RECENT CASES

BILLS AND NOTES—PAYMENTS—RIGHT TO RECOVER.—ISAACS v. KOBRE, 145 N. Y. S., 919.—Defendant purchased a note on June third, which was payable on May third of the same year. The note being unpaid, defendant informed plaintiff, an indorser, that the note was payable on June third, the day of the purchase. As both parties labored under a mutual mistake, the plaintiff paid the note, but on receiving it discovered the mistake. *Held,* as the plaintiff had been discharged of his liability by the failure of the holder to protest it when not paid when due, the plaintiff might recover his payment.

Where the indorser paid a check without knowledge of the facts which discharged him from all liability, he may recover the money so paid. *Martin v. Campbell,* 160 N. Y. 190. If an indorser of a note relying upon a notice received from a notary public that the note has been dishonored, and being called upon to pay the note, when in fact a proper demand has not been made upon the maker, such payment is made under a mistake of fact and the money so paid may be recovered. *Talbot v. National Bank of Commonwealth,* 129 Mass. 67.

COURTS—OPINIONS—"DICTUM."—DUNCAN v. BROWN, 139 PAC. (N. M.) 140.—*Held,* wherever a question fairly arises in the course of a trial, and there is a distinct decision of such question, the ruling of the court in respect thereto cannot be called mere *dictum.*

Remarks in an opinion, not necessary to the decision of the case, are *dicta,* and have no binding force. *In re Klock,* 51 N. Y. S. 879, a judicial opinion on a point not necessary to the decision of the question before the court is *dictum,* and has no binding force. *People v. Leubischer,* 54 N. Y. S. 869. The determination of a matter which is involved in the litigation and discussed at the bar is not mere *dictum,* even though it is only indirectly involved in the discussion of the question on which the case turns. *Lancaster County v. McDonald,* 73 Neb. 453. Every proposition of law enunciated, if actually involved in the facts is to be taken as a principal of law *stare decisis. Maddox v. U. S.,* 5 Ct. Cl. 372.

FRAUDS—STATUTE OF—PARTY TO BE CHARGED.—KAISER v. JONES, 163 S. W. (KY).—Plaintiff contracted to sell land to the defendant but the defendant alone signed the contract and the vendor sued for damages for the breach. Held, that the words "the party to be charged" in the statute of frauds means the vendor, and if the vendee alone has signed no action can be maintained on the contract.

In practically all the states the words "the party to be charged" have been interpreted to mean the defendant in the action, whether he is the vendor or the vendee. *Heflin v. Milton,* 69 Ala. 354; *Hodges v. Kowling,* 58 Conn. 12; *Old Colony R. R. Co. v. Evans,* 6 Gray, 25; *Simmes v. Killian,* 34 N. C. 252. But in Kentucky and Tennessee it has always been held that the agreement of the plaintiff who hasn't signed, not being binding, forms no consideration for the promise of the defendant and there is a want of mutuality which can only be avoided by interpreting the words "party to be charged" to mean the vendor. *City of Murray v. Crawford,* 138 Ky. 25; *Usher v. Flood,* 83 Ky, 552; *Frazer v. Ford,* 2 Head (Tenn.) 464. And where the vendor hasn't signed, the bringing of the action doesn't remedy the defect. *Frazer v. Ford, supra.* For the same reason New York, Wisconsin, Nebraska, Michigan, Montana, Pennsylvania, and Texas have thought it necessary to change their statutes to read "grantor or lessor" instead of "party to be charged." All these states proceed on the theory that the purpose of the statute is to protect the holders of title to realty rather than the vendee. *City of Murray v. Crawford, supra.* But the great majority of the states hold that the vendee is to be equally protected because there is as much danger of an exorbitant price being imposed on him by perjury as there is of a contract to sell being similarly imposed on the owner of the land. *Simmes v. Killian, supra; Harper v. Goldschmidt,* 156 Cal. 245. So the holding of the principal case and the reasoning upon which it is based are contrary to the great weight of authority, but in accord with the precedents of their own state and Tennessee.

LIMITATIONS OF ACTIONS—OBSTRUCTION OF WATER COURSE.—TAYLOR V. NEWMAN, *et* 1. 139 P. (KAN.) 369.—In an action for trespass to real property, where the defendant had built and maintained a permanent obstruction in the channel of a stream which had for two years prior to this action so diverted the flow of water so as to cause the plaintiff's land on the opposite shore to be carried away, it was *held* that the cause of action was barred by the two-year statute of limitations.

There is perhaps no subject in the law about which there is greater conflict than the application of the statute of limitations to these cases. *Board of Directors of St. Francis Lev. Dist. v. Barton,* 92 Ark. 406. The weight of authority, however, seems to be that where the nuisance is of a permanent character and its continuance is necessarily an injury, the damage is original, may be fully compensated for in one action, and the statute begins to run from the time the structure is erected. *Board of Dir. St. Francis Lev. Dist. v. Barton, supra; Parker v. Atchison,* 58 Kan. 29; *St. Louis I. M. & S. R. Co. v. Morris,* 35 Ark. 622. This was held even where the injury was at irregular intervals. *Gulf, C. & S. R. Co. v. Mosely,* 161 Fed. 72. But where the full extent of the injury cannot be foreseen at the time the obstruction is erected, the statute doesn't begin to run until the injury is apparent and then the whole recovery must be had in one action. *Buntin v. Chicago, R. I. & R. R. Co.,* 41 Fed. 774. Yet in a few cases

where the defendant's act may or may not cause injury, a recovery was allowed for each separate injury. *Troy v. Cheshire R. R. Co.,* 23 N. H. 83. An extreme view is taken by some courts which hold that even where the obstruction is permanent and the injury must necessarily follow, each continuance is a new injury and damages may be recovered in successive actions until the prescriptive period has run. *Prime v. Yonkers,* 131 N. Y. App. Div. 110; *Valley R. Co. v. Franz,* 43 Ohio St. 623; *Daneri v. Southern Cal. R. Co.,* 122 Cal. 507. Farnham on "Water and Water Courses", Vol. 2, Sec. 506, disapproves of the above rule and says it has no application to cases of permanent obstructions, but that the statute should run from the time of the erection and the time the injury is done. This is the majority rule with which the principal case is in accord.

MASTER AND SERVANT—SCOPE OF EMPLOYMENT.—KEMP V. CHICAGO R. I. & P. RY CO., 138 PACIFIC REPORTER, 621.—An employer may be held liable for the wrongful acts of his employee done in the scope of his employment. While it is difficult to define this expression with precision, as applied to all situations ,it may be said generally, that to fix liability upon the employer the act must not only be done in the time but in pursuance of the object of and in furtherance of duty. If done solely to accomplish an employee's own purpose or device, although in an interval of his regular service, the employer is not liable. Benson, Mason and West JJ., *dissenting.*

This court held there was no question for the jury as to the brakeman's acting within the scope of his employment, when, after he had ordered away trespassers and they had called back an insult to him after they had reached some distance in flight, he pursued and shot one of them.

In general the master is not liable for the acts of the servant unless they are in the course of his employment, *Haler v. Ross,* 68 N. J. L. 324; *Lima Ry. v. Little,* 67 Ohio St. 91, though this phase is not synonymous with, "during time of employment." The scope of duty is to be implied from the nature of the employment, *Ephland v. Mo. Pac. Ry.,* 137 Mo. 187, which in this case clearly included the duty of expelling trespassers. To escape liabliity the master must show the servant had gone about some purpose of his own, *Barmore v. Vicksburg,* 85 Miss. 426. In the opinion of the majority of the court the brakeman's action here was so plainly retaliatory that they held in accord with *Barmore v. Vicksburg* as matter of law. In a similar case, *Lytle v. Crescent News Co., 27* Tex. Civil Appeals, 530, a master was held not liable when his agent shot a man who called him a vile name. Several cases have held there is no liability upon a master when his watchman shoots a trespasser, *Sandles v. Levenson,* 176N. Y. 610; *Belt Co. v. Banicki,* 102 Ill. App. 642. Since, in the principal case, there was no pursuit by the brakeman until he was insulted, it would seem as though there were here no question of fact to be decided and that the court rightly passed upon the case as a question of law.

MUNICIPAL CORPORATIONS—FRIGHTENING HORSES—STREETS.—STOKES *v.* SAC CITY, 144 N. W. (IOWA) 639.—Defendant allowed a third party to exhibit within the limits of the public highway, an animal confined in a cage. Plaintiff's horse became frightened at the cage, ran away causing injuries to the plaintiff. *Held,* the city was liable in damages to the plaintiff for the injuries caused by the horse becoming frightened at the obstruction in the highway.

By the weight of authority, objects within the limits of a highway naturally calculated to frighten horses of ordinary gentleness may constitute such deficiencies in the way as to render the town liable, even though so far removed from the traveled path as to avoid all danger of collision. *Foshay v. Town of Glenhaven,* 28W is., 288; *Morse v. Richmond,* 41 Vt. 435; *Newison v. New Haven,* 7 Am. Law Reg. 83. In Massachusetts the rule appears to be that the mere fright of a horse at an obstacle in the highway which results in injury is not sufficient to hold the town liable, though the object was of a character naturally calculated to frighten horses. *Cook v. Charleston,* 98 Mass. 80; *Bowes v. Boston,* 155 Mass. 334; *Champlin v. Village of Pen Yan,* 34 Hun. 33; a dead animal lying in the street, *Chicago v. Hay,* 75 Ill. 530; a pig sty containing pigs, *Bartlett v. Hooksett,* 48 N. H. 18, have been held to be objects naturally calculated to frighten horses. But lumber piled temporarily in the highway, *Chamberlin v. Enfield,* 43 N. H. 356, and a steam roller used in repairing streets, *McMulkin v. Chicago,* 92 Ill. App. 331; building material temporarily placed upon a portion of the street, *Loberg v. Amherst,* 87 Wis. 634, have been held to be objects not naturally calculated to frighten horses. The liability of the town rests primarily upon whether the use to which the highway was put was reasonable and necessary for travel and the incidents of travel or whether the highway was allowed to be used as a place of business, storehouse, or some other purpose for which the highway was not primarily laid out. If the latter, the town should be responsible.

NEW TRIAL—FAILURE TO REQUEST INSTRUCTIONS.—LINITZKY V. GORMAN, 146 N. Y. SUP., 313.—*Held,* where plaintiff, in a malicious prosecution did not request a charge that, under the uncontroverted evidence, he was entitled to substantial damages, the court cannot, on motion, set a verdict for him for nominal damages, though he was entitled, as a matter of law, to substantial damages.

The general rule is that a question of law available, but not raised at the trial, cannot be raised on motion for a new trial. *Holdsworth v. Tucker,* 147 Mass., 572; *Beals v. Beals,* 20 Ind., 163. In *St. Louis & S. F. R. R. Co. v. Werner,* 70 Kan., 190. it was held, an erroneous instruction, not excepted to, is not ground for a new trial. In some cases, however, where there has been positive error in the charge, a new trial has been granted, though the instruction was not ex-

cepted to. *Nulton v. Croskey,* 111 Mo. App., 18; *McCann v. Ullman,* 109 Wis., 574; *Lochrane v. Solomon,* 38 Ga., 286. In *Brigden v. Osmun,* 36 N. Y. S., 1025, a new trial was allowed where an instruction was given based on a misapprehension of testimony, though no request was made or exception taken, and in *Moore v. Balten,* 5 Misc. (N. Y.), 520, the broad rule was laid down that a court may allow a new trial, in its discretion, for failure to give proper instructions, though no request was made. However, *Freeland v. Southern Ry. Co.,* 70 S. C., 427, a case very similar in its facts to *Linitzky v. Gorman,* held in accord with the principal case, the rule of which seems to be well established. Although the rule undoubtedly works hardships in some instances, as in the principal case, where it led to the denial of a clear legal right, adherence to it leads to uniformity and certainty in procedure, and a less stringent rule, it may be argued, would cause subterfuge and delay.

PHYSICIANS AND SURGEONS—SERVICES RENDERED IN EMERGENCY—RIGHT TO COMPENSATION.—SCHOENBERG V. ROSE, 145 N. Y. S., 831.—The president and secretary of a corporation were, during the pendency of a trial against a corporation, in a court room, when the president became suddenly ill and fell unconscious on the floor. The secretary and counsel for the corporation called for a doctor, whereupon the plaintiff, who was in the court room, responded and rendered medical assistance. *Held,* that the fact that the secretary and counsel summoned plaintiff did not render them liable for the service, since they, being under no legal obligation to furnish medical services to the deceased, occupied the relation of mere strangers.

When a person calls a physician to care for another rendered by sudden injury unable to act for himself and to whom he stands in no relationship which creates any obligation to furnish necessary medical care, and no express undertaking is entered into, the law does not presume from the mere summoning of the physician and requesting him to care for the injured, any implied promise to pay for the services. *Starrett v. Miley,* 79 Ill. App., 658; *Dorion v. Jacobson,* 113 Ill. App., 653. One is not under any implied obligation to pay for the services of a physician called to attend a minor living with his family and supported by him, but not otherwise relator to him, though he acquiesced in the attendance. *Holmes v. McKim,* 109 Iowa, 245; *Raukin v. Beale,* 68 Mo. App., 32. The rule appears to be that if the party summoning the physician is under only a moral obligation to the party needing the medical aid, and there is no express promise to pay the physician, the party summoning the physician is not liable for the services.

RELIGEOUS SOCIETIES—RIGHTS OF PEWHOLDERS.—WITTHAUS V. ST. THOMAS' CHURCH, 146 N. Y. S., 279.—*Held,* a pewholder has no title to the church edifice nor to the soil, but possesses only a usufructuary right to the use of the pew when the building is open for services, subject to the reasonable regulations of the church.

A pewholder's right is only a right to occupy his pew during public worship. *First Presbyterian Society of Antrim v. Bass,* 68 N. H., 333; *Daniel v. Wood,* 18 Mass., 102. It is a qualified ownership subject to the superior title included in the ownership of the house. *Colby v. Society,* 63 N. H., 63. A parish or corporation is the sole owner of the soil on which the meeting house stands. The pewowner does not own the soil over which the pew is built. *Gay v. Baker,* 17 Mass., 435. The decision on both principle and authority is clearly sound.