict is too large or too small, the principle is precisely the same. *McDonald v. Walter,* 40 N. Y. 551.

EVIDENCE—PAROL EVIDENCE TO VARY WRITING—ILLEGALITY OF CONTRACT. —TWENTIETH CENTURY CO. V. QUILLING, 110 N. W. 174 (WIS.).—*Held,* that where a contract is against public policy, the parties cannot, by reducing an unobjectionable part of it to writing, prevent the reception of parol evidence to show the entire agreement, although the entire contract be inconsistent with the written paper.

It has long been established that the rule that parol evidence is inadmissable to contradict or vary the terms of a written contract, does not apply to contracts forbidden by the statute, by common law or by the general policy of the law. 1 *Greenleaf, Ev.*, 284; *Friend v. Miller*, 52 Kans. 139. The court will look through all disguises in order to detect fraud or illegality. *Martin v. Clarke*, 8 R. I. 389. But parol evidence will be admissible to impeach only an executory contract. *"In pari delicto potior est conditis defendentis, et possidentis." Gisaf v. Neval*, 81 Pa. 354; *Marksbury v. Taylor*, 10 Bush. 519. For while the law refuses to enforce, it equally refuses to relieve a party who has suffered by the enforcement. *Collins v. Blantern*, 2 Wils. 341. Conversely, parol evidence is admissable to show that a contract apparently invalid is really valid. *Wesetrn Tr. & Coal Co. of Michigan v. Kilderhouse*, 87 N. Y. 430; *Griffin v. New Jersey Oil Co.*, 11 N. J. Eq. (3 Stockt.) 49.

EVIDENCE—RES GESTÆ—STATEMENTS ACCOMPANYING TRANSACTION.—CHILCOTT ET AL. V. WASHINGTON STATE COLONIZATION CO., INC., 88 PAC. 113 (WASH.).—*Held*, where a corporation adopts and receives the benefits arising from contracts of its promoter, it is liable thereon.

Where a person renders professional services in preparing articles of incorporation under a contract in good faith with the promoters of the association, and the association avails itself of the benefits of such services the association is liable for the compensation. *City Bldg. Association*, 6 Ohio Dec. 1068. A corporation is liable for services rendered at the request of its incorporators soon after the granting of the charter, whether its officers have been elected or not. *Harrison v. Vermont Manganese Co.*, 20 N. Y. Supp. 194. A corporation in contemplation of formation at the time work was ordered by one of its incorporators, and which went to its benefit, is liable therefor. *Grier v. Hazard, Hazard & Co.*, 13 N. Y. Supp. 851. A corporation having carried on business, and held itself out to the world as such before it was organized according to law, the assets thereof should be made liable for its debts, though created previously to the completion of such organization.

EXECUTORS AND ADMINISTRATORS—LIABILITY FOR EXPENSES OF WAKE.—MCCOLLOUGH V. MCCREADY, ET AL., 102 N. Y. SUPP. 633.—Where expenditures for a wake were exclusively for refreshments, including provisions, liquors, wines, and cigars, *held*, expenditures for a wake, made at the request of the widow of decedent who left no children, being reasonable, are recoverable of the executors as expenses of the funeral. Gildersleeve, J., *dissenting*.

It is the duty of the executor or administrator to bury the deceased, and from this duty springs a legal obligation, and from the obligation the law implies a promise to him who in the necessity of the case, directs a burial and pays such expenses thereof as are reasonable. *Patterson v. Patterson*, 59 N. Y. 574. Funeral expenses comprehend more than the shroud, the coffin, and the grave. Such expenses include carriage hire, vaults, and tombstones. *Donald v. McVhorter*, 44 Miss. 124. But the expenses incurred must be reasonable. *Fogg v. Holbrook*, 88 Me. 169, and to determine this the amount of the decedent's estate is to be considered. *In re Hasson's Estate*, 5 Pa. Co. Ct. R. 19. Mourning attire for widow has been allowed. *In re Wachter's Estate* (*Sur.*), 38 N. Y. Supp. 941; *contra, Jenks v. Mathews*, 31

Me. 318. Removal of body to another state and traveling expenses of wife and near relatives allowed. *In re Carpenter's Estate,* 16 Phila. 290. So, too, have music and flowers. *In re Ogden's Estate,* 83 N. Y. Supp. 977. But in *In re Johnson's Estate,* 8 Pa. Co. Ct. R. 1, it was declared that the expenses of a wake, if not unreasonable, constitute a proper item of funeral charges, as for example, where the refreshments provided consisted only of cheese, crackers, and tobacco.

EXPERT TESTIMONY—HYPOTHETICAL QUESTION.—KELLY V. KELLY, 63 ATL. 1082 (MD.).—*Held,* that on an issue as to the capacity of a testator, a hypothetical question to a medical expert based on an assumption of fact shown only by hearsay testimony was not admissible.

Expert opinion evidence is admissible by reasons of necessity because such evidence lies not in the realm of the knowledge of the ordinary man and the expert's qualification rests on previous habit, study and professional experience. *Taylor v. Monroe,* 43 Conn. 33; and that opinion is admitted as facts when deduced from his investigation or on much of the evidence given in a trial at which he has been generally present or the counsel sums up all the evidence in the form of a hypothetical question. *People v. Muller,* 96 N. Y. 408; but the hypothetical question must be based upon the hypothesis of the truth of all the evidence or on a hypothesis framed of certain facts assumed to be proved for the purpose of inquiry, *Jackson v. N. Y. Central Ry. Co.,* 58 N. Y. 623; *Spear v. Richardson,* 37 N. H. 23. The assumption must be reasonably and fairly supported by the evidence shown, *In re Barber's Estate,* 63 Conn. 393, or reflect facts either admitted or proved by other witnesses, *Merrill v. Tegarden,* 19 Neb. 534; and, while an expert may give his opinion upon facts assumed to have been given and established, it would be against every rule and principle of evidence to allow him to state his opinion upon the conclusions and inferences of other witnesses, *Williams v. State,* 1 Atl. 887; and it should be based only on facts which have gone to the jury or which can go to the jury by the ordinary rules of evidence, in absence of statute, *People v. Augsbury,* 97 N. Y. 501.

FRAUD—INTENT.—CERNY ET AL. V. PAXTON AND GALLAGHER CO., 110 N. W. 882 (NEB.).—*Held,* that ordinarily the deceit to ground a recovery must relate to existing facts, but if one person by means of a promise which he makes with the secret intention of not performing it, induces another to part with his money or property, he is guilty of actionable fraud. A representation upon which fraud can be predicated must be of an existing fact or a fact alleged to exist, and cannot consist of a mere promise. *Fouty v. Fouty,* 34 Ind. 433; *Murray v. Smith & Sons,* 42 Ill. 548. But where there is a purchase of goods on credit, there is an implied representation to pay for them; and an action for deceit will lie against the one who obtains goods on credit, with no intention of paying for the same. *Swift v. Rounds,* 19 R. I. 527. A contrary view in the majority of the decisions seems to prevail to the case just cited. *People v. Healy,* 128 Ill. 9; *Welshbillig v. Dienhart,* 65 Ind. 94; *Gallagher and Mason v. Brunel,* 6 Cow. 346 (N. Y.). An action for deceit will not lie for inducing the plaintiff to convey to the defendant certain real estate in consideration of a loan of a certain sum of money, and a promise on the part of the defendant, to execute to the plaintiff, a bond for reconveyance on payment of the loan, and a refusal to execute bond after conveyance. *Long v. Woodman,* 58 Me. 49. But a fraudulent promise made

by the maker of a promissory note to the payee, by which the maker got possession of the note and held it until the Statute of Limitations had run, is actionable. *Cockrill v. Hall,* 65 Cal. 326.

FRAUDS, STATUTE OF—DEBT OF ANOTHER—ORIGINAL OR COLLATERAL PROMISE.—MECHANICS' AND TRADERS' BANK V. STETHEIMER, 101 N. Y. SUPP. 513.—*Held,* that where a bank refused to loan money to a corporation, whereupon the directors orally agreed with the bank that each one would guarantee their proportionate share of the amount of the loan, and the loan was then made, the promise of the directors was within the statute of frauds (Laws 1897, p. 510, c. 417, Section 21), as a promise to answer for the debt of another. McLaughlin, J., *dissenting.*

Whether the promise is within the statute depends on how the credit was given. *Clark on Contracts,* p. 68. If the credit was given exclusively to the promisor his undertaking was original. *Chase v. Day,* 17 John. 114; *Hartley v. Varner,* 88 Ill. 561. And likewise when, although the effect of the promise was to pay the debt of another, the leading object was not to become guarantor or surety but to subserve some purpose of his own, *Davis v. Patrick,* 141 U. S. 479, or where the promise is to indemnify the promisee against any liability which he may incur. *Jones v. Bacon,* 145 N. Y. 446; *Aldrich v. Ames,* 9 Gray 76. But where the promise is to indemnify the promisee against any loss he may sustain by reason of the default or miscarriage of a person under liability to him the promise is within the statute. *Nugent v. Wolf,* 11 Penn. 471; *Mallory v. Gillett,* 21 N. Y. 412. And in all cases the inquiry is whether such promise is independent of the original debt or contingent upon it. *Brown v. Waber,* 38 N. Y. 187.

HOMICIDE—TRIAL—INSTRUCTIONS—INVADING PROVINCE OF JURY.—LOGAN V. STATE, 43 SO. REP. 10 (ALA.).—*Held,* that court is not invading the province of jury when he charges them that if they believe the defendant cursed deceased, and told him he was going to kill him and said this as soon as he saw deceased, and further, that defendant immediately after using such language, shot deceased, then defendant could not be acquitted on the plea of self-defense. Dowdell, Anderson and Denson, JJ., *dissenting.*

The jury are the sole determiners of controverted questions of facts, and instructions that the defendant was the aggressor is ground for reversible error as it invades province of the jury. *Watson v. State,* 82 Ala. 10. Charges which are abstract or invade the province of the jury, are improper. *Springfield v. State,* 96 Ala. 81. An instruction that, "if you believe from the evidence that the defendant brought on the difficulty for the purpose of stabbing deceased then there is no ground for self-defense and you cannot acquit him on that ground," is erroneous, in absence of any evidence to that effect. *State v. Smith,* 125 Mo. 2. But, although judges are not allowed to charge juries with respect to matters of fact, it does not prohibit them from determining and charging the jury as to whether there is any evidence in regard to the issue or tending to sustain a fact on which a conviction or judgment may depend. *People v. Welch,* 49 Cal. 174.

INSURANCE—PROOF OF LOSS—WAIVER DENIAL OF LIABILITY.—THOMPSON V. GERMANIA FIRE INS. CO., 88 PAC. REP. (WASH.) 941.—*Held,* that where there is an oral insurance contract, and the company, within the time written contracts provide for proving loss, denies liability on the ground that there is no contract, it waives proof of loss.

Waiver of proof of loss may be either, express, *Edgerley v. Farmers' Ins. Co.*, 48 Iowa 644, or inferred from any act of the insurer evincing a recognition of liability or a denial of obligation, exclusively for other reasons, *Lebanon Mut. Fire Ins. Co. v. Erb*, 112 Pa. 149; *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571. Want of proof of loss, *Graves v. Wash. Marine Ins. Co.*, 94 Mass. 391; *Caledonian Ins. Co. of Scotland v. Traub*, 80 Md. 214; or a defect in same, *State Ins. Co. v. Waackens*, 38 N. J. Law 564; *Metropolitan Acc. Assn. v. Froiland*, 161 Ill. 30, is waived by denial of liability on the grounds that there is no contract at all, *Rathbone v. City Fire Ins. Co.*, 31 Conn. 193. Such denial, however, must be made by an agent capable of waiving such proof, *Aetna Ins. Co. v. Shryer*, 85 Md. 362; *East Texas Fire Ins. Co. v. Coffee*, 61 Tex. 287; and be made to beneficiary and not to a third person, *Employers' Liability Assn. Corp. v. Rochelle*, 35 S. W. 869. This rule is in harmony with the elementary principle that a party who places his refusal upon one ground, cannot after action brought, charge to another and different one, *Aetna Ins. Co. v. Shryer, supra.*

JUDGMENT—PERSONS CONCLUDED—RUMFORD CHEMICAL WORKS v. HYGIENIC CHEMICAL CO., 148 FED. REP. 862.—*Held:* That one is not bound as a privy merely because he contributes to the defence, without having the right to control the proceedings or to appeal from the judgment or decree.

Parties to be bound by a judgment are all persons having a right to control the proceeding, to make a defence, to adduce and cross-examine witnesses and to appeal from the decision of an appeal lies, 1 *Greenleaf Ev.*, Section 535; *Peterson v. Lothrop*, 34 Pa. 223; all these privileges are essential and only those who had enjoyed them collectively are concluded by a judgment, *Cecil v. Cecil*, 19 Md. 72. General rule is that mere contribution to the defence will not make a judgment binding on a party outside of record. *Goodnow v. Stryker*, 62 Iowa, 221; *Lebanon v. Mead*, 64 N. H. 8; *Gaytes v. Franklin Nat. Bank*, 85 Ill. 256; not even if one contributes to the employment of counsel for parties to the suit, *Lownsdale v. City of Portland*, Fed. Cases, No. 8578, (1 Or. 381). The exceptions are well defined and supported by numerous cases. Whenever a tenant, agent or servant, or other party to a relation, contractual or representative, is defended by his landlord, principal or master, respectively, the judgment is binding on the latter. *Castle v. Noyes*, 14 N. Y. 329; *Thomsen v. McCormick*, 136 Ill. 135.

LANDLORD AND TENANT—LEASE—CROPS—LIEN.—THOSTESEN V. DOXSEE ET AL., 110 N. W. 567 (NEB.).—*Held*, that a clause in a lease attempting to create a lien on the crops to be raised on the leased premises for the payment of rent reserved is ineffectual to create either a legal or equitable lien on the crops grown thereafter on the leased premises.

It has been held that a stipulation that future acquired property shall be held for security for some present engagement is an executory agreement of such a character that a creditor may under it take the property into his possession when it comes into existence and the lien will be good. *Butt v. Ellett*, 19 Wall. 544. But in most jurisdictions the agreement itself, although it may be a license to take possession subsequently, *Holoyd v. Marshall*, 10 H. L. Cas. 215, being an attempt to contract for something not having even a potential existence, *Moody v. Wright*, 13 Met. 17; *Williman v. Neher*, 20 Barb. S. C. 37, creates neither a lien nor a right of property, *Long v. Hines*, Ho. Kan. 220; *Williams v. Briggs*, 11 R. I. 476, until by "a new intervening

act," after the property is acquired, the possession is given to the creditor. *Newton v. Withey,* 5 Vt. 97; *Brown v. Neilson,* 61 Neb. 765.

MASTER AND SERVANT—INJURIES TO SERVANT—WARNING—DELEGATION OF DUTY.—HENDRICKSON V. UNITED STATES GYPSUM CO., 110 N. W. 322 (IA.).—*Held,* that the duty of a master operating a mine to warn employees of an expected explosion in blasting was one which could not be delegated to a fellow servant of the person injured. Bishop, J., *dissenting.*

A master in delegating one servant to warn a fellow-servant of a special danger, does so at his peril, *Wheeler v. Wason M'f'g Co.,* 135 Mass. 294; and so where the employer places his employees where there is unusual danger, even though a foreman directs the work, *Thompson v. Chicago M. & St. P. Ry. Co.,* (*C. C.*), 14 Fed. 564; also where an apprentice was killed while working under the direction of his tradesman, *Missouri Pac. Ry. Co. v. Peregoy,* 36 Kan. 424. But where a servant was injured through negligence of one whose duty it was to give signal when a bale was about to be lowered into a ship, it was held that the master was not liable, *Cheeney v. Ocean S. S. Co.,* 86 Ga. 278; and where a section hand was killed while working on the railroad under the direction of a foreman, no money could be had against the railroad company, *Shea v. Pa. R. Co.,* 13 Atl. 193. However, the tendency of the courts is to lay down the rule that a master cannot by delegating his authority to another, avoid liability and the presumption as to the point in question is in favor of the plaintiff. *F. T. Smith Oil Co. v. Slover,* 58 Ark. 168; *Carlson v. Northwestern Tel. Exch. Co.,* 63 Minn. 428.

MASTER AND SERVANT—INJURIES TO THIRD PERSONS—SCOPE OF EMPLOYMENT.—ST. LOUIS SOUTHWESTERN RY. CO. V. BRYANT, 99 S. W. 693 (ARK.)—*Held,* that where the foreman of a bridge gang employed by a railroad threw from a moving train a water cooler belonging to him, whereby plaintiff was injured, and there was no evidence tending to show that it was in the line of his duty to provide appointments for the cars, his act was not one for which the railroad company could be held liable as within the scope of his employment.

In determining the question of authority the object, purpose, and end of the employment are to be regarded; and in every instance it becomes a mixed question of law and fact, to be settled by the peculiar facts and circumstances, *Cooley on Torts,* (3d Ed.) 1035, which have not always been consistently interpreted. Thus where a section foreman used a hand car in his own business and negligently injured one at a crossing, the company was held not liable. *Branch v. International, etc., Ry. Co.,* 92 Tex. 288; *contra, Salisbury v. Erie R. R. Co.,* 66 N. J. L. 233. And compare *Ritchie v. Waller,* 63 Conn. 155 with *McCarthy v. Timins,* 178 Mass. 378. But where a brakeman threw a stone at a boy who had been trespassing, and the stone struck another person, the act was declared not done in behalf of the railroad company which was accordingly not liable. *Georgia R. and Banking Co. v. Wood,* 94 Ga. 124. And where the defendant's driver injured a boy, the defendant's liability was said to be contingent upon whether the act was to gratify personal malice or to remove the boy from the wagon. *Brennan v. Merchant,* 205 Pa. 258. In harmony with the present case is *Walton v. New York Cent. Sleeping Car Co.,* 139 Mass. 556, where a sleeping car porter threw from the car a package to his washerwoman, thus injuring the plaintiff. The act was declared outside of the scope of his employment.